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

CASE NO: CC 27 / 2018

In the matter of:

THE STATE

versus

FADWAAN MURPHY	Accused 1
SHAFIEKA MURPHY	Accused 2
GLENDA BIRD	Accused 3
DOMINIC DAVIDSON	Accused 4
LEON PAULSEN	Accused 5
FADWAAN MURPHY AS THE REPRESENTATIVE OF UTS TRADING SOLUTIONS CC	Accused 6
DESMOND DONOVAN JACOBS	Accused 7

MAIN JUDGMENT : DELIVERED ON 12 JULY 2023

DAVIS, AJ:

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INTRODUCTION : THE CHARGES

1. The accused were charged with 229 offences in terms of the Prevention of Organized Crime Act 121 of 1998 ("**POCA**") and the Drugs and Drug Trafficking Act 140 of 1992 ("**the Drugs Act**").[1]

[1] The charges were as follows:

1.1. the first to third accused were charged with managing an enterprise conducted through a pattern of racketeering activities, in contravention of s 2(1)(f) of POCA ("the 1st count");

1.2. the first to seventh accused were charged with conducting an enterprise through a pattern of racketeering activities, in contravention of s 2(1)(e) of POCA (the 2nd count);

1.3. the first to seventh accused were charged with receiving or retaining property on behalf of the enterprise in circumstances where they knew, or ought reasonably to have known, that such property was derived from or through a pattern of racketeering activities, in contravention of s 2(1)(b) of POCA ("the 3rd count");

1.4. the first to sixth accused were charged with dealing in undesirable dependence producing substances, in contravention of s 5(b) of the Drugs Act (as read with s 51(2) of the Criminal Law Amendment Act 105 of 1997), alternatively possession of undesirable dependence producing substances, in contravention of s 4(b) of the Drugs Act (as read with s 51(2) of the Criminal Law Amendment Act 105 of 1997) ("the 4th to 20th counts");

1.5. the first to fourth and the sixth accused were charged with dealing in undesirable dependence producing substances, in contravention of s 5(b) of the Drugs Act (as read with s 51(2) of the Criminal Law Amendment Act 105 of 1997), alternatively possession of undesirable dependence producing substances, in contravention of s 4(b) of the Drugs Act (as read with s 51(2) of the Criminal Law Amendment Act 105 of 1997) ("the 21st to 150th counts");

1.6. the first to fourth and the sixth accused were charged with money laundering in contravention of s 4 of POCA ("the 151st to 221st counts");

1.7. the first to sixth accused were charged with money laundering in contravention of s 4 of POCA ("the 222nd count");

1.8. the first to fourth accused were charged with money laundering in contravention of s 4 of POCA ("the 223rd count");

2. The offences in the indictment may conveniently be classified into three groups:

2.1. the first three counts in the indictment relate to alleged racketeering offences in terms s (2)(1) of POCA;

2.2. counts 4 to 150, 227 and 228 pertain to alleged drug dealing in contravention of s 5(b) of the Drugs Act, alternatively possession of drugs in contravention of s 4 (b) of the Drugs Act; and

2.3. counts 151 to 226 and 229 pertain to alleged money laundering in contravention of s 4 of POCA.

3. The third accused died unexpectedly during the course of the trial shortly after the State closed its case.

1.9. the first and sixth accused were charged with money laundering in contravention of s 4 of POCA ("the 224th count");

1.10. the first, sixth and seventh accused were charged with money laundering in contravention of s 4 of POCA ("the 225th to 226th counts");

1.11. the first, third and sixth accused were charged with dealing in undesirable dependence producing substances, in contravention of s 5(b) of the Drugs Act (as read with s 51(2) of the Criminal Law Amendment Act 105 of 1997), alternatively possession of undesirable dependence producing substances, in contravention of s 4(b) of the Drugs Act (as read with s 51(2) of the Criminal Law Amendment Act 105 of 1997) ("the 227th to 228th counts");

1.12. the first, sixth and seventh accused were charged with money laundering in contravention of s 4 of POCA ("the 229th count").

4. Following an application brought by the accused for discharge at the close of the State's case in terms of s 174 of the Criminal Procedure Act 51 of 1977 ("**the CPA**"), I discharged the fifth and seventh accused on all counts and the remaining accused on certain counts. My reasons for doing so are set out in a judgment dealing with the s 174 application ("**the s 174 judgment**").

5. The remaining accused now face the following charges:

5.1. Count 1: managing an enterprise conducted through a pattern of racketeering activity (POCA s 2(1)(f)) (**first and second accused**);

5.2. Count 2: conducting or participating in the conduct of an enterprise through a pattern of racketeering activity (POCA s 2(1)(e)) (**first, second, fourth and sixth accused**);

5.3. Count 3: receiving or retaining property derived from or through a pattern of racketeering activity (POCA s 2(1)(b)) (**first, second, fourth and sixth accused**);

5.4. Counts 4 to 150: drug dealing in contravention of s 5(b) of the Drugs Act, alternatively possession of drugs in contravention of s 4(b) of the Drugs Act (**first, second, fourth and sixth accused**);

5.5. Counts 151 to 221: money laundering in contravention of s 4 of POCA (**first, second and sixth accused**);

5.6. Count 223: money laundering in contravention of s 4 of POCA (**first and fourth accused**);

5.7. Counts 224 and 225: money laundering in contravention of s 4 of POCA (**first and sixth accused**).

6. I shall refer to counts 1 to 3 as "**the racketeering charges**", counts 4 to 150 as "**the drug dealing charges**", and counts 151 to 225 as "**the money laundering charges**".

7. In terms of POCA an enterprise includes:

> *"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."*

8. A pattern of racketeering activity is defined in POCA as:

> *"the planned, ongoing and continuous or repeated participation or involvement in any offence referred to in Schedule I and includes at least two offences referred to in Schedule I, of which one of the offences occurred after the commencement of this Act* [21 January 1999] *and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule I ."*

9. The alleged Schedule I offences which the State relies on to found the alleged pattern of racketeering activity are money laundering,[2] and dealing in an undesirable dependence-producing substance.[3]

10. At the heart of the racketeering charges is the so-called Murphy enterprise, said to be made up of a group of individuals allegedly managed by the first to third accused, i.e., Fadwaan Murphy ("**Murphy**"), his ex-wife Shafieka Murphy ("**Shafieka**") and his sister Glenda Bird ("**Bird**").[4] It is alleged that the enterprise was an association in fact based on informal agreements to co-operate between the alleged members, the common objective being to profit financially from unlawful dealings.

11. The State alleges that during the period July 2013 until September 2015 and within the districts of Mitchells Plain, Wynberg, Cape Town, Strand, Worcestor and Caledon, the enterprise conducted unlawful activities consisting of the planned, continuous and repeated dealing in drugs and money laundering, which activities constituted a pattern of racketeering activity in terms of POCA.

12. In order to establish the racketeering charges, the State needs to prove the existence of the enterprise and the pattern of racketeering activities, which requires

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[2] See POCA Schedule 1, para 32).

[3] See POCA Schedule 1, para 22).

[4] Ms Glenda Bird passed away in December 2019.

proof of participation in the commission of at least two offences of money laundering and / or drug dealing during the relevant period.

AN OVERVIEW OF THE TRIAL

13. This trial has not been straightforward. The dramatic twists and turns in the proceedings have rivaled a work of fiction. Given the unusual occurrences, I think it helpful to sketch an overview of the sequence of events in order to contextualize the various interlocutory rulings and the ultimate findings.

14. The presentation of the State's case was protracted due to no less than six trials-within-a-trial, in which the defence challenged the admissibility of evidence. It is no exaggeration to say that every conceivable technical point was taken on behalf of the accused. In one of those challenges, the evidence was ruled inadmissible, which led to the dismissal of the charges in count 222. The other challenges were dismissed.

15. The cornerstone of the State's case was the surprise discovery on 18 September 2015 of a large haul of drugs and cash at 1[...] R[...] Close, Grassy Park, where the 2nd accused ("**Shafieka**"), Ms Zuluyga Fortuin ("**Fortuin**") and Ms Felica Wenn ("**Wenn**") were caught red-handed packing the drug known as "tik".[5]

[5] Methamphetamine.

16. At the start of the trial, the defence challenged the admissibility of the evidence yielded by this particular search because it was conducted without a warrant. A trial within a trial ensued to determine the legality of the search, and on 7 November 2018 I ruled that the search was lawful and the evidence admissible. My reasons for that ruling are contained in a separate judgment dealing with four challenges mounted by the defence to the admissibility of the evidence obtained in four separate search and seizure operations ("**the search and seizure judgment**").

17. The three women were arrested on 18 September 2015 following the discovery of the drugs and cash found at 1[...] R[...] Close. Fortuin and Wenn subsequently elected to co-operate with the police investigation and become State witnesses in terms of s 204 of the CPA.

18. On 27 October 2015, at a stage when they were still facing drug dealing charges, Fortuin and Wenn consulted with the investigating officer, Captain Nadine Britz ("**Britz**")[6] and Advocates Van der Merwe and Viljoen of the office of the Director of Public Prosecutions, Cape Town ("**the DPP**"), with a view to becoming s 204 witnesses. They gave written statements in which they disclosed details of their involvement in drug dealing activities, and implicated all of the accused in varying degrees (save for the seventh accused).

[6] At the time when the s 204 statements were made Captain Britz held the rank of Warrant Officer. She was subsequently promoted to the rank of Captain.

19. Flowing from information recovered from the three women's cell phones,[7] and disclosures made by Fortuin and Wenn in their s 204 statements, Britz proceeded to subpoena various banking and cell phone records in terms of s 205 of the CPA, which led in turn to the discovery of evidence of multiple payments made by the 6th accused, Ulterior Trading Solutions CC ("**UTS**"), a close corporation of which the 1st accused ("**Murphy"**) is the sole member, to Fortuin, Wenn and others, as well as multiple cash deposits into the bank account of UTS.

20. The State relied on the cell phone records to place the s 204 witnesses and certain of the accused in the vicinity of 1[...] R[...] Close at various material times, in order to sustain an inference that drugs were being packed there in the period between 4 November 2014 and 17 September 2015.[8]

21. Reliance was also placed on the cell phone records of sms notifications of payments made to the s 204 witnesses by UTS. The banking records were relied upon *inter alia* to show a pattern of payment to the three women for drug packing and to sustain the various money laundering charges.

22. On 4 February 2019, while Wenn was testifying in chief, a controversy arose due to the fact that Wenn's s 204 statement on the face of it indicated that it had been signed in Lentegeur, whereas Wenn's evidence indicated that the statement had been taken in Cape Town. The controversy spawned a defence conspiracy theory

[7] The cell phones of the women were seized on their arrest on 18 September 2015.

[8] The dates specified in counts 4 to 148 of the indictment.

which dogged the remainder of the trial. Although Britz explained that the two women had been interviewed at the office of the DPP in Cape Town but that the statements had later been finalized and signed at Lentegeur police station, the defence persisted with the notion that Wenn's s 204 statements had not in fact been signed by her in Lentegeur, and that, after the statement was taken in Cape Town, Britz had "doctored" the statements in Lentegeur and forged Wenn's signature on the document.

23. In their testimony in Court, both Fortuin and Wenn departed materially from the contents of their written s 204 statements. Fortuin nonetheless gave evidence useful to the State, and the State did not seek to discredit her. In the case of Wenn, however, the State sought to have her declared hostile. A second trial-within-a-trial ensued in order to determine whether or not Wenn should be declared hostile. That particular trial-within-a-trial was dubbed "*the Wenn trial*", and I shall refer to it as such in this judgment.

24. While Britz still testifying in chief in the Wenn trial, the arrest of one Rushdien Abrahams ("**Abrahams**"), a close associate of Murphy who can aptly be described as his "fixer", led to the serendipitous discovery of evidence which revealed that both Fortuin and Wenn had been influenced to disavow their s 204 statements. Abrahams had recorded on his cell phone a discussion which he had had with Fortuin the day before she was due to testify in this trial. A transcript was made of the conversation, which was admitted by agreement as exhibit "NN".

25. At the tail end of his cross-examination of Britz in the Wenn trial, Mr Van der Berg dropped the bombshell that the defence had sought an opinion from a handwriting expert in the person of Mr Yvette Palm of Hands on Forensics, who had given a conclusive opinion that Wenn's signature on her s 204 statement had been forged. The clear insinuation was that Britz had forged the signature.

26. The issue arose because Wenn's various statements showed two different executions of the letter "W" in her signature. The State handwriting experts maintained that the two forms of "W" amounted to natural variation in Wenn's handwriting, while Palm maintained that the different forms of "W" indicated a forgery.

27. In yet another dramatic turn of events, the State produced rebuttal evidence in response to Ms Palm's report which showed that there were indentations on a page of sample signatures provided by Wenn, which showed that Wenn indeed had two methods of executing the letter "W". The presence of the indentations also served to show that Wenn had been practising her signature, no doubt in order to avoid showing both forms of "W" on the sample signatures page.

28. At the end of the Wenn trial, in the light of the controversy which had arisen regarding the authenticity of Wenn's signature, and given that Wenn herself had not testified regarding the circumstances under which she signed the specimen signatures, I considered it imprudent to decide on the authenticity of Wenn's s 204 statement at that juncture. I also considered it unnecessary to do so, since I was

of the view that there was ample evidence, based on Wenn's performance in the witness box, to make the determination on whether or not to declare her hostile.

29. I therefore declared Wenn hostile for reasons other than her departure from her s 204 statement, the authenticity of which was still in issue, and I deferred the determination of the authenticity issue until the end of the trial, when the State had heralded that it would be bring an application in terms of s 3(c) of the Hearsay Act to have Wenn's s 204 statement admitted as proof of the contents thereof ("**the hearsay application**").

30. Following the declaration of hostility, Wenn was cross-examined by the State and totally discredited.

31. At the end of the State's case, as heralded, the State brought the hearsay application. At this stage, the issue of the authenticity of Wenn's statement came to the fore. Based on the totality of the evidence, and eschewing reliance solely on the evidence of the handwriting experts, I concluded that the signature on Wenn's s 204 statement was authentic and had not been forged.

32. Another issue which loomed large in the Wenn trial and the hearsay application was the question of whether or not there had been police or prosecutorial misconduct on the part of Britz or the staff of the DPP, as contended by the defence, on account of the fact that Wenn and Fortuin were accused persons with legal representation who were interviewed in the absence of their attorney. Having

regard to the evidence, I determined that there had been no misconduct, and that Wenn's constitutional rights had not been violated in the manner in which the statement had been obtained.

33. Based on the authorities of *Rathambu v S* 2012 (2) SACR 219 (SCA) and *Mathonsi v S* 2012 (1) SACR 335 (KZP), I ruled that Wenn's s 204 statement be admitted as hearsay evidence, but I stressed that the ultimate weight to be attached to the statement could only be determined at the end of the trial.

34. At the close of the State's case the accused applied for discharge in terms of s 174 of the CPA. As mentioned above, I acquitted and discharged the fifth and seventh accused, and discharged the remaining accused on certain counts.

35. Shortly before the presentation of the defence case, subpoenas *duces tecum* were issued on behalf of Murphy and UTS against Ms Joulou Van der Merwe, a senior State Advocate at the DPP, and Ms Joslin Pienaar, Chief Clerk to the DPP, requiring them to produce a wide range of documents relating to the meeting held with Wenn and Fortuin at the DPP's office on 27 October 2015. The avowed purpose of the subpoena was to uncover evidence of malfeasance on the part of the State in procuring Wenn's s 204 statement.

36. The State, unsurprisingly, did not take kindly to the subpoena. An application was brought in terms of s 36(5) of the Superior Courts Act 10 of 2013 to set aside the subpoena. At the insistence of the State, that application was not brought before

me in the criminal trial, but in the civil court, to be heard before another Judge of this division.

37. In the event, the trial was delayed by over a year. Lengthy affidavits were prepared dealing with matters which were already on record in the criminal trial, and with which I was well versed. The matter ultimately came before Saldanha J on 2 June 2022, when the defence took the point that the Judge presiding in the criminal trial was best placed to determine the application.

38. Saldanha J delivered judgment on 23 June 2022, holding that the matter should be dealt with by the criminal trial court. The matter accordingly came before me, and I heard argument on 29 July 2022. On 15 August 2022, I handed down judgment setting aside the subpoenas *duces tecum* in respect of both Ms Van der Merwe and Ms Pienaar, but confirming the validity of the subpoena requiring Ms Van der Merwe to attend at court and give oral evidence ("**the subpoena judgment**").

39. Having subpoenaed Ms Van der Merwe as a defence witness, Mr Van der Berg elected not to call her as such, and instead brought an application to have Ms Van der Merwe called as the Court's witness in terms of s 186 of the CPA in order that she might be cross-examined. I granted the application, as I considered her evidence essential to the just decision of the case as it would serve to clear up any lingering mystery over where and in what circumstances Wenn and Fortuin had signed their s 204 statements.

40. One witness testified on behalf of Murphy and UTS, namely Desmond Jacobs, the former 7th accused, who had been discharged at the close of the State's case. Murphy did not testify in his own defence or on behalf of UTS, and Shafieka and Davidson both closed their cases without calling any witnesses.

41. At the close of the defence case, Ms Van der Berg sought an opportunity to apply for a reconsideration of my interlocutory rulings in the first trial within a trial (concerning the search and seizure at 1[...] R[...] Close), and the hearsay application (concerning the admission of Wenn's s 204 statement as evidence of its contents). The reconsideration was sought on the grounds of the new evidence which had been received through the s 186 witness.

42. During the course of the reconsideration application, Mr Van der Berg relied for the first time on a legal point which had not been raised and considered in the hearsay application, namely that Wenn's s 204 statement was inadmissible against the accused in terms of s 219 of the CPA as it amounted to a confession.

43. After careful consideration, I came to the conclusion that there was merit in the point. Since s 3(1) of the Hearsay Act is expressly made subject to the provisions of any other law, which includes s 219 of the CPA, I concluded that the statement was inadmissible. The full reasons for that decision are set out in a separate judgment dealing with the reconsideration of the ruling in the hearsay application ("**the reconsideration judgment**").

44. That had the consequence that the swathes of evidence heard in the Wenn trial had ultimately been rendered irrelevant, as had the argument on the hearsay application. I have nonetheless dealt with the evidence and the arguments in this judgment, because they have important bearing on the credibility of the investigating officer, and also because serious allegations of misconduct were made against the investigating officer and members of the DPP which I felt needed to be addressed.

45. This overview would not be complete without mention of the regrettably long time it has take to finalize the matter. A perfect storm of deaths, a global pandemic, logistical difficulties with virtual hearings, and an ill-conceived approach on the part of the State to the subpoena application, all converged to delay the completion of the case for almost five years. The trial commenced in October 2018. As mentioned, the presentation of the State's case took a year on account of the six trials-within-a trial. The application in terms of s 174 of the CPA was delayed by the tragic assassination of Mr Jantjies, who appeared for Ms Bird. Shortly thereafter, Ms Bird herself died unexpectedly from a recently diagnosed illness, and the 174 application could not proceed. The hearing of the s 174 application was scheduled to take place at the end of March 2020, but had to be postponed once again on account of the Covid 19 hard lock down. Then followed a period of some six months when physical hearings could not take place due to serious comorbidities of certain of the defence counsel and accused, and the court at that stage lacked the necessary facilities for viable virtual hearings. The s 174

application was ultimately determined in November 2020. The trial was scheduled to resume in April 2021 with the presentation of the defence case, only to be delayed by the issue of the subpoenas *duces tecum* which the DPP wished to set aside. The subpoena application delayed the matter for over a year until the matter returned to the criminal court and I gave judgment in the matter in August 2022. The commencement of the defence case was then delayed by the sad passing of Mr Van Aswegen, who appeared for Ms Shafieka Murphy. An opportunity had to be afforded for new counsel to be briefed and to become acquainted with a lengthy record. In the event, the presentation of the defence case only commenced in January 2023.

THE CASE FOR THE STATE

46. The State produced the requisite written authority signed by the National Director of Prosecutions as required in terms of s 2(4) of POCA for the institution of prosecutions against the accused for contraventions of ss 2(1)(b), 2(1)(e) and 2(1)(f) of POCA, i.e., the racketeering charges.[9]

47. The State led the evidence of 33 witnesses. The key civilian witnesses for the State were Craig Jones ("**Jones**"), and the two s 204 witnesses, Fortuin and Wenn. The main police witness was Britz, the investigating officer. The evidence of the remaining witnesses was largely uncontentious, the focus of dispute rather being

[9] Exhibits "A1", "A2" and "A3".

the inferences which can legitimately be drawn from the primary facts. I deal first with the evidence of the three key civilian witnesses, then with the uncontentious evidence, and finally with the evidence of Britz.

The key civilian witnesses

Craig Jones

48. Craig Jones ("**Jones**") testified in the first trial within a trial, which concerned the search and seizure at 1[...] R[...] Close on 18 September 2015. The State subsequently applied to have all evidence led in the first trial within a trial incorporated into the main trial, which application was granted in the absence of objection from defence counsel.

49. As at 18 September 2015, Jones was a tenant residing in the front section of the dwelling at 1[...] R[...] Close. He rented a portion of the premises from the fourth accused ("**Davidson**"), who owned of the premises. The premises comprised three separate dwellings: the front section of the house, which was occupied by Jones and his girlfriend; the back section of the house, which was occupied by Davidson, and an outhouse section behind the garage which was occupied by another tenant. The front and back sections of the house had separate entrances and were sealed off from one another internally.

50. Davidson used to leave for work at approximately 07h00 every day and return home after 17h00. Jones was unemployed and spent his days at home on the premises, along with his girlfriend.

51. Approximately one year before the date of the search,[10] Jones met Murphy accused when he arrived at the premises, together with Shafieka and a person called Gavin, and stated that Gavin and Shafieka were looking for a place to stay at the property. Jones assumed that they would be living on the premises, but he later observed that they did not sleep there. Instead Jones observed that the 1st accused would drop Shafieka and Gavin off at the premises by 07h30 in the morning and that they would be fetched at various times between 14h00 and 17h00 in the afternoon.

52. After about two to two and a half months after Shafieka and Gavin came to the premises, Jones observed that they were accompanied by two women, one of whom was named Zuluyga. After another two months or so, Jones no longer saw Gavin at the premises. Jones observed that the three women were dropped off at the premises, either by Murphy or an unknown driver, at around 07h30 and fetched in the afternoon between 14h00 and 17h00. They would spend the day in the rear bedroom in Davidson's section of the premises, with the door and windows closed and the curtains drawn. He did not know what the women did there.

[10] This was merely an estimate. Jones was not certain of the exact date. Record 15/10/2018 p 71, l 22; p 83, l 18 - 19.

53. Jones from time to time conversed with Murphy in the driveway of the premises. He knew him as “Wanie”. They used to talk about cars, and Jones understood from Murphy that he was involved in the construction business and the sale of motor vehicles. He knew the 2nd accused as “Shafieka”, but did not know her surname. He was under the impression that she was a nurse, who worked shifts.

54. On Thursday 17 September 2015, while visiting a friend, Jones was shown an article in a local newspaper called “The Voice” about a recent drug raid conducted by the police in Lentegeur. The article featured a photograph of Murphy, who was described as “Fats Murphy”, and referred to his alleged involvement in drug dealing and ongoing police efforts to bring him to justice. Jones recognized the person in the photograph as “Wanie”, and was flabbergasted. He’d had no inkling that the person he had encountered at the premises was suspected of being a drug kingpin.

55. The next morning, on Friday 18 September 2015, Jones told his ex-girlfriend about the article. Because of Murphy’s alleged links to the drug trade, and the conduct of the women which they now viewed as suspicious, they were concerned that illicit activities involving drugs might be taking place on the premises. Between 10h30 and 11h00 Jones’ ex-girlfriend telephoned the Lentegeur Police Station in Jones’ presence and asked to speak to General Goss (“**Goss**”), being the police official named in the newspaper article.

56. Jones' heard his girlfriend inform the person to whom she spoke, who he assumed was Goss, that she recognized the person identified in the newspaper photograph as "Fats" Murphy, that three women came to the premises in the mornings and left at a certain time, that there was no sign of activity while they were there, that the premises were always closed and locked, and that Murphy sometimes brought the women there and sometimes a driver brought them there.

Evaluation of Jones' evidence

57. Jones made a very favourable impression on me as a witness. He was open, honest and straightforward. He had no reason to lie or exaggerate: if anything, he had an incentive not to testify as he was clearly afraid of reprisal. But he nevertheless stepped up to testify, as he felt it was his civic duty to do so.

58. Jones's evidence was clear and straightforward. There was nothing improbable or internally contradictory in Jones's evidence. His identification of Murphy and Shafieka is reliable, as he had had ample opportunity to see them, and he had conversed with Murphy on several occasions. His evidence that Murphy told him that he was in the business of construction and selling cars is consistent with what Desmond Jacobs testified about the nature of Murphy's businesses.

59. Mr Van der Berg, who appeared for Murphy and UTS, argued that Jones was not telling the truth when he maintained that he had seem the three women brought to 1[...] R[...] Close every day for months, because Fortuin's cell phone data showed that she had only been present at 1[...] R[...] Close on 41 days, and so Jones could

have seen her at most on 41 days. To my mind this argument as misconceived on two scores. In the first instance, a close examination of Jones' evidence reveals that Jones did not in fact say that the women had been brought to 1[...] R[...] Close every single day. A more accurate understanding of his evidence is that the women were brought to the premises regularly or frequently. Secondly, the fact that Fortuin's cell phone data only placed her in the vicinity of 1[...] R[...] Close on 41 days does not mean that she was not there on other days: the absence of cell phone activity in the vicinity of 1[...] R[...] Close does not indicate an absence from the location, for the cell phone may have been turned off or not in use. (I deal with this aspect below in relation to cell phone evidence).

60. The only indication of error which I can find in Jones's evidence is his testimony that Shafieka and Gavin, and later Shafieka and the three women, were dropped off at around 07h30 in the morning. This is inconsistent with Fortuin's evidence that she and Shafieka had to drive through to Cape Town from Worcestor, and Fortuin's cell phone data which shows that at 07h30 am she was still in the vicinity of Worcestor, and Shafieka's cell phone data, which shows that she generally did not reach the vicinity of 1[...] R[...] Close before 09h00. I do not regard this error as material, however, and it is certainly no indication of dishonesty on Jones's part. It is understandable that he might have been mistaken in his recollection of the time after the lapse of some three years before he testified.

61. I am mindful of the fact that Jones is a single witness to the presence of Murphy at 1[...] R[...] Close during the period specified in counts 4 to 150 of the indictment,

and that his evidence must therefore be approached with caution. However I find corroboration for Jones's evidence in the evidence of Murphy's cell phone records, which serve to place Murphy in the vicinity of 1[...] R[...] Close at times consistent with Jones's evidence. And Jones's evidence about the presence of the three women at 1[...] R[...] Close in corroborated by Fortuin's evidence, as will become apparent when I deal with Fortuin's evidence.

62. In short, I found Jones to be an honest witness, and that his evidence was satisfactory in every material respect. I have no hesitation in relying on the evidence of Jones.

The first s 204 witness: Zuluyga Fortuin

63. Fortuin testified in chief over three days, from 3 to 5 December 2018. Before she testified I gave her the requisite warning in terms of s 204(1)(a) of the CPA.

64. Fortuin knew Murphy from the fact that he had been married to Shafieka, who is Fortuin's father's cousin. Fortuin and Shafieka reside in Worcestor. According to Fortuin, she knew that Shafieka was engaged in the packaging of tik into small packets. There came a time when Fortuin could no longer work at her previous employment, and she approached Shafieka for work, knowing the nature of the work.

65. Fortuin testified that she worked for Shafieka for a time in Grassy Park, Cape Town. Shafieka would fetch her for work in the morning and drive her from Worcestor to Grassy Park, where they would make up packets of tik, and then return to Worcestor in the evening.

66. As Fortuin was testifying it was abundantly clear that she was a most reluctant witness. Her responses were brief and devoid of detail, and getting her to answer questions was like pulling teeth. Her apparent lack of co-operation was such that I felt the need to remind her of the need to satisfy me that she had answered all questions fully and frankly if she was to receive indemnity at the end of the case.[11]

67. Following that warning, Fortuin was briefly more co-operative, and repeated that she and Shafieka would go to Grassy Park and make up packets of tik, then return home to Worcestor. Shafieka would drive. She and Shafieka communicated about work arrangements by WhatsApp messages on their cell phones. According to Fortuin, she, Shafieka and Fortuin would always proceed directly to Grassy Park without stopping at any other location. (This differed from the evidence of Jones that Murphy or another driver would drop the women off at 1[...] R[...] Close and fetch them later.)

68. At that point Ms Heeramun wished to present photographs of 1[...] R[...] Close to Fortuin for identification. Fortuin was evidently under the mistaken impression that she was about to be confronted with a written statement, for she spontaneously

[11] Record 3 December 2018, p 790 l 20 - 24.

asked if she could say something, and then proceeded to announce, while pointing at the photograph album,[12] that she wanted nothing to do with *"the statement"*. She then pointed at Britz, who was present in court, and stated that on the day when she made the statement, Britz told her that if she did not make the statement she would get a prison sentence of more than 15 years and her children would be taken away from her. Fortuin then said, *"so ek sal uit my eie uit maar praat what happening that day",* meaning the day of her arrest at 1[...] R[...] Close.

69. Fortuin proceeded to say that, when Britz entered the room (where the three women were found) Britz said, *"Shafieka, jou ma se poes, I've been looking for you for 20 years."* This differed from the version put to Britz in cross-examination in the first trial-within-a-trial, when Shafieka's counsel had put it to Britz that she had said to Shafieka, *"Jou poes, ek het jou."*[13] (A transcript of a conversation between Abrahams and Fortuin the day before she was due to testify reveals that Abrahams, who had been present in court and had heard what Mr Van Aswegen had put to Britz, had specifically told Fortuin to bring this up in her evidences.)

70. Fortuin testified that, on the Sunday following her arrest (20 September 2015), she and Wenn made statements because they were afraid of going to prison. At that point Fortuin became tearful. I gathered that Fortuin was trying to say that her statement was not truthful, and so I asked her if she lied in her statement. (I did not identify the statement because Fortuin herself had not identified it, and no

[12] Exhibit C.

[13] Record 17 October 2018, p 356, l 20 - 24.

written statements made by Fortuin had been placed before me at that stage. But one knows from Britz's evidence that on 20 September 2015 Fortuin signed a warning statement before Britz and a confession before Lieutenant Truter.) Fortuin replied that she lied in "the statement" because she was afraid *("Daai verklaring is leuns want ek is bang gewees.")*

71. I asked Fortuin what lies she told in the statement, to which she responded that everything she said about Murphy was false. I then asked Fortuin why she lied, to which she responded that she thought that if she said something she would not have to go to prison.[14] I also asked Fortuin about the source of the false information in the statement, to which she responded that it was things which she had heard from Shafieka, but which she had never seen herself with her own eyes.[15] Significantly, she did not say at that stage that Britz had told her what to say. That allegation only came later.

72. At that point the matter stood down to afford the State an opportunity to consider its position as the prosecution had been caught off guard by Fortuin's apparent change of stance.

73. When the matter resumed after the adjournment, I told Fortuin that only the Court could grant her indemnity from prosecution, provided she told the full truth. I also

[14] Record 3 December 2018 p 798, l 8 - 9.

[15] Record 3 December 2018 p 798, l 12 - 14.

told her that she could not be forced to testify if she did not want to do so, but that a failure to testify might have consequences for her. I impressed upon her that her obligation was not to testify in accordance with her written statement, but to tell the truth.

74. At that point Fortuin sighed deeply. She was manifestly troubled and uncertain of what to do. After a further explanation by me of the choice which she faced, i.e. testify truthfully in order to receive indemnity or refuse to testify and face possible prosecution, Fortuin elected to continue giving evidence, prefacing her testimony with the qualification that she did not have much to say. When I reminded Fortuin that she needed to provide as much detail as she could recall, she sighed once again. To call her a reluctant witness is an understatement.

75. Fortuin was shown photographs of 1[...] R[...] Close, Grassy Park, and admitted that this was the place to which she had been taken to on 18 September 2015, along with Shafieka and Wenn. Fortuin denied knowing who owned the house at 1[...] R[...] Close and that she had ever seen any other person in the house while she was there.

76. Fortuin was then shown a photograph of the room in which the three women had been arrested. She confirmed that the room depicted in photograph 29 of exhibit “C” was the room in which she had worked, and she identified on the crime scene photographs the table on which she had been working on 18 September 2015.

77. Although Fortuin was clearly uncomfortable testifying about the events of 18 September 2015, she went on to describe in some detail how the three women were working at packing drugs on 18 September 2015. On arrival they found the tik in a large bag under the bed in the room. The tik was weighed placed into small packets. The tik was weighed and placed in small packets which were then sealed. The sealed small packets were batched in large packets of 1000,[16] which were then placed under the bed in the bedroom. Fortuin identified with reference to photographs where the scales and sealers used were kept.

78. Fortuin admitted that on 18 September 2015 she had had her cellular phone with her, and that Shafieka and Wenn also had their respective cellular phones there on that day. Fortuin identified her cell phone, with reference to photographs 205 and 206, which depicted three cellular phones. She could not say which of the other two phones belonged to Shafieka and Wenn respectively.

79. Fortuin admitted that 18 September 2015 was not the first time that she was present at the house at 1[...] R[...] Close, but she could not recall how many times she had been there before. She said that she had worked there approximately two days per week on different days of the week for varying hours, and that she was paid R 200 per day.[17] She typically left Worcestor at around 08h00, arrived at 1[...] R[...] Close at around 10h00, and departed again between 15h00 and 16h00 in the afternoon. If they worked on Fridays they would depart an hour earlier in the

[16] Comprising 10 medium sized packets each containing 100 small packets.

[17] Record 3 December 2012, p 841.

afternoon. She and Shafieka travelled from Worcestor to Cape Town in Shafieka's motor vehicle and would use the Huguenot Tunnel on the N1 national road. Shafieka would send her a Whats App informing her when they would be working. Wenn would be picked up along the way. Fortuin was unable to say where Wenn was picked up, as she claimed to be unfamiliar with Cape Town.

80. In response to the question who paid her, Fortuin answered that she did not know who paid her, but that she received the money in her bank account. She added that the payments came from a registered business. When the name Ulterior Trading Solutions ("UTS") was mentioned to Fortuin, she confirmed that she recognized the name and that she received notifications on her cellular phone of payments made by UTS. She confirmed that these payments were for the work which she did at Grassy Park.

81. When asked whether Wenn also worked at Grassy Park from the time she and Shafieka started working there, Fortuin answered that Wenn only commenced working there with them a while later. She estimated it to be five or six months later.

82. On her second day of evidence in chief , Fortuin was questioned about her banking records. She admitted her signature on the Nedbank account opening form in her name,[18] and that her employer was described therein as *"Constructive Civil Engineering"*, and the date of commencement of her employment was given as 14

[18] Exhibit "H2".

March 2015. When she was asked about the description of her employer, Fortuin's voice dropped to a whisper, providing a clear indication of discomfort.

83. Fortuin was shown copies of her bank statements reflecting numerous payments received from UTS during the period 28 March 2015 and 11 September 2015. She confirmed that UTS made the payments into her bank account for the work done at 1[...] R[...] Close, meaning the packing of drugs. She testified that before she opened her bank account on 14 March 2015, she used to receive weekly cash payments from Shafieka.[19] According to Fortuin she elected to open a bank account of her own accord.[20]

84. Fortuin then suddenly and inexplicably departed from her previous testimony that UTS paid her for the work done at Grassy Park. She now insisted that Shafieka paid her and Wenn, and that she did not know where Shafieka got the money from. Fortuin then spontaneously added that she also worked for Shafieka doing cleaning at her house, and that she was also paid in cash for this work by Shafieka.[21]

85. Fortuin was confronted with the information which had been downloaded by Mfiki from her Blackberry cellular phone seized at 1[...] R[...] Close on 18 September 2015. She immediately anticipated questions about her contact list, and she

[19] Record 4 December 2015, p 886 l 24 - p 887 l 4.

[20] Record 4 December 2015, p 887 l 5 - 10.

[21] Record 4 December 2015, p 887 l 10 - 25.

hastened to state that many of the numbers contained in her statement did not emanate from her, but from Britz.

86. Ms Heeramun then sought leave to introduce a written statement allegedly taken by Britz from Fortuin on 8 August 2016 in which Fortuin ostensibly identified a number of cellular phone numbers stored in her cell phone contact list. Fortuin testified that many of the numbers contained in the statement had been told to her by Britz,[22] and that the statement was part of the statement which she made because she was afraid, and that she wanted nothing to do with the statement.[23]

87. I admonished Fortuin that she was nonetheless obliged to answer Ms Heeramun's questions regarding the statement. Fortuin then admitted her signature on the statement of 8 August 2016 but claimed that the numbers which she allegedly identified in the statement as belonging to Bird, Shafieka, Wenn and Murphy, did not come from her but were given to her by Britz.

88. When Ms Heeramun explained to Fortuin that Britz had found the names and numbers on Fortuin's contact list as downloaded by Mfiki and had simply asked Fortuin to confirm the numbers, Fortuin then changed her evidence and said that Britz told her to say that the cell phone number stored under the name "Bieno" belonged to Murphy, and that the numbers stored under the names "Gleda" and

[22] Record 4 December 2012 p 895 l 25 - p 896, l 2.

[23] Record 4 December 2012 p 897 l 16 19.

"Ms B" belonged to Bird. She was adamant that that Murphy was not "Bieno" and that Bird was not "Gleda" or "Ms B", claiming that these were friends of hers. Fortuin now admitted, however, that the numbers listed in the statement as belonging to Shafieka and Wenn were correct, and that she had identified those numbers to Britz. She confirmed that the number stored "Fazel 2" belonged to Wenn.

89. Fortuin confirmed that whenever she went to Cape Town, she would have had her cell phone with her, unless she had forgotten it at home in Worcestor.[24] She admitted that when the detailed billing records for her phone showed that it had been picked up by cell phone towers all the way from Worcestor to Cape Town, then her phone would have been with her.[25]

90. On the third day of evidence in chief, Fortuin denied having had any interaction with Murphy, Bird, Davidson, Paulsen or Jacobs prior to her arrest on 18 September 2015. She was again asked to say what she did when she arrived at 1[...] R[...] Close on the morning of 18 September 2015. This time she responded that it was a long time ago, the suggestions being that she could not recall, despite the fact that she had given detailed evidence on the subject just two days before.

91. Having earlier testified that Shafieka drove her and Wenn to 1[...] R[...] Close on 18 September 2015 in her motor vehicle and that they proceeded directly to that

[24] Record 4 December 2018, p 944, l 1 - 12; p 951, l 11 - 13.

[25] Record 4 December 2018, p 948, l 9 - 23.

venue without stopping anywhere else, Fortuin was unable to explain where Shafieka's motor vehicle was parked at 1[...] R[...] Close on that day. Appreciating the difficulty, Fortuin then changed her evidence and stated that Shafieka had dropped her and Wenn at the house and driven away and parked the car elsewhere at an unknown place. When asked what Shafieka had done in the past, Fortuin said that she always parked the car at 1[...] R[...] Close. But in the very next breath she stated that Shafieka did not always park her car at 1[...] R[...] Close.[26]

92. Fortuin testified that on Sunday (20 September 2015) Britz told Fortuin and Wenn that they would be sentenced to 15 years imprisonment or more, and their children would be taken away if they did not make a statement. Britz then took her to a man who took her statement, and Britz remained seated next to the man and told her what to say in the statement. Most of the contents of the statement emanated from Britz. The statement was correct insofar as it pertained to her own involvement in the events at 1[...] R[...] Close, but anything pertaining to any of the other accused emanated from Britz and not from her.[27] (This could only have been a reference to the confession which Fortuin made before Lt. Truter.)

93. After the statement was taken Britz returned her to the cells. She told Fortuin and Wenn that they would not be held in Pollsmoor but would be kept in the police cells. Yet after they appeared on Monday 21 September 2015 they were indeed

[26] Record 5 December 2012, p 968 l 968 - 15.

[27] Record 5 December 2015, p 983.

sent to Pollsmoor. A week later she was released on bail of R 20 000.00, but she did not know who paid her bail.

94. Ms Heeramun then asked Fortuin what exactly she had wanted to tell the court when she stated on 3 December 2018 that she wanted to say something. Fortuin sighed before saying that she had wanted to say something for a long time but had been afraid, and that she had decided to come and tell the Court that she had been threatened by Britz that she would be imprisoned for more than 15 years and that her child would be taken away from her if she did not say what Britz wanted her to say. What was contained in her statement regarding the accused, other than Shafieka, was not the truth because it was what Britz had told her to say. She confirmed that what was said regarding Shafieka in her statement was correct, and she repeated her confirmation of Shafieka's and Wenn's respective cell phone numbers.

95. At the conclusion of Fortuin's evidence in chief, Ms Heeramun informed the court that the State would not be seeking to discredit her or to have her declared hostile.

96. During cross-examination by Mr Van der Berg, Fortuin was asked about what Britz told her on Sunday 20 September 2015 before she gave a statement. Fortuin's response was that Britz said if she did not become a State witness and make a statement they would give her 15 to 20 years and take away her children. Given this choice she decided to make a statement.

97. Fortuin was asked, but could not recall, whether she was aware on 18 September 2018 that there was heroin inside the bedroom at 1[...] R[...] Close. Fortuin admitted that she was aware at the time of her arrest that there was money in the room, but she did not know how much.

98. Mr Van der Berg put it to Fortuin that Murphy's version is that UTS did building works, alterations, kitchen refurbishments and the like, and that when the building work was complete UTS used ladies to clean up. Fortuin's response was, *"Nee ek weet nie van dit nie maar ek het nie vir mnr Murphy gewerk nie. Ek het vir mev Murphy gewerk. Ek het in Worcestor gewerk by huise en dan het ek vir haar naweke gehelp om net my pay 'n bietijie te lig."*

99. When Mr Van der Berg raised the subject of Fortuin's statement of 9 August 2016 in which reference was made to her having received of a sms message stating that she had received a payment of R 1 000 from UTS. Fortuin claimed that she had no knowledge regarding who owns the business of UTS and that she would ask Shafieka when she would be paid and would then see on her phone that payment had been made by UTS. She never queried this with Shafieka.

100. Mr Van der Berg referred Fortuin to an allegation in her statement of 9 August 2016 that money deposited into her account on 21 August 2015 was a payment from Murphy for the work she had done that week packing drugs for him. Fortuin maintained that this allegation was untrue, and that it was one of the things which Britz had told her to say.

101. In response to a highly leading question from Mr Van der Berg, Fortuin confirmed that during her conversations with Britz she got the impression that Britz regarded Murphy as a “big fish” who she wanted to “nail” and that Britz was eager for Fortuin to implicate Murphy. When I asked Fortuin to elaborate, she said that Britz spoke mostly of Murphy and had very little to say about any of the other accused.

102. Fortuin agreed with a further highly leading suggestion by Mr Van der Berg that, when when Britz told her that she must make a statement in order to avoid going to prison, she got the impression that she needed to implicate Murphy in her statement, and that were it not for pressure from Britz she would not have made a statement implicating Murphy. Fortuin added that she would have only told the court about her own involvement in the matter.

103. Mr Van Aswegen, who appeared for Shafieka, put it to Fortuin that when she worked at Grassy Park she was not working for Shafieka and was never paid by Shafieka. Fortuin’s response was that she did not know; she did not ask Shafieka about the name UTS associated with the payments.

104. Mr Van Aswegen questioned Fortuin about her statement of 9 August 2016 regarding cell phone numbers. Fortuin reiterated that much of the content of the statement emanated from Britz, and that she only knew her own cell phone number and the numbers of Wenn and Shafieka. She said she had entered Shafieka’s number on her phone.

105. Fortuin conceded that she had no way of knowing, when confronted with her cell phone billing records, whether she had her cell phone with her at a given time and whether or not she was party to the particular communications reflected therein.

106. When Mr Van Aswegen asked Fortuin about where Shafieka's car was usually parked when the women went to work at Grassy Park, she testified that they would park the car in front of the shop and walk from there to 1[...] R[...] Close. She could not give a reason for this, and she then changed her evidence, stating that they sometimes left the car at the shop and sometimes parked it at 1[...] R[...] Close. In contrast to her earlier evidence that Shafieka dropped her and Wenn at the house on 1[...] R[...] Close and parked the car elsewhere at an unknown place, Fortuin stated that she could not recall where the car was parked, and in the next breath stated that the car had been parked at the shop.

107. Mr Van Aswegen asked Fortuin if she could recall making three police statements. She stated that she could only remember the first statement which she made (to another policeman) and the one regarding the cell phones (i.e. the statement of 8 August 2016). She could not recall making another statement to Britz.[28]

108. Mr Van Aswegen then taxed Fortuin on how she could say that Britz told her what to say in her statement if she, Fortuin, did not make a statement before Britz. Fortuin's response was that Britz had told them beforehand what to say. As she

[28] Record 6 December 2018, p 1044.

said this Fortuin was visibly uncomfortable and her voice dropped to a whisper. It was clear that she had been caught in a lie.

109. Mr Van Aswegen then asked for three of Fortuin's statements to be entered as exhibits, being her warning statement dated 20 September 2015,[29] her confession dated 20 September 2015[30] and her s 204 statement dated 27 October 2015[31].

110. Fortuin admitted that she was told by the police officer who took her confession that she was not obliged to make a statement, but said that she did so because she was afraid of Britz, and she was aware that Britz would read the statement later. According to Fortuin, Britz told her what to say in the statement, and she lied when she told the police officer that no one had told her what to say. Fortuin also testified that Britz had promised her that she would not be kept at Pollsmoor but would be kept in the police cells.

111. Fortuin was asked about the statement which she made on 27 October 2015. Mr Van Aswegen asked Fortuin if she was taken to Lentegeur on that date, being about one month after her release on bail. Fortuin replied, *"Yes".* She stated that she and Britz were present in the room, and that there was another policeman who walked in and out of the room. She confirmed that Wenn was also present that day, but that she waited outside until Fortuin had finished giving her statement to

[29] Exhibit "H2.4".

[30] Exhibit "H 2.5".

[31] Exhibit "H 2.6"

Britz.[32] (The significance of this evidence is that it confirms the evidence of Britz that Fortuin and Wenn were indeed taken to Lentegeur on 27 October 2015 to sign their s 204 statements.)

112. Mr Van Aswegen asked Fortuin what Britz was asking for on 27 October 2015. She answered that Britz was looking for information on Murphy, that she told her that she did not know anything, and that Britz then told her what to say. Mr Van Aswegen then asked Fortuin if the entire contents of the s 204 statement came from Britz. Fortuin had difficulty answering this question, and the record reflects that she was mumbling, but she eventually answered "*Yes*". She then explained that she did give information about her own involvement in what happened at 1[...] R[...] Close (*"dit wat ek gedoen het het ek gesê"*), but that most of the contents of the statement came from Britz.

113. Fortuin testified that certain of the contents of the s 204 statement emanated from her and were true and correct, including the allegation that Shafieka is her father's cousin, and that on a day in April 2014 Shafieka approached her and asked her if she would come work with her. Fortuin also admitted that she said in her statement that she suspected the work involved drugs, and that this was true. When questioned about the basis for her suspicion, she replied that Shafieka had often told her that she was working with drugs, in particular tik. Fortuin denied that the

[32] Record 6 December 2012, p 1069 - p 1072.

allegations in the second paragraph of the statement about Murphy and Bird emanated from her and said that they came from Britz.[33]

114. Mr Jantjies asked Fortuin about her confession on 20 September 2015. Fortuin testified that Britz took her to the policeman who took her confession. She testified that while the confession was being taken down, Britz would sit in the room, then leave the room to fetch something if asked to do so and would then return and sit there. (This evidence is highly improbable and conflicts with the evidence of Britz that she was not present when Fortuin's confession was taken by Lieutenant Dudley Truter, as is normal police practice.)

115. When asked about Britz's visit to her in 2016 regarding cell phone numbers, Fortuin testified that Britz told her to say that certain numbers belonged to Bird, and that this was not true. She insisted that the number saved under the name "Gleda" in her contact list was not Bird's number.

116. Mr Jantjies questioned Fortuin about her allegation in chief that Britz came to her and asked her to testify about the place where the plastic packets were purchased. She explained that this happened a few weeks previously, and that Britz had been accompanied by Ms Heeramun and another woman. According to Fortuin, Britz wanted her to testify about the name and location of the business where the plastic packets were purchased.

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[33] *"Glenda se huis by nommer 1[...] T[...] straat Lentegeur, Glenda is Vet se suster wie ek daardie dag ontmoet het by nr 1[...] T[...] straat, Lentegeur."*

117. I then asked Fortuin whether or not she knew anything about the plastics, to which she replied, *"Sy het mos vir my gesê van die sakkies. Ek weet van die plastics wat ons mee gewerk het. … Maar ek het nie geweet waar sit die plek rêrig nie, want ek ken mos nie die Kaap nie."* She also claimed that she did not know the name of the business which supplied the plastic bags.

118. During cross-examination by Mr Twalo, who appeared for Davidson, Fortuin was asked if she knew Davidson. She first replied that she had never really seen him (*Ek het hom nog nie rêrig gesien nie*), and she denied knowing him. She then went on to say that she had seen him at Pick 'n Pay, but could not recall ever seeing him at 1[...] R[...] Close. She added that she had not seen him at the property but that she had heard him in the next room and Shafieka told her that it was the homeowner ("*die huisbaas"*) who was in his room. She had difficulty explaining how she knew that Shafieka was referring to Davidson. She then added that she found out on the day of her arrest that he was the owner of the house, but did not explain how.

119. Fortuin testified that the bedroom in which the women worked would always be locked on their arrival and that a key would be used to gain access thereto.

120. During cross-examination by Mr Mafereka, Fortuin admitted that she had received payments into her bank account from UTS but denied knowing who UTS was. She then changed her evidence about the nature of the work which she did in Cape

Town, mentioning for the very first time that she did cleaning work in Cape Town relating to building work:

"Soos ek sê, het ek met Shafieka gewerk en baie kere as daar – vra ek haar ekstra werk. Dan kom ons Kaap toe en dan maak ons groot huise skoon. Jy kan sien mense het gebou, maar ek weet nie wie dit is nie, want ek het nooit vir haar gevra nie. Want ek was te bly net vir die ekstra geld."

121. Mr Mafereka then put it to Fortuin that she had been working for UTS, and she agreed that she could not dispute that she was working for and being paid by UTS.

Evaluation of Fortuin's evidence

122. At the time when Fortuin testified, even before evidence emerged of her conversation with Abrahams the day before she testified,[34] it was abundantly clear that Fortuin was content to implicate Shafieka and to disclose her own involvement in drug packing, but that she assiduously avoided implicating Murphy or Bird.

123. Fortuin was manifestly dishonest. Her evidence was evasive and full of contradictions, particularly with regard to any aspect which might implicate Murphy or Bird. Fortuin was not a convincing or adept liar, and it struck me that she was uncomfortable telling lies. She had the appearance of a rabbit caught in the headlights. A clear "tell" that she was lying was that her voice would drop to a whisper. Another "tell" whenever she felt uncomfortable was that she would sigh deeply.

[34] Exhibit "NN"

124. It is clear from the transcript of the discussion which took place between Abrahams and Fortuin on the day before she took the stand, that she was coached to distance herself from her statements, and to say that Britz had told her what to say and that she had been forced to say things she did not know about. She was also coached to bring up what Mr Van Aswegen had put to Britz about her comment when she found the three women at 1[...] R[...] Close. One sees that Fortuin performed in the witness box exactly in accordance with the script given to her by Abrahams:

> *"Wat gebeur nou more as sy in die boks ingaan dan gaan die Stattsaanklaer mos nou vir haar vra om dinge te verduidelik, hulle gaan jou verklaring vir jou gee, wat jy vir hulle se is, is kyk hier, jy voel nie lekker oor die verklaring, dis nie jou eie woorde nie, jy was forseer om die dinge af te skryf, of sy het dit afgeskryf en syt vir jou gese wat om te se, dan stoot jy dit eenkant dan se jy, jy wil uit jou eie uit praat oor wat rerig gebeur het, dan begin jy om te se toe sy daar aankom, dit is wat sy vir one gese het, syt gese jou poes, ek het jou uiteindelik gevang. Syt mos gestry en gese sy het nooit so iets gese nie. Sy was onder eed toe say dit gese het."* [Emphasis added]

125. Fortuin's inclination to shield Murphy and Bird was evident from her testimony, even without the evidence of the coaching by Abrahams. For example, Fortuin was constrained, under pressure, to admit the cell phone numbers of Shafieka and Wenn stored in her contact list, but she remained adamant that the cell phone numbers for Murphy and Bird did not come from her but from Britz. This denial proved to be futile in the case of Murphy, as he himself later admitted his cell phone number.

126. Another example of Fortuin's attempts to shield Murphy is her insistence that Shafieka would proceed directly to Grassy Park and would not go anywhere else in Cape Town before going to 1[...] R[...] Close to pack drugs. This evidence conflicted with the evidence of Jones that Murphy, or another driver, dropped the women at 1[...] R[...] Close and fetched them later. Fortuin was unable to explain why Shafieka's motor vehicle was not parked at 1[...] R[...] Close on the day of the search, and she gave contradictory and nonsensical answers about where the car was and where Shafieka usually parked the vehicle. She was clearly lying in this regard.

127. Yet a further example of Fortuin's tendency to shield the accused other than Shafieka, was her fumbled denial that she had seen Davidson at 1[...] R[...] Close and knew that he owned the house. She revealed that she knew that Davidson was the owner of the house when she said that she could hear him in the room next door and that Shafieka had told her that it was the "*huisbaas*", for she could not have known that it was Davidson unless she knew that he owned the house. She hastened to cover up the lie by stating that she found out on the day of the arrest that he was the owner - a statement which struck me as clearly false.

128. Fortuin was, however, able to give detailed evidence about the drug packing activities at 1[...] R[...] Close, which evidence had the ring of truth about it.

129. Fortuin is, of course, an accomplice, and her evidence must be approached with caution, particularly since she was patently dishonest in many respects. But the

fact that Fortuin gave evidence that is false in certain respects does not meant that all of her evidence falls to be rejected. The maxim *falsum in uno, falsum in omnibus* is not part of our law (*R v Gumede* 1949 (3) SA 749 (A)). Where it is clear that certain evidence is false, one must discern the reason for the lie in order to separate the false evidence from evidence which may be true. In this case the reason for the lie is clear: Fortuin was obviously intent on protecting Murphy and Bird. One does not know the reason for that, but the reason is irrelevant. What is beyond doubt is that Fortuin was influenced to depart from the evidence in her written statements which implicated anyone other than herself and Shafieka. It bears emphasis that, even without the evidence of Abrahams' conversation with Fortuin on the day before she testified, it was still clearly discernible from her testimony that she was intent on shielding Murphy and Bird.

130. Fortuin's detailed evidence regarding her own, Wenn's and Shafieka's involvement in drug packing at 1[...] R[...] Close, is well corroborated by the evidence of Jones, the evidence of what was found in the back room at 1[...] R[...] Close on the day of the search, and the contents of the cell phone and banking records.

131. I therefore consider that I may safely rely on the evidence of Fortuin which is independently corroborated, including her evidence that she travelled to and from Worcestor with Shafieka to Cape Town and packed tik at 1[...] R[...] Close for a period of months before her arrest, that the tik was found under the bed in the room, that the tik was packed in small pastic packets and left under the bed in the room, that she always had her cell phone with her when she went to Cape Town,

and that she was first paid in cash for drug packing work and thereafter received payment in her bank account from UTS.

The second s 204 witness: Felicia Wenn

132. Wenn first took the stand on 4 February 2019. Before she commenced her testimony, I warned her that she was required to answer all questions frankly and honestly in order to be granted indemnity from prosecution. Wenn was visibly anxious in the witness box. Not long after she began testifying, she was overcome with emotion and began to weep. I adjourned the proceedings for a short while to give her an opportunity to compose herself.

133. When the proceedings resumed Wenn confirmed that she had been arrested on 18 September 2015 along with Shafieka and Fortuin. She denied knowing the address of the house where they were arrested, and insisted that this was the first time she had ever been there. (This contradicted the evidence of Fortuin that the three women had worked at 1[...] R[...] Close packing drugs for months prior to their arrest.)

134. Wenn was shown photographs of 1[...] R[...] Close, Grassy Park, and identified the house as the place where she went on 18 September 2015. She testified that the three women gained access to the house by means of a key which Shafieka Murphy had. On entry they went straight to the bedroom at the back of the house.

135. Wenn was asked to describe what she did not the morning of 18 September 2015. She testified that, *"Shafieka Murphy took out the drugs from underneath the bed. Then she said we only had to do that."* Wenn denied having done this ever before, or that she knew she would be working with drugs on that day. She said she was under the impression that she was going to do a cleaning job, and only found out when she arrived at the house that there were drugs involved. Wenn was, however, able to describe in some detail her role in the drug packing that day. (I formed the impression at that stage already that it was improbable that this was the first time Wenn was packing drugs at 1[...] R[...] Close as her evidence suggested a familiarity with the set up born of experience.)

136. According to Wenn, when Britz came into the bedroom when the police entered the house on 18 September 2015, Britz said to Shafieka, *"I vanged you now."* After the arrival of the police, Shafieka was kept in the bedroom with the drugs, and Wenn and Fortuin were taken to the kitchen. Fortuin wanted to go to the toilet and called for Britz, and told Britz that she wanted to talk.

137. Wenn testified that she and Fortuin were taken to Grassy Park police station and detained together in the same cell. Shafieka was taken to Mitchells Plain police station. Wenn was very afraid. Fortuin decided that she was going to talk, and Wenn also decided that she wanted to talk. The wanted to talk about the drugs she was arrested with and to say who they belonged to.

138. In response to the question who the drugs belonged to, Wenn stated that they belonged to Shafieka, and that she knew they belonged to Shafieka because Shafieka told her so in the bedroom at 1[...] R[...] Close on the morning of 18 September 2015, that being the first time Wenn had ever been asked to work with drugs.

139. Wenn was asked about events on the weekend following her arrest when she and Fortuin were taken to see Britz.[35] Wenn testified that Britz gave her and Fortuin Kentucky, and offered them soap to bath. After they had taken a bath she spoke to them and told them that if they did not talk they would be going to prison for many years, she would take away their children, and Murphy would make sure that someone killed them. Wenn denied knowing Murphy, although she had heard of him.

140. Wenn then stated that everything mentioned in her statement was what Britz told her and Fortuin to say. Britz told them to say that the drugs belonged to Murphy. She was afraid that she would be harmed, and she was afraid that if she did not talk she would go to prison. According to Wenn, Britz told her and Fortuin that they had to talk and they had to say that the drugs belonged to Murphy because she, Britz, knew they belonged to Murphy. Britz told her she would have to relocate for her own safety, and she promised her that if she talked she would see to it that

[35] Sunday 20 September 2015, when Wenn and Fortuin completed warning statements and made confessions to commissioned officers.

nothing happened to her and that she would not go to jail. Wenn understood this to mean that Britz would protect her.

141. Wenn could not recall how many statements she made to the police. She said that Britz had forced her to make a statement *"at the first location"* (referring to the weekend of her arrest, before she first appeared in court on Monday 21 September 2015) and on a second occasion when Britz fetched her at her home and took her to Cape Town to the DPP's office where there were two State Advocates present besides Britz.[36]

142. Wenn maintained that on that morning when she was taken to the DPP's office in Cape Town, Britz came to the place where she was staying while she and her husband were still in bed and told her in the presence of her mother that she had to come to Cape Town (to make a statement) or else she would go to jail and Britz would take her child away from her.

143. According to Wenn, while Britz was driving her and Fortuin to Cape Town, Britz told them that they needed to say in their statements that the drugs belonged to Murphy because she had been after him for a long time, and they needed to talk and say that the drugs belonged to Murphy in order to stay out of prison.

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[36] On the face of it Wenn's s 204 statement dated 27 October 2015 appeared have been taken at Lentegeur Police Station without anyone other than Britz present. Britz later testified that she had made a number of errors on the s 204 statement, and that the statement had in fact been made at the DPP's office in Cape Town in the presence of two State Advocates, and was then later printed out and signed by Wenn at Lentegeur Police Station.

144. Wenn testified that at the interview, she was asked questions, which she answered. Britz was typing on her laptop computer, and one of the State advocates wrote down notes as they were speaking. Afterwards Britz took her and Fortuin home, first dropping Fortuin in Worcestor and then dropping Wenn on her way back to Cape Town.[37]

145. Wenn was shown photographs of the cellular phones found on the crime scene at 1[...] R[...] Close on 18 September 2015. She identified her phone as the red Nokia phone depicted on photographs 205 and 206. She confirmed that she had her phone with her on the morning of 18 September 2015 before she was arrested. She confirmed that she received notifications on her phone if a deposit was made into her banking account.

146. Wenn confirmed that she had a bank account with Nedbank, and she confirmed her signature on the account opening form in her name, dated 26 March 2015 (exhibit "H 3"). In answer to the question why she opened a bank account, Wenn stated that Shafieka no longer wished to give her money "*in her hands*". The following exchange then ensued between Wenn and Ms Heeramun:

"Ms Heeramun:	*What money?*
Wenn:	*The money that we worked for.*
Ms Heeramun:	*What are you talking about what work?*

[37] Record 4 February 2019, Record p 55 l 23 – p 56 l 56.

Wenn:	*We also worked with construction but I can't say at which places because we worked at different places where we sweeped* [sic] *– we cleaned the floors, washed the windows and cleaned.*
Ms Heeramun:	*Who are you referring to when you say we?*
Wenn:	*Shafieka Murphy, Zuluyga Fortuin and myself."* [Emphasis added]

147. Wenn was referred to her bank statements which reflected that she had received payments from UTS. She stated that she had never before seen the name UTS, and that the name UTS did not reflect on her cell phone in deposit notifications. She denied having any knowledge of UTS or its owner. She thought the payments deposited into her bank account were for cleaning work done with Shafieka and Fortuin.

148. Wenn was referred to a payment of R 2 000 from UTS on 11 September 2015 and asked where she worked on 11 September 2015. She spontaneously answered that she packed drugs. She then immediately changed her evidence and said that she packed drugs on 18 September 2015. Ms Heeramun then asked Wenn where she had worked on 11 September 2015, to which she responded that she worked *"at the same place"* but doing cleaning there (having previously said that she had never been to 1[...] R[...] Close before). She was then asked whether she was referring to 1[...] R[...] Close, to which she answered *"No".* She stated that she had worked *"at a construction"* on 11 September 2015, but could not say where because, in her words, *"I never saw the places that we go to".* In response to my request for clarification, Wenn stated that the buildings they cleaned were still being built *("they were still busy building").*

149. When Wenn resumed testifying in chief on 5 February 2019, I reminded her of her obligation to testify fully and honestly in order to receive indemnity, without leaving out anything. I asked her if she needed a few minutes to reconsider anything she had said the day before, and I explained that I was giving her an opportunity to correct, add to or change her testimony if she wished to do so. I did so because I had doubts about the veracity of some parts of Wenn's testimony given on 4 February 2019, and I wanted to be sure that she understood that her indemnity was at stake if she was not 100% truthful. Wenn took me up on the offer of time to consider her position and I took a short adjournment.

150. When proceedings resumed, Wenn said that she had nothing to say. She repeated her evidence that she had never worked at 1[...] R[...] Close before 18 September 2015, and said that prior to that she had worked at different construction sites where they swept, mopped and cleaned windows. No people were living in the houses yet. She was paid between R 1 200 and R 1 600 per week. She insisted that she did not know the areas in which they worked because when Shafieka picked her up for work she was always busy on her cell phone and she did not pay attention to where they were driving. She confirmed that she was referring to the same cellular phone which the police seized on 18 September 2015.

151. Ms Heeramun then dealt with all the statements made by Wenn. Wenn was shown her warning statement dated 20 September 2015, and she identified her signature on the document, which was handed in as exhibit "H3.1". Wenn had no recollection

whatsoever of having made a confession on 20 September 2015 before Lieutenant Hugo.

152. Wenn insisted that she could only recall making two statements, referring to her warning statement and her s 204 statement. However Wenn confirmed, when reminded, that she also gave Britz a statement on 9 August 2016 regarding her cellular phone, but she stated that she could not recall what she said. When pressed as to the gist of the statement, she answered that it concerned whose numbers she knew, who called her and who sent her sms messages.

153. Wenn also confirmed that she made two statements with Britz on 12 December 2018 in Paarl, and she identified her signature on these statements. The one recorded her refusal to go into the witness protection programme, and the other dealt with her s 204 statement. Wenn volunteered that Britz went through that whole statement again. When Ms Heeramun asked Wenn why Britz did so, she had difficulty answering. Ms Heeramun then reminded her of her evidence that Britz had gone through the statement with her, and Wenn anticipated the line of questioning and said that Britz had gone through it very quickly:

"Sy het deur die verklaring gegaan, maar sy het so vining gelees, maar agterna toe sê ek daar is niks fout met die verklaring nie."

154. During a highly leading cross-examination by Mr Van der Berg, Wenn was anxious to agree. She repeated that, prior to her arrest on 18 September 2015, she had been been doing cleaning work on numerous occasions at different construction

sites. Once she had opened her Nedbank account in March 2015, she received payment for cleaning work directly into her bank account.

155. Wenn agreed that Britz gave her a choice to make a statement implicating Murphy or else face going to prison for many years and losing her child. Wenn agreed that Britz told her to say in her statement that the drugs belonged to Murphy because she, Britz, knew that the drugs belonged to Murphy and she had been after him for a long time. If it were not for the ultimatum which Britz gave Wenn, she would not have implicated Murphy. What she said about Murphy in her statement was not the truth.

156. Mr Van der Berg questioned Wenn about the statement which she made at the DPP's office in Cape Town. She testified that she was asked questions to which she gave answers, while Britz typed on her laptop. According to Wenn she was not told at the meeting with the state advocates that she would go to jail if she did not make a satisfactory statement, but that Britz had said this to her earlier at her house in the presence of her mother. Wenn was asked whether her statement flowing from that meeting was read back to her from the computer screen, to which Wenn replied that it was read from a page. In response to the question where Wenn went after that meeting, she replied that Britz drove Fortuin to Worcestor, dropped her off and then dropped Wenn off on her way back to Cape Town. Wenn

was asked if she went to Lentegeur Police Station on that day, to which she answered , "*No*".[38]

157. Mr Van Aswegen put it to Wenn that she had never in fact worked for Shafieka and had never been paid by Shafieka, but by UTS. Wenn stated that she did not know where UTS fitted in, but when Mr Van Aswegen suggested to her that she did cleaning work for UTS, she admitted that she had been paid by UTS for cleaning work, but said that she did not know the company's name.

158. Mr Van Aswegen put it to Wenn that, according to his instructions, one of UTS's businesses is cleaning buildings. Wenn said that she had no knowledge in this regard. It was also put to Wenn that she had never worked for Shafieka, and that Shafieka had never paid her a salary, to which Wenn responded, *"No Comment"*.

159. Mr Van Aswegen asked Wenn about her movements on the morning of 18 September 2015. She confirmed that she had been contacted by Shafieka and told that she would be fetched for work, and that they drove to 1[...] R[...] Close. According to Wenn, Shafieka parked her motor vehicle in the yard of the property, more particularly, in the driveway. She admitted that they carried no cleaning utensils with them. Wenn was unable to explain why Shafieka's motor vehicle had not been observed in the driveway and photographed by the police when they raided 1[...] R[...] Close. She resorted to saying that she could not remember because it was long ago.

[38] Record 5 February 2019, p 119 l 6 – 10; p120 l 1 – 3.

160. Wenn was asked what Britz said when she entered the bedroom at 1[...] R[...] Close where the three women and the drugs were found. Contrary to the version which she gave in chief, Wenn testified that Britz said, *"Ja, jy kan maar poe …".* When she was asked to repeat her answer, she stated that Britz said, *"Jy, jou ma se poes, ek het jou nou."*

161. Mr Van Aswegen put it to Wenn that Shafieka did not say that the drugs belonged to her, as she had alleged. Wenn appeared uncertain and said, *"Ek weet nie nou nie."* When pressed, she conceded that Shafieka had never told her that the drugs were hers.[39] She added that she had slept on it overnight and wanted to change her evidence.[40] (This was not something about which Wenn could have been honestly mistaken in her evidence in chief. Her altered version is a clear indication that she lied in her evidence in chief.)

162. Mr Van Aswegen asked Wenn about the confession which she made before Hugo on 20 September 2015. It was put to her that she had answered *"No"* to the question whether any person assaulted or threatened her or influenced her to make the statement, and she was asked whether that was true. Wenn answered most emphatically, *"Niemand het my gedreig nie".* The following illuminating exchange then ensued:

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[39] Record 5 February 2019, p 140.

[40] Record 5 February 2019, p 141

"Mr Van Aswegen: Het kaptein Britz nie vir u gedreig dat sy vir u gaan laat toesluit en u kind wegneem nie?

Wenn: Nee, sorry, ek is nou [onduidelik], sorry. Ja, sy het my gesê as ek nie 'n statement gee nie, dan gaan sy my kind wegvat van my af en dan gaan sy vir my 25 jaar gee om to sit in die trunk.

Mr Van Aswegen: M'Lady, I will admit I have never had it that easy to have an answer changed."

163. Wenn was asked if Britz made her any promises, to which she responded that Britz told her that if she gave a statement nothing would happen to her, she would put her in a safe place, no one would come after her, and she would see to it that she got toiletries and money on time, that she would sort her out and she would need nothing.

164. Mr Van Aswegen that put it to Wenn that there was a condition attached to Britz's offer of protection, namely that Wenn had to include the information which Britz wanted in the statement, to which Wenn replied that Britz wanted her to say who the drugs belonged to, and when she said she did not know who they belonged to, Britz told her that she knew they belonged to Murphy.

165. During cross-examination by Mr Jantijies, Wenn confirmed that before the trial the prosecution had given her copies of all her statements as well the banking and cell phone records and told her to go through them.

166. Mr Jantjies asked Wenn about the two statements which she gave Britz in Paarl on 12 December 2018. She testified that Britz took down the statement; she did

not know whether Britz wrote in English or Afrikaans: Britz wrote fast and when she finished writing she did not read the statement back to Wenn and simply asked her to sign.

167. Wenn elaborated that Britz said regarding the statement dealing with witness protection that she did not read it back to her because she knew it was Wenn's lunch time. She testified that Britz did read her s 204 statement back to her off her computer, but that she read very fast, and that her statement on 12 December 2018 dealing with the correctness of her s 204 statement was not read back to her by Britz. Britz said that certain parts of the statement were not important and she was going to skip over them, saying *"blah-blah-blah"*.

168. Mr Twalo asked Wenn whether she knew Davidson. She denied knowing him or ever having seen him before. She confirmed that the door to gain entrance to 1[...] R[...] Close was locked when the three women arrived, as well as the door to the back bedroom, and that Shafieka had keys to open both.

169. Before re-examination Ms Heeramun placed it on record that there were material deviations between Wenn's s 204 statement and her testimony in court. She asked for leave to recall Wenn in order to place her s 204 statement before her and give her an opportunity to explain the inconsistencies.

170. Wenn was recalled by Ms Heeramun and confronted with her s 204 statement, which was handed in as exhibit "H3.2". Significantly, she confirmed that her

signature appeared on every page of the document. Wenn however disputed that the contents of the statement came from her and said that Britz had told her to say the drugs belonged to Murphy.

171. Ms Heeramun then went through the statement with Wenn line by line. She confirmed that certain allegations in the statement came from her and were correct, and that certain allegations, particularly those referring to Murphy, did not come from her and were incorrect.

172. Wenn denied having said in the statement that she knew that Murphy and Bird were involved with drugs. Wenn's testimony in this regard was illogical; on the one hand she denied having made any incriminating statements about Murphy, and in the next breath she said that the statements about Murphy were false because Britz told her what to say (i.e. an implicit admission that she did make incriminating statements about Murphy, albeit statements which were not true according to Wenn).

173. I asked Wenn in the light of the fact that Britz had told her to implicate Murphy, whether she did so – whether falsely or otherwise. I explained that I simply wanted to know whether she said the things about Murphy in the statement, whether or not they were true. Wenn's response was that she could not remember. One would have expected Wenn to answer that that she did make the statements, but that she was simply saying what Britz told her to say.

174. Curiously, Wenn admitted to having said in the statement that, *"In die begin het ek net geknip en pak",* referring to working with drugs, but she hastened to add that she was working for Shafieka at the time.

175. Wenn admitted having said in the statement that every day when she had to work, Shafieka would telephone her or send her a message to tell her that she had to come in to work. She then hasted to add that this had only happened on the day of her arrest on 18 September 2015. (This does not make sense when one considers Wenn's version that she and Fortuin and Shafieka regularly did cleaning work at construction sites.)

176. According to Wenn there were many details in the statement which did not come from her, and that Britz had told her that she knew many people who gave her information whose identities she could not reveal, the suggestion being that the details in the statement emanated from Britz's informers.

177. Wenn insisted that she never mentioned Murphy's name. Her knee jerk response was to deny having made each and every allegation in the statement which concerned Murphy, even if the denial made no sense – such as her denial of the innocuous statement that Murphy did not contact her after her arrest.

178. After she had finished taking Wenn through the s 204 statement, Ms Heeramun informed the court that she would be bringing an application to have Wenn declared hostile in order that she might be cross-examined by the State. Mr Van der Berg submitted that a trial-within-a-trial should be held on the question, and

that Wenn should be afforded legal representation during those proceedings, given the implications for her indemnity.

179. Mr Van der Berg correctly pointed out that in the trial-within-a-trial the State would have to prove the coming into existence of the s 204 statement and the absence of coercion and undue influence in relation thereto, and that one could only go on to assess the value to be attached to the statement once the making of the statement had been established as a fact.

180. A trial-within-a trial was then held, to which I shall refer as *"the Wenn trial".* The central question in the Wenn trial was whether or not Wenn had in fact made the s 204 statement. Wenn was represented by an attorney, Mr Beg.

The second trial-within-a trial: the Wenn Trial

Captain Britz

181. Britz was the first witness called by the State in the Wenn trial. Her evidence continued from where she left off in the first trial within a trial, at the point where the police entered the premises at 1[...] R[...] Close.

182. Britz testified regarding her actions at 1[...] R[...] Close and the steps taken to process the crime scene. While the crime scene was being processed, Shafieka remained in the room with the drugs, and Fortuin and Wenn were kept in the kitchen. At a certain point, Britz, as a female officer, was called to escort Fortuin

and Wenn to the toilet. Britz was asked to go into the toilet with them, and they said to her that they wanted to tell the truth. They named Murphy as the person who they were working for, and Wenn said, "*Ons gaan nie mang vir 'n ander man se dwelms en geld nie. Ons gaan nie tronk toe vir hom nie.*" Britz told them this was not the time and place for them to talk, and that she would speak to them later.

183. Three cell phones were found at the crime scene. At Britz's request, the three women identified their respective phones. The phones were seized, sealed in evidence bags, booked into the SAP 13 and then sent for forensic analysis. Sergeant Mfiki supplied the information downloaded from the phones on 15 November 2015. Britz then subpoenaed the cell phone providers for call related data.

184. Britz issued Wenn and Fortuin with notices of rights at the Grassy Park police station in the early hours of the morning on 19 September 2015, where they were taken once the crime scene had been processed. Britz confirmed that Wenn signed the Notice of Rights in her presence.

185. On Sunday 20 September 2015. Britz interviewed Wenn and Fortuin (separately) at Lentegeur police station. She took warning statements from the two women (exhibits 3.1 and 2.5). The warning statements were signed by Wenn and Fortuin in her presence.

186. Given that the women said that they wanted to tell the truth about everything, Britz arranged for commissioned officers to take confessions from Wenn and Fortuin. Wenn's confession was taken by Lieutenant Hugo (exhibit 3.3), and Fortuin's confession by Lieutenant Truter (exhibit 2.5).

187. According to Britz, the two women told her on 20 September 2015 that a legal representative, a certain Mr Gladile from Mr Twalo's office, had visited them at the cells in Grassy Park, but they had refused his representation and asked to be left alone.

188. Britz was present when the three women first appeared in Wynberg court on 21 September 2015. Wenn and Fortuin applied for legal aid, and Shafieka was represented by Adv Twalo. The three women were detained at Pollsmoor as Britz required time to verify the bail information furnished by the women. The women next appeared on 27 September 2015, when they were each granted bail of R 20 000.00. Britz did not know who paid their bail.

189. Britz held discussions with the advocates in the office of the Department of Public Prosecutions ("**DPP**") regarding the possibility of Wenn and Fortuin being used as s 204 witnesses. Following these discussions, Britz contacted Wenn and Fortuin telephonically to arrange an interview at the DPP's office regarding the possibility of their becoming State witnesses and furnishing statements. A meeting was scheduled for 27 October 2015 with Senior State Advocate Van der Merwe and Deputy Director of Public Prosecutions, Advocate Viljoen.

190. Britz drove Wenn and Fortuin to the meeting at the DPP's offices. According to Britz, when she fetched Wenn, she remained in her car and did not enter the house and knock on Wenn's bedroom door as alleged by Wenn. *En route* to Cape Town, Britz explained the s 204 process to Wenn and Fortuin.

191. Britz testified that she told Wenn and Fortuin that they had to be totally honest and truthful, including their own part in the crime, and that, if they were permitted to be s 204 witnesses, it would not be Britz or the DPP who would give them indemnity, but it will be up to the court to give them indemnity, *"if they gave evidence totally honestly and truthfully and in line with what they had declared in the 204 statement. And only then, at the end of the trial, would the judge either give them indemnity of not."*

192. Britz testified that she had already informed Wenn and Fortuin at the time when she took their warning statements of the gravity of the charges facing them, and that they would likely be sentenced to lengthy terms of imprisonment if found guilty.

193. Britz and the State Advocates saw the two women separately. At the start of each interview, Adv Van der Merwe explained the s 204 process to the women, after which a question and answer session followed. Britz made notes on her laptop during the interview.

194. When asked about what arrangements were made for legal representation for Wenn during the meeting with the DPP, Britz testified that Legal Aid was on record as Wenn's lawyer, but that she did not want him present. She stated that was well aware, and had agreed that Britz and the DPP could proceed to take a s 204 statement.[41]

195. At the DPP's office a consultation was held with the two women, and the body of their respective statements were formulated. Britz did not finalise their statements there and then, as she did not have printing facilities at the offices of the DPP. After the interview at the DPP's office, Britz took the two women to her office at Lentegeur Police Station, where she formatted the statements, dotted the i's and crossed the t's. The statements were then read back to Wenn and Fortuin, and they signed their s 204 statements. The statements were signed at Lentegeur.

196. According to Britz, the contents of Wenn's s 204 statement came from Wenn. The statement was read back to Wenn at the DPP's office, and again at Lentegeur polics station before Wenn signed the statement. Wenn gave no indication that there was anything wrong with the contents of the statement.

197. The s 204 statements of Wenn and Fortuin were filed in the docket, and charges against them were later withdrawn on 12 April 2016. The reason for the delay in that regard was that Britz needed time to verify and corroborate the information provided by the women in the s 204 statements. This she did by subpoenaing

[41] Record 27 February 2019, p 537.

Nedbank and the cell phone service providers to provide information. Also, the DPP needed time to decide whether or not the women could be used as s 204 witnesses.

198. In the light of Fortuin's *volt face* in the witness box on 3 December 2018, Britz took the precaution of taking two further statements from Wenn on 12 December 2015. One of these statements concerned Wenn's s 204 statement: Britz read back Wenn's s 204 statement to her line by line from her laptop, and Wenn gave no indication that there was anything wrong or false in the statement. The other statement recorded Wenn's refusal of the State's offer of witness protection.

199. Britz produced a download of Whats App communications between herself and Wenn commencing on 28 November 2018, which included communication about Fortuin's recantation in the witness box (exhibit TWT 2.f). Certain voice notes were played in Court (TWT.2.f.1). The communications showed an ostensibly friendly, mutually caring relationship between Wenn and Britz. When Wenn began testifying on 4 February 2019 and broke down in the witness box, Britz accompanied her to the bathroom and comforted her. Wenn cried in Britz's arms.

200. Britz testified that she had received confidential information that Fortuin and Wenn were going to be approached to change their evidence. On 17 February 2019 (after Wenn had already recanted her s 204 statement, but before the Wenn trial had commenced), Britz was called to the scene of the arrest of Rushdien Abrahams ("Abrahams"), who had been arrested with drugs and cash. (Abrahams was known

to Britz as an associate of Murphy. They were raised by the same mother, and Abrahams had been present when the Asset Forfeiture Unit ("AFU") was seizing Murphy's assets at [...] T[...] Street, and had acted as if he were Murphy's legal representative.)

201. Abrahams proceeded to show Britz a Whats App conversation between himself and Wenn on his cell phone. Britz recognized Wenn's profile picture, and took photographs or "screen shots" of the profile picture and the conversation between Wenn and Abrahams.

202. Mr Van der Berg objected to the screen shots being placed before the court, on the grounds that the evidence amounted to hearsay. Mr Beg placed on record that Wenn did not deny that she was the recipient of the Whats App messages from Abrahams. However, when asked whether he objected to the admission of the evidence, he took his cue from Mr Van der Berg and likewise objected. I was not satisfied that the screen shots had sufficient potential probative value to be admitted in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 ("**the Hearsay Act**"), and I therefore ruled that the screenshots were not admissible at that stage, but that the question could be revisited if circumstances changed. (The screenshots were subsequently admitted as evidence in the main trial when Wenn was cross-examined on the contents thereof.)

203. Britz testified that Wenn had on 17 February 2019 received a payment of R 4 000.00 from one Shaleen Davids, who had been arrested along with Abrahams.

204. In cross-examination by Mr Van der Berg, Britz explained that, when she began leading a project involving drug dealing in the area known as the Island in Lenteguer, Murphy was not the main target of the investigation, but a person of interest. Following the raid on 18 September 2015, however, and the information gleaned from Wenn and Fortuin, Murphy did become the main target of the investigation.

205. Mr Van der Berg asked Britz about the day the two women were arrested at 1[...] R[...] Close. Britz recognized Wenn and Fortuin as the two women she had seen with Shafieka a few weeks before in a vehicle outside Murphy's house, when Shafieka's vehicle had been searched for drugs, but nothing had been found.

206. Britz admitted, when asked, that it had occurred to her, once Wenn and Fortuin said that they were willing to talk, that she had an opportunity to implicate those at the top of the drug peddling. Mr Van der Berg then put it to Britz that she must have been concerned about the fact that the search of 1[...] R[...] Close had been conducted without a warrant. Britz replied that she was not worried as she was confident that she had acted correctly. Mr Van der Berg persisted, putting it to Britz that she had embellished the facts in her written statement in order to bolster the

case for a warrantless search. Britz denied this. She did concede, however, that the wording in her statement was not as accurate as it could have been.

207. Mr Van der Berg put it to Britz that she opposed bail for Wenn and Fortuin because she was disappointed at the lack of information in their confessions, and she wanted them to "stew" in Pollsmoor for a week in order to make them more compliant. Britz denied this. She pointed out that she needed time after the first appearance to verify the bail information furnished by Wenn and Fortuin.

208. Mr Van der Berg asked Britz whether she raised with Wenn the fact that her child would be taken away from her. Britz denied having said to Wenn that her child would be taken away from her, and that she would not see her child for years. She said Wenn had expressed concern about what would happen to her child if she went to prison. She admitted that Wenn had been fearful of going to prison and losing her child. Britz also denied having told Wenn that she could avoid going to prison if she made a statement implicating Murphy.

209. Britz was questioned at some length about the arrangements made for Wenn and Fortuin to attend at the DPP's office on 27 October 2015. Britz admitted that she knew at the time that Wenn was legally represented by a Legal Aid attorney. She could not recall the name of the attorney. Britz was asked whether she had ever spoken to Wenn's legal representative before the meeting with the DPP. She replied that she had done so, at one of the court appearances. Britz was asked when she spoke to the lawyer, taking as two poles the dates of 28 September

2015, when bail was granted, and 27 October 2015, when the meeting took place. Britz answered:

> *"It was after the bail shortly before the arranging or the idea of a 204, and speaking to the Legal Aid representative."*

210. In response to the question what she told Wenn's lawyer, Britz said that she informed him that she had been in consultation with the DPP, that there was a possibility that she could be used as a s 204 witness, and she wanted to know if he was amendable to Wenn being approached in this regard. According to Britz, the lawyer replied that he would speak to his client and revert, and he came back to her and told her that he had spoken to his client and he had no objection, they could go ahead.[42] She was asked when the lawyer reverted to her, and she replied that she thought it was at the next appearance.

211. When Mr Van der Berg later repeated the question as to when Wenn's lawyer had reverted to her, Britz stated as follows:

> *"M'Lady, I cannot remember exactly if it was in the beginning in Wynberg on the same day that he came back to me, when he spoke to his clients and came back to me, or if he came back to me on a subsequent occasion. I cannot remember that exactly."*[43]

[42] Record 5 March 2019, p 655 - 756; p 764.

[43] Record 5 March 2019, p 762 - 763.

212. Britz insisted that she had consent from Wenn's lawyer for the DPP to interview Wenn inconnection with her becoming a s 204 witness. When Mr Van der Berg put it to Britz that the court only had her word on this aspect as she had not made a note, Britz replied that the name of the legal representative could be found on the file and the person could be called.[44]

213. It was put to Britz that Wenn's lawyer was a Mr Rustin Ravat, who would testify that Mr Ravat maintained that he had not been requested to obtain his client's consent to being questioned by the prosecution, and that he did not obtain or convey any such consent to Britz.[45] Britz disputed this and stated that perhaps Ravat did not recall, but she specifically recalled speaking to him at the Wynberg Court.

214. Britz was questioned at length about the events at the office of the DPP on 27 October 2015. Britz testified that a question and answer session was held with each of the women. She typed notes on her laptop. What she had typed was read back to the women and the State advocates. The State advocates then indicated that they were happy and that Britz could proceed to print and sign. Britz then went back to Lentegeur to finalize the statements. They were read back to the witnesses again, and signed. Britz denied, when pointedly asked by Mr Van der Berg, that

[44] Record 5 March 2019, p 763.

[45] Record 7 March 2019, p 890.

there was any chance that Wenn's s 204 statement had actually been printed out and signed by Wenn at the DPP's office in Cape Town.

215. At the conclusion of his cross-examination of Britz, Mr Van der Berg put it to her that there was a discrepancy between Wenn's signature on her confession, which had been independently verified by Hugo, and Wenn's signature on her s 204 statement, which had been taken by Britz. The defence had obtained an opinion from an expert in the person of Ms Yvette Palm of Hands on Forensics ("**Palm**"), who had opined that Wenn's signature on the confession and s 204 statements were not written by the same person, in essence that Wenn's signatures on the s 204 statement were forgeries.[46] Palm's report was handed in as exhibit "TWT 2(g)".

216. Britz was asked whether she had written Wenn's signature on her s 204 statement, and Britz denied that she had done so, adding that the suggestion was absurd.

217. The issue regarding the authenticity of Wenn's signature on the s 204 statement arose because one could see with the naked eye that the letter "W" in her signature was not uniform in the documents which she had allegedly signed.

217.1. In the confession, Wenn's letter "W" looked like a "k" attached to an "l":

[46] Record 7 March 2019, p 961.

217.2. In the s 204 statement, Wenn's letter "W" looked like a small "w" with extended side lines:

218. The former was referred to in the trial as "**the fancy W**", while the latter was referred to as "**the plain W**" or "**the normal W**".

Warrant Officer Smit

219. On the strength of what had been heralded during the cross-examination of Britz, the State called Warrant Officer Susanna Mariesa Smit ("**Ms Smit**")[47], a forensic analyst employed in the Questioned Documents Section of the Forensic Science Laboratory in Plattekloof, who handed in an affidavit in terms of s 212 of the CPA. She testified that she had examined a number of documents allegedly signed by Wenn.[48] She did so without having had sight of Palm's opinion.

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[47] I refer to her as Ms Smit to distinguish her from the witness Colonel Smit.

[48] Wenn's warning statement, Wenn's s 204 statement, Wenn's confession, Wenn's notice of rights, Wenn's statement signed on 9 August 2016, Wenn's two statements dated 12 December 2018, and Wenn's Nedbank account opening form.

220. Having examined the documents, Smit's finding was inconclusive. She opined that she could not reach a conclusion because the signatures were too simplistic and lacking in complexity to display a sufficient number of identifying features. Smit testified that Wenn had two ways of executing the letter "W", one more complex than the other, but both simplistic.

221. Smit testified that she disagreed with Palm's finding *inter alia* because her finding was based on inadequate specimen signatures. Smit was critical of the fact that the seventeen requested specimen signatures used by Palm were all executed on one and the same page, whereas the guidelines stipulated that requested signatures should be done separately, one per page. The reason for this is to prevent the person providing the sample signatures from copying signatures on the page.

222. Smit was also critical of the fact that Palm had placed too much reliance on the requested specimen signatures obtained in 2019, and had only obtained two collected specimens from 2015, namely the confession signatures, which were executed in one sitting. For that reason, Smit considered that Palm did not have sufficient specimens to cover Wenn's range of natural variation.

223. Smit was of the opinion that the differences between the "fancy W" and the "plain W" fell within Wenn's range of natural variation. She pointed to the fact that in her collected samples she had examples of Wenn using a "plain w" in many documents. Smit also referred to the fact that the warning statement (H 3.1)

contained signatures featuring both the “fancy W” and the “plain W”. One sees that the initials on the first page of the warning statement feature both the “fancy W” and the “normal W”.

224. The State closed its case in the Wenn trial after the evidence of Ms Smit.

225. Mr Van der Berg, on behalf of Murphy and UTS, called Palm. Mr Beg, on behalf of Wenn, called Wenn’s mother, Ms Kaashiefa Jones (“**Kaashiefa**”) and Mr Rustin Rawat (“**Ravat**”).

Ms Yvette Palm

226. Palm testified that she was instructed by Mr Davies of Davies Attorneys (the attorneys of record for Murphy and UTS) to undertake an examination and comparison of the Wenn signatures, the questioned signatures being the Wenn signatures on the s 204 statement. She was asked to compare the questioned signatures on the s 204 statement with two known signatures of Wenn, being the two signatures on the confession document (which had been signed before an independent police officer other than Britz). She said that these signatures were not enough to work with, and that she required additional signatures. She was told that specimen signatures for Wenn could not be found, and she was given a piece of paper containing seventeen requested specimen signatures (TWT 2(n)).[49]

[49] Record 20 May 2019, p 1928 - 1929.

227. Palm noticed that the requested specimen signatures all had the “fancy W”, as did the confession taken almost four years previously in 2015. Palm took into account the possibility that the requested specimen signatures might be an attempt to reproduce a particular signature, but she did not think that there was any attempt to disguise or alter the requested signatures as they were all written freely with a natural speed and rhythm. She would have expected more hesitations if the requested specimens were disguised signatures.

228. Palm considered that the “**fancy W**” and the “**plain W**” were fundamentally different in construction, and that they did not fall within the range of natural variation. The only explanation, in her view, was that the different W’s emanated from different authors. She also considered that the questioned signatures showed inconsistencies, indicating that they were not practised, regular signatures.

229. She opined that the evidence was conclusive that the questioned signatures in the s 204 statement were not written by the same person as the specimen signatures. Palm went on to testify that she had subsequently been given the originals of the documents which Smit had examined. Having examined these documents, Palm did not change her opinion.

230. Palm raised certain suspicions regarding Wenn’s statements dated 12 December 2018 (TWT2 (d) and (e). She pointed out that the statements were written on different paper with different pens, and that the statement taken at 11h00 had a commissioner of oaths stamp on it, whereas the other statement, taken at 12h33,

had the oath written out. She could not exclude the possibility that the person who wrote the body of the statements also wrote the signatures on the statements.

231. Palm testified with regard to Wenn's warning statement, which featured both the "fancy W" and the "plain W", that she did not regard the instances of the "plain W" as authentic. She considered that the position of the "plain W" signature on the second page of the document was odd.

232. Palm went on to testify that she performed a study known as a control test group which is used to examine a *modus operandi*. She had been shown documents ostensibly signed by Wenn which exhibited two types of "W". In each case where the "plain W" appeared, the documents had ostensibly been signed before Britz, as opposed to an independent third party. Palm then did the same exercise with regard to documents ostensibly signed by Zuluyga Fortuin, and she found indications of inauthentic signatures in the warning statement and written statements of Fortuin, being documents connected to Britz. In other words, she observed the same pattern as she had observed in regard to Wenn, that wherever there was inconsistency in the signatures, Britz was involved.

233. Under cross-examination by the State, Palm testified that she was approached in connection with this matter and consulted with Mr Van der Berg a few days before 22 February 2019, when she was given Wenn's confession and s 204 statement. She requested additional specimens, and was given the 17 requested specimen signatures on 22 February 2019. Palm was happy to work with the 17 requested

specimens, even although they were all contained on one page, because she could not pick up any indication of disguise in the signatures because the specimen signatures had been executed freely and with speed.

234. Once she had seen Smit's s 212 affidavit, Palm's mandate was extended and she was asked to consider documents signed by Fortuin as well. The test documents were the documents with Wenn's signature, and the control documents were the documents with Fortuin's signature. However, the exercise revealed that certain of Fortuin's signatures were also suspect. In every instance where the signatures were suspect, the common denominator was Britz. There were no difficulties with statements made before independent third parties.

Kaashiefa Jones

235. Kaashiefa testified that she is the biological mother of Wenn. After Wenn's release on bail in 2015, Wenn and her husband came to reside with her in East Ridge, Mitchells Plain. She stated that one morning Britz arrived, alighted from her motor vehicle, and asked if she could speak to Wenn. She went to wake Wenn and told her Captain Britz was outside to see her. Wenn then said, "*Mammie, I am not going to depose a statement*."

236. Kaashiefa relayed the message to Britz, who asked to come in and speak to Wenn. As Britz was speaking to Wenn, Wenn appeared very nervous as she did not know what to do.

237. Kaashiefa asked Britz why she had come to fetch Wenn, to which Britz replied that she had come to fetch her to go to Cape Town. Wenn did not want to go, but Britz told her that she must go with her. Britz said to Wenn that if she did not go with her, Wenn would *"get 25-years imprisonment with Fadwaan Murphy or her child will be taken away."* Britz then went to wait for Wenn outside, and Wenn got dressed and left with Britz.

238. Under cross-examination by the State, Kaashiefa insisted that Britz had introduced herself to her as "*Captain Britz*", even when it was pointed out to her that Britz had been a Warrant Officer at the time.

239. According to Kaashiefa, she knew that Wenn had been arrested for drugs, but she did not ask her about it. She then changed her evidence and said that she did ask Wenn why she had been arrested for drugs when she had said that she was doing cleaning work.

240. Kaashiefa displayed a reluctance to answer Ms Heeramun's questions. She protested that she had nothing to do with this case, and that she was only here to testify about what happened the day Britz came to fetch Wenn. I had to explain to her that the State was entitled to ask her questions about other matters, and that she was obliged to answer honestly and fully.

241. Kaashiefa denied knowing Rushdien Abrahams. She admitted to knowing Murphy, Shafieka and Bird. She said she had worked for Shafieka and Bird for years in a

factory making clothes. Kaashiefa admitted that she had rented No [...] T[...] from Shafieka, and that she had been living there in August 2014 when Wenn's child was born. She had lived there for three years prior to the birth of Wenn's child. She was friendly with Murphy's mother, Faeeza. She had also worked for Faeeza part-time while she lived at [...] T[...], and full time for the year of 2018.

242. Kaashiefa professed to be ignorant of Murphy's involvement in the affair for which Wenn had been arrested until Britz mentioned him when she came to fetch Wenn, and that, on hearing Murphy's name, she did not ask what it was all about.

243. Kaashiefa was astute to distance herself from Murphy, Shafieka and Bird, saying that she had not had contact with them. She was evasive and refused to answer the point that it was hard to believe that she had not asked Wenn what the case was all about and how Murphy and Shafieka were involved. It was put to Kaashiefa that the reasons she did not ask was that she knew full well what Wenn had been doing. Kaashiefa denied this, and said Wenn told her "*that she's working at a place where they are cleaning.*"

244. According to Kaashiefa, Wenn lived with her at 36 Gazelle Street, East Ridge, from approximately March to July 2015. She left for work early in the morning and returned home early in the evening. She said she was working with Shafieka, doing cleaning. Kaashiefa was asked why Wenn stopped going to work at cleaning after her arrest and release on bail. Kaashiefa's response was that Wenn said she did not want to work anymore. She added that Wenn had met a man and married him,

the suggestion being that she did not have to work. (That made no sense, as Wenn had already been married in July 2015 when she was allegedly doing cleaning work.)

245. According to Kaashiefa, before the Wenn trial commenced and it became apparent that Wenn would require legal representation, her husband, Wenn's stepfather, said that he would arrange a lawyer for her and he appointed Mr Begg and was paying for Mr Begg. Kaashiefa could not answer why no private legal representation had been arranged for Wenn at the time when she was arrested and first appeared in Wynberg court.

246. I was not at all impressed with Kaashiefa as a witness. She manifested a defiant demeanour towards the State, being unwilling to answer questions about anything other than the narrow issue on which she had been called to testify, namely what Britz said to Wenn on the day she came to fetch her to take her to Cape Town. She repeatedly turned her back on Ms Heeramun and did not want to look at her while she was posing her questions.

247. Kaashiefa had been present in court throughout Wenn's testimony and had heard what she had had to say. It is therefore not surprising that her testimony had a scripted quality about it, which I found most unconvincing.

248. Kaashiefa's testimony was riddled with inconsistencies, evasions and nonsensical answers. It was evident that she had a close, longstanding association with

Murphy's mother, Faeeza, and with Bird and Shafieka. It was clear that her denial of the obvious, and her professed ignorance regarding any alleged drug dealing, was aimed at protecting them. It is beyond belief that she would not have asked or been concerned about police raids at 1[...] T[...], unless she knew what was going on there. It is also impossible to credit that she would not have asked Faeeza about why Wenn had been arrested and why Murphy's name had come up in regard thereto, unless she knew what the situation was.

249. In my judgment, Kaashiefa was not an honest witness. She evinced a clear bias against the State, and it appeared to me that she had been schooled in what to say. I consider that no reliance can be placed on her evidence about what Britz allegedly said to Wenn on the day in question.

Rustin Ravat

250. Ravat, a pupil advocate at the Cape Bar, testified that he had previously been employed as a public defender by Legal Aid. At the time of Wenn's arrest in September 2015, he had been stationed at the bail court in Wynberg Magistrates Court. The relevant charge sheet was handed in as exhibit "TWT 2(r)".

251. Ravat confirmed that he had represented Wenn in the Wynberg Magistrates Court on 23 September 2015, 28 September 2015, 26 November 2015 and 27 January 2016.

252. Ravat had no independent recollection of whether he had come on record for Wenn at her first appearance. He could only see from the charge sheet that the fourth accused, Davidson, was added on 23 September 2015.

253. Ravat was asked whether he was ever approached by Britz or any police official or member of the DPP staff for his or Wenn's consent to Wenn being interviewed or questioned by any member of the police or the DPP staff. Ravat answered that he did not recall any such conversation or that he was approached.

254. Ravat was then asked whether he consented to Britz or the DPP interviewing Wenn, and he reiterated that he had no recollection of being approached and no recollection of giving such consent.

255. In a highly leading and suggestive cross-examination by Mr Van der Berg, Ravat confirmed that, if he had been approached by the prosecution or police with a request to interview his client, as a matter of Legal Aid policy, he would have consulted with his client first. He added that he would have made a note of the consultation and requested his client to sign the note.

256. Ravat reiterated that he had no independent recollection of having been approached for consent and consulting with Wenn in regard thereto, and he added that, if this had happened, he would have made a note of it. He would have placed the consultation note in the legal aid file, and he would have also written a note on the front cover of the file that he had been approached by the police or the DPP,

because he kept detailed notes on the front cover of whatever happened in court. He pointed out that at any given time he had to deal with 350 to 400 cases, so he kept the notes to remind him what had happened on previous appearances.

257. Ravat could not recall ever having been approached with a view to a client becoming a s 204 witness. He could recall an instance where he was approached by the police with regard to an ID parade. He informed his manager, and attended the ID parades in both instances. As he was the only person in the bail court, it meant that the bail court could not proceed in his absence. As a result, his manager told him that he should no longer be absent because it created a backlog in the bail court, and it was undesirable that he be a witness in the case.

258. Under cross-examination by the State, Ravat testified that an attempt had been made to locate the relevant legal aid files, and that the Khayelitsha priority court file had been located, but not the district court file from the Wynberg court.

259. Ravat testified that, if he had been approached about Wenn becoming a s 204 witness, he would have sought guidance from his manager. He agreed that, with proper informed consent, it would have been in the client's interests to be a s 204 witness.

260. He confirmed that he had no independent recollection of the s 204 aspect, but he could vaguely recall the case because of the amount of drugs and money found.

He also confirmed that he was likely present in court at the first appearance (the record of which was missing from the charge sheet).

261. Ravat had no memory of the first appearance, save for the fact that three women appeared. He thought that a male person was added a week or two later. (The charge sheet shows that this in fact happened two days later, on 23 September 2015.) He also could not recall the bail application for Wenn and Fortuin, but confirmed that he would have consulted with them in order to draft the bail affidavits.

262. Ravat could not recall Britz being present at the first appearance or during the bail applications. He also did not recognize Wenn in court. He conceded that the fact that he could not recall an event did not mean that it did not happen.

263. Ravat impressed me as a clearly honest witness, but his memory was patently unreliable - understandably so as he was dealing with events which happened years ago when he was burdened with a heavy case load. One would not have expected him to recall the details of each and every case.

264. As to Ravat's evidence that he would have made a note on the file of any request from the police or DPP to interview a client, one has to bear in mind that his evidence was that he did not recall ever having had such a request. He could not testify as to what he habitually did in such instances, because he could not recall any such instances. He was able to say that this was what he ought to have done

as this was legal aid policy. But his evidence as to what he would have done in such an event is a reconstruction, because he does not recall such an event. It does not assist to determine what actually happened. One must also be mindful of the fact that, as an aspiring advocate, Ravat might have had unconscious tendency to present himself in the best light and not betray any inexperience or omission. (I say that with no reflection on Ravat's honesty and integrity, which is not in any doubt.)

265. After the close of the case for the accused, Ms Heeramun applied to lead rebuttal evidence of Captain Olsen and Britz, the latter having been taken by surprise at the end of Mr Van der Berg's cross-examination, when the matter of inauthentic signatures was raised for the first time. I granted the application on the basis that the defence would be entitled to adduce rejoinder evidence, if so advised.

Rebuttal: Captain Henry Olsen

266. Captain Henry Olsen ("Olsen"), a forensic document examiner employed in the Questioned Document Section of the Forensic Science Laboratory handed in an affidavit in terms of s 212 of the CPA (exhibit "TWT 2(q)").

267. Olsen testified that he was approached by Ms Heeramun on 21 May 2019 with a request to conduct a forensic examination of the page of seventeen specimen signatures provided by Wenn to Palm (exhibit "TWT 2(n)"), which I shall refer to as "**the specimen signatures page**".

268. The specimen signatures page contained one obliteration. Ms Heeramun asked Olsen to determine whether the obliteration could be deciphered.

269. The specimen signatures page was subjected to examination using microscopic magnification, video spectral analysis using a VS6000 Video Spectral Comparator ("VSC") and an electrostatic detection process, using an Electrostatic Detection Apparatus ("ESDA"). The instruments had been verified as being in working order.

270. The result of the video spectral analysis was that the writing was obliterated to the extent that it could not be deciphered with certainty.

271. While undertaking the VSC analysis, Olsen noticed indentations on the specimen signatures page (i.e. handwriting impressions made by writing on a page above the specimen signatures page) He used the ESDA in order to make the indentations visible and legible.

272. The indentations made visible by the ESDA showed the name "F Wenn", the same as on the specimen signatures page, and the indentations came about by someone writing F Wenn on a page which was on top of the specimen signatures page.

273. According to Olsen, he would expect to see indentations such as those on the specimen signatures page if someone has written for up to five pages above the specimen signatures page.

274. He was asked whether there needed to be a test run before using the ESDA machine and a test page result, and he denied that this was required. He stated that the fact that the ESDA machine produced a result when he knew there were indentations on the page was sufficient to indicate that the machine was working.

275. Olsen testified that the obliteration on the specimen signatures page had been made by the same pen and ink as the signatures on the page (which indicates that Wenn would have made the obliteration).

276. Olsen commented that an unusual feature of the signatures on the specimen signatures page was the construction of the “W” in the name Wenn, which did not conform to what is taught in schools. He pointed out, with reference to the result of the ESDA, that one saw two forms of execution of the letter “W” in the indentations, some “normal” and some “fancy”.

277. Olsen was asked in cross-examination whether one would expect to find a more marked contrast on the ESDA result between the signatures and the indentations, reflecting as black and white. Olsen said this was not always the case, and that differing pressure of indentations could produce different toner results. He stressed that the point was that the indentations were an indication that there had been a previous page or pages above the specimen signatures page which had created the indentations.

278. Olsen was asked whether he was familiar with the terms secondary indentations, and he said he was not. Olsen was asked whether he had examined the reverse side of the specimen signatures page, and he said that he had done so. He found embossing there, both from the requested specimen signatures and from the indentations.

279. It was put to Olsen that the indentation signatures marked 17, 18 and 19 on page 3 of exhibit “TWT 2 (v)” (a document prepared by Olsen at the request of the defence, showing all the indentations) were identical, and that there was one indentation repeated twice. He disagreed that the signatures were identical. He was asked to give a scientific explanation for why the signatures might be identical, and he insisted that he could not answer the question without having sight of the original document, as opposed to merely the ESDA result. It was put to him that a number of the indentations were identical, and he disagreed.Olsen was adamant that the only explanation for the indentations marked 16 to 19 on “TWT 2(v)” was the pressure of writing from a page above.

280. Mr Van der Berg asked Olsen whether he was familiar with the concept of friction indentations, which occur when a document containing original writing is kept on top of another document containing original writing, and the movement or shuffling of the documents creates friction which causes the writing on the bottom document to create an indentation on the back of the top document.Olsen answered that any such friction would not have an effect on the page which could be discernible using the ESDA.

Rebuttal: Captain Britz

281. Britz was given an opportunity to respond to the suggestion by Palm that she had forged the signatures of Wenn and Fortuin on various documents.

282. Britz confirmed that Wenn had in her presence signed and, where applicable, initialed, her notice of rights, warning statement, s 204 statement, statement of 9 August 2016 and two statements dated 12 December 2018.

283. She reiterated that Wenn's s 204 statement had been signed at Lentegeur police station, not at the offices of the DPP in Cape Town.

284. With regard to Wenn's two statements dated 12 December 2018 (concerning which Palm had raised suspicions), Britz explained why there was no commissioner of oaths stamp on the second statement (which confirmed the contents of Wenn's s 204 statement "TWT 2(e)"), as opposed to the first statement (dealing with witness protection "TWT 2(d)").

285. She had a folder with a pen and state issue fullscap paper (P21). She first took the statement regarding witness protection on the P21 paper, using the pen from her folder. When Wenn had signed that statement, she put it back in her folder. She then opened her laptop bag and removed her laptop so that she could read back Wenn's s 204 statement from her laptop. In her laptop bag was a new writing pad and her favourite pen. Britz wrote the second statement on the new writing pad

with her favourite pen. She wrote out the oath on the second page of the statement. When Wenn had already left and returned to work, Britz put the second statement in her folder. She then noticed that she had forgotten to write the oath on the first statement. She therefore went to the Paarl police station, where she affixed the commissioner of oaths stamp to the first statement.

286. Britz likewise confirmed that Fortuin had signed in her presence her notice of rights, warning statement, s 204 statement and statement dated 9 August 2016, and that the s 204 statement had been signed at Lentegeur polcie station.

287. Britz vehemently denied the suggestion by Palm that she had forged signatures on various of Wenn's and Fortuin's statements.

Yvette Palm in rejoinder to Captain Olsen

288. Palm was critical of the ESDA result produced by Olsen which showed that the toner had reacted to the ink on the specimen signature page, producing dark markings in the place of the writing, whereas, according to Palm, the toner should only react to the ink where the ESDA test is performed within three weeks of the writing. (In this case, the ESDA test was performed some three months after Wenn wrote the signatures on the specimen signatures page.)

289. She was also critical of the fact that no test run had been performed before and after the ESDA test, no ESDA test performed on the reverse page of the specimen

signatures page, and no notes taken of conditions at the time of testing, such as temperature and humidity.

290. Palm distinguished between indentations on a document, which are caused by the pressure of writing on a page placed on top of that document, and secondary impressions, which are caused by friction or movement between two documents, which results in markings from the embossing at the back of the top document to be transferred to the bottom document, thereby creating the impression.

291. Palm testified that secondary impressions are typically fragmented and fuzzy, and do not have the sharp quality of direct indentations. Another characteristic of secondary impressions is that one finds identical impressions which can be superimposed on one another, whereas one cannot have identical indentations of a signature, since no human signature can ever identical to another.

292. Palm's point was that it could not simply be assumed that the indentations on the specimen signatures page were primary indentations as opposed to secondary impressions.

293. According to Palm, the markings numbered 17, 18 and 19 on the specimen signature page were identical and therefor could not be indentations, but had to be secondary impressions. (This was denied by Olsen, who disputed that the signature markings were identical.)

294. Palm maintained that it was impossible to tell whether the markings on the specimen signatures page were primary indentations or secondary impressions, as no ESDA test had been done on the reverse page of the specimen signatures page, i.e. on the embossing at the rear of the page. If the marking did appear on the reverse side of the specimen signature page, it was a primary indentation caused by pressure of writing which would create embossing on the reverse side of the specimen signature page. But if the marking did not appear on the reverse side of the specimen signatures page, it was a secondary impression caused by friction between the specimen signature page and a document kept on top of it.

295. Palm explained that the secondary impressions would have come about as follows: Wenn would have written her signatures on a page ("the top page"). She would then have written her signatures on a separate page, being the specimen signatures page. The top page would then have been placed on top of the specimen signatures page. The signature embossing from the top page would then rub off onto the page beneath, i.e. the specimen signature page.

296. I asked Palm whether, in the circumstances, this did not suggest that Wenn had been practising her signature. Palm did not concede this. Her answer was, "*Not necessarily, M'Lady, because we cannot determine at what stage those secondary impressions were brought onto her document*."[50]

[50] Record 25 June 2019, p 2514, l 1 -3.

297. Palm could not say with certainty which of the markings on the specimen signatures page were indentations and which were secondary impressions. All she could say with certainty was that the markings numbered 17, 18 and 19 were secondary impressions because she regarded them as identical.

298. Palm was asked whether her opinion would be the same without the 17 specimen signatures obtained from Wenn. She answered that she would revise her opinion from “the evidence is conclusive” to “the evidence strongly supports the proposition”, or “strong probability”, being the level just below conclusive, which indicates that an alternative explanation cannot be fathomed on the available evidence.

299. During cross-examination by the State, Palm stated that secondary impressions are an extremely rare occurrence that are not often dealt with.[51] She had to concede that she herself has never identified secondary impressions by means of an ESDA test. Her knowledge on the subject is entirely theoretical.

300. Palm’s biggest concern regarding Olsen’s ESDA result was the fact that the toner had reacted to the ink, which should not have happened given the lapse of time since the document was created. The ink should have yielded a white result and the indentation a black result.

[51] Record 26 June 2019, p 2538 l 19 - 20.

301. Palm testified in this regard that "*all the data and all the research that has been done*" showed that the ink should not react when the ESDA test is run more than three weeks after the writing was created. When Palm was asked whether she would be able to produce this research, she answered that it was ongoing research and was not in a position to refer to any published article on this point She testified that she had contacted Robert Radley, the expert in ESDA results, and asked him why this had happened, and that "*[H]e said to me that it can be one of two things but we are not sure. They are in the process of eliminating the effect and why that particularly happens.*"

302. Palm conceded, when I suggested that this could not fairly be postulated as accepted state of the art science, but she insisted that the overall consensus is that it is an anomaly for the toner to react with the ink on the document when the ESDA test is run more than three weeks after the writing.

303. Palm repeated her evidence that, in the absence of an ESDA run on the reverse side of the specimen signatures page, it was impossible to say whether the markings on the specimen signature page were indentations or secondary impressions.

304. In response to a question which I posed for clarification, Palm agreed with me that one knew which of the markings on the ESDA result were from Wenn's original

specimen signatures, and that the remaining markings on the ESDA result were either indentations or secondary impressions.[52]

305. Palm conceded that the literature on the subject of secondary impressions stated that they occur where the printing on the top document is heavily indented into the paper and there is significant embossing, and that the secondary impressions are only detectable after three months. She further conceded that, in order to observe secondary impressions on the specimen signatures page, it would have had to be subjected to the conditions mentioned in the experiment, such as being stapled to the top page and having pressure put on it for three months.[53]

306. Palm however insisted, with reference to the article in question, that secondary impressions can be rapidly generated as opposed to only after three months. But she had to concede that with normal handling it would take months for secondary impressions to appear, whereas with deliberate and extraordinary handling, such putting pages together, shuffling the pages, moving them around with some force, a more rapid generation of secondary impressions would take place.[54]

307. Ms Heeramun asked Palm why she had not conducted her own ESDA test of the specimen signatures page, given her concerns about and criticism of Olsen's ESDA result. Her answer was that it was not her mandate, as she has been asked

[52] Record 26 June 2019, p 2565 l 14 - 23.

[53] Record 26 June 2019, p 2581 l 8 - 15.

[54] Record 26 June 2019, p 2584 l 10 - 23.

to examine the signatures on the confession and s 204 statement. She was asked why she did not examine the obliteration on the specimen signatures page and her answer, once again, was that she did not deem it necessary as it was not part of her instruction. After Olsen testified and produced his ESDA result, Palm did not run her own ESDA test because she was not instructed to do so. [55]

308. Palm was questioned about the circumstances surrounding the production of the specimen signatures page. She admitted that she knew nothing of the circumstances under which Wenn produced the signatures. The specimen signatures page was given to her by Mr Van der Berg on 22 February 2019 in a manilla folder, together with Wenn's warning statement, confession and s 204 statement. She retained the folder containing these documents in a filing cabinet until she testified on 20 May 2019. On that day she returned the folder to Mr Van der Berg, and the specimen signatures document was handed in as an exhibit ("TWT 2 (n)").

309. The gravamen of Palm's rebuttal evidence was that one could not be sure that the markings on the specimen signature page were indentations and not secondary impressions, and that Olsen had erred in jumping to conclusions that the markings were indentations, given the problems with the ESDA result.

Conclusion at the end of the Wenn trial

[55] Record 26 June 2019, p 2595 l 16 - 23.

310. At the end of the Wenn trial I considered that it was not necessary or desirable at at that stage to make findings on the question of the authenticity of Wenn's s 204 statement, particularly since I had not heard evidence from Wenn regarding the circumstances under which she gave the specimen signatures, and having regard also to the fact that evidence had emerged which pointed to possible interference with Wenn by Abrahams.

311. I considered that I had ample material based on Wenn's performance in the witness box to decide whether or not she should be declared hostile, without having any regard to her s 204 statement and the alleged inconsistencies between the contents thereof and her testimony in court. Ms Heeramun had heralded her intention to bring an application at the close of the State's case in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 to have the contents of Wenn's s 204 statement admitted as proof of the contents thereof. I indicated to counsel that the determination of the authenticity of Wenn's s 204 statement could be deferred and determined in the context of the hearsay application, rather than the hostile witness application.

312. On 8 August 2019 I made a ruling that Wenn be declared a hostile witness on the basis of her performance in the witness box. I indicated that the reasons for my ruling would follow.

Reasons for declaring Wenn hostile

313. The State bore the burden of satisfying me that Wenn was not desirous of telling the truth at the instance of the State (*S v Steyn* 1987 (1) SA 353 (W) at 355 F). I was required to decide whether Wenn was adverse from her demeanour, her relationship to the parties and the general circumstances of the case (*Meyer's Trustee v Malan* 1911 TPD 559 at 561).

314. In my assessment there were a number of improbabilities and inconsistencies in Wenn's evidence which gave a strong indication that she was not desirous if telling the truth at the instance of the State.

315. In the first instance, it is highly improbable that she would have been able to pack drugs for the very first time on 18 September 2015 in the manner she testified. The whole tenor of her testimony indicated that she was familiar with the set-up in the back room at 1[...] R[...] Close. Her insistence that she had never packed drugs before 18 September 2015 was belied by her spontaneous answer that the payment she received on 11 September 2015 was for packing drugs - an answer which she hastened to change when she realized that she had contradicted herself.

316. She tripped herself up when she answered spontaneously that no one had threatened her into making a statement to the police, and then reverted in

confusion to what struck me as a parroted narrative that Britz had threatened her with a long prison sentence and that her children would be taken away.

317. Her inability to say where she had cleaned houses, and her inability to explain why the women carried no cleaning utensils on the morning of 18 September 2015, were, to my mind, clear indications that Wenn's evidence about the cleaning work was false, which, in turn, demonstrated that she was unwilling to tell the truth at the instance of the State.

318. I also regarded it as significant that Wenn changed her evidence about who the drugs belonged to. Whereas she first alleged that the drugs belonged to Shafieka, and that Shafieka had told her so, she later denied that this was the case and said that she did not know who the drugs belonged to. On her own version, Wenn had lied about this issue.

319. When Wenn was asked about what emanated from her and what emanated from Britz in her s 204 statement, and what was true and what was false, she showed a single-minded determination to disavow anything to do with Murphy and Bird - even to the extent of denying the innocuous statement that she had had no contact with Murphy since her arrest.

320. These manifest difficulties with Wenn's evidence, viewed in conjunction with her uncooperative demeanour towards the prosecution, as compared with her over anxious agreement with Murphy's counsel, convinced me that Wenn was indeed

unwilling to tell the truth at the instance of the State. I therefore granted the State's application to have Wenn declared hostile.

Cross examination of Wenn as a hostile witness

321. Wenn was represented by Mr Begg during her cross-examination by the State. Before her cross-examination commenced, I warned her once again in terms of s 204 of the CPA.

322. When asked, Wenn answered that it was her step father who had instructed and paid Mr Begg to represent her. (Evidence subsequently emerged when Britz later testified that Mr Begg had addressed and emailed his invoice to Abrahams, which suggests that he was in fact paid by Abrahams.)

323. Wenn was asked about the circumstances under which she signed the specimen signatures page. She testified that Mr Begg had come to see her after work on a Saturday and requested her to sign. He told her that he wanted signatures from her, and he gave her a paper to sign. She signed only on one page. The page was not in a writing pad, but in a book with lines. Mr Begg opened the book at a clean page, and she signed on the page in the book. According to Wenn, Mr Begg opened the book at about the middle of the book. Wenn stated, when asked, that the pages before that were also clean. (The obvious difficulty with this answer is that she could not have known that if she only saw the page on which she signed).

324. Wenn was asked about the obliteration. She admitted that she scratched out her signature, but she could not explain why. She said "*I just did it*".

325. Mr Begg told Wenn to sign as she normally does. Wenn was evasive about what Mr Begg said when she asked him what he was going to do with her signatures. She gave contradictory answers, first saying then that he did not tell her, then that she could not recall what he said.

326. Wenn denied having practised her signature before Mr Begg arrived or in the book that Mr Begg gave her. She was adamant that she only signed on one page. When the concept of an indentation was explained to Wenn, she spontaneously answered that there was nothing that was removed or taken out from the book, seemingly in an attempt to deny that she had signed on another page which had created the indentations.

327. Wenn was asked whether it was her signature on the confession, the s 204 statement, the statement dated 8 August 2016 and the two statements dated 12 December 2018. She replied that she could not tell whether those were her signatures.

328. Wenn could not explain why she had never raised an issue with her signature during the various consultations with members of the DPP. She frequently answered that she could not recall.

329. When Ms Heeramun put it to Wenn that she had previously confirmed her signature on the two statements dated 12 December 2019, she answered that she could not recall. When pushed, Wenn recalled having made a statement refusing to go to witness protection, and confirmed that she has signed the statement.

330. When asked why she did not tell the State Advocates (without Britz present) in the consultation immediately preceding the trial that there was something wrong with her statement, Wenn answered that she was afraid, that she did not want to speak about these things, and that she simply pretended to be happy in their presence. She played along.

331. Wenn testified that Britz wanted her to say that the drugs belonged to Murphy. Britz said she knew the drugs belonged to Murphy, but she just wanted to hear it coming out of their mouths. (According to Wenn she told this to her mother, but Kaashiefa Jones did not testify to that effect during the Wenn trial.)

332. Wenn was asked if she knew Rushdien Abrahams. She admitted knowing him through her mother, but was evasive about how long she had known him and said she only greeted him. She denied having given him her cell phone number and that she had taken his number. She denied knowing Shaleen Davids.

333. She admitted that Shaleen Davids transferred R 5 000.00 to her through a Shoprite Money Market account, and said that it was for a bed. She claimed that she had asked her mother to borrowed R 5 000.00 from Abrahams for her so that she could

buy a bed. She also claimed that she had repaid him R 500.00 by paying the money to her mother, who paid him. But she could not produce the receipt on her cell phone as she said she had deleted it. Wenn denied having ever discussed this case with Abrahams.

334. Wenn later contradicted herself when she admitted that she and Abrahams had grown up together and had lived opposite each other. She admitted that Abrahams lived with and was raised by Murphy's mother, Faeeza.

335. Wenn was constrained to admit when confronted with Whats App communications between herself and Abrahams, that she had indeed approached Abrahams for money to buy a bed, and that Abrahams had referred to a third party, saying, "*He will sort you out tomorrow*."

336. Wenn was able to recount in detail what happened when Britz came to fetch her on 27 October 2015 to take her to the DPP for a consultation with a view to taking a s 204 statement. Yet she could not explain why she could not recall what had happened recently with Mr Begg.

337. While Ms Heeramun was questioning Wenn about the events on 27 October 2015, Wenn anticipated the line of questioning and spontaneously stated that after the meeting at the DPP's office, Britz drove her and Fortuin straight to Worcestor.

338. Wenn was asked about Fortuin's evidence that she and Wenn had worked together packing tik in Grassy Park. Wenn's response was that it was first a

cleaning job, then she did not see her for a long time, and then when they met again they packed tik.[56] According to Wenn, she took a break, and then came back to work on 18 September 2015, when they were arrested.

339. Before her break, she did cleaning work for Shafieka Murphy. She did not have a uniform. They did have cleaning equipment. The cleaning equipment would be in the building they were going to clean. The cleaning work would be done at newly constructed buildings where the windows needed to be cleaned and the floors had to be mopped. They did not drive around with cleaning equipment. The cleaning equipment would stay there. Wenn did not notice where these locations were as she was always on her cell phone.

340. According to Wenn, when she did cleaning work, it was every day of the week from Mondays to Fridays, and she would be paid in cash at the end of the week by Shafieka. Shafieka told Wenn to open a Nedbank account as she did not want to pay her in cash any more. She did so in March 2015.

341. Wenn denied seeing notifications of payments from UTS on her cell phone. She claimed that she received notifications of payments, but not of the name of the payer. Wenn could not explain why she was receiving payments from UTS in July and August 2015 at a time when she claimed that she had taken a break from work.She could not explain why her cell phone was picked up in the vicinity of 1[...] R[...] Close on 24 July 2015 and said perhaps she was cleaning, having apparently

[56] Record 14 August 2019, p 2881 l 21 - 23.

forgotten that she had testified that she had taken a break from cleaning in July and August 2015. She insisted that she only packed drugs on the day of her arrest. She was unable to explain why, if she had been doing legitimate cleaning work prior to her arrest in September 2015, she did not resume her work as a cleaner once she was released on bail.

342. Wenn was asked about the day of her arrest, and whether she knew that it was wrong to pack tik. She answered that she knew that what she was doing was wrong, because tik kills people.[57] She knew it was illegal.

343. Wenn was asked whether she had ever been approached by anyone to change her evidence in this trial. She answered "*No*". When shown a copy of her Whats App communications with Abrahams (exhibit "V"), she admitted that the communications were between her and Abrahams. When asked who the person referred to in the messages as "Wani" was, she claimed not to know. It was put to her that "Wani" was Murphy, and she responded that she does not know. However, she later admitted to having a friend called "Uncle Wani", but could not say where he lived. Wenn admitted that Abrahams may have been referring to Britz when he asked whether "she" had threatened Wenn, and did Wenn know that "she" had changed her statement. Wenn pretended not to know what case Abrahams was referring to, even although she had admitted that the messages were talking about Britz.

[57] Record 14 August 2019, p 2923 l 19 - 25.

344. Despite being confronted with evidence of Whats App communications between "Wani" and Abrahams apparently referring to Kaashiefa Jones and a s 204 witness and to Ms Heeramun as prosecutor, Wenn was adamant that Abrahams did not approach her to change her evidence and that she had not been paid to change her evidence.

345. Wenn was also confronted with evidence of a WhatsApp communication between herself and Abrahams on 11 February 2019, in which Wenn was enquiring about when her lawyer would arrive. (That was the day when the Wenn trial was due to start.) She could not explain why she was making arrangements with Abrahams when, according to her previous testimony, her step father had arranged for Mr Begg to represent her. It was clear from the conversation that Wenn had no idea as to the name of the lawyer, and that she was enquiring of Abrahams who would be representing her, which indicates that Abrahams was arranging her legal representation. Wenn also could not explain why she communicated with Abrahams on 13 February 2019 about the fact that Mr Begg had arranged to meet her on Saturday 16 February 2019.

346. Wenn could not explain why she had previously confirmed her signature on documents when she testified between 4 and 6 February 2019, before the expert evidence of Palm was led, but later could not confirm her signatures. She resorted to her stock answer that she could not remember.

347. During an exceedingly leading cross-examination by Mr Van der Berg, Wenn stated that she only had one way of signing , and that was with the “fancy W”. (Wenn actually used the word “fancy W”, which was the term which had been used during the Wenn trial.)

348. She reiterated that Britz had told her that if she made a statement implicating Murphy, Britz would make sure that Wenn would not go to prison and would be able to live a normal life.

349. Wenn was asked whether she had had any contact with her lawyer between the day she received bail (28 September 2015) and the day she next appeared in court (26 November 2015). She could not remember. She did say, however, that no lawyer came to see her at her mother’s house and that she did not go into court during that period to consult with her lawyer.

Evaluation of Wenn’s evidence

350. Wenn struck me as brazenly dishonest. The negative impression which I had already formed prior to the Wenn trial was compounded during her cross-examination as a hostile witness. It is no exaggeration to say that she was eviscerated in cross-examination by the State.

351. Her responses were riddled with contradictions and evasions too many to enumerate. She manifested selective amnesia, in that she could recall chapter and verse about what Britz had said to her on 27 October 2015, but she claimed not to

remember recent events, such as what Mr Begg said to her on 16 February 2019 about why her signatures were required. Whenever she was confronted with a difficult question, Wenn would resort to the stock answer that she could not remember. At times she simply refused to answer.

352. Wenn's denials that she had been influenced by Abrahams to change her evidence ring hollow in the face of the evidence of their Whats App communications, which clearly refer to this trial, and show that Abrahams arranged for Mr Begg to represent Wenn in the proceedings to have her declared a hostile witness.

353. It was clear to me, both from the evidence indicating that Wenn had been approached by Abrahams and from Wenn's testimony itself, that Wenn had been coached to put up several narratives designed to bolster the defence case: a) that she, Fortuin and Shafieka had worked at cleaning houses and had only packed drugs on one day, being the day of their arrest, b) that Britz had forced her to implicate Murphy falsely by promising that she would be spared prison if she did so, c) that she only had one way of forming the letter "W" in her name and d) that Britz had taken the women straight home after the interview at the DPP's office.

354. Wenn's evidence about cleaning houses conflicts with Fortuins's evidence that the women were packing drugs at 1[...] R[...] Close. Her explanation that she could not remember the location of the houses because she was "always on her phone" is improbable. Her testimony that the women did not carry their cleaning equipment with them but that it was left at the premises which they cleaned does not tally

with her evidence that they were cleaning newly constructed buildings, which indicated a once-off cleaning job, as opposed to a recurring job cleaning the same premises.

355. I have no doubt that Wenn's evidence that Britz told her falsely to implicate Murphy is a false narrative put up under the influence of Abrahams. The similarity to Fortuin's evidence in this regard is too striking to be a coincidence. Both women repeated the story that Britz told them they would get 15 years in prison and their children would be taken away from them.

356. No weight can be attached to Wenn's evidence that she only had one way of signing her "W", namely the "fancy W", given that she had been present in court throughout Palm's evidence, and was clearly tailoring her evidence to fit in with Palm's evidence. It was telling that she insisted that she only signed on one page in the book presented to her by Mr Begg, and that the other pages in the book were clear. The difficulty for Wenn is this: if she only saw the page on which she signed, how could she have known what was on the previous pages in the book? Wenn unwittingly revealed that she had seen the previous pages in the book, which is consistent with her having practised her signature on a previous page, thereby giving rise to the indentations visible on the specimen signatures page.

357. Wenn's spontaneous insistence that Britz had driven the women straight home after the interview at the DPP's office on 27 October 2015 struck me as a transparent attempt to bolster the narrative that the s 204 statements had not in

fact been signed by the women at Lentegeur, as Britz had testified. It was a clear indication that she had been coached. Her evidence on that score conflicted with the evidence of Fortuin and Britz.

358. Given Wenn's patently hostile demeanour, the extremely poor quality of her evidence, and the clear indications that she had been interfered with by Abrahams, I consider that no reliance whatsoever can be placed on Wenn's evidence, and I intend to disregard her evidence entirely.

The uncontentious evidence

Police witnesses

359. Constable Adam Adams ("Adams") gave evidence regarding the search of the premises at 1[...] R[...] Close on 18 September 2015, the discovery of drugs and packing equipment in one of the rooms in the house, and the arrest of the three women found in the room with the drugs. He testified that, when he and Warrant Officer Lindt entered the front door of the property, they called out "*polisie, le plat*", and when they entered the back room where the drugs were found, they found Shafieka, Fortuin and Wenn seated on the floor with their hand on their heads.

360. Warrant Officer Morné Van Meyeren ("**Van Meyeren**") of the South African Police Service ("SAPS") Local Criminal Record Centre, Mitchells Plain, testified regarding the actions he took to process the crime scene at 1[...] R[...] Close on 18 September 2015. He took photographs at the crime scene, made a video recording

thereof, and drew up a plan of the crime scene. The video recording was played in court, and the photographs and plan were handed in as exhibit "**C**".

361. The photographs depict two tables with a scale, sealer, card used to "cut" or separate a loose white powdery substance later identified as tik, empty clear plastic packets, and a white powdery substance in small packets later identified as tik. The photographs also depict a double bed in the room on which there was a sealer, numerous small empty clear plastic bags, numerous small clear plastic bags filled with a white powdery substance later identified as tik, a number of larger packets containing a white powdery substance later identified as tik, and a box containing two digital scales.

362. Van Meyeren testified that in the course of searching the room he found two laptop bags under the bed containing a substance later identified as tik, a laptop bag in the corner of the room containing a substance later identified as heroin, and three carry bags containing cash in a wardrobe. Photographs show that the money was separated into bundles of notes wrapped in cling wrap or other plastic, then placed in a plastic shopping bag held inside a sturdy carry bag. (Britz testified that the cash amounted to R 1 194 020.00, made in denominations of R 200.00, R 100.00, R 50.00 and R 20.00.)

363. Van Meyeren also found in a wardrobe a basket containing tik lollies as well as a carton containing plastic bags each filled with 1000 small clear plastic packets, featuring the name "Easigrip re-sealable bags".

364. Three cell phones were found in the room, one on the table described by Van Meyeren as “workstation A”, one on the bedside table next to the table described by Van Meyeren as “workstation B” and one on the space on the double bed described by Van Meyeren as “workstation C”. The cell phones were sealed in separate forensic exhibit bags and photographed.

365. Van Meyeren also testified that in the room in which the drugs were found there was a window, which was covered over. The relevant photograph reveals what looks like a quilted duvet or similar covering hung in front of the window, thereby obstructing vision into and out of the room.

366. Van Meyeren took swabs from the left hands of Shafieka, Fortuin and Wenn, which were sent away for forensic analysis, as were the suspected drugs and cell phones found in the room.

367. Van Meyeren’s evidence was not shaken in cross-examination.

368. Warrant Officer Makauta Ndesi (“**Ndesi**”), a forensic analyst attached to the Chemistry Unit of the SAPS Forensic Science Laboratory, gave evidence regarding the nature and quantity of the suspected drugs seized at 1[...] R[...] Close on 18 September 2015. She deposed to three affidavits in terms of s 212 of the CPA, which were handed in as exhibit “**D**”.

369. Ndesi's first two s 212 affidavits reveal that the suspected drugs seized at 1[...] R[...] Close comprised 8 929.87 grams of methamphetimine or tik and 729.77 grams of diacetylmorphine or heroin, both being substances listed in Part III of Schedule 2 of the Drugs Act.

370. Ndesi's third s 212 affidavit discloses that the swabs taken from the hands of Shafieka, Fortuin and Wenn were tested for the presence of substances listed in the Schedules to the Medicines and Related Substances Control Act, Act 101 of 1965, and/or the Drugs Act, but that no such substances could be detected in the swab samples.

371. Ndesi was not cross-examined and her evidence stands uncontested.

372. Colonel Johan Smit ("**Colonel Smit**"), the commander of the narcotics section of the SAPS Provincial Detectives, Organized Crime Unit, with 29 years' experience in the investigation of drugs and drug-related offences, gave evidence regarding the street value of the drugs seized from 1[...] R[...] Close on 18 September 2015.

373. He testified that the 8 929.87 grams of tik had a street value of R 350.00 per gram, amounting in total to R 3 155 445.50, and the 729.7 g of heroin a street value of R 160 per gram, amounting in total to R 116 752.00. The combined value of the tik and heroin seized amounted to R 3 242 206.50.

374. Based on his experience, Colonel Smit testified that larger quantities of tik are usually weighed off in 1 gram batches and packaged in small plastic bags to sell

on the street. He confirmed with reference to a number of Van Meyeren's photographs in exhibit "C" that the indications were that tik was being packaged into 1 gram packets for sale on the street at R 350.00 per package. He further confirmed with reference to a photograph of heroin packaged in small packets that this was typical of the way in which heroin is sold on the street.

375. Colonel Smit testified further that, in his experience, one typically finds scales, cards, miniature plastic bags and sealers at crime scenes where drugs are being packaged for sale on the street.

376. Colonel Smit's evidence was not challenged in cross-examination and stands uncontested.

377. **Colonel Gerhardus Muller** ("Colonel Muller"), employed by SAPS crime intelligence as the area information manager for the Mitchells Plain cluster, gave evidence regarding his involvement in 2004 in project "Toxic", which entailed compiling a database of all known drug outlets in the Western Cape. In 2004 Murphy's alleged drug outlet at [...] T[...], Lentegeur was listed in the database. In 2006 Colonel Muller became aware that 1[...] T[...] was also an alleged drug outlet. As part of police operations aimed at addressing drug distribution from 200 drug outlets in the greater Mitchells Plain area, numerous search and seizure operations were conducted at […] and 1[...] T[...], Lentegeur.

378. Colonel Muller was requested by Britz to conduct a radial analysis using [...] T[...] as the central point for the period 1 June 2013 to 1 May 2014. He produced six maps of the area surrounding [...] and 1[...] T[...], which were handed in as exhibits "V 1" to "V6" and a schedule of offences reported during the period 1 June 2013 to 18 September 2015, handed in as exhibit "V7".

379. Exhibit "V 2" revealed four primary schools in close proximity to [...] T[...] Street, namely Aloe Street Primary at a distance of 0.2 km, Aloe Primary at a distance of 0.25 km, Springdale Primary at a distance of 0.29 km and Westend Primary at a distance of 0.23 km.

380. Exhibits "V 4" to "V 6" depicted a 0.3 km (300 metre) radius around [...] T[...] Street and detailed the number of crimes reported[58] within the radius during the period 1 June 2013 to 18 September 2015, when reports of drug related crimes topped the list.

381. Exhibit "V 7" showed that during the period 1 June 2013 to 18 September 2015 504 drug related crimes were reported within the radius, and that drug related crimes were by far the highest number of crimes reported, with theft coming second at 145 and assault and robbery coming third and fourth at 61 and 40 respectively.

[58] Merely reported crimes, not convictions.

382. Colonel Muller explained that the figure for drug related crimes included in the radial analysis referred to the number of charges brought against persons arrested within the radius for possession of drugs and / or dealing in drugs, as opposed to convictions.

383. Colonel Muller also testified as to the nature of the relationship between drug dealing and gang activity. He explained that the market of a drug dealer is protected by a related gang, which protects the market territory by inflicting violence on anyone who attempts to sell drugs in that particular drug dealer's turf. According to Muller the area between Merrydale Avenue and Highlands Drive (within which Turksvy lies) is dominated by the Young Dixie Boys gang who use the symbol "**YDB**".

384. Colonel Muller testified further that in May 2009 a vigilante organization known as PAGAD[59] organized protest action against alleged drug dealing at [...] and 1[...] T[...] Street and attempted to burn down the premises there, with the result that the police had to intervene.

385. Colonel Muller's evidence was not challenged in cross-examination, but Mr Van der Berg did indicate that he would be challenging the inferences which the State seeks to draw therefrom.

[59] An acronym for People Against Gangsterism and Drugs.

386. Captain Louis Hugo ("**Hugo**"), a police officer stationed at Lansdowne Detective Services, gave evidence regarding the taking of a written confession from Wenn on 20 September 2015 at Lentegeur Police Station.[60] The gist of his evidence is that he duly completed the preliminary formalities on the standard confession form before taking Wenn's statement. He read out the contents of Wenn's statement, which he confirmed emanated from her, and he further confirmed that Wenn made the statement freely and voluntarily, that she chose to proceed with the statement without the presence of legal counsel despite having been informed of her right to counsel, and that she signed the confession document in his presence.

387. Hugo's evidence was not disputed in cross-examination.

Evidence regarding plastic packaging

388. Mohamed Zahid Osman ("**Osman**"), the director of Easipack (Pty) Ltd ("Easipack"), an Athlone-based manufacturer and distributor of plastic bags and other packaging products, gave evidence regarding 29 purchases of small clear plastic bags from Easipack by a customer called "Mervy's Trading".

389. Osman was shown two photographs from exhibit "C" depicting the bags of empty small clear plastic bags found on the premises at 1[...] R[...] Close on 18 September 2015.[61] He recognized the label on the packaging referring to "Easigrip

[60] Exhibit H 3.3.

[61] Exhibit "C", photographs 144 and 145.

Reselable Bags" as that of Easipack. In other words, he identified the packaging found at 1[...] R[...] Close as having been purchased at Easipack.

390. Osman testified that he was approached by Britz with a request for information regarding the labels on the plastic packaging found at the crime scene. She had details of a card used to pay for a purchase at Easipack, and when Osman searched for the relevant invoice pertaining to that transaction, it was discovered that the customer in question was an entity called "Mervy's Trading" which had made numerous purchases from Easipack.

391. Osman produced a bundle of documents (handed in as exhibit "E") comprising a list of all 29 purchases made by Mervy's Trading from Easipack during the period 7 June 2012 to 12 February 2016, together with the relevant invoices and three credit/debit card payment slips.[62] Three payments were made by card, and the rest of the purchases were paid for in cash.

392. One sees from exhibit E that between 7 June 2012 and 12 February 2016, Mervy's Trading regularly made bulk purchases of small plastic bags measuring 40 x 60 mm (4 x 6 cm) and 65 x 80 mm (6.5 x 8 cm). For example:

392.1. On 26 November 2014, 20 000 size 40 x 60 mm bags were purchased (exhibit E13).

[62] Exhibit E2 (R 526.32); Exhibit E17 (R 2 472.66) and Exhibit E20 (R1072.11).

392.2. On 17 February 2015, 60 000 size 40 x 60 mm bags were purchased (exhibit E 17).

392.3. On 28 April 2015, 10 000 size 40 x 60 mm bags and 5 000 size 65 x 80mm bags were purchased (exhibit E 18).

392.4. On 22 June 2015, 30 000 size 40 x 60 mm bags were purchased (exhibit E 19).

392.5. On 18 August 2015, 20 000 size 40 x 60 mm bags and 5 000 size 65 x 80 mm bags were purchased (exhibit E 20).

393. During the period relevant to the drug dealing counts in the indictment, 5 purchases of clear plastic packets were made. During the entire period that “Mervy’s Trading” dealt with Easipack, 29 purchases of clear plastic packets were made, ranging from 10 000 to 60 000 in the case of the smaller 40 x 60 mm bags, and from 2 000 to 20 000 in the case of the larger 65 x 80 mm bags.

394. Osman further testified that the card used to pay for packets purchased from Easipak on 17 February 2015, which Britz enquired about, belonged to UTS. He explained that it was not unusual for a customer, in this case Mervy’s Trading, to pay for a purchase using a card belonging to a different entity.

395. Osman was not cross-examined, and his evidence stands uncontested.

Evidence regarding purchases of immovable property

396. Allison Marie Airey-Spengler ("Airey- Spengler"), who was a Seeff estate agent in 2015, gave evidence regarding the purchase by UTS in March 2015 of the immovable property situated at 3[…] C[…] Crescent, Parklands ("**the Parklands property**").

397. Airey-Spengler testified that in March 2015 she had been given a sole mandate to sell the Parklands property. She received an online enquiry from a person who identified himself as Mr Murphy. Airey-Sprengler then telephoned the gentleman, who indicated that he wished to view the property.

398. An appointment was arranged to view the property the next day. The seventh accused, Mr Desmond Jacobs ("**Jacobs**"), attended the viewing on behalf of Murphy, who arrived late for the appointment. Airey-Sprengler was able to identify Murphy and Jacobs in court.

399. According to Airey-Sprengler Murphy expressed an interest in purchasing the Parklands property as a family home, and he put in an offer to purchase the property after he had viewed it three times.

400. The written offer to purchase the Parklands property was made in the name of UTS and signed on 3 March 2015 by Murphy[63] acting in his capacity as the sole member of UTS.[64] It was accepted by the sellers on 5 March 2015.

401. The purchase price for the Parklands property was R 2.5 million, with the full purchase price being payable within seven days of signature of the deed of sale as a deposit to be held in the Seeff trust account pending registration of transfer.

402. In the FICA documentation annexed to the deed of sale[65] Murphy gave his cell phone number as 076[…], his residential address as [...] T[...] Crescent and the registered address of UTS as 1[...] T[...] Crescent, Lentegeur.

403. As to payment of the purchase price, Airey-Sprengler testified that an amount of R 2.4 million in cash was deposited into the Seef trust account on 11 March 2015. The relevant deposit slip[66] reflects that the payment of R 2.4 million was made by UTS at Absa Bank, Cape Town, and comprised R 200.00 notes totalling R 668 200.00, R 50.00 notes totalling R 680 100.00 and R 100.00 notes totalling R 1 051 700.00. The balance of the purchase price of R 100 000.00 was paid to Seeff via EFT, and on 19 March 2015 UTS paid Seeff an additional amount of

[63] Exhibit "F1" - Offer to Purchase.

[64] Exhibit "F2" - CK2 & CK2A document in respect of UTS Trading Solutions CC.

[65] Exhibit "F2" - record of prescribed client particulars in terms of the Financial Intelligence Centre Act, Act 38 of 2001.

[66] Exhibit "F3".

R 21 890.00 by internet banking to cover the bank charges on the cash deposit of R 2.4 million.

404. Airey-Sprengler made discreet enquiries about the source of the funding for the transaction. She had noticed that Jacobs arrived at the first viewing in a branded bakkie bearing the name of UTS, and on asking Murphy about the nature of his business he told her that UTS was in the business of leather upholstery in vehicles and furniture, and cars.

405. According to Airey-Sprengler she had frequent dealings with Jacobs during the course of the transaction, who presented himself as the manager of Murphy's affairs. She understood from Jacobs that he was Murphy's right hand man in the UTS business.

406. Airey-Sprengler's evidence was not challenged in cross-examination.

407. Wilna Roux ("**Roux**"), an attorney from Worcestor, gave evidence regarding the transfer of the immovable property situate at 84 Sampson Street, Worcestor ("**the Worcestor property**") to UTS in terms of a written deed of sale entered into on 11 March 2015.

408. Roux testified that in March 2015 her client, the seller of the Worcestor property, instructed her to attend to the transfer of the property, which had been sold to UTS.

409. The written deed of sale in respect of the Worcestor property[67] reflected UTS as the purchaser and was signed on 11 March 2015 by Murphy acting in his capacity as the sole member of UTS.[68]

410. The purchase price for the Worcestor property was R 265 000.00, payable on registration of transfer. On 19 March 2015 UTS paid the transfer costs of R 9 200.00 in cash.[69] On 8 April 2015 UTS paid the purchase price of R 265 000.00 into Roux's trust banking account by way of an electronic funds transfer "EFT" .[70] The payment emanated from a Nedbank Account.

411. Roux's evidence was not challenged in cross-examination.

Evidence relating to cellular phones

412. Van Meyeren testified that three cell phones were found at the crime scene at 1[...] R[...] Close on 18 September 2015. Britz testified that Shafieka, Fortuin and Wenn each identified one of these three cell phones as belonging to her, pointed out which was her phone, and provided the number. Fortuin and Wenn confirmed that they had identified their cell phones at the crime scene. The three phones were sealed in evidence bags by Van Meyeren and sent for forensic analysis.

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[67] Exhibit "J 2".

[68] Exhibit "J4" - CK2 & CK2A document in respect of UTS Trading Solutions CC.

[69] Exhibit "J8" - Proforma account and cash receipt.

[70] Exhibit "J7" - Nedbank proof of payment.

413. Sergeant Lungile Mfiki ("**Mfiki**"), a specialist forensic investigator and data analyst stationed at the SAPS Operational Coordination Centre, Western Cape (informally known as "the war room"), testified regarding information extracted from the three cell phones seized at 1[...] R[...] Close, as well as a further cell phone allegedly belonging to Shafieka and a cell phone allegedly belonging to the fourth accused, Dominic Davidson ("Davidson").

414. Murphy made a formal admission in terms of s 220 of the CPA that his cell phone number is, and at all material times was, **079[...]**. I shall hereinafter refer to the number 079[...] as "Murphy's number".

415. Mfiki's evidence regarding the information recovered from five cellular phones evidence was set out in an affidavit in terms of s 212 of the CPA, handed in as exhibit "**H 2.1**". Printouts of the data extracted from five cellular phones was handed in as exhibits "**H 2.1.1**" (Fortuin),[71] "**H 2.1.2**" (Wenn),[72] "**H 2.1.3**" (Shafieka)[73] and "**H 2.1.4**" (Davidson)[74].

416. Mfiki testified with reference to the information downloaded from the Vodafone telephone number 072[...] (allegedly belonging to Shafieka), that the contact list stored on the handset contained:

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[71] BlackBerry Torch, number 061[...]

[72] Nokia 5250, number 074[...]

[73] Vodafone, number 072[...] (seized at 1[...] R[...] Close); Samsung GT-S5233A with no sim card, IMEI no 358027032090343 (seized later).

[74] Samsung S5, number unknown, IMEI number 353[...].

416.1. the number 079[...] (i.e. Murphys' number) stored under the name "Bieno";

416.2. the number 074[...] (allegedly Wenn's number for the Nokia 5250) stored under the name "Fazlin";

416.3. the number 061[...] (allegedly Fortuin's number for the Blackberry Torch) stored under the name "Layga".

417. Lynette Van Zyl ("**Van Zyl**"), employed by Vodacom as a manager in its Law Enforcement Agency ("**LEA**") Division, testified regarding Vodacom's response to subpoenas served on it in terms of s 205 of the CPA for cell phone records for the period 1 September 2014 to 19 September 2015 pertaining to:

417.1. Cell phone number 079[...] (being Murphy's number);[75]

417.2. Cell phone number 072[...] and IMEI/handset number 359[...] (the Vodafone allegedly belonging to Shafieka).[76, 77]

[75] Exhibit "M1" - Ref No WK 141/08/2016 - dated 12 August 2016.

[76] Exhibit "M 2.1" - Ref No WK 141/08/2016 -dated 12 August 2016.

[77] Exhibit "M 2.2" - Ref No WK 51/09/2016 - dated 5 September 2016.

418. Van Zyl testified that on receipt of the s 205 subpoenas, Vodacom supplied the information to the SAPS Technical Support Unit ("TSU") in PDF format, which cannot be altered. According to Van Zyl the TSU is able to convert the raw data into Excel format which the investigating officer can use in order to perform analyses and compile spreadsheets. However the information placed before the court is in PDF format, as supplied to the TSU.

419. The data pertaining to Murphy's and Shafieka's numbers ran to thousands of pages and was therefore not printed out, but was instead burnt to a CD which was submitted as exhibit "**M 3**". Copies thereof were supplied to the defence.

420. The data supplied by Vodacom included call AMA data, which refers to incoming and outgoing calls and sms messages, GPRS data, which refers to multimedia messaging, internet and WhatsApp usage, and mapping, which relates to the name and location of the cell phone signal tower which picked up the call or other phone activity at any particular time.

421. Van Zyl's evidence was not challenged in cross-examination.

422. Hilda Du Plessis ("**Du Plessis**") a forensic liaison manager employed by Cell C, testified regarding Cell C's response to subpoenas served on it in terms of s 205 of the CPA for cell phone records pertaining to:

422.1. Cell phone number 074[...] (allegedly Wenn's number);[78]

422.2. Cell phone number 061[...] (allegedly Fortuin's number).[79]

423. A CD containing the cell phone data supplied by Cell C was admitted as exhibit "**N 3**", as well as hard copies of the information, being exhibits "**N 3.1**" to "**N 3.3**" relating to Fortuin's and Wenn's alleged cell phones.

424. Du Plessis testified that she had received basic training on radio planning and optimization and was thus able to explain the basic functioning of cell phone towers and their ranges and locations. According to Du Plessis, cell phone towers are named according to their locations. In densely built up areas the maximum radius of coverage of a cell phone tower is 1 kilometre or 1000 metres. Each cell phone tower has three radial sectors in decreasing signal strength. In essence, the further away the phone is from the tower, the weaker the signal strength. Cell phone towers are frequently shared between different cell phone networks or service provider, but each network has its own equipment on the tower.

425. Du Plessis testified that she was given GPS coordinates for 1[...] R[...] Close and [...] and 1[...] T[...] and requested to ascertain which cell phone towers are closest to those addresses. According to Du Plessis:

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[78] Exhibit "N1" - Ref No WK 132/08/2016 - dated 12 August 2016.

[79] Exhibit "N 2" - Ref No WK 52/09/2016 - dated 5 September 2016.

425.1. Four different towers cover 1[...] R[...] Close,[80] namely Lotus River High, Neuman's Farm, Pelican Park High and Lotus River South. The closest tower to 1[...] R[...] Close is Neuman's farm, which has a coverage range of 940 metres in the direction of the property. It is the dominant tower serving 1[...] R[...] Close, but depending on where on that property one is standing, one could be covered by one of the other three towers.

425.2. Three different towers cover [...] and 1[...] T[...], Lentegeur,[81] namely Aloe High School, Merrydale and Woodville Primary School. Aloe High School is the tower closest to [...] and 1[...] T[...], with a coverage range of 280 metres in the direction of [...] and 1[...] T[...], with Woodville and Merrydale having coverage ranges of an estimated 740 and 900 metres respectively in the direction of [...] and 1[...] T[...].

426. Du Plessis pointed out with reference to exhibit "N 3.1" (in respect of Fortuin's alleged cell phone) that on 8 May 2015 at 07h33 Fortuin's phone received an incoming call picked up by the Worcestor Gallows Hill tower. At 10h42 on the same day the phone received a "please call me" message and at 10h55 an incoming call, both picked up by the Aloe High School tower, which is in the vicinity of [...] and 1[...] T[...]. Between 16h00 and 20h34 on 8 May 2015 the phone was used for five communications picked up by the Lotus River High and Pelican Park towers, which are in the vicinity of 1[...] R[...] Close. At 21h26 and 21h33 on the same day

[80] Exhibit "N 3.5.1".

[81] Exhibit " N 3.5.2"

the phone received two incoming calls picked up by the Aloe High School tower, and at 00h18 - 18 seconds past midnight - on 9 May 2015, the phone was used for a "please call me" message, picked up by the Worcestor Water Works tower.

427. During cross-examination Du Plessis confirmed that SIM cards can be inserted into different handsets and used by different persons, and that the SIM card in respect of Wenn's alleged phone (074[...]) had been used in at least nine different handsets while Fortuin's alleged phone (076[...]) had been used in at least ten different handsets.

428. Du Plessis conceded the obvious point that people can exchange cell phones, meaning handsets together with SIM cards. She further conceded that the cell phone towers in question are located in highly densely populated areas and service hundreds of households.

429. Krishan Pillay ("**Pillay**"), a manager employed in MTN's LEA Department, testified regarding MTN's response to subpoenas served on it in terms of s 205 of the CPA for:

429.1. cell phone records pertaining to IMEI/handset number 353[...] (allegedly Davidson's handset);[82]

[82] Exhibit "P" - Ref No WK 224/02/2019 - dated 26 February 2016.

429.2. cell phone records pertaining to cell phone / Sim card number 071[...]565 (allegedly Bird's number);[83]

429.3. detailed tower mapping indicating which cell phone towers served the specified GPS co-ordinates for 1[...] R[...] Close, Lotus River, Grassy Park; 1[...] T[...] Street, Lentegeur and [...] T[...] Street, Lentegeur[84] for the period 1 September 2014 to 19 September 2015.

430. Pillay was first called to testify on 18 February 2019, at which stage it was discovered that the s 205 subpoena served on MTN contained an error inasmuch the second paragraph mistakenly referred to a "representative of Cell C", which contradicted the reference in the first paragraph to "a representative of MTN".

431. Mr Van der Berg objected that the subpoena was fatally defective, and the State accordingly arranged for Pillay's testimony to be postponed until such time as a fresh subpoena had been served on MTN. Pillay returned to testify on 6 March 2019.

432. Pillay testified that the handset profile of IMEI number 353[...] (allegedly Davidson's phone) revealed that SIM card / cell phone number 078[...] had been used in this particular handset during the period 1 June 2014 to 20 September 2015.

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[83] Exhibit "P 6" - Ref No WK 225/02/2019 - dated 26 February 2016.

[84] Exhibits "P" and "P 6".

433. As regards tower mapping Pillay referred to exhibit “P 3”, which indicated that:

433.1. 1[...] R[...] Close was serviced by six towers, some shared with other networks, being Neuman’s Farm, Lotus High School, Pelican Park (Vodacom), Lotus River (Telkom), Pelican Park High School (Telkom) and Pelican Heights;

433.2. Numbers [...] and 1[...] T[...], Lentegeur were serviced by three towers, some shared, being Merrydale (Vodacom), Aloe High School and Lentegeur (Vodacom).

434. Pillay produced 82 pages of call data for the cell number / SIM card 078[...], IMEI / handset number 353[...] (allegedly Davidson’s phone) during the period 1 June 2014 to 19 September 2015, which was handed in as exhibit “P 4”. The call data shows the originating base station or tower where each cell phone communication linked to this particular SIM card and IMEI number was initiated, and the terminating base station or tower where the communication ended. Where the phone remains in the same position during the communication, the originating and terminating towers will remain the same, but where the cell phone moves during a communication, the towers will differ, indicating movement from one area to another.

435. Pillay produced the 158 pages of call data for cell phone / Sim card number 071[...]565 (allegedly Bird) during the period 14 March 2015 to 19 September 2015, which was handed in as exhibit “P 8”.

436. Pillay’s evidence was essentially unchallenged in cross-examination.

437. Tsholanang Golele (“**Golele**”), a Vodacom radio planning and network optimizer and network analyst responsible for the release of call data, gave evidence regarding the mapping, i.e., location and coverage, of various cell phone towers.

438. Vodacom was requested to furnish maps setting out the location and predicted coverage of the Neuman’s Farm, Aloe School and Merrydale cell phone towers, as well as the location of 1[...] R[...] Close and [...] and 1[...] T[...] Street, Lentegeur. Using the relevant GPS coordinates Golele produced five aerial satellite maps, which were handed in as exhibits “M 4.1” to “M 4.5”.

439. Golele testified with reference to exhibit “M 4.3” that [...] T[...] Street is covered predominantly by the Aloe School tower and 1[...] T[...] predominantly by the Merrydale tower, but that the two towers overlap, and [...] and 1[...] T[...] are both covered by these two towers, with varying signal strengths. The Neuman’s farm tower covers 1[...] R[...] Close.

440. Golele testified, with reference to exhibit “M 4.4”, that the predicted radius of coverage for the Neuman’s Farm tower was 1.89 km, with 1[...] R[...] Close falling comfortably within that range.

441. He testified further, with reference to exhibit “M 4.5”, that the predicted radius of cover of Aloe School tower was 4.3 km to the south west, and that of Merrydale tower 5.4 km to the north. In both cases [...] and 1[...] T[...] fell within the relevant radius

442. Prior to his testimony the State requested Golele to furnish additional maps showing the locations of relevant towers referred to in the various call data, which were handed in as exhibits “M 4.6” to “M 4.11”.

443. Golele testified that where a particular cell phone tower is referred to in the call data as the tower which picked up the call, it means that the relevant cell phone was in the vicinity of that particular tower at the time of the call or activity. Golele confirmed that Vodacom has towers all along the route from Worcestor to Cape Town, and that the movement of an active cell phone from Worcestor to Cape Town would be shown in the different cell phone towers reflected in the cell phone data for that phone.

444. During cross-examination, Mr Van der Berg asked Golele whether a cell phone call made by a person travelling along the Vanguard Expressway (the M7) could be picked up by the Merrydale tower, since the Vanguard Expressway appears close to Merrydale on exhibit “M 4.3”. Golele answered that the call would not be covered by Merrydale as there are other towers closer to the Vanguard

Expressway, and that one would only be served by the Merrydale tower if one was in the vicinity of Merrydale.

445. Mr Van der Berg then asked Golele whether a cell phone call made by a person travelling along Settlers Way (the N2) would be picked up by the Merrydale tower, since exhibit “M 4.3” shows that Settlers Way runs through the radius of the Merrydale tower. Golele’s response was that while Settlers Way was within the reach of the Merrydale tower, it was not the dominant tower for that area, and the call would be picked up by a closer tower. Merrydale would only pick up a call made from Settlers Way if there were no closer towers. Golele was unable to say, without checking, whether there were in fact closer towers to that part of Settlers Way than Merrydale.

446. Mr Van der Berg referred Golele to the R 300 (the Cape Flats Freeway), being a major artery connecting the N2 and the N1, which cuts through the Merrydale tower radius depicted on exhibit “M 4.3” and “M 4.5”. He asked whether a call made by a person travelling along the R 300 through the Merrydale area would be picked up by the Merrydale tower. Golele confirmed that if a road runs close to a particular tower, a call made in the vicinity of the tower would be picked up by that tower.

447. Golele conceded with reference to exhibit “M 4.5” that the stretch of the R 300 from its intersection with the N2 to its termination where it meets the M7 cuts through a sizeable part of the Merrydale tower radius depicted on exhibit “M 4.5”.

448. Mr Van der Berg suggested to Golele with reference to exhibit “M 4.10” that a popular route of travel for someone travelling from Strand to Cape Town along the N2 is to turn off at Baden Powell Drive and proceed along the coast up towards Muizenberg. Mr Van der Berg pointed out that Baden Powell Drive runs through the centre of the radius of the Pelican Park tower depicted on exhibit “M 4.10” and put it to Golele that a call made from a car travelling there would likely be picked up by the Pelican Park tower. Golele responded in similar vein that that would only be the case if there were no closer cell phone tower.

449. As Golele was unable to say whether or not there was a cell phone tower closer to Baden Powell Drive than Pelican Park, or closer to the R 300 than Merrydale, I requested Golele to produce information detailing the names of the dominant cell phone towers servicing the major arteries such as the N2, the R 300, Vanguard Expressway and Baden Powell Drive.

450. At my suggestion, and with the agreement of the State and the defence, proceedings were adjourned to allow Golele to source the necessary information, and Golele was recalled to amplify his evidence in chief on this aspect.

451. Golele produced a further five maps, which were handed in as exhibits “M 4.12” to “M 4.16”. He testified with reference to these maps that:

451.1. the area where the N2 intersects with the R 300 is served by the Phillipi East tower;[85]

451.2. as the R 300 (Cape Flats Expressway) moves east from the M7 (Vanguard Expressway) towards the N2 (Settlers Way), the operative cell phone towers are CWD Weltevreden CTC, PPK Lentegeur Atlas WES New, Joe Gqabi Station, Kwa Faku Primary and Phillipi East;[86]

451.3. a cell phone call initiated along the R 300 between Settlers Way and Vanguard Expressway would be picked up by one of the abovenamed towers and not by the Merrydale tower;

451.4. a cell phone call initiated along Baden Powell Drive between Strand and Muizenberg would be picked up by the dominant Pelican Heights, John Power Camp or Wave Crest towers, but if the Pelican Heights tower was not functioning a call made from very close to the Pelican Heights tower could possibly be picked up by the Pelican Park tower.

452. Mr Van der Berg did not take issue with Golele's additional evidence regarding the dominant towers servicing the R 300 between the M7 and the N2. He put it to Golele, with reference to exhibit "M 4.2", that the large Promenade Mall in Mitchells Plain is located in the "dale" part of the word Merrydale on exhibit "M 4.2". Golele

[85] Exhibit "M 4.13".

[86] Exhibit "M 4.14".

conceded that a mall located in that position fell within the range of the Merrydale tower.

Evidence regarding section 205 subpoenas

453. Magistrate Clive Erasmus ("**Magistrate Erasmus**"), a senior magistrate based at Wynberg Magistrates' Court, testified regarding various subpoenas in terms of s 205 of the CPA which he granted at Britz's request for information pertaining to cellular phone records. He also explained the procedure which he follows regarding applications for subpoenas in terms of s 205 of the CPA.

454. Magistrate Erasmus testified that he is presented with two copies of a s 205 subpoena, one to be kept by himself, and one to be handed back to the investigating officer for despatch to the recipient of the subpoena. He dates and signs the subpoena in the designated place on the document, which is then handed back to the investigating officer. He deals differently with the copy of the subpoena which he keeps for his own records: that document he does not sign in the designated place on the subpoena form. Instead he date stamps the document on the top right hand corner of the front page thereof, and writes the word *"granted"* and signs his name in the block of the date stamp.

455. Magistrate Erasmus explained that the reason why he does not sign the copy of the subpoena which he keeps is that he is concerned about the possibility that

someone might alter the details regarding the cellular phone number in respect of which information is required, and thus obtain confidential information unlawfully.

456. Magistrate Erasmus retains his copies of the s 205 subpoenas granted by him, files them personally, and stores them securely in his office under lock and key. Any copies of s 205 subpoenas which bear the prosecutor's signature, but do not bear his signature and stamp at the designated place are useless.

457. Copies of Magistrate Erasmus's subpoena copies featuring date stamps and his signature and the word *"granted"* in the top right hand corner of the document were handed in as exhibits "O1",[87] "O2",[88] "O3",[89] "O4",[90] and "O5"[91].

458. Also handed in, as exhibits "O6"[92] and "O7"[93], were copies of the corrected MTN subpoenas which Magistrate Erasmus issued on 26 February 2019 following the objection raised to the erroneous MTN subpoenas when Pillay was first called to testify on 18 February 2019. Unlike Magistrate Erasmus's other copies of s 205 subpoenas, these two copies did bear his signature, date and date stamp at the designated space on the subpoena form. He explained that he had been presented

[87] Cell C – cell number 061[...] (allegedly Fortuin's number).

[88] Cell C – Cell number 074[...] (allegedly Wenn's number).

[89] Vodacom – cell number 079[...] (allegedly Murphy's number).

[90] Vodacom – cell number 072[…] (allegedly Shafieka's number).

[91] Cell C – cell number 081[…] (allegedly Shafieka's number).

[92] MTN – handset serial number 353[...] (allegedly Davidson's phone).

[93] MTN – cell number 071[...]565 (allegedly Bird's number).

with a pile of subpoenas to sign, and he signed these copies in error not realizing that they were duplicates of subpoenas which he had already signed.

459. Lieutenant Colonel Lisa ("**Lisa**"), the provincial coordinator of the SAPS Technical Support Unit ("TSU") testified regarding the procedure followed to serve s 205 subpoenas on service providers, referring to Telkom, Vodacom, Cell C, Neotel and MTN. He brought with him certain original subpoenas in possession of the TSU which had been requested by Britz. I viewed the originals and copies thereof were then handed in as exhibits "Q1",[94] "Q2",[95] "Q3",[96] "Q4",[97] "Q5",[98] "Q6",[99] "Q7",[100] "Q8"[101] and "Q9"[102].

Evidence relating to bank statements and financial transactions

460. Vanessa Sweeney("Sweeney"), a subpoena administrator employed by Nedbank, was called to testify on 19 February 2019 regarding Nedbank's response to three

[94] WK52/09/16 – Cell C - cell number 061[...] (allegedly Fortuin).

[95] WK 132/08/16 – Cell C - cell number 074[...] (allegedly Wenn).

[96] WK141/08/16 – Vodacom - cell number 079[...] (allegedly Murphy).

[97] WK51/09/16 – Vodacom - cell number 072[…] (allegedly Shafieka).

[98] WK128/08/16 – Vodacom - handset serial number 359[…] (allegedly Shafieka).

[99] WK129/08/16 – MTN - cell number 071[...]565 (allegedly Bird) (erroneous subpoena – refers to Cell C mistakenly as well as MTN).

[100] WK225/02/19 – MTN - cell number 071[...]565 (allegedly Bird).

[101] WK139/08/16 – MTN - handset serial number 353[...] (allegedly Davidson)(erroneous subpoena – refers to Cell C mistakenly as well as MTN).

[102] WK224/02/19 – MTN - handset serial number 353[...] (allegedly Davidson).

subpoenas in terms of s 205 of the CPA for bank statements and other information relating to the Nedbank accounts of Fortuin, Wenn, Shafieka and UTS.[103]

461. In response to the subpoenas Sweeney produced the following documents, to which I shall refer collectively as "the Nedbank documents", which were handed in as exhibits:

461.1. Nedbank current account opening form in the name of Zulayga Fortuin dated 14 March 2015 and bank statements covering the period 14 March 2015 to 26 November 2015;[104]

461.2. Nedbank current account opening form in the name of Felicia Wenn dated 26 March 2015 and bank statements covering the period 26 March 2015 to 26 November 2015;[105]

461.3. Nedbank savings account opening form in the name of Felicia Wenn dated 26 March 2015 and bank statement covering the period 9 May 2015 to 26 December 2015;[106]

[103] Exhibits "G 1", "G 2" and "G 3".

[104] Exhibit "H 2".

[105] Exhibit "H 3".

[106] Exhibit "H 4".

461.4. Nedbank current account opening form in the name of Shafieka Murphy dated 9 March 2015 and bank statement covering the period 9 March 2015 to 9 November 2015;[107]

461.5. Nedbank business current account opening form in the name of UTS Trading Solutions CC dated 24 January 2014, with the sole authorised signatory listed as Fadwaan Murphy, ID number 720[...], and bank statements covering the period 24 January 2014 to 12 December 2015;[108]

461.6. copies of some 101 deposit slips in respect of deposits made into the Nedbank account of UTS Trading Solutions CC during the period 17 March 2014 to 26 November 2015.[109]

462. On the account opening forms in the name of Shafieka, UTS was listed as the employer of the person opening the account. Wenn listed her employer as "*Constructive Civil Engineering*".

463. Sweeney was no cross-examined and her evidence stands undisputed.

464. Lorinda Liebenberg ("**Liebenberg**"), a financial analyst employed by the National Prosecuting Authority's Asset Forfeiture Unit ("AFU"), gave evidence regarding the results of her analysis of the Nedbank documents.

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[107] Exhibit "H 5".

[108] Exhibit "H 6".

[109] Exhibit "H 7".

465. At the commencement of Liebenberg's testimony on 2 September 2019, Mr Van Aswegen raised an objection to the use of the Nedbank documents. He contended that they had been unlawfully procured because Britz's affidavit in support of the initial s 205 subpoena contained incorrect information. The issue first surfaced when Van Aswegen cross-examined Britz on her s 205 affidavit during the Wenn trial on 7 March 2019.[110]

466. A sixth trial within a trial then ensued, which I refer to as "**the Nedbank subpoena trial**", to determine the admissibility of the Nedbank documents.

The sixth trial-within-a trial: the Nedbank Supoena Trial

467. On 9 September 2019 I made a finding that there were no material inaccuracies in Britz's affidavit which had bearing on the prosecutor's decision to seek, or the magistrate's decision to grant, the subpoena for the Nedbank documents, and that neither the prosecutor nor the magistrate were mislead in any way. I accordingly ruled that the Nedbank subpoena was lawful and valid, and that the Nedbank documents were admissible. I indicated that my full and further reasons would be furnished as part of the main judgment in the trial.

468. Section 205(1) of the CPA reads as follows in relevant part:

[110] Record 7 March 2019 pp 928 l 20 to 933 l 6.

"... a regional court magistrate or a magistrate may, … upon the request of a [duly authorized] *public prosecutor …, require the attendance before him … for examination … **of any person who is likely to give material or relevant information as to any alleged offence**, whether or not it is known by whom the offence was committed …"* [Emphasis added.]

469. Acting in terms of the section, Britz on 1 December 2015 deposed to an affidavit in support of a *pro forma* application for a subpoena in terms of s 205 of the CPA, calling upon the responsible person or representative of Nedbank to produce bank statements for 5 listed and numbered Nedbank bank accounts belonging to Fortuin, Wenn (two accounts), Shafieka and UTS.

470. Ms Naidoo, senior prosecutor at Wynberg Magistrates Court, on 7 December 2015 signed the *pro forma* document requesting the magistrate to authorize the subpoena, and on the same day Magistrate Erasmus signed the authorization for the subpoena.

471. It is common cause that it was on the strength of this subpoena that Britz obtained a first batch of Nedbank bank statements, and that this led to two further subpoenas for Nedbank documents which were requested as a result of queries arising from the first batch of Nedbank statements received. Thus the subpoena of 7 December 2015 was the catalyst for the discovery of all the Nedbank documents.

472. The defence challenged the lawfulness of subpoena process based on factual errors in paragraph 6 of Britz' affidavit in support for the application for the s 205 subpoena. The impugned paragraph (which was preceded by a paragraph

identifying Fortuin, Wenn, Shafieka and Davidson as the persons arrested pursuant to the drugs seized at 1[...] R[...] Close on 18 September 2015) read as follows:

> *"During the questioning and charging of these accused's* [sic] *all four accused's* [sic] *gave confessions in the respect* [sic] *of their involvement with the crime and that they all worked for the main target, namely Fadwaan Murphy. All four confessed to having regular daily cellular contact with the main target of the investigation for the past year in order to arrange their dealing activities. Confessions also included the fact that they were receiving weekly payments via EFT from Mr Fadwaan Murphy's business, namely Ulterior Trading Solutions."*

473. The State called three witnesses in the Nedbank subpoena trial, namely Britz, Ms Naidoo, the senior prosecutor who requested the subpoena, and Mr Erasmus, the magistrate who authorized the subpoena. The defence put up no evidence, and the matter fell to be decided on the State's version.

474. Britz was taxed by counsel in cross-examination for factual inaccuracies in paragraph 6 of her affidavit (quoted above). The subject first surfaced when Britz' credibility was being tested in cross-examined by Mr Van Aswegen during the Wenn trial on 7 March 2019.[111]

475. Mr Van Aswegen pointed out to Britz that the factual statements in paragraph 6 of her s 205 affidavit were not to be found in the formal confessions made by Wenn, Fortuin, Shafieka and Davidson in terms of the CPA. Britz conceded this. She

[111] Record p 928 l 20 - p 933 l 6.

explained that the wording in her s 205 affidavit was not correct,[112] and that she should have used different wording in her affidavit.[113]

476. When Britz testified in chief during the Nedbank subpoena trial, she was asked how it came about that she decided to subpoena the Nedbank banking records. She explained that, during her interviews with Wenn, Fortuin and Shafieka, and prior to the making of their confessions, they had given Britz information,[114] and that Wenn and Fortuin had in their section 204 statements indicated that they had been paid by UTS, had opened bank accounts at Nedbank and had received sms confirmations of payments from UTS.

477. Britz stated with reference to the wording of paragraph 6 of her s 205 affidavit that she had the knowledge from the four confessions and her interviews that Murphy had been implicated[115] by all four of the arrestees. She also had the knowledge gleaned from the s 204 statements of Wenn and Fortuin. She explained that she chose poorly when she used the words "*confessed*" and "*confession*" in paragraph 6, because she was not in fact referring to the formal confessions made by the suspects in terms of the CPA, and what she really meant was that the suspects had **given her information** or **told her things**.[116]

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[112] Record p 932 l 7 - 9.

[113] Record p 933 l 2 - 5.

[114] Record p 3225, l 14 - 19; p 3226.

[115] Implicated as opposed to incriminated. The three women had all incriminated Murphy, but Davidson, whose "confession" was entirely exculpatory, merely referred to or implicated Murphy.

[116] Record p 3234, l 22 - p 3235 11.

478. Britz also testified that in the last sentence in paragraph 6, she should have referred to s 204 statements instead of “confessions”, as the information about weekly payments by EFT from UTS was contained in the s 204 statements of Wenn and Fortuin.[117]

479. Britz admitted to a poor choice of words in her s 205 affidavit, but denied that she had had any intention to mislead anybody.[118]

480. Both Ms Naidoo and Mr Erasmus testified that they did not understand the reference to “*confessions*” in paragraph 6 of Britz’ affidavit to be a reference to formal confessions in terms of the CPA, but rather as a reference to information given to Britz by the suspects,[119] on the basis of which she applied for the subpoena. They also both testified that, had the word “*confessions*” in the last sentence in paragraph 6 been replaced with “*s 204 statements*” it would have made no difference to their respective decisions to sign the s 205 subpoena.[120]

481. In the cross-examination and argument of Mr Van der Berg and Mr Van Aswegen , much was made of the fact that there were factual errors in paragraph 6 of Britz’ s 205 affidavit. It seems to me, however, that the extent and import of the errors was greatly exaggerated by counsel.

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[117] Record p 3235 l 20 - p 3236 l 6.

[118] Record p 3236, l 13 - 16.

[119] Record p 3266 l 10 - p 3267 l 6; p 3285 l 6 - 12.

[120] Record p 3264 l 13 - 21; p 3285 l 23 - p 3286 l 5.

482. I am mindful that, even if one accepts Britz' explanation that she did not intend to refer to the written confessions of the accused but rather to oral statements or information conveyed by them to her, or to the s 204 statements in the case of the last sentence in paragraph 6, it seems that there are still a number of factual inaccuracies in paragraph 6. In this regard:

482.1. First, it is doubtful that all four accused would have told Britz that they worked for Fadwaan Murphy. The confession of Davidson was entirely exculpatory, and all Safieka said in her confession was that the drugs belonged to Murphy. At best for Britz, Wenn and Fortuin had told her that they worked for Murphy, and the reference to working for Fadwaan Murphy should therefore have been confined to Wenn and Fortuin.

482.2. Second, it is likewise doubtful that all four accused would have told Britz that they had daily cellular contact with Fadwaan Murphy to arrange dealing activities. This statement, too, should have been confined to Wenn and Fortuin.

482.3. Third, the reference to the fact that "*they*" were receiving weekly payments via EFT from Mr Fadwaan Murphy's business from should have been confined to Wenn, Fortuin and Shafieka.

483. Britz admitted that she did not refresh her memory by checking the contents of the statements in the docket before preparing her s 205 affidavit.[121] That was a serious error and a lapse of judgment on her part. Had she done so, she would have been in a position to employ more accurate wording in her s 205 affidavit. She rightly conceded that it was negligent to rely on her memory and not to check the source of the information in the docket.[122] I think it fair to say that her approach was sloppy.

484. That having been said, I was of the view that the factual inaccuracies in paragraph 6 of Britz' section 205 affidavit were not material having regard to a) the purpose of the subpoena, namely to obtain bank statements for Wenn, Fortuin, Shafieka and UTS, and b) the threshold requirement of s 205, namely whether or not the information sought is likely to be material or relevant to an alleged offence.

485. I was of the view that Britz's affidavit of 7 December 2015 met the threshold requirements of s 205: it showed that the offence under investigation was one of drug dealing, that Murphy had been implicated in the offence, that the investigating officer had received information that the suspects were being paid by UTS, Murphy's business, that Nedbank had identified a number of bank accounts belonging to the suspects, and that the bank statements were sought to establish a pattern of payment.

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[121] Record 3235, l 18 - 20.

[122] Record 3246 l 18 - p 3247 l 3.

486. I considered it important that no bank statements were being sought in respect of Davidson. Thus any factual inaccuracies in paragraph 6 in respect of statements wrongly attributed to Davidson could have no bearing on the decision to issue the s 205 subpoena.

487. Moreover, when Ms Naidoo perused the docket, as she did, she would have found that the s 204 statements of Wenn and Fortuin materially substantiated the contents of Britz' s 205 affidavit, in particular by stating that Wenn and Fortuin were were receiving payments by EFT from UTS into Nedbank bank accounts.

488. It seems to me that defence counsel reduced the s 205 enquiry to a box-ticking exercise to see whether each allegation in Britz's affidavit could be linked to a specific allegation contained in a written statement in the docket. To my mind this approach was misconceived: the true enquiry was whether or not a proper case had been made out that the recipient of the subpoena - Nedbank - would be able to produce the documents - bank statements - and whether the documents were relevant to the offence of drug dealing. The relevance of the bank statements lay in the fact that Wenn and Fortuin had said that they were paid for drug packing by EFT from the bank account of UTS into their Nedbank accounts. This was apparent from Wenn's and Fortuin's s 204 statements, which were in the docket and were perused by Ms Naidoo.

489. For all these reasons I considered that the factual inaccuracies in paragraph 6 of Britz's 205 affidavit were not material and did not have any bearing on the decision

by the prosecutor to request, and the magistrate to issue, the relevant s 205 subpoena. In the circumstances I ruled that the Nedbank documents had been lawfully obtained and were admissible.

490. I furthermore ruled that, even if I were to be wrong on that score, and that the factual errors in paragraph 6 of Britz's 205 affidavit did in fact render the subpoena invalid, with a resultant breach of the right to privacy, I would nonetheless exercise have exercised my discretion in terms of s 35(5) of the Constitution to admit the Nedbank documents as evidence because:

490.1. Britz' error amounted to negligent inattention to detail and was not deliberate and designed to mislead;

490.2. Ms Naidoo and Mr Erasmus were not in fact mislead;

490.3. the Nedbank documents were highly relevant;

490.4. I was of the view that the admission of the Nedbank documents would not render the trial unfair in any manner, but that the administration of justice would be brought into disrepute by the exclusion of such highly relevant evidence by virtue of an error on the part of the investigating officer which did not prejudice any person and was not intended to, and did not in fact, mislead any person with regard to the issue of the s 205 subpoena.

Evidence of analysis of financial transactions

491. Pursuant to the ruling in the Nedbank Subpoena trial, Liebenberg resumed her testimony on 14 October 2019, when a file containing her workings was handed in as exhibit "AA".[123] The purpose of Liebenberg's analysis was to identify payments made from the UTS account into the accounts of Fortuin, Wenn, Shafieka, and to identify patterns within these accounts.

492. Based on her analyses of the bank statements, Libenberg pointed that Shafieka's bank statements for the period 9 March 2015 to 9 November 2015 revealed:

492.1.1. payments for the use of the Huguenot Tunnel (on the N1 between Worcestor and Cape Town) on 28 May 2015, 23 June 2015, 2 July 2015, 9 July 2015 and 1 August 2015;[124]

492.1.2. two debit card payments to Easipack, one on 21 May 2015 for R 1 736.36 and one on 20 August 2015 for R 1 072.11.[125]

493. UTS's bank statements for the period 24 January 2014 to 12 December 2015 revealed:

[123] Exhibit "AA" comprises various schedules and annotated copies of the Nedbank documents. It runs from "AA i" to "AA xvi".

[124] Exhibit "AA. vi".

[125] Exhibit "AA.vii" read with "AA. i" at pages 2 and 7 thereof.

493.1.1. one debit card payment to Easipack on 17 February 2015 in the amount of R 2 472.66;[126]

493.1.2. 29 salary payments into Shafieka's account totaling R 108 000.00 in the period 20 March 2015 to 7 November 2015;[127]

493.1.3. 24 salary payments into Fortuin's account, totaling R 43 600 during the period 28 March 2015 to 11 September 2015;[128]

493.1.4. 24 salary payments into Wenn's account, totaling R 43 600 during the period 28 March 2015 to 11 September 2015,[129] all made on the same dates and in the same amounts as the payments made to Fortuin;

493.1.5. salary payments to other unspecified persons totaling R 1 554 235.00;

493.1.6. deposits totaling R 4 867 988.30 made by various individuals for unspecified purposes into the account of UTS during the period 24 January 2014 to 12 December 2015;[130]

[126] Exhibit "AA.vii" read with "AA.ii" at page 23 thereof.

[127] Exhibit "AA. viii" read with "AA.ii" and "AA.i"

[128] Exhibit "AA. viii" read with "AA.ii" and "AA.iii"

[129] Exhibit "AA. viii" read with "AA.ii" and "AA.iv"

[130] Exhibit "AA.ix" read with "AA.xv"

493.1.7. credits totaling R 1 158 835.50 referenced to vehicle sales and debits totaling R 1 747 174.81 referenced to vehicles and vehicle parts;[131]

493.1.8. credits totaling R 564 899.45 and debits totaling R 941 045.56 referenced to building work / renovations and property related transactions;[132]

493.1.9. credits totaling R 58 500.00 and debits totaling R 215 450.00 referenced to loans and bonds;[133]

493.1.10. debits totaling R 580 170.68 referenced to retail goods and restaurants;[134]

493.1.11. miscellaneous debits totaling R 2 429 955.95 and credits totaling R 1 121 916.40 without any reference;[135]

493.1.12. one bank credit for R 18.00 and debit bank charges totaling R 96 551.09;[136]

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[131] Exhibit "AA.x".

[132] Exhibit "AA.xi".

[133] Exhibit "AA. xii".

[134] Exhibit "AA.xiii".

[135] Exhibit "AA.xiv".

[136] Exhibit "AA.xv".

493.1.13. total credits amounting to R 7 772 157.65 and total debits amounting to R 7 762 905.75, the difference of R 9 251.90 reconciling to the balance in UTS's bank account as at 12 December 2015.

494. During cross-examination, Mr Van der Berg put it to Liebenberg that his instructions were that three payments by Ayinofu Creations to UTS totalling R 360 000.00 were in respect of the purchase of a motor vehicle, and that payments to UTS totaling R 500 000.00 from Shaheed Essa were in respect of an acknowledgement of debt. Liebenberg confirmed that she was not in a position to dispute these allegations.

495. Mr Van der Berg also put it to Liebenberg that UTS made EFT payments in an amount of R 363 990.00 on 17 March 2014 in respect of the purchase of a BMW 335 I motor vehicle, and an amount of R 399 990.00 on 3 October 2014 in respect of the purchase of a VW Golf motor vehicle, which EFT payments were not reflected anywhere in the Nedbank statements of UTS. It was further put to Liebenberg that these two vehicles were sold by UTS shortly thereafter for similar amounts and the payments therefor received by EFT. Liebenberg confirmed that none of these payments appeared in the UTS Nedbank statements which she had analysed, and that she would have expected to see these payments reflected there if they had been made from or to the bank account in question.

496. Van Aswegen suggested to Liebenberg that what was reflected in UTS's bank statements as salary payments to Shafieka might in fact be maintenance payments

from Murphy to his ex-wife. Liebenberg was not in a position to comment in this regard.

497. Liebenberg conceded that she had no knowledge regarding the underlying transactions depicted in UTS's bank statements and deposit slips, and that the details reflected therein were not necessarily a reliable indication of the nature of the transaction or the identity of the individuals involved.

498. It is important to appreciate the limits of Liebenberg's evidence. Liebenberg's analysis provides a useful tool for understanding patterns and movements in the UTS bank account. But Liebenberg cannot say whether or not the narrations in payments or deposit slips, or the names and details of depositors reflected in deposit slips, are genuine and accurate. Nor can she shed light on whether payments received derived from unlawful activities.

The Investigating Officer: Captain Nadine Britz

499. Britz testified on three separate occasions: in first trial within a trial concerning the search at 1[...] R[...] Close, in the Wenn trial, in the Nedbank Subpoena trial, and finally in the main trial. Her evidence in the first trial within a trial is set out in the search and seizure judgment, and there is no need to repeat it here. Her evidence in the Wenn trial and the Nedbank subpoena trial has been dealt with above. All the evidence in the various trials-within-a-trial was incorporated into the record of the main trial by agreement.

500. The salient evidence presented by Britz during the main trial may be summarized as follows.

501. The cash found and seized at 1[...] R[...] Close was in denominations of R 200.00, R 100.00, R 50.00, R 20.00, and R 10.00. The cash deposit of R 2.4 million in payment for the Parklands property was in denominations of R 200.00, R 100.00 and R 50.00. In Birtz's experience, cash in various denominations of bank notes was frequently found at police raids on drug houses, which was regarded as "drug money".

502. Britz was asked whether it was possible the UTS had another bank account which Britz had not discovered. She explained that she had requesed SABRIC (South African Banking Risk Centre) to furnish the bank account details linked to the identity numbers of Murphy, Shafieka, Fortuin and Wenn. All bank accounts linked to Murphy's ID number were disclosed, yielding a dormant Capitec bank account in Murphy's name and the UTS bank account. If there had been another bank account in the name of UTS, it would have been disclosed as being linked to Murphy's identity number. Britz therefore disputed that it was possible that UTS could have had another bank account which had not been discovered by the State, as suggested by Mr Van der Berg.

503. Britz testified that she called the various cell numbers listed on cash deposit slips into the UTS banking account. Two of the persons called said they had no dealings

with UTS and no knowledge of Murphy. A number of the calls were not answered. In the case of the number of J Le Fleur, the call was answered and Britz spoke to Mr Le Fleur.

504. Britz confirmed her previous evidence that, at 1[...] R[...] Close, Wenn, Fortuin and Shafieka had each identified her cell phone to Britz and supplied her with her phone number. The phone numbers were later confirmed when the downloads from the phones were obtained. Britz confirmed that Fortuin had identified the cell numbers of Murphy, Shafieka and Wenn on her cell phone contact list.

505. With regard to the cell phone of Rushdien Abrahams, Britz testified Abrahams' cell phone was registered in his own name, and that the downloads from his cell phone included Whats App chats with a person named "Wani", with a cell phone number (071[...]951) registered in the name of Murphy. In Abrahams' contact list there was another cell phone number stored under the name "Wani", being Murphy's admitted cell phone number ending in 2826.

506. The downloads from Abrahams' cell phone yielded a recorded conversation between Abrahams and two others and Fortuin, which Britz transcribed. The transcript was handed in as exhibit "NN", and the correctness of the transcript agreed between the State and the defence. Britz read the contents of the transcript into the record. (I have referred above to the contents of the transcript in connection with the evaluation of Fortuin's evidence.)

507. Britz testified that, based on the data from Murphy's cell phone, it appeared that he was in the vicinity of 1[...] R[...] Close at the time the search and seizure operation was underway, and she surmised that he had been watching the operation unseen from a distance.

508. During cross-examination of Britz, Mr Van der Berg put certain photographs to her which showed construction billboards featuring the name of UTS and a motor vehicle featuring the name UTS and the name and telephone number of Jacobs. I allowed the photographs to be shown to Britz, but made it clear that they would have no evidential value unless they were authenticated.

509. Britz admitted, under cross-examination, that cell phone data could not place an individual at a particular location, but only within the vicinity of a particular cell phone tower.

Britz's credibility

510. Britz's credibility came under sustained attack by the defence for the duration of the trial. While Britz's conduct is open to fair criticism in certain respects, the attacks on her honesty and professional integrity were unfair and unwarranted in my judgment.

511. In the first trial-within-a trial, Britz's credibility was attacked on account of the difference between her testimony in court regarding the information on which she

relied to conduct a warrantless search, and the contents of the third paragraph of her written statement made after the search which read as follows:

"During the morning on the same day [18 September 2015]*, I received information on this project, that drugs and firearms were being packed and stored at 1[...] R[...] Close, Lotus River, Grassy Park. I also received the information that three persons were in the said home at that present time busy with illegal activities."*

512. This was inaccurate. Britz did not receive information that drugs and firearms were being packed on the premises. Nor did she receive information that three persons were in the home busy with illegal activities. She in fact received information from General Goss that morning that three women had been dropped off at the premises and that she was required to go and investigate. At the premises she received information from Jones that Murphy regularly brought three women there, who remained closeted behind closed doors and shaded windows, and that Jones did not know what they were doing there, but suspected that it might have to do with drug dealing.

513. Britz's explanation was that the information imparted to her by Jones, together with the information from crime intelligence that the 2nd accused was packing drugs for the 1st accused, led her to believe that drugs were being packed on the premises. She stated that she had suspected that firearms might be found on the premises because, in her experience, drugs and firearms are closely linked in gangsterism. She conceded that she did not express herself well in her written statement.

514. Mr Jantjies, who appeared for the 3rd accused, and Mr Van der Berg in his closing arguments, went so far as to suggest that Britz deliberately fabricated the contents of her statement because she knew that she did not have enough to secure a warrant. The flaw in this argument is that the information known to Britz at the relevant time did in fact meet the requirements for a search warrant, as I found in the first trial-within-a-trial, and there was therefore no need for her to embellish in her written statement. Moreover, if Britz had intended to bolster the case for a warrantless search by means of fabricated evidence, she would doubtless have tailored her evidence in court to accord with her statement. But she did not do so.

515. Having compared Britz's written statement with her testimony in court, and having regard to her explanation for the discrepancies between her statement and her testimony, I am satisfied that the discrepancies are the product of muddled thinking and poor drafting on the part of Britz rather than any deliberate attempt to mislead. It must be born in mind that Britz is a police officer, not a lawyer. She lacks the honed skills of a lawyer practised in formulating affidavits with the verbal equivalent of surgical precision. I therefore reject the suggestion that she deliberately fabricated the contents of her statement in an attempt to bolster her case for a warrantless search. I found no reason to doubt Britz's oral testimony in court, which was corroborated by Jones, was not improbable, and was not gainsaid by any evidence from the accused.

516. Without meaning any disrespect to Britz, I think it necessary to say that I observed from her oral evidence that Britz does not manifest precision in her verbal

expression. I emphasize this because it is important to note that I believe that her errors are not the product of dishonesty, but rather an inability to think and express herself clearly. For example, when testifying about the cell phone data, Britz repeatedly testified that the cell phone date showed one when an accused was “at the crime scene”, i.e., 1[...] R[...] Close, even although she had made it clear in cross-examination that she agreed with Mr Van der Berg that the data could only show that an accused was “in the vicinity of” 1[...] R[...] Close. Britz continued testifying using the shorthand of “at the crime scene”. It was clear to me that she had no intention to mislead, but her verbal expression was not precise. That is simply the way she communicates.

517. Unfortunately, Britz’s lack of verbal acuity is compounded by a lackadaisical approach and lack of attention to detail in the preparation of statements and the completion of pro forma documents. That approach landed Britz in hot water in the Nedbank subpoena trial, in which she was taken to task for inaccuracies in her affidavit in support of the application for the s 205 subpoena for the Nedbank documents. (I have dealt with this issue in detail above.)

518. In that instance it was clear that the inaccuracies in Britz’s affidavit stemmed from her admittedly negligent failure to refresh her memory by perusing the docket before drafting her affidavit. I would go as far as to say that her drafting was reckless. But I do not believe it was intentionally misleading or dishonest, and, as I have found, the factual inaccuracies were not material. They had no bearing on the granting of the subpoena.

519. Another recurring feature in statements taken by Britz was her failure accurately to note the time when the interview began and when the statement was signed. One saw this in Jones's statement, the warning statements of Wenn and Fortuin, and the s 204 statements of Wenn and Fortuin. These details are important and need to be recorded properly. The inaccuracies on the face of the two s 204 statements, which Britz was able to explain, caused huge controversy in this trial which could have been avoided if she had paid proper attention to detail. If the statements had disclosed the time when she sat down to read through the statement with Wenn at Lentegeur, and when Wenn had actually signed the statement at Lenteguer, that would have obviated the suspicion and the needless and time consuming debate about whether the statement was signed in Cape Town at the DPP's office or at Lentegeur.

520. It is to be hoped that Britz will exercise more care in future with her written statements, given the slings and arrows she has had to endure in this trial. But again, I stress that, in my considered judgment, her errors are not indicative of a deliberate attempt to mislead or fabricate evidence or secure an illegitimate advantage in an investigation. As I have indicated, there was no need for her to embellish in her statement regarding the first search and seizure or her application for the Nedbank subpoena, as she had a proper case in both instances.

521. Another issue in respect of which Britzs' credibility came under attack concerned the interview with Wenn and Fortuin in the absence of their lawyer, and whether or

not Britz had indeed approached Ravat for consent for the State to interview the women with a view to their becoming s 204 witnesses. I deal with this issue below in relation to the application in terms of s 3(1)(c) of the Hearsay Act to admit Wenn's statement as hearsay evidence. Suffice it to say that I accepted Britz's evidence on this issue at the time of the s 3(1)(c) application, and my belief in the truth of her evidence was subsequently confirmed by the evidence of Van der Merwe, the s 186 witness who testified after the close of the State's case.

522. To sum up: Britz was not a perfect witness - if indeed there is such a phenomenon. She had a poor memory, including on matters helpful to her. For example, when Mr Van der Berg insinuated that she had let Wenn and Fortuin "stew in Pollsmoor" for a week instead of keeping them in the police cells because she was disappointed with their lacklustre confessions, she did not at that stage recall that she had in fact tried to arrange for the women to be kept in Pollsmoor, but that the presiding magistrate had forbade it. That would have been a timely answer to Mr Van der Berg's unfounded attack, but her memory failed her. At times she was defensive, but that is understandable given the sustained and deeply offensive attacks on her integrity which she had to endure during lengthy, at times patronizing and sarcastic cross-examination.

523. All in all, despite the shortcomings I have referred to above, I am convinced that Britz's testimony was fundamentally honest and reliable in all material respects, and I have no hesitation in accepting her evidence. I reject the arguments advanced by the defence that she fabricated evidence or forged signatures or

acted unethically to advance her investigation, and I accept her evidence that she would not have risked losing her career and her livelihood by acting in that way.

The application in terms of s 3(1)(c) of the Hearsay Act

524. After presenting its last witness, the State brought an application to have Wenn's s 204 statement admitted as proof of the truth of the contents thereof. Ms Heeramun relied on the cases of *Mathonsi v S* 2012 (1) SACR 335 (KZP) and *Rathumbu v S* 2012 (2) SACR 219 (SCA).

525. In *Mathonsi* the court had to do with the written statement made by a witness, the contents whereof were subsequently disavowed by the witness who was then declared hostile at trial. The court in *Mathonsi* approved and adopted the criteria laid down by the Supreme Court of Canada in *R.V.B. (K.G.)* [1993] 1 S. C. R 740 for the substantive use of a previous inconsistent statement made by a hostile witness.

526. In *Rathumbu* the Supreme Court of Appeal, relying on *S v Ndhlovu* 2002 (6) SA 305 (SCA), admitted the written statement of a hostile witness who subsequently disavowed the statement, as evidence in terms of s 3(1)(c) of the Hearsay Act.

527. Ms Heeramun argued that there was ample corroboration in other evidence adduced by the State for what Wenn alleged in her s 204 statement. Mr Van der Berg rightly pointed out the difficulty of requiring the court to make findings on the State's evidence before the defence case had been heard, with a view to

establishing whether there was corroboration for the contents of Wenn's s 204 statement. In essence it would amount to an impermissible prejudging of the matter.

528. It seemed to me that what I was required to do was to determine the **admissibility** of the s 204 statement in terms of s 3(1)(c) of the Hearsay Act in accordance with the criteria set out therein, only one of which is the probative value of the evidence (s 3(1)(c)(iv). The probative value of the evidence relates to the weight thereof. To the extent that s 3(1)(c) required me to consider the probative value of the evidence, it seemed to me that, in a situation where the ultimate probative value of the hearsay evidence could not be determined until the end of the trial when all the evidence was weighed in totality, s 3(1)(c)(iv) required me to assess the **potential probative value** of the hearsay evidence sought to be admitted, leaving the weight thereof to be determined at the end of the case.

529. Mr Berg further rightly pointed out that, in order to make a determination on the admissibility of Wenn's s 204 statement in terms of s 3(1)(c) of the Hearsay Act, I was required first to determine the challenges which had been raised, but not yet decided, in the application to have Wenn declared hostile, namely the challenges to:

529.1. the **authenticity** of the statement (did Wenn say what was attributed to her and did she sign the statement ?);

529.2. the **voluntariness** of the statement (was the statement made freely and voluntarily without coercion or undue influence ?);

529.3. the **legitimacy** of the statement (was the statement properly obtained without any police or prosecutorial misconduct or violation of constitutional rights?).

The authenticity of the statement

530. A crucial question in regard to the authenticity of Wenn's s 204 statement was whether Wenn had signed the s 204 statement, or whether Wenn's signature on the s 204 statement had been forged. The issue in that regard was whether the differences between the "fancy W" and the "plain W" fell within the range of natural variation, as testified by Ms Smit and Olsen, or whether the differences between the "fancy W" and the "plain W" indicated that they had been executed by different authors, as testified by Palm.

531. The ESDA result produced by Olsen revealed markings which he said were indentations caused by writing on a page above the page on which the specimen signatures were written.

532. Palm differed from Olsen in that she maintained that the markings revealed by Olsen's ESDA test were not necessarily indentations, but could be secondary impressions caused by friction generated by placing a document with writing above the specimen signatures page.

533. To my mind, the important point was that Olsen's ESDA result showed that the name "F Wenn" had been written on a page above the specimen signatures page, for it was common cause that the ESDA result had revealed numerous markings featuring the signature "F Wenn" which did not appear on the specimen signatures page. Significantly, Palm conceded that these markings were either indentations or secondary impressions.

534. Whether the markings were indentations caused through writing on a page above the specimen signatures page, or secondary impressions resulting from writing the name "F Wenn" on a page and then storing that page above the specimen signatures page, what was significant is that they indicated that Wenn had been writing her signature on another page other than the specimen signatures page. This was a clear indication that Wenn had written her signature on another page which had not been handed over to Palm with the specimen signatures page.

535. Also signitifant is that fact that Olsen testified that the markings revealed by his ESDA test, which he called indentations, showed the use of both the "fancy W" and the "plain W". Palm did not address this, the very nub of the issue, and I took it that she could not dispute Olsen's evidence in this regard, for the use of both the "fancy" and the "plain" W in the markings was readily apparent.

536. Olsen agreed, when it was put to him, that if anyone were intent on forging Wenn's signature, they would likely have focused on the distinctive "fancy W". A difficulty

which I had with the notion that Britz had forged Wenn's signature, was that no attempt had been made to copy the "fancy W". Any forger worth his or her salt would have done a better job of it.

537. In my view it was wholly irrelevant, for purposes of this case, whether the markings revealed by the ESDA result were indentations or secondary impressions, for either way, the markings served to show that the different uses of the letter "W" fell within Wenn's natural range of variation. To my mind Palm's insistence that the markings were secondary impressions was an exercise in missing the point. She was also unwilling to concede what seemed obvious to me, namely that the markings - whether indentations or secondary impressions - suggested that Wenn had been practising her signature.

538. In any event, it seemed to me highly unlikely that there could have been sufficient friction to cause secondary impressions in the circumstances. In order for that to have happened, there would have had to be another page featuring the signatures "F Wenn" stored on top of the specimen signatures page for a period of time. As Palm conceded, the literature she referred to indicates that, with normal handling of documents, faint secondary impressions caused by friction only become visible after three months, and it requires extraordinary handling in the nature of a laboratory experiment to cause secondary impressions to be generated more rapidly.

539. Wenn's evidence, together with the evidence of her Whats App communications with Abrahams, showed that the specimen signatures page was generated by Wenn on 16 February 2019. Palm testified that, on 22 February 2019, the specimen signatures page was handed to her in a manilla folder, together with Wenn's warning statement, confession and s 204 statement. Palm made no mention of another page of signatures, which she doubtless would have disclosed if there has been such a document in the folder. Palm kept the folder in a filing cabinet until 20 May 2019, when she handed the folder to Mr Van der Berg, who then handed the specimen signature page in to court as exhibit "TWT 2(n)".

540. If there had been a second page of Wenn signatures stored on top of the specimen signatures page, it could only have been kept there between 16 and 22 February 2019, before the folder was handed to Palm (minus the second page of Wenn signatures). Based on the literature referred to by Palm, this would not have been a sufficient period to generate secondary impressions detectable by means of the ESDA test.

541. I therefore accepted Olsen's evidence that the markings revealed by his ESDA test were indentations caused by the pressure of Wenn having written her signature on a page above the specimen signatures page. (I rejected as false Wenn's testimony that she only wrote on the specimen signatures page and not on any other page.)

542. The indentations revealed by Olsen's ESDA test served to show that, on another page other than the specimen page, Wenn had indeed used <u>both</u> the "fancy W"

and the “plain W”. Olsen maintained that this showed that Wenn’s different execution of the letter “W” fell within her natural range of variation.

543. When I considered Olsen’s evidence against the backdrop of the evidence that Wenn was in communication with Abrahams, about arrangements to meet with Mr Begg and furnish him with specimen signatures, the conclusion was inescapable that Wenn had been coached on the need to provide specimens of only the “fancy W”. That explained why the page of signatures which created the indentations was not good enough, so that Wenn had to produce another page of signatures. It also likely explains the obliteration on the specimen signatures page: any example of the “plain W” had to be deleted.

544. The conclusion that the “fancy W” and the ‘plain W” fell within Wenn’s range of natural variation, and that her signature on the s 204 statement had therefore not been forged, also explained why Wenn had at no stage complained that her signature had been forged. Indeed, she had confirmed her signature on various documents during her evidence in chief, before the issue of the alleged forgery arose. Only later, after she had heard Palm testify, did she assert that she only one way of signing, and that was with the “fancy W”. This was a transparent lie designed to fit a false narrative.

545. Palm’s opinion that Wenn’s signature on her s 204 statement had been forged was predicated on the premise that the “plain W” did not fall within Wenn’s natural range of variation, and had to have been signed by someone else. I rejected Palm’s

opinion, as it was inconsistent with broader factual matrix, whereas Olsen's opinion was consistent with and supported by the broader factual matrix.

546. As regards Palm's evidence that there were anomalies in the signatures of Wenn and Fortuin whenever Britz was involved, it seemed to me that Palm's "control test group", which she said was a method of detecting a *modus operandi*, was an exercise in confirmation bias. It was clear that this control test group exercise was not part of Palm's original mandate, but her mandate evidently evolved - in terms which were not disclosed to the court. It seems to me that Palm proceeded from the (flawed) assumption that Wenn's signature on documents produced by Britz had been forged, and then searched for confirmation of that theory in documents signed by Fortuin, but without ensuring that she had a sufficient range of specimen sample signatures for Fortuin in order to ascertain Fortuin's full range of natural variation. When Palm was asked by Ms Heeramun why she did not request more signatures for Fortuin, Palm responded that there was not sufficient time to do so. In my view that was not an acceptable answer. If she did not have time to obtain sufficient specimen signatures for Fortuin, she should not have ventured an opinion based on inadequate data. Neither was it acceptable for Palm to say, when asked why she had not run her own ESDA test in the light of her criticisms of Olsen's ESDA test result, that it was not her mandate to do so. I was left with the overriding impression that Palm merely spoke to her brief, which detracts from the weight of her opinion. Palm did not strike me as objective and unbiased, but rather as "*a hired gun who dispenses his or her expertise for the purposes of a particular*

case" (per Davis J in Schneider NO and Others v AA and Another 2010 (5) SA 203 (WCC).

547. I rejected an argument advanced by Mr Van der Berg Wenn had testified before the s 204 statement became controversial that the statement had been taken in Cape Town and that she had not gone to Lentegeur on that day, so that Britz could not have been telling the truth when she said the statement was printed and signed in Lentegeur. Wenn's memory of events in 2015 was poor - either because she genuinely could not remember, or because it suited her to feign amnesia. For example, she initially had no recollection of having made a confession before Hugo, but she later embraced the document when she saw that it exhibited the "fancy W". I considered that no reliance whatsoever could be placed on Wenn's denial that she had gone to Lentegeur after the visit to the DPP's offices, and that she had signed her statement in Lentegeur.

548. Mr Van der Berg also contended that Britz's evidence that she returned to her office in Lentegeur as she lacked printing facilities in the DPP's office was highly improbable. Although I initially thought he may have a point in that regard, on further reflection and consideration of the record, I concluded that there was nothing improbable about Britz's evidence that she wanted further time to format and correct the statement without rushing it, and that she did not want to detain Adv Van der Merwe while she did so.

549. My conclusion in all the circumstances was that Britz's denial that she had forged Wenn's signature on the s 204 statement was truthful, and that Wenn had indeed signed the s 204 statement at Lentegeur, as testified by Britz.

550. A further question in regard to the authenticity of the statement was whether Wenn had indeed said what was contained in the statement, or whether Britz had told her what to say.

551. Wenn performed very poorly in the witness box when Ms Heeramun took her through her s 204 statement and asked her what emanated from her and what emanated from Britz. The common thread was that she disavowed anything having to do with Murphy or Bird.

552. The screen shot of the Whats App communication between Abrahams and Wenn on 11 November 2018 (exhibit "V (i)"), shows clearly that Abrahams was the author of the narrative that Britz had changed Wenn's statement, and that she had threatened Wenn.[137] The transcript of the conversation between Abrahams and Fortuin on 2 December 2018 (exhibit "NN"), also shows that Abrahams planted the idea that Britz told the women what to say and that she threatened them.

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[137] RA: Ek wil wiet of sy gedruig het? En wiet djy sy het jou statement gechange?

FW: Ha se wea.

RA: Dai is hoekom ek se ek moet jou kom sien.

FW: j kan mos n voice note stu.

RA: Ek moet samm jou face to face praat.

FW: Se net iets op n voice note asb.

553. In the light of Abrahams' clear interference with Wenn, I considered that I could not believe her evidence that Britz had told her what to say in her s 204 statement. I also considered it improbable that Britz had told Wenn what to say, for much of the contents of the statement could not have been known to Britz until she had done further investigation by subpoenaing bank and cell phone records. On the other hand, I found Britz's evidence that the contents of the statement emanated from Wenn probable and credible, and I had no reason to disbelieve her.

554. In the circumstances I concluded that Wenn's s 204 statement was authentic in the sense that she had indeed said what was attributed to her, and she had signed the statement.

Was the statement made freely and voluntarily ?

555. Mr Van der Berg contended that Wenn had been subject to coercion or undue influence in making the statement, because Wenn testified that Britz had told her that she would go to prison for a long time and her child would be taken away from her if she did not make a statement implicating Murphy.

556. Britz admitted that she had told Wenn that she was facing a lengthy prison sentence if convicted for drug dealing. She denied, however, that she told Wenn that her child would be taken away from her. It was when I probed Wenn's fear that she knew that if she went to prison for a long time, she would be separated from her loved ones. That had nothing to do with Britz: it was a simple reality.

557. As to the fact that the statement had to implicate Murphy, there is no evidence to suggest that Britz told Wenn to implicate Murphy falsely. Britz's uncontradicted evidence was that both Fortuin and Wenn had disclosed at the time of their arrest on 18 September 2015 that the drugs belonged to Murphy, and that they wanted to tell the truth in that regard. From the outset they signaled their willingness to implicate Murphy in order to help themselves. That is not surprising.

558. Much was made by Mr Van der Berg of the fact that Britz said she told Wenn that, in order to obtain indemnity in terms of s 204, she had to testify truthfully about everything and in line with her statement. I saw no difficulty with this in the light of the fact that Wenn had already declared her willingness to implicate Murphy, and Britz was not telling her to lie about Murphy in her statement. What Britz said to Wenn about testifying in line with her statement was obviously predicated on the assumption that Britz would tell the whole truth about everything in her s 204 statement - including Murphy's involvement.

559. To my mind, there was no reliable evidence that Wenn had been subjected to coercion or undue influence. The pressure which she felt to make a statement arose as a result of the predicament in which she found herself, namely that she had been caught red-handed packing a large quantity of drugs, and was facing a stiff prison sentence.

560. It is true that Britz did offer Wenn a lifeline in the sense that she told her that the court could give her indemnity if she testified truthfully about her involvement in the matter. But this, to my mind, did not constitute coercion or undue influence, for, in the very nature of things, s 204 of the CPA holds out the hope of indemnity for a crime in return for truthful testimony. That, after all, is the very purpose of s 204.

561. With regard to Mr Van der Berg's argument that the reliability of Wenn's statement was questionable because of the possibility that she might have been inclined to say things which she believed Britz wanted to hear in order to obtain indemnity, I considered that this went to the question of weight, not admissibility, and fell to be evaluated at the end of the case along with all the evidence.

562. I therefore concluded that there was no merit in the argument that Wenn's s 204 statement should not be admitted because it had not been made freely and voluntarily and had been induced by coercion or undue influence.

Was the statement legitimately obtained ?

563. Mr Van der Berg contended that Wenn's s 204 statement was the product of grave police and/or prosecutorial misconduct because the statement had been obtained from Wenn in the absence of her lawyer in the full knowledge that Wenn was an accused person facing criminal charges, who had legal representation at the time. It was contended that Wenn's related constitutional rights to counsel and against self incrimination had been violated in the circumstances, and that her s 204 statement accordingly fell to be excluded in terms of s 35(5) of the Constitution.

564. Britz's evidence was that she was aware that Wenn and Fortuin were represented by legal aid, and that she had approached their lawyer at the Wynberg Court and asked if the women could be interviewed with a view to becoming s 204 witnesses. The lawyer (Ravat) had spoken to his clients and reverted to her and confirmed that it was in order. Britz could not recall the date when this had happened, but she recalled that this conversation had taken place at Wynberg court at one of the court appearances.

565. In cross-examination, Mr Van der Berg tried to pin Britz down to a period when this alleged conversation had taken place. He posited two poles, between 28 September 2015, the date when bail was granted, and 27 October 2015, being the date of the interview at the DPP's office. His argument was that, as there were no court appearances between 28 September 2015 and 27 October 2015, the alleged conversation with Ravat could not have happened.

566. To my mind this was an unfair approach. In the first instance, it was unfair to pose the question with the starting date of 28 September 2015, when there were court appearances on 21 September 2015, being the three women's first appearance, and 23 September 2015 when Davidson was added as an accused and granted bail on the same day. I therefore considered it wrong to construe Britz's confused answer that she had spoken to Ravat, "*after the bail, shortly before the arranging - or the idea of a 204, and speaking to the Legal Aid representative"* (whatever that

may mean) as a necessary indication that Britz had spoken to Ravat after 28 September 2015, as Mr Van der Berg argued.

567. It was evident from Ravat's testimony that he consulted with the women to prepare their affidavits for the bail application on 28 September 2015. It was thus entirely possible that Britz had spoken to Ravat on 23 September 2015, the day when Davidson was granted bail, and that Ravat had discussed the matter with his clients and reverted to Britz on 28 September 2015.

568. The important point, to my mind, was that Britz's memory of dates was obviously poor. When pressed by Mr Van der Berg in robust cross-examination, she was often reconstructing. But she made it clear, both in chief and in cross-examination, that she could not recall at which appearance she spoke to Ravat, and whether he reverted to her on the same day or later. But what Britz could recall was that she had spoken to the lawyer and received consent for the women to be interviewed for purposes of becoming s 204 witnesses. I did not see her inability to recall dates as a reason to disbelieve her on the substance of her evidence, namely that she had received consent from Ravat.

569. To my mind, an indication of Britz's honesty in this regard was that she volunteered that the name of the legal aid lawyer would be recorded on the legal aid file and that he could be asked whether his consent had been sought. Britz did not know at the time that Ravat's version was that he had no recollection of having been asked for permission. Her spontaneous invitation to Mr Van der Berg to check her

version with the legal aid lawyer struck me as an indication that she had nothing to hide and was telling the truth.

570. Mr Van der Berg put it to Britz that Ravat would testify that he had not been approached for consent. That was simply wrong. Ravat testified that he could not recall having been approached for consent, and that he would have made a note of it if he had been approached.

571. It was clear that Ravat had no independent recollection of the relevant events. His evidence that he would have made a note on the file was clearly an *ex post facto* reconstruction not based on habitual practice, as his evidence was that he did not recall ever having had such a request.

572. In all the circumstances I was convinced that that Britz was telling the truth about having approached Ravat for consent to interview Wenn and Fortuin, and Ravat's evidence was not such as to cast reasonable doubt on Britz's evidence.

573. Moreover, the contents of paragraphs 5 to 10 of the *pro forma* s 204 document, which Britz testified she read out to Wenn, contained pertinent warnings in regard to the right against self incrimination and the right to counsel. Paragraph 5 warned the witness that she was in the presence of a police officer and that she was not obliged to make any statement or to disclose incriminating evidence. Paragraph 10 notified the witness that she could seek legal advice before deciding to make a statement.

574. Mr Van der Berg argued that Britz only testified at a later stage that the preliminaries in the s 204 form had been read to Wenn at the office of the DPP before she gave her statement, and that her evidence in this regard was a fabrication. This argument was based on a misreading of Britz's evidence in chief, which made it clear that, after Van der Merwe explained s 204 in layman's terms, Britz opened up the pro forma s 204 statement on her laptop, and proceeded to read through the preliminaries before proceeding to the body of the statement at paragraph 17.

575. In all the circumstances, I was satisfied that Wenn had validly and effectively waived her rights against self-incrimination and to counsel, and that there had been no police or prosecutorial misconduct in the manner in which Wenn's s 204 statement had been obtained.

The factors in s 3(1)(c) of the Hearsay Act

576. As to the factors listed in s 3(1)(c) of the Hearsay Act, I considered that Wenn's s 204 statement should be admitted in the interests of justice, having regard to:

576.1. the nature of the proceedings, being criminal proceedings in which there is a strong public interest in arriving at the truth (subject, of course, to the right of an accused to a fair trial);

576.2. the nature of the evidence, being a written statement freely and voluntarily made before a police officer in circumstances where the importance of telling the whole truth had been impressed upon the witness;

576.3. the purpose for which the evidence was tendered, namely to corroborate other evidence and complete the matrix of the State's case;

576.4. the probative value of the evidence, in which regard I considered that the statement had sufficient *prima facie* probative value to warrant admission, subject to an assessment of the weight thereof at the conclusion of the trial;

576.5. the reason why the evidence was not given by Wenn, namely that Wenn had recanted her s 204 statement in circumstances which indicated that she had been subjected to witness tampering;

576.6. the fact that I could see no prejudice or unfairness to the accused as they had had the opportunity to cross-examine Wenn on the contents of the statement, and had chosen not to do so.

The ruling on the admissibility of Wenn's statement

577. I accordingly made the following ruling on 4 November 2019:

"I am satisfied beyond a reasonable doubt as to the authenticity of the document; I am satisfied that the statement was freely and voluntarily made by Ms Wenn; I am satisfied

as to the legitimacy of the statement, by which I mean that I'm satisfied that there was no violation of her constitutional rights or other police misconduct in bringing about the statement, and finally I am satisfied that it has sufficient potential - and I emphasize that word - potential probative value to warrant its reception in terms of s 3(1)(c) in the interests of justice."

THE DEFENCE CASE

578. One witness was called to testify on behalf of the 1st and 6th accused in the person of Mr Desmond Jacobs, the former 7th accused ("**Jacobs**"). Murphy himself elected not to testify.

579. Shafieka and Davidson both elected not to testify and closed their cases without presenting any evidence.

The evidence for the first and sixth accused: Desmond Jacobs

580. Jacobs, a former police officer and employee of First National Bank, testified that he took up employment with UTS as its business manager in 2012. According to Jacobs, UTS had two main areas of business, being construction, which was the principal business, and the purchase and sale of motor vehicles.

581. Jacobs testified that UTS was involved in the construction of new residential properties as well as the renovation and interior decoration of existing residential properties. He mentioned one commercial project involving the renovation of a building for Nedbank in Strand. In his evidence in chief, Jacobs mentioned that

UTS had built 20 houses in Broadlands Village for R 456 000.00 each.[138] He did not say when this happened, but it emerged in cross-examination that the construction in Broadlands took place in 2012.

582. Jacobs was shown the photographs in exhibits SS.1 and SS.2, which featured construction billboards bearing the logo and contact details of UTS, and a vehicle bearing the logo, business description[139] and contact details for UTS. He confirmed that the billboards were those of UTS, and that the vehicle was the company car which he had driven as the UTS business manager.

583. Jacobs produced copies of various documents aimed at demonstrating that UTS operated as a legitimate business, including an employment contract for one Ronald Rajap,[140] who he said was employed as a driver, and six offers to purchase vehicles, which he signed on behalf of UTS in respect of six vehicles purchased by UTS between 17 March 2014 and 23 March 2016.[141]

584. Jacobs was asked in chief whether he was surprised that UTS paid the purchase price of R 2.4 million for the Parklands property in cash. His response was that he was not surprised because, when he met Murphy (which he had said happened in

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[138] This equates to gross revenue of R 9 120 000.00.

[139] The business description on the vehicle read:

- Home Renovations & Interior Design
- Vehicle Purchasing & Vehicle Sales

[140] SS.3

[141] SS.4 - SS.9

2010), Murphy had told him that he'd sold his night club and aluminium businesses, and he therefore assumed that there were funds available.

585. Jacobs was asked in chief about the day of his arrest. He testified that he came to see Britz as he had been told she was looking for him. He was arrested and told her that he refused to make any statements that morning. He was then "thrown in the jail cell" before being taken to court and granted bail.

586. Cross-examination of Jacobs took place after the lunch adjournment. In a conspicuously "friendly" cross-examination, Mr Paries, on behalf of the 2nd accused, again raised the subject of Jacobs' interaction with Britz on the day of his arrest. Jacobs took the cue and embellished on his evidence, alleging that Britz had been rude to him and had sworn at him in the presence of his lawyer, telling him that he was stupid for covering for Murphy. Not only was this version not given in chief, but if had never previously been put to Britz in cross-examination by Jacobs' counsel prior to Jacobs' discharge at the close of the State's case.

587. In response to questions by Mr Paries, Jacobs denied that he had observed anything unlawful about the operations of UTS, and said that he would have reported any underhand dealings. He confirmed that he had arranged for UTS to open a bank account with Nedbank in 2014, but he was at pains to distance himself from the financial operations of UTS. He insisted that Murphy was "*completely in charge of all monies coming in and going out of his accounts*".

588. When questioned by Mr Paries about payments received by UTS, Jacobs was vague. He testified that “some” payments were made in cash and “some” by EFT. He was asked whether he ever received cash payments from clients, to which he responded that clients either paid monies directly into the account or dealt directly with Murphy, which I understood to mean that any cash payments were made directly to Murphy. Jacobs could not say what percentage of vehicle sales payments were made in cash.

589. Mr Twalo asked Jacobs if he knew Davidson. He testified that he met him at a garage in Grassy Park where two staff members of UTS introduced him to Davidson and asked if there was an employment opening for him, to which Jacobs replied that there was no vacancy at the time. According to Jacobs, this was his only interaction with Davidson before the trial in this matter.

590. Mr Jacobs fared very poorly in cross-exmination by the State. He resorted to blaming his former counsel, Mr Mafereka, when taxed with why his complaint about Britz’s conduct at the time of his arrest had not been put to her in cross-examination. He fumbled when Ms Heeramun asked him for UTS’s registration number with the National Home Builders Registration Counsel (“**NHBRC**”). His first response was that one does not necessarily have to be registered with the NHBRC, and when Ms Heeramun took him to task on this, he retreated and stated that UTS was registered, but its annual registration fees were not paid on time so

the registration lapsed. He went on to say that when he joined UTS, he arranged for a bank account to be opened and for UTS to be registered with the NHBRC.[142]

591. According to Jacobs, he was the person at UTS responsible for preparing employment contracts with employees. Jacobs was asked why only one employment contract had been produced in respect of UTS employees, to which Jacobs responded that he had handed all the contract over to Murphy, who had given them to his counsel.

592. According to Jacobs, he did not compile employment contracts for Shafieka, Wenn and Fortuin. He advised Murphy that UTS should enter into a contract with a cleaning company owned by Shafieka - which he could not name - who would subcontract with the three women. He could not dispute, however, that Shafieka, Wenn and Fortuin were in fact paid a salary by UTS, but he said that this was for cleaning houses.

593. He was vague, however, about where where the women had done the cleaning work. He was only able to mention one house in Strand in 2017 (which was after Wenn and Fortuin had been arrested and had ceased being paid by UTS), and said that he could not recall where they had cleaned houses in 2015. He was asked again later whether he had seen Shafieka, Wenn and Fortuin cleaning houses at construction sites, and he could only say that he had seen them at one site in Strand. On this occasion he could not even recall the date.

[142] Record 16 January 2023, p 77, l 1 - 20

594. On the second day of cross-examination by Ms Heeramun, Jacobs brought a number of documents pertaining to UTS in response to Ms Heeramun's request. He produced an amended founding statement (CK 2 & CK2A) for UTS,[143] a copy of Murphy's ID book;[144] a BBBEE certificate dated 6 October 2016,[145] a building contract dated 14 September 2014 to construct a house at 1[...] C[...] Street, Parow for R 1 million,[146] an NHBRC Certificate for an entity called Siyahamba Sonke CC[147] ("*as an example*") and building plans for work at 1[...] C[...] Street, Parow.[148] He was not able to produce an NHBRC certificate for UTS for any period.

595. Jacobs had testified in chief that UTS paid by EFT for the vehicles referred to in the offers to purchase which he produced. When Mr Heeramun put it to him that none of these payments except one (for R 85 000.00 on 25 May 2015) reflected in the bank statements of UTS, he could offer no explanation.

596. Jacobs was asked by Ms Heeramun whether he had ever had to attend to depositing cash into the UTS bank account. He did not answer at first, but when the question was repeated, he answered that there was a time when a cash deposit was received from a client for a building deposit. I pointed out that in that situation,

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[143] SS.10

[144] SS.11

[145] SS.12

[146] SS.13

[147] SS.14

[148] SS.15

the client would have deposited the cash into the UTS bank account, but that what Ms Heeramun was asking was whether Jacobs had ever had to deposit cash into the account of UTS. Jacobs answered that sometimes a client would give him cash to deposit into the UTS account. He was referred to cash deposits on Liebenberg's analysis which had his cell phone number as a reference. He answered that those were payments made to Murphy for vehicle sales, which Murphy handed to him to deposit into the UTS bank account. Jacobs had no explanation for why clients would pay cash to Murphy instead of depositing it directly into the UTS bank account.

597. Jacobs could not explain why the building contract allegedly concluded with one C Van Rooyen in respect of a project at 1[...] C[...] Street Parow had a different font and no page number on the signature page, in comparison with the first four pages which were numbered 1of 5, 2 of 5, 3 of 5 and 4 of 5. His answer was that that was how he received the document. When I queried this answer he gave the absurd answer that it was drawn up with a labour consultant. This made no sense, given that he was being asked about a construction contract, not an employment contract.

598. During re-examination Mr Van der Berg sought to put a bundle of photographs to Jacobs for his comment. The photographs were said to have come to light overnight from Murphy's collection. I allowed the photographs to be entered as exhibit "SS 16" to on the basis that they would be authenticated later by the person who took the photographs.

599. The photographs were of the UTS construction billboard (a duplicate of exhibit SS.1), a flatbed truck bearing the name “Ulterior Home Renovations & Interior Designs”, a photograph of a Nissan double cab bakkie with an expanded description of the business of UTS, which included, “Ulterior Trucking Solutions” and “Ulterior Auto Panel and Spray” in addition to the descriptions “Vehicle Purchasing & Vehicle Sales” and “Home Renovations & Interior Designs” which featured on the vehicle depicted in SS.2 and SS.3.

600. One cannot fail to notice that, in SS 16.3, the Nissan vehicle is parked in front of a sign which says “*The Branding Specialists*”. The remainder of the photographs are of workmen clad in overalls featuring the UTS logo (all of which appear to be new, and many of which appear to be remarkably clean), engaged in various building activities, such as bricklaying, plastering, removal of rubble and the like.

601. Jacobs confirmed that the Nissan vehicle was his company vehicle, and that the photographs were of UTS employees performing construction work. Jacobs was not the photographer, however, and he was unable to shed any light on who took the photographs or when and where they were taken.

602. In the event, the photographer was not called to authenticate the photographs in SS 1, 2 and 16, and they are accordingly inadmissible for failure to comply with the requirements of s 222 of the CPA (as read with ss 33 to 38 of the Civil Proceedings Evidence Act 25 of 1965.

Evaluation of Jacobs's Evidence

603. One must appreciate at the outset that Jacobs is not an impartial witness. He was charged as an accomplice, and his discharge at the close of the State's case presented the unique opportunity for him to be called to give evidence favourable to the defence without any risk of self incrimination. For this reason, his evidence warrants close scrutiny.

604. Jacobs made a very poor impression on me as a witness, and I found his evidence unsatisfactory for the reasons which follow.

604.1. In the first instance, his testimony about Britz's alleged swearing at him for covering for Murphy was clearly a fabrication contrived to bolster the narrative that Britz put pressure on the s 204 witnesses to implicate Murphy. It is inconceivable that Mr Mafereka, a diligent and able advocate, would not have put Jacobs' version in this regard to Britz during cross-examination. Moreover, Jacobs did not give this evidence in chief. He only came out with this version after lunch when he was pointedly asked about his arrest by Mr Paries. Jacobs' enthusiastic and expansive answer leaves one with the ineluctable impression that Jacobs did not give the desired evidence in chief, and was coached by his former co-accused during the lunch adjournment. Hence the "do-over", with an assist by Mr Paries.

604.2. Second, Jacobs was incurably vague with regard to dates and details. For instance, whereas he stated that he started out with UTS in 2012 and at that stage set about getting UTS's affairs in order with regard to CIPRO, a bank account, SARS, NHBRC registration and the like,[149] the documentary evidence shows that the UTS bank account was in fact only opened on 24 January 2014. It begs the question of how UTS was operating without a bank account between 2012 and 2014.

604.3. Third, there are indications that Jacobs exaggerated the extent of the construction work done by UTS. Whereas he testified in chief that UTS built 20 houses in Broadlands Village for R 456 000.00 each,[150] he stated in cross-examination that UTS was allocated 5 of 120 houses which were out to tender in Broadlands, Strand.[151] In my view, this discrepancy cannot be put down to an honest mistake: the exaggeration was a deliberate misrepresentation of the truth. He also claimed that he managed about 40 people at UTS,[152] but if one scrutinizes the bank statements of UTS, one does not see anything near 20 salary payments in a weekly period, let alone 40.

[149] Record 16 January 2023 p 116 l 11 - 22

[150] Record 16 January 2023 p 29, l 7 - 11

[151] Record 19 January 2023 p 387 l 22 - p 388 l 13

[152] Record 19 January 2023 p 282 l 13

604.4. Fourth, Jacobs gave non-sensical answers when confronted with difficult questions. I have already referred to his absurd response when asked about the discrepancies in the building contract handed in as exhibit SS.13. Another risible answer was his statement that he did not think it odd that UTS paid R 2.4 million in cash for the Parklands property (in March 2015) because Murphy told him (in 2010) that he has sold his businesses and he, Jacobs, assumed that funds were available. Not only is it ludicrous to assume that an unknown amount of money received in 2010 would still be available in 2015, but Jacobs evaded the real question, which is this: why would UTS / Murphy choose to pay for an immovable property in cash, by depositing bank notes in various denominations into an attorney's trust account, rather than making payment by way of an EFT from the funds held in the UTS bank account?

604.5. Fifth, Jacobs tended to adapt his evidence under pressure. For example, he betrayed that he was unaware that a NHBRC registration was required for all home builders, and then quickly resorted to claiming that UTS had been registered with the NHBRC, that in its registration had lapsed due to non payment of the annual fee. He then claimed that he had arranged for the registration to be reinstated - he did not say when - but he was unable to produce any proof of UTS's having been registered with the NHBRC at any time. His adaptation of his evidence under pressure was also evident in his answers to questions about his communications with Murphy on the day of the police raid at 1[...] R[...] Close. He said he saw Murphy at 1[...]

T[...] in the late afternoon, but when confronted with the fact that the cell phone data showed that Murphy was in Parklands at the time, he said he must have seen him in Parklands. He claimed that he did not see Murphy on the morning of 19 September because he had a court appearance, and when it was pointed out that 19 September 2015 was a Saturday, he said it must have been the following Monday.

604.6. Sixth, Jacobs frequently answered “no comment” in circumstances were he should have been able to offer an explanation. Despite the fact that he had been discharged at the close of the State case, he was clearly uncomfortable testifying, and his evidence was often self serving and aimed at distancing himself from any unlawful activity involving UTS’s finances.

605. In short, I consider that Jacobs was not an honest witness. I reject as false his evidence that Shafieka, Fortuin and Wenn were paid for cleaning houses built by UTS. He could he not give any indication of where they worked, which he ought to have known if it was true. Moreover, if one has regard to the bank statements which show the number of payments the women received, UTS would have had to have completed many new houses in 2015 in order to justify the frequent cleaning work. One would then have expected to see income from construction projects coming in the UTS bank account in 2015, but it is not there.

606. My overall impression of Jacobs was that he was testifying according to script at the behest of Murphy, and that his evidence was aimed at bolstering the image of

UTS as a *bona fide* business with a view to showing that the income of UTS derived from legitimate sources.

607. The endeavour failed, in my assessment, for more questions were raised than answered by Jacob's evidence, and the documentation which he produced. In this regard:

607.1. First, the building contract ostensibly entered into with one C Van Rooyen on 14 September 2014 in respect of 1[...] C[...] Street, Parow (exhibit SS.13), appears to be for the construction of a dwelling from the ground up for R 1 million. It includes costings for foundation and a roof. The first four pages of the document are paginated 1 of 5 to 4 of 5. The last page, however, which bears the signature and the date, has no pagination and appears to be in a different size font from the first four pages. Furthermore, the building plans in respect of the 1[...] C[...] Street project (SS.15) do not tally with the building contract. They relate to proposed additions to an existing dwelling, with the addition of a sun room and a carport to be erected under the existing roof. In the circumstances I have grave doubts about whether the building contract relating to 1[...] C[...] Street is genuine. The plans appear to be genuine, but one sees that the plans were dated 27 May 2015, were submitted to the City of Cape Town on 18 August 2016, and that the validity of the building plan approval was extended for a year until 26 August 2017. It would therefore appear that the work on the 1[...] C[...] Street project - if it happened at all - did not take place in 2015. The use of

the plans in an attempt to demonstrate construction activity by UTS in 2015 is clear a misrepresentation.

607.2. Second, the total amount allegedly paid by UTS for vehicle purchases during the period 14 March 2014 to 17 June 2015 (the first five offers to purchase produced by Jacobs) amounts to R 1 482 156.92.[153] Yet one sees from the bank statements of UTS, and the analysis by Liebenberg (Exhibit AA (x)), that only the payment of R 85 000.00 on 25 May 2015 was made from the UTS bank account. Jacobs was therefore untruthful when he testified that these vehicle purchases were all paid by EFT from the UTS bank account. The ineluctable conclusion, in the absence of an alternative explanation for the funding, is that the vehicles were paid for in cash. (It is clear from the evidence of Britz that UTS only had one bank account, as the details of any second bank account would have been revealed by SABRIC by virtue of being linked through Murphy's ID number.)

607.3. What is most telling is what was not produced for UTS: no financial statements, Vat returns or Income Tax returns were handed in as exhibits. Given Jacob's much vaunted experience as a former bank employee and his professed awareness of the need for compliance, one would have expected that he would have ensured that UTS would have been compliant

[153] R 263 990.01 on 17 March 2014; R 431 676.91 on 12 September 2014; R 399 990.00 on 3 October 2014, R 85 000.00 on 25 May 2015 and R 301 500.00 on 17 June 2015.

in these areas and be able to produce these records. But they were conspicuous by their absence.

608. As regards the dearth of records for UTS, Mr Van der Berg submitted that this was due to the fact that the Asset Forfeiture Unit ("AFU") had seized property and records of UTS. I find this explanation unconvincing. As Ms Heeramun pointed out, any records seized by the AFU would have been turned over to the prosecution and would have formed part of the docket in this trial. Moreover, Murphy's legal team were astute to subpoena the production of documents by the prosecution which they considered were required for Murphy's and UTS's defence. I have no doubt that, if relevant records of UTS had indeed been seized by AFU, they would have been obtained by way of subpoena.

609. In my estimation, Jacobs' evidence goes no further than to show that UTS did some legitimate business by way of construction and vehicle sales, the extent whereof is unclear and which, to my mind, was likely exaggerated by Jacobs. That however does not assist Murphy and UTS, for it is textbook money laundering to engage in legitimate business as a front to conceal "dirty" money derived from unlawful activities by mingling it with "clean" money derived from lawful business activities.

THE SECTION 186 WITNESS: ADVOCATE VAN DER MERWE

610. Ms Jolou van der Merwe ("**Van der Merwe**") is a senior advocate employed by the DPP. Van der Merwe was subpoenaed by Murphy and UTS to testify as a defence witness. The purpose was to elicit evidence about the circumstances under which Wenn and Fortuin made their s 204 statements. Before Van der Merwe was called to the stand, however, Mr Van der Berg applied to have Van der Merwe called as the Court's witness in terms of s 186 of the CPA, in order that she might be cross-examined by the defence.

611. Section 186 of the CPA provides that the Court may subpoena witness at any stage of criminal proceedings, and that the Court shall so subpoena the witness if the evidence of such witness appears to the court essential to the just decision of the case.

612. In my judgment, the evidence of Van der Merwe was essential to the just decision of the case as it would serve to clear up any lingering mystery over whether Wenn and Fortuin had indeed signed their s 204 statements in Lentegeur, as Britz had testified, or whether they had in fact signed statements in Cape Town, which raised the possibility that Britz had later "doctored" the statements and forged the signatures thereon, as had been suggested by Mr Van der Berg. It would also shed light on the issue of legal representation for Wenn and Fortuin. With this in mind, and considering that the truth finding purpose of the exercise would best be served by permitting the defence to cross-examine Van der Merwe, I granted the application.

613. Ms Van der Merwe's evidence under cross-examination may be summarized as follows. She was involved in the Murphy case in 2015, but was taken off the case in early 2016 to deal with another matter. Following the discovery of the drugs and the arrest of the three women, Britz informed Van der Merwe that two of the women had said that they wanted to talk. Van der Merwe told Britz that she would need to consult with the women to hear what they had to say before a decision could be made on whether or not they could be used as s 204 witnesses. Van der Merwe told Britz that it was important that the women have their own legal representation.

614. Van der Merwe recalled that the two women had an attorney in the Wynberg Court, although she could not recall whether she herself had appeared in Wynberg in the matter. Because Britz would be present at Wynberg Court for each postponement, Van der Merwe requested Britz to inform the attorney that she wanted to consult as the women wanted to talk to the prosecution about becoming s 204 witnesses. She gave Britz a number of dates when she would be available for consultation, with a view to accommodating the attorney so that he could attend the consultation.

615. Britz came back to her and gave her the date of 27 October 2015. Van der Merwe expected the women to be accompanied by their lawyer. According to Van der Merwe, the purpose of the consultation was not to minute a statement, but to hear what information the women had and to explore whether or not they could be used as s 204 witnesses.

616. On the day, the women arrived with Britz and without their attorney. Van der Merwe asked Britz where the attorney was, and Britz replied that the attorney had been informed that the women wanted to speak to the prosecution about becoming s 204 witnesses, but he said that it would not be necessary for him to attend. Van der Merwe then spoke to the two women. Her evidence on this aspect bears quoting in full:

> *"And then I went to the two witnesses and I said to them: I have a problem, your attorney isn't here. And then they said to me, they did tell him that they wanted to come, he knows and they want to continue without him. I was still a bit unsure. I said to them: Look, we can arrange a different day, it doesn't have to be today, but if you want him here, we can - or even if he can't come to our offices we can make some other arrangement. It shouldn't be a train smash. And they said, no, they're there, they want to talk and they don't need their attorney."* [Emphasis added.]

617. Van der Merwe then went to inform her colleague, Adv Viljoen, and debated whether they should continue with the interview, as the women requested, despite the absence of their lawyer. Van der Merwe decided that, in the circumstances, she was comfortable to continue without the lawyer being present. She herself would have preferred to have the attorney there, but she did not see any problem with continuing without the lawyer, given that the women had said that did not need him there and wanted to proceed without him.

618. Consultations were then held with the two women separately. Van der Merwe explained s 204 to them in layman's terms. They were made aware that the they would be giving incriminating information to the prosecution. They were asked if

they were sure they wanted to proceed without their attorney present. During the consultation, questions were put to the women and they gave answers. Britz typed notes on her laptop. Britz read out what she had taken down. After the consultations, Van der Merwe held a brief discussion with Adv Viljoen, and then told Britz that the women would be used as s 204 witnesses, and that Britz could proceed to take their statements. At the time when she left the boardroom, Britz was packing up her laptop in order to leave.

619. Van der Merwe confirmed that the written s 204 statements furnished to her by Britz were in accordance with what the women had said during the consultation. She did not see anything in the written statements which differed from the consultation. The s 204 statements were handed to Wenn's and Fortuin's attorney in the Khayelitsha Court, and she informed Van der Merwe that they were happy with the statements.

620. Van der Merwe was crystal clear about the fact that the written statements were not taken in Cape Town. A consultation was held in Cape Town, and notes were made. The statements were thereafter taken in Lentegeur.

621. Van der Merwe's evidence put paid to any suggestion that the s 204 statements had been signed in Cape Town, and supported Britz's version (which Mr Van der Berg had previously argued was highly improbable) that Fortuin's and Wenn's s 204 statements had indeed been signed at Lentegeur, and that the contents of the statements had emanated from the women and had not been "doctored" by Britz.

622. However, Van der Merwe's evidence gave impetus to a modified line of attack on the legality of the procurement of the s 204 statements, which I deal with below in connection with the reconsideration application.

THE RECONSIDERATION APPLICATION

623. After the close of the cases for the defence, Mr Van der Berg brought an application for the reconsideration of the interlocutory rulings made in regard to the search and seizure at 1[...] R[...] Close on 18 September 2015, and the admission of Wenn's s 204 statement in terms of the Hearsay Act.

624. The need for the reconsideration was predicated on the new evidence received from Van der Merwe which was relevant to the circumstances under which the s 204 statement had been obtained and which, so it was contended, had bearing on Britz's credibility which, in turn, had bearing on the ruling regarding the warrantless search. I granted the application in the interests of a fair trial, as it is incumbent upon a judge presiding in a criminal trial to keep an open mind and to reconsider interlocutory rulings where evidence emerges which sheds new light on matters.

625. Three lines of argument were advanced in the reconsideration application:

625.1. first, that the search and seizure ruling should be set aside (seemingly on the grounds that Britz lacked credibility, there being no other basis for a

reconsideration as there was no new evidence having bearing on that ruling);

625.2. second, that Wenn's s 204 statement should be excluded as the evidence of Van der Merwe demonstrated that there had indeed been a violation of Wenn's constitutional rights;

625.3. third, that Wenn's s 204 statement was inadmissible against the accused in terms of s 219 of the CPA as it amounted to a confession.

626. The latter point was a legal point which had not been previously raised at the time when the application in terms of s 3(1)(c) had been argued.

627. The arguments advanced for a reconsideration of the search and seizure ruling amounted essentially to a rehash of the arguments advanced in the first trial-within-a-trial, which I had already carefully considered and rejected, for the reasons set out in the search and seizure judgment. I was not persuaded to alter the search and seizure ruling in the absence of any relevant new evidence or reason to do so.

628. The evidence of Van der Merwe, far from undermining Britz's credibility, served to support Britz's evidence that Ravat had indeed been approached and had given his consent to the women being interviewed.

629. Van der Merwe's evidence that Britz told her that the lawyer had been told that the women wanted to talk to the prosecution and that he had said it was not necessary

for him to attend resonates with Ravat's evidence that his manager told him that he should not be absent from the bail court as it created a backlog in the court.

630. Moreover, Van der Merwe's evidence that the women told her that they did tell their lawyer that they wanted to come to speak to the DPP, that he knew, and that they wanted to proceed without him, supports Britz's version that she spoke to Ravat, and he said he would take instructions from his clients and revert. What the women said to Van der Merwe confirms that Ravat had spoken to the women about being interviewed by the DPP with a view to becoming s 204 witnesses.

631. In addition, Van der Merwe's evidence regarding what she said to the women before their interviews about the functioning of s 204 and the fact that they would be divulging incriminating information to the State impels me to conclude that the women were fully informed regarding their rights, and that they knowingly chose to proceed without legal representation. I am satisfied that the State has discharged the onus of showing that there was a valid waiver of rights by Wenn and Fortuin, and no misconduct in the obtaining of the s 204 statements in the circumstances.

632. That having been said, I venture to suggest that it would be prudent practice for the police and prosecutorial authorities to ensure in future that, where a prospective s 204 witness has legal representation: a) the prospective s 204 witness must not be brought to the consultation by the investigating officer, but, if transport by the police is necessary, it must be done by an independent police

official having nothing to do with the investigation; b) that all arrangements for an interview with the police or DPP must be made through the person's legal representative and c) that, if the legal representative is amenable to the prospective s 204 witness being interviewed by the police or DPP in his or her absence, a written note to that effect should be obtained from the legal representative and placed in the docket. It seems to me that adherence to these guidelines would go a long way to prevent the suspicions and accusations of misconduct which arose in this case.

633. As to the legal point belatedly raised by Mr Van der Berg relying on s 219 of the CPA, I was persuaded that the point had merit, and I accordingly set aside my ruling that Wenn's s 204 statement be admitted in terms of s 3(1)(c) of the Hearsay Act, and instead ruled the statement inadmissible in terms of s 219 of the CPA. The reasons for that decision are contained in the reconsideration judgment.

THE EVALUATION OF THE EVIDENCE AS A WHOLE

The evidence for the State

634. The State's case against the accused consists of a combination of direct evidence, real evidence and circumstantial evidence.

635. As a starting point, there is the evidence of Fortuin that the three women were packing drugs at 1[...] R[...] Close on the morning of 18 September 2015, which is

corroborated by the direct evidence of Britz, Adams and Van Meyeren regarding who and what was found at 1[...] R[...] Close, as well as the real evidence in the form of the drugs, drug packing paraphernalia and money seized. This evidence provides a basis for drawing inferences about what had been happening at 1[...] R[...] Close before the police raid on 18 September 2015.

636. A key element of the State's case is the testimony of Jones that Murphy had for months regularly brought Shafieka, Fortuin and Wenn to 1[...] R[...] Close, where they spent the day closeted in the back room of the house with curtains drawn and doors locked, and were later fetched at some time during the afternoon. Jones estimated that Murphy and Shafieka had been coming to 1[...] R[...] Close regularly for approximately a year before the police raid. Although one cannot place too much reliance on the estimate of one year, Jones' evidence is supported by the evidence of Fortuin, who confirmed that the women had been coming to 1[...] R[...] Close for some time before the police raid, and by Shafieka's cell phone records which serve to place her in the vicinity of 1[...] R[...] Close at regular intervals from 18 November 2014 until 18 September 2015. Jones also testified that "*they*" sometimes came to the premises at night.

637. Circumstantial evidence of the presence of Murphy, Shafieka, Fortuin and Wenn at 1[...] R[...] Close may be found in the cell phone data extracted from the cell phones of Murphy, Shafieka, Fortuin and Wenn. Two observations are pertinent in regard to the cell phone evidence:

637.1. First, the relevant cell phone numbers and handsets have been convincingly linked to Murphy, Shafieka, Fortuin, Wenn and Davidson because:

637.1.1. Murphy formally admitted during the trial that the cell phone number 079[...] is, and at all material times was, his phone number.[154] (This is the number which was stored under the name "Bieno" in Fortuin's contact list.)

637.1.2. Britz's testified that three cell phones were found with the women in the room at 1[...] R[...] Close, and that the three women identified their respective cellular phones. When the data on these phones was extracted by Mfiki, the cell numbers were obtained. Fortuin and Wenn both confirmed that they had identified their respective cell phones to Britz. In her evidence Fortuin also confirmed her cell phone number and those of Wenn and Shafieka.

637.1.3. Britz testified that she seized Davidson's cell phone when she arrested him, and the phone was subjected to forensic analysis which yielded all the data for the phone, including the number.

[154] The admission may have been prompted by the fact that Britz had discovered that Murphy had given that number as his number in an affidavit in support of a criminal complaint which he had previously laid.

637.2. Secondly, the very nature and purpose of a cell phone entails that it it typically carried on one's person for use at all times. Fortuin testified that when she went from Worcestor to Cape Town, she would have her cell phone with her, and Wenn testified that she was "*always on her phone*". Fortuin also testified that Shafieka would communicate work arrangements with her by cell phone. In the circumstances, and in the absence of any evidence to the contrary, I consider that it can be accepted that Murphy, Shafieka, Wenn and Fortuin were in possession of their respective cell phones at all material times relevant to the alleged drug packing at 1[...] R[...] Close.

638. The evidence pertaining to cell phone towers shows that when a call or other cell phone activity is initiated, it will be picked up by a cell phone tower nearby. The evidence of Du Plessis and Golele is that the dominant tower serving 1[...] R[...] Close is Neuman's farm. According to Du Plessis (Cell C), the Neuman's Farm tower had a coverage range of 940 metres in the direction of 1[...] R[...] Close. According to Golele (Vodacom) the Neuman's farm tower had a predicted radius of coverage of 1.89 km, with 1[...] R[...] Close falling well within that radius (Exhibit M4.4").

639. Du Plessis (Cell C) testified that the dominant cell phone tower servicing [...] T[...] (Murphy's home) and 1[...] T[...] Street, Lentegeur (Bird's home), is the Aloe High School tower, with a coverage range of 280 metres in the direction of [...] and 1[...]

T[...] Street. Other towers servicing [...] and 1[...] T[...] Street are the Woodville tower and Merrydale towers.

640. The significance of this evidence is that, when a particular cell phone tower is referred to in the cell phone data as the tower which picked up a particular cell phone activity (be it a call, sms message, Whats App or internet usage), it means that the cell phone in question was in the vicinity of that specific cell phone tower at the time of the relevant cell phone activity. In other words, the cell phone was within the range of coverage of that particular cell phone tower.

641. It bears emphasis that the cell phone data, viewed in isolation, cannot establish exactly where the cell phone was at the time of the phone activity. It only serves to establish that the cell phone was within the range of coverage of that specific tower. But when cell phone data is considered in conjunction with other evidence, against the backdrop of a pattern of repeated and regular presence within the vicinity of a particular cell phone tower for a specific purpose, it can provide a compelling indication of a person's precise whereabouts at the time - particularly in the absence of any explanation to the contrary.

642. The cell phone data extracted from the cell phones of Murphy, Shafieka, Fortuin and Wenn shows frequent and regular cell phone activity by these individuals' cell phones picked up by the Neumans Farm tower, and other towers servicing 1[...] R[...] Close, at times when Jones's evidence puts them on the premises at 1[...] R[...] Close and when Fortuin's evidence puts the three women there.

643. Moreover, the cell phone data for Fortuin demonstrates a clear pattern of movement from Worcestor to the vicinity of 1[...] R[...] Close. One can observe her path of travel from Worcestor to Grassy Park by virtue of the various cell phone towers which picked up her cell phone transactions *en route* to Cape Town and back to Worcestor. It corroborates her evidence that she was coming with Shafieka from Worcestor to Grassy Park to pack drugs, and it places her at 1[...] R[...] Close on every occasion when one of the towers servicing 1[...] R[...] Close is reflected in her cell phone data.

644. The cell phone data for Wenn (exhibit "W") covering the period 19 June 2015 to 18 September 2015 shows that her cell phone was frequently picked up by the Aloe High School tower, placing her in the vicinity of [...] and 1[...] T[...] Street at times consistent with her being at 7 or 1[...] T[...] before and after being at 1[...] R[...] Close.[155] The dates on which Wenn's cell phone was picked up by one of the towers servicing [...] and 1[...] T[...] coincide virtually exactly with the dates

[155] For instance, on 21 July 2015, the data shows that Wenn's phone was picked by by the Aloe High School tower at 10h01, then repeatedly by the Pelican Park and Neuman's Farm towers between 14h44 and 16h26, and then by the Merrydale tower at 17h08. On 24 July 2015, Wenn's cell phone was picked by by the Aloe High tower at 08h37 and by the Neuman's Farm tower at 10h12. On 27 July 2015, Wenn's cell phone was picked up by the Aloe School tower at 08h36 and repeatedly by the Neuman's Farm tower between 10h42 and 14h25. On 6 August 2015, Wenn's cell phone was picked up by the Aloe High School tower between 08h23 and 08h34, then by the Neuman's Farm tower between 09h19 and 10h11, and then by the Aloe High School and Merrdyale towers between 15h00 and 15h08. On 13 August 2015, Wenn's cell phone was picked up by the Aloe High School tower at 08h50, then repeatedly by the Neuman's Farm tower between 13h43 and 13h59, and then by the Aloe School tower between 14h25 and 14h27.

specified in counts 117 (14 July 2015) to 150 (18 September 2015). One sees similar patterns in the cell phone data for Fortuin (exhibit "N3.1").[156] This is important because it supports Jones's evidence that the women were brought to 1[...] R[...] Close by Murphy, or another driver, and that Shafieka did not drive them to 1[...] R[...] Close (as Fortuin and Wenn stated).

645. Another important element in the State's case is the evidence of Fortuin that she was paid for her drug packing work at 1[...] R[...] Close by UTS. Her evidence in this regard is corroborated by what appears in Fortuin's bank statements and those of UTS. The bank statements of Shafieka, Wenn and UTS show that Shafieka and Wenn were also paid more or less weekly, at the same time as Fortuin. One sees from the account opening forms completed by Shafieka, Fortuin and Wenn, that they opened bank accounts with Nedbank in March 2015, and began receiving regular payments from UTS thereafter. Before that, according to Fortuin and Wenn, Shafieka used to pay them in cash. This serves to establish that Fortuin and Wenn were working with Shafieka at 1[...] R[...] Close before March 2015, which is consistent Jones's evidence that Shafieka came with Gavin at first, that

[156] For example, on 8 May 2015, Fortuin's cell phone was picked up in Worcestor at 07h33, then by the Aloe High School tower at 10h42, then by the Lotus River and Pelican Park towers between 16h00 and 20h34, then by Aloe High School at 21h26, then by a Worcestor tower at 00h18. On 15 June 2015, Fortuin's cell phone was picked up in Worcestor at 08h04, then by Neuman's Farm tower at 11h32, then by Aloe High School at 16h14, then by a Worcestor tower at 19h02. On 13 July 2015, Fortuin's cell phone was picked up in Worcestor at 06h04, then by the Merrydale tower at 07h40, then by the Neuman's Farm tower at 14h03, then by the Aloe High School tower at 14h55, and by a Worcestor tower at 16h07. On 7 September 2015, Fortuin's cell phone was picked up in Worcestor at 07h35, then by the Neuman's Farm and Pelican Park towers between 09h41 and 10h23, then by Aloe High School tower at 15h51, and by a Worcestor tower at 18h33.

they were joined by the two women after two months, and after another two months Gavin no longer came with them.

646. One sees from the Founding Statement of UTS that its sole member is Murphy. This is not in dispute. Nor is it disputed that Murphy is solely in charge of the finances and bank account of UTS: Jacobs testified as much. The regular payments made to Shafieka, Fortuin and Wenn for drug packing therefore serve to implicate Murphy in drug dealing, as the payments must have been made by Murphy (having regard to the evidence of Jacobs that Murphy was in total control of all monies coming into and going out of the UTS bank account).

647. UTS is also implicated by the fact that Shafieka listed UTS as her employer in the account opening form which she completed when she opened her Nedbank account, and furnished Murphy's cell phone number as her work telephone number (exhibit "H5").

648. A vital element in the State's case, which implicates both Shafieka and UTS (and therefore Murphy), is the evidence relating to the repeated purchase of large quantities of miniature plastic packets which are typically used for packing drugs for sale on the street.[157] The evidence of Osman from Easipack (Pty) Ltd shows that plastic packets had been purchased by an entity which called itself "Mervy's Trading" from 7 June 2012 to 12 February 2016. For present purposes it is relevant to note that such purchases were made on 26 November 2014, 17 February 2015,

[157] As testified by Colonel Smit.

28 April 2015, 22 June 2015 and 18 August 2015 - during the period covering the drug dealing counts in the indictment.

649. Osman identified packaging found in the back room at 1[...] R[...] Close as having been purchased from Easipack. His records showed that three of the purchases were paid for by debit cards, which were later traced back to UTS and Shafieka, which payments were made on 17 February 2015, 21 May 2015 and 20 August 2015, within the period relevant to the drug dealing counts.

650. As regards Davidson, it is common cause that he and his brother jointly own the property at 1[...] R[...] Close, and that he at all material times resided in the middle section of the house in a room adjacent to the room where the drugs were found. It is also common cause that Jones rented the front section of the property, and that another tenant rented a room at the rear of the property.

651. The case against Davidson is based cell phone data which places him at the property at the same time as Shafieka, Fortuin and Wenn, and which places Murphy on the property at odd times in the middle of the night and early hours of the morning. There is also evidence of some 66 cell phone communications between Murphy and Davidson between 10 February 2015 and 19 September 2015, including several communications between Murphy and Davidson, interspersed with communications between Murphy and Adv Twalo at the exact time when the police raid was taking place at 1[...] R[...] Close. (Adv Twalo previously represented Shafieka and later represented Davidson in this trial.)

652. As regards the charges against UTS, the criminal liability of corporations is regulated by s 332 of the CPA. The relevant subsection, for present purposes, is s 332(1), which essentially provides that any act performed by Murphy in the exercise of his powers as member of the close corporation, or on his instructions or with his permission, shall be deemed to have been performed by UTS and with the same intent as Murphy, if any.[158]

653. Against that general backdrop, I turn to examine the specific evidence relevant to the remaining counts in the indictment, commencing with the predicate offences in counts 4 to 225 and thereafter dealing with the racketeering charges in counts 1 to 3.

Counts 4 to 150: Drug dealing s 5(b), alternatively possession of drugs s 4(b): first, second, fourth and sixth accused

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[158] Section 332(1) of the CPA reads as follows:

For the purposes of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law -

(a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and

(b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body,

in the exercise of his powers or in the performance of his duties as such director or servant or in furthering the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body.

654. Dealing in drugs is very broadly defined in the Drugs Act. In addition to the ordinary meaning of "deal in", namely "*to buy and sell something*",[159] "deal in" is defined as including:

> *"... **performing any act in connection with the** transshipment, importation, cultivation, collection, manufacture, supply, prescription, administration, **sale**, transmission or exportation **of the drug**."*
> [Emphasis added.]

655. The drug in question, methamphetamine, or "tik" as it is commonly known, is an undesirable dependence-producing substance listed in Part III of Schedule 2 to the Drugs Act.

656. The revised count 150 relates to the tik and heroin found at 1[...] R[...] Close on 18 September 2015. Counts 4 to 148 relate to the alleged packing of an estimated 1kg of tik per day at 1[...] R[...] Close on specified dates between 18 November 2015 and 17 September 2015.

657. In relation to counts 4 to 148, the State was not able produce scientific proof that the substance involved was tik, or to prove the weight thereof. Instead, the State relies on the direct evidence of Fortuin that the women were packing tik, taken together with the circumstantial evidence that the substance seized on 18

[159] Merriam-Webster online Dictionary at www.merriam-webster.com

September 2015 was indeed tik, as established by forensic analysis. The estimate of 1 kg of tik per day is a minimum estimate based on the evidence of Fortuin regarding how much tik was usually packed in a day.

658. For the reasons set out in the judgment in the s 174 application, I consider that, whereas a conviction for drug dealing is not sustainable in the absence of scientific proof of the nature of the substance, a conviction for attempted drug dealing is competent in such circumstances if there is evidence that the parties thought that they were packing tik and intended to pack tik, as there is in this case. Proof of the weight of the substance is not necessary to sustain a conviction for an attempt to deal in tik.

Counts 4 to 47

659. Counts 4 to 47 relate to alleged drug packing activities at 1[...] R[...] Close between 18 November 2014 and 13 March 2015. This period falls within the period of one year before the search on 18 September 2015, when Jones says Murphy was bringing people to the property regularly. It precedes the period commencing in March 2015 when the Shafieka, Fortuin and Wenn opened bank accounts at Nedbank and began receiving regular payments from UTS.

660. Relevant to counts 4 to 47 is the evidence of Jones that Murphy initially brought Shafieka and Gavin to the premises, and later brought Shafieka with the two women to the premises. Also relevant is the evidence of Fortuin that Shafieka paid her in cash for a time before she opened her bank account in March 2015, and

that the women would find the tik which they had to pack in a suitcase beneath the bed at 1[...] R[...] Close. Her evidence in this regard is corroborated by the evidence of Van Meyeren that he found two laptop bags filled with tik under the bed in the back room at 1[...] R[...] Close during the search on 18 September 2015.

661. The State also relies on the cell phone data of Murphy and Shafieka which places them in the vicinity of 1[...] R[...] Close on various dates specified in counts 4 to 47. The available cell phone data for Shafieka commences from 18 November 2014, while the available cell phone data for Murphy commences from 31 January 2015.

662. The cell phone data for Shafieka (exhibit “LL”) places her within the vicinity of one of the towers servicing 1[...] R[...] Close on all the dates specified in counts 4 to 47, often for apparently long periods of time. This is consistent with the evidence of Jones that she was being dropped at the premises and fetched later in the day.

663. There is no cell phone data for Murphy prior to 31 January 2015. However, his cell phone data (exhibit “MM”) places him within the vicinity of one of the towers servicing 1[...] R[...] Close on all the dates specified in counts 23 to 47, from 2 February 2015 to 13 March 2015, mostly for short periods of time. That is consistent with Murphy dropping or fetching Shafieka, as testified by Jones.

664. One also sees that there were regular and frequent cell phone communications between Murphy and Shafieka while Shafieka was in the vicinity of of one of the

towers servicing 1[...] R[...] Close, and by inference at 1[...] R[...] Close, on virtually all the dates specified in counts 23 to 47.

665. On 5 March 2015, Murphy's cell phone data places him in the vicinity of one of the towers servicing 1[...] R[...] Close at between 20h47 and 21h18 at night, which is consistent with his fetching or dropping drugs at the premises, bearing in mind Fortuin's evidence that the tik was found and left in a suitcase under the bed, and the evidence of Van Meyeren that he found two laptop bags containing tik under the bed.

666. The only evidence against Davidson in regard to counts 4 to 47 is his ownership of and residence in 1[...] R[...] Close during the relevant period, cell phone data which goes to show that Davidson was present at 1[...] R[...] Close at the same time as Shafieka and the women on at least two occasions, cell phone communications between Davidson and Murphy, and Murphy's presence at 1[...] R[...] Close late at night and in the early hours of the morning. From this evidence the State seeks to draw the inference that Davidson knew that drugs were being packed and stored in the back room.

667. There is no evidence linking UTS to drug dealing prior to 17 February 2015, when a UTS card was used to purchase plastic packets from Easipack (Pty). The use of UTS funds on 17 February 2015 to purchase plastic packets used in drug packing links UTS to the charges in the indictment from 17 February 2015 to 13 March 2015, i.e. to counts 31 to 47.

Counts 48 to 148

668. Counts 48 to 148 relate to alleged drug packing activities at 1[...] R[...] Close between 16 March 2015 and 17 September 2015. Count 122 must be struck from the indictment as there is no reference to count 122 in Schedule 2 to the indictment, and no particulars furnished in regard to count 122.

669. As in the case of counts 4 to 47, the State relies on the oral testimony of Jones and Fortuin referred to above, together with the cell phone date of Murphy and Shafieka. In addition, the State relies on the cell phone data of Fortuin and Wenn, and the bank statements of UTS, Shafieka, Fortuin and Wenn. From 20 March 2015, payments were made to the three women from the UTS bank account, which payments Fortuin testified were for drug packing work done at 1[...] R[...] Close.

670. In order to analyse the cell phone evidence, I compiled a schedule setting out all the specified dates in counts 48 to 148, the dates and time periods when the cell phones of Shafieka, Murphy, Fortuin and Wenn were picked up by one of the towers servicing 1[...] R[...] Close, and the dates on which Shafieka, Fortuin and Wenn were paid by UTS. The schedule records the times when the cell phones were first and last picked up by one of the towers servicing Reindeer Close on a particular date. A copy of the schedule is annexed as Addendum A to this judgment.

671. The cell phone data for Shafieka for the period 16 March 2015 to 17 September 2015 shows that Shafieka was in the vicinity of one of the towers servicing 1[...] R[...] Close, and by inference at 1[...] R[...] Close, on each of the dates specified in counts 48 to 148, save for four dates, being 22 July 2015 (count 119), 29 July 2015 (count 125), 15 September 2015 (count 146) and 16 September 2015 (count 147).

672. The cell phone data for Murphy for the period 16 March 2015 to 17 September 2015 shows that Murphy was frequently in the vicinity of one of the towers servicing 1[...] R[...] Close, and by inference at 1[...] R[...] Close, during the day for short intervals consistent with dropping or fetching the women, and often late at night or in the early hours of the morning, for intervals consistent with fetching and/or dropping drugs at the premises. [160]

673. The cell phone data for Shafieka for this period (exhibit "LL") likewise shows frequent and regular communications between Shafieka and Murphy while Shafieka was in the vicinity of one of the towers servicing 1[...] R[...] Close, and by inference at 1[...] R[...] Close.

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[160] One sees, for example, that Murphy was in the vicinity between 00h15 and 00h44 on 18 March 2015, between 04h45 and 05h14 on 1 April 2015, between 03h32 and 03h35 on 12 May 2015, between 00h03 and 00h14 on 19 May 2015, at 03h07 on 25 June 2015, between 22h46 and 22h55 on 2 July 2015, between 01h13 and 01h15 on 22 July 2015, between 00h46 and 00h56 on 27 July 2015, at 04h01 on 11 August 2015, between 00h54 and 00h59 on 1 September 2015, and between 20h49 and 21h15 on 9 September 2015.

674. The available cell phone data for Fortuin covers the period 7 May 2015 to 18 September 2015. It places Fortuin in the vicinity of 1[...] R[...] Close on the forty dates specified in counts 80, 81, 82, 83, 84, 92, 94, 95, 96, 97, 101, 102, 103, 104, 105, 111, 112, 113, 115, 116, 117, 118, 120, 123, 124, 126, 128,130, 134, 135, 136, 137, 138, 139, 141, 142, 143, 144, 145 and 148. The fact that Fortuin's cell phone was not picked up by one of the towers servicing 1[...] R[...] Close on all the relevant dates does not necessarily mean she was not at 1[...] R[...] Close on those dates: it could mean that she did not have the cell phone in question with her at the time, or that her cell phone was not on or active at the time. In order to determine whether or not she was there, one has to have regard to other evidence which points to her regular presence there, such as the evidence of Jones and the bank statements, and the evidence of Fortuin herself.

675. The available cell phone data for Wenn covers the period 2 July 2015 to 18 September 2015. It places Wenn in the vicinity of 1[...] R[...] Close on the nineteen dates specified in counts 111, 116, 118, 120, 121, 123, 126, 129, 130, 131, 132, 133, 134, 135, 137, 138, 139, 140, and 144. Likewise, the fact that Wenn's cell phone was not picked in the vicinity of 1[...] R[...] Close on all the the dates in counts 48 to 148 does not necessarily that she was not there on those dates.

676. The cell phone data for Wenn, Fortuin and Shafieka shows that all three women were present in the vicinity of 1[...] R[...] Close on the dates specified in counts 111, 116, 118, 120, 126, 130, 135, 137, 138, 139, and 144. But, again, the fact that the cell phone data does not show that all three women were present together

for all the dates in counts 48 to 148 does not mean that they were not in fact there. What is important is that fact that Shafieka's cell phone data places her in the vicinity of 1[...] R[...] Close on each of the dates specified in counts 48 to 148, save for the four dates specified in counts 119, 125, 146 and 147.

677. The bank statements of UTS, Shafieka, Fortuin and Wenn, taken together with Fortuin's evidence that she was paid weekly for packing drugs, give an indication of the dates when the three women packed drugs at 1[...] R[...] Close.

678. The bank statements show that Shafieka was paid between R 4 000.00 and R 6 500.00, usually on a Friday (but sometimes on a Saturday, Monday or Thursday) for a working for between four and five days a week on different days of the week. The bank statements show that Fortuin and Wenn were paid at the same time as Shafieka, and that they were paid less than Shafieka. Initially Shafieka was paid R 4 000.00 per week, while Fortuin and Wenn were paid R 1 600.00. Later Shafieka was paid R 5 000.00 per week on average, while Fortuin and Wenn were paid R 2 000.00 per week on average.

679. In relation to counts 146 and 147, there is no cell phone data placing Shafieka, Fortuin, Wenn or Murphy in the vicinity of one of the towers servicing 1[...] R[...] Close. Nor is there any evidence of payments to the women for drug packing work allegedly done on these dates, as the three women did not receive the customary payment from UTS on 18 or 19 September 2015. The last payment to they received before the police raid was on 11 September 2015. Thereafter Fortuin and Wenn

received no further payments from UTS, and Shafieka received only four payments of R 1 000.00, on 16, 23 and October 2015, and 30 November 2015.

680. As in the case of counts 4 to 47, there is likewise no evidence against Davidson in relation to counts 48 to 148, save for the circumstantial evidence referred to above.

Revised count 150

681. The evidence relevant to count 150 is the evidence of Jones that Murphy brought the women to 1[...] R[...] Close on the morning of 18 September 2015, the evidence of Fortuin that she, Wenn and Shafieka were busy packing tik in the back room at 1[...] R[...] Close, the evidence of Van Meyeren regarding the drugs and drug packing equipment found in the room, and the forensic evidence of Warrant Officer Ndesi that the substances found in the room were tik (8 929.87 g) and heroin (729.77 g).

682. Also relevant is Murphy's cell phone data which shows that his cell phone was picked up by the Lotus River and Neuman's Farm cell phone towers in the early hours of the morning between 12h45 and 01h07, by inference placing him at 1[...] R[...] Close.

Counts 151 - 221: money laundering: first, second and sixth accused (salary payments)

683. Counts 151 to 175 relate to the salary payments made by UTS to Shafieka (counts 151 to 175), Fortuin (counts 176 to 197) and Wenn (counts 198 to 221) for drug packing during the period 20 March 2015 to 11 September 2015.

684. The relevant provision is s 4 of POCA, which reads as follows:

"4. Money laundering

Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and -

(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or

(b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person,

which has or is likely to have the effect -

(i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or

(ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere -'

(aa) to avoid prosecution; or

(bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence,

shall be guilty of an offence."

685. The State's case is that Murphy made the salary payments to the women from the UTS bank account, that Shafieka opened a bank account and received her payments and also arranged for Fortuin and Wenn to open bank accounts to receive their payments, and that Murphy, Shafieka and UTS knew, alternatively

ought reasonably to have known, that the funds in the bank account of UTS used to pay the salaries consisted in part of the proceeds of unlawful activity (i.e. drug dealing), and further that the payments had, or were likely to have, the effects referred to in s 4(b)(i) or (ii) of POCA.

686. It bears emphasis that what is important is not the purpose for which the salary payments were made, but the source of the funds from which the payments were made. The "*property*" referred to in s 4 of POCA is the money in the UTS bank account used to fund the salary payments. In order to sustain counts 151 to 221, the State is required to prove a) that the UTS bank account contained funds acquired from unlawful drug dealing activities, b) that the accused had actual knowledge of that fact, or ought reasonably to have known that that was the case and c) that the payments had or were likely to have the effect referred to in s 4(b)(i) or (ii) of POCA.

687. The relevant evidence in relation to these counts is the evidence of Fortuin that she received payments into her Nedbank account from UTS for packing drugs at 1[...] R[...] Close, together with the bank statements of UTS and the three women, which prove the payments.

688. There is also the evidence of Fortuin that she used to be paid in cash by Shafieka before she opened her bank account. Fortuin testified that she decided to open a bank account on her own initiative, while Wenn testified that she was told by Shafieka to open a bank account. Neither version is reliable, because both

witnesses were likely protecting Murphy. What is irrefutable is that, in March 2015, the three women opened bank accounts with Nedbank and began receiving salary payments therein from UTS.

689. Murphy and UTS are implicated by virtue of Murphy's control of the bank account, and Shafieka by her having received payments from UTS into her Nedbank account.

690. There is circumstantial evidence which goes to show that the funds in the UTS bank account consisted, at least in part, of the proceeds of unlawful drug dealing:

690.1. First, there is the panoply of evidence referred to above in connection with counts 4 to 150, which goes to show that Murphy and Shafieka were engaged in drug dealing activities during the period 18 November 2014 to 18 September 2015.

690.2. Second, there is the evidence that cash in an amount of R 1 924 020.00 was found stored in the back room at 1[...] R[...] Close, which likely represents proceeds from the sale of drugs.

690.3. Third, throughout the period from September 2014 to August 2015, there are frequent unexplained cash deposits into the UTS bank account. Those deposits include cash deposits, usually for the amount of R 70 000.00, ostensibly made by Shafieka (because her name is given as a reference and the deposit slip bears what appears to be her signature if one compares

it with the signature on her Nedbank account opening form), and by Johain Le Fleur, Shafieka's husband or partner.

690.4. Fourth, there are a number of suspicious features regarding the transactions in the UTS bank account, as I elaborate below.

Suspicious circumstances regarding the transactions in the UTS bank account

691. It is striking that most of the transaction descriptions in the UTS bank account are extraordinarily vague. Thus one sees:

691.1. descriptions such as "vehicle sales" or "vehicle purchase", whereas one would expect to see a description of the vehicle purchased or sold and/or the seller or purchaser, as one does indeed see on occasion, such as the reference to the purchase of a Tata Super Ace 1.4 Diezel and the sale of a BMW E-46 to Mr Twalo;

691.2. descriptions such as "vehicle parts and repairs", or "truck repairs and services", or "tiles and glue", or "cement purchase" - all for fairly substantial amounts, whereas on occasion one sees more detail provided, usually for smaller payments, for instance to "Builders Warehouse", "Zeds Plumbing", "Barons N1 City", "Forsdicks BMW" or "Jack Lemkus";

691.3. multiple payments to "salary", "personal loan" and "loan" without identifying the salary recipient or the loan debtor;

691.4. multiple payments to “bond account” at irregular intervals instead of at monthly intervals, without specifying the bond account number or property address, and where the mortgage account number is not reflected in the bank statements.

692. Another striking feature about the UTS account is the unusually high number of cash payments into the account. Thus one sees:

692.1. vast numbers of cash deposits by individuals for undisclosed purposes, whereas one would expect the payments to be made by EFT and the transaction details to be referenced if the payments were for legitimate business;

692.2. frequent cash deposits ostensibly for building work, such as R 49 000.00 for “kitchen” on 25 August 2015 and R 180 000.00 for “fix-paint-tile” on 10 September 2015, whereas one would expect payments for *bona fide* building work to be received by way of EFT, not in cash;

692.3. large cash deposits ostensibly for motor vehicle sales, such as R 120 000.00 for “vehicle sales” on 15 April 2014, R 20 000.00 for “vehicle sales” on 17 April 2014, R 370 690.00 for “vehicle sales ulterior” on 19 June 2014, R 355 000.00 for “A5 Audi” on 1 August 2015, and R 48 300.00 for “BMW E 32 vehicle sales” on 13 August 2015, whereas one would expect the payments for *bona fide* vehicle sales to be received by EFT, not in cash;

692.4. a cash deposit of R 164 160.00 made by UTS into its own bank account on 3 February 2015, without any reference to the source of the funds.

693. There is also the evidence of Jacobs that Murphy had him deposit cash funds received from vehicle sales into the UTS bank account, which raises the obvious question of why a *bona fide* vehicle purchaser who wished to pay in cash would hand the cash over to Murphy instead of simply depositing the funds directly into the UTS bank account. There is also the question of why so many purchasers would have elected to pay in cash for their vehicles. While one could accept that a few might pay in cash, this was apparently the norm judging by the UTS bank statements, and I consider it beyond the realms of reasonable possibility that these were all cash payments for *bona fide*, legitimate business. To my mind the ineluctable inference which arises in the circumstances is that the reason why the payments were received in cash is that they derived from illegal drug sales.

694. The overriding impression which one gets from scrutinizing the UTS account against the backdrop of all the evidence, is that the narrations appended to the transactions are mere “window dressing” intended to create a semblance of legitimacy to conceal or disguise the nature and source of the funds in the account.

Count 223: money laundering: first and fourth accused (stored cash)

695. The evidence relevant to this count is a) the evidence of Van Meyeren that, on the day of the search, he found three carry bags filled with cash stored in a wardrobe

at 1[...] R[...] Close, b) the evidence of Britz that the cash amounted to R 1 194 020.00, made up in denominations of R 200.00, R 100.00, R 50.00, R 20.00, and R 10.00, and that it is common to find stashes of cash together with illegal drugs.

696. Also relevant is Murphy's cell phone data, which frequently places him in the vicinity of 1[...] R[...] Close in the middle of the night or early hours of the morning, in particular at shortly after midnight on 18 September 2015, i.e. early in the morning on the day of the raid, and, generally, the entire panoply of evidence relating to the drug dealing counts in 4 to 150.

697. There is no evidence implicating Davidson on this count, save for that referred to above.

698. In respect of count 223 the State is required to prove that the accused a) knew that the cash represented the proceeds of unlawful activity, or ought to have known that this was the case, b) stored the cash at 1[...] R[...] Close, or knowingly allowed the cash to be stored there, and c) that the storage of the cash at 1[...] R[...] Close had or was likely to have the effect referred to in s 4(b)(i) or (ii) of POCA.

Counts 224 and 225: money laundering: first and sixth accused (purchase of properties)

699. These counts relate to the purchase by UTS, represented by Murphy, of a property in Worcestor on 11 March 2015 (count 224) and a property in Parklands on 3 March 2015 (count 225).

700. The purchase price for the Worcestor property was R 265 000.00, which was paid by EFT from the UTS bank account on 8 April 2015.

701. The purchase price of the Parklands property was R 2.5 million, R 100 000.00 of which was paid by EFT from the bank account of UTS, and R 2.4 million of which was paid in cash on 11 March 2015 in denominations of R 50.00, R 100.00 and R 200.00.[161] The relevant deposit slip references UTS as the depositor, without specifying the name of the individual who made the deposit.

702. As in the case of counts 151 to 221, in respect of the Worcestor property (count 224), which was paid for by EFT from the bank account of UTS, the State is required to prove a) that the UTS bank account contained funds acquired from unlawful drug dealing activities, b) that Murphy had actual knowledge of that fact or ought reasonably to have known that that was the case, and c) that the use of the funds to acquire the Worcestor property had or was likely to have the effect referred to in s 4(b)(i) or (ii) of POCA.

703. In the case of the Parklands property (count 225), which was paid for in cash, the State is required to prove a) that the cash represented the proceeds of unlawful drug dealing activities, and that Murphy had actual knowledge of that fact or ought reasonably to have known that that was the case, and b) that the use of the funds

[161] R 680 100.00 in R 50.00 notes, R 1 051 700.00 in R 100.00 notes, and R 668 200.00 in R 200.00 notes.

to acquire the Parklands property had or was likely to have the effect referred to in s 4(b) of POCA.

Counts 1 - 3: the racketeering charges

704. In order to sustain the charges in counts 1 to 3, the State is required to prove the existence of an enterprise and a pattern of racketeering activity, elements which are common to all three counts.

705. The definition of an enterprise is very wide: it includes "any individual, partnership, corporation, association, or other juristic or legal entity, and any union or group of individuals associated in fact, although not a juristic or legal entity.

706. In *Eyssen v S* 2009 (1) SACR 406 (SCA) at para [6] the court stated as follows with regard to the definition of an enterprise in s 1 of POCA:

> *"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 fact; those which the Legislature has not included specifically would 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 the 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 discrete. Proof of the pattern may establish proof of the enterprise, but this will not inevitably be the case."

[Emphasis added.]

707. The court in *Eyssen (supra)* held as follows at para [8] regarding the meaning of "*pattern of racketeering activity*":

" … That concept is defined as follows: ' "pattern of racketeering activity" means the planned, ongoing, 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 commission of such prior offence referred to in Schedule 1.' The word 'planned' cannot be read eiusdem generis with 'ongoing, continuous or repeated' and accordingly qualifies all three. The relevant meaning of 'pattern' is given in the Oxford English Dictionary as 'an order or form discernible in things, actions, ideas, situations, etc. Frequently with of as pattern of behaviour = behaviour pattern . . . .' 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. The participation must be by way of ongoing, continuous or repeated participation or involvement. The use of '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. …"

[Emphasis added.]

708. In this case the State relies on the pattern of conduct to establish the existence of the enterprise.

709. The relevant evidence is the evidence of Jones regarding Murphy bringing the women to and from 1[...] R[...] Close, together with the evidence of Fortuin regarding the repeated drug packing at 1[...] R[...] Close, and her evidence that Shafieka would communicate with her by Whats App when they would be working, coupled with the contents of the cell phone records and bank statements which showed a regular pattern of ongoing and repeated drug packing activity paid for out of the bank account of UTS, as well as the circumstantial evidence that Murphy placed the drugs under the bed to be found by the women, all of which goes to show both that there was:

709.1. an enterprise in the form of a conscious and ongoing association between Murphy, UTS, Shafieka, Wenn and Fortuin which functioned as a continuing unit, the common purpose whereof was to sell drugs; and

709.2. a pattern of racketeering activity in the form of the planned, ongoing and or repeated participation or involvement in the offence of drug dealing.

710. I should mention that, in my view, it has not been established that money laundering was one of the purposes of the enterprise as it is not clear that this was a common purpose shared by all the members of the enterprise, as opposed to an objective of Murphy alone.

711. Count 1, involving Murphy and Shafieka, is a charge framed under s 2(1)(f) of POCA, which provides that:

> *"Any person who manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity, shall be guilty of an offence."*

712. Bozalek J held in *S v De Vries & others* 2009 (1) SACR 613 (C) at para 380, that the State, in order to prove an offence in terms of s 2(1)(f) of POCA, must prove the following elements:

(a) that an 'enterprise' existed;
(b) that the accused managed the operations or activities of the enterprise;
(c) that a 'pattern of racketeering activity' took place; and
(d) that the accused knew, or should reasonably have known, that a pattern of racketeering activity took place.

713. Count 2, which was preferred against Murphy, Shafieka, Davidson and UTS, is framed under s 2(1)(e) of POCA, which 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."*

714. In order to prove an offence in terms of s 2(1)(e) of POCA, the State must prove the following elements:

(a) that an 'enterprise' existed;

(b) that the accused managed, was employed by, or associated with the enterprise;

(c) that a pattern of racketeering activity took place;

(d) the accused's participation (direct or indirect) in the affairs of the enterprise by way of a pattern of racketeering activity.

715. Common to both ss 2(1)(e) and 2(1)(f) is the word "*manage*". This word is not defined in POCA and therefor bears its ordinary dictionary meaning, which was held in De Vries v S (*supra*) to include the following: *"1. [To] be in charge of; run [Or] 2. Supervise staff [Or] 3.[To] be the manager of a (sports team or a performer).*"

716. The evidence referred to above which serves to establish the existence of the enterprise and the pattern of racketeering activity, is also relevant to establish the other elements of counts 1 and 2, namely the association of Murphy, Shafieka and UTS with the enterprise, their respective participation in the affairs of the enterprise, and the managerial role played by Murphy and Shafieka as well as their direct knowledge of their own, and others', participation in the conduct of the affairs of the enterprise through a pattern of racketeering activity. That Shafieka managed or supervised Wenn and Fortuin is evident from the fact that she was paid significantly more than them, indicating an elevated position in the enterprise. Shafieka was also the person who held the key to access the premises at 1[...] R[...] Close.

717. Count 3, which is likewise preferred against Murphy, Shafieka, Davidson and UTS, is framed under s 2(1)(b) of POCA, which reads as follows in relevant part:

> *"Any person who receives or retains any property, directly or indirectly, on behalf of any enterprise, and knows or ought reasonably to have known that such property derived or is derived from or through a pattern of racketeering activity … shall be guilty of an offence."*

718. In order to prove an offence under s 2(1)(b) of POCA, the State must prove the following elements:

(a) that an 'enterprise' existed;

(b) that the accused received or retained property (directly or indirectly) on behalf of the enterprise;

(c) that a pattern of racketeering activity took place;

(d) that the property derived from or through a pattern of racketeering activity;

(e) that the accused knew, or ought reasonably to have known, that the property derived from or through a pattern of racketeering activity.

719. Having regard to count 3 of the indictment, read with schedule 1 thereto, one sees that, in relation to the drug dealing counts (4 to 150), the State's case is that Murphy, Shafieka, Davidson and UTS received or retained drugs on behalf of the enterprise. In regard to the money laundering counts involving salary payments (counts 151 to 221) it is alleged that Murphy, Shafieka and UTS received or retained "dirty" money on behalf of the enterprise. In relation to money laundering count 223 (money stored at 1[...] R[...] Close) it is alleged that Murphy and Davidson received or retained "dirty" money on behalf of the enterprise. In relation to money laundering counts 224 and 225 (purchase of immovable properties), it is alleged that Murphy and UTS received or retained "dirty" money and property on behalf of the enterprise.

720. The words "received" and "retained" are not defined in POCA and must bear their ordinary meanings, which in this context include:

720.1. receive: to be given, presented with or paid (something); to take delivery of (something sent or communicated); to buy or

accept goods; to serve as a receptacle for; to provide space or accommodation for;

720.2. retain: continue to have (something); keep possession of; maintain; keep (something) in place (see Oxford Languages Dictionary).

721. The evidence relied on by the State in relation to count 3 is the evidence (including circumstantial evidence) that:

721.1. Murphy brought the drugs to 1[...] R[...] Close, left them under the bed, and collected them again;

721.2. Shafieka worked with the drugs;

721.3. Davidson provided the accommodation where the drugs were stored and packed, and where money was stored;

721.4. UTS retained “dirty” money derived from drug dealing in its bank account.

722. In my view the charges in relation to count 3 are indiscriminately framed and are misconceived in certain respects, *inter alia* because insufficient attention has been paid to the requirement that the property be received or retained on behalf of the enterprise. In this regard:

722.1. There is no evidence to show that UTS, as opposed to Murphy in his personal capacity, received or retained the drugs referred to in counts 4 to 150.

722.2. In regard to the salary payments, Murphy did not receive or retain any money on behalf of the enterprise, and it seems clear that Shafieka received and retained her salary payments for herself, not on behalf of the enterprise.

722.3. In relation to the purchase of immovable properties, it seems to me that neither Murphy nor UTS retained the funds used to purchase the properties and/or the properties themselves on behalf of the enterprise: the funds and properties were retained directly by UTS, and indirectly by Murphy, for Murphy's benefit.

The evidence on behalf of Murphy and UTS

723. The essence of Jacobs' evidence is that UTS and Murphy conducted legitimate business in construction and car sales, that he was not aware of any unlawful activities on the part of UTS or Murphy, and that Shafieka, Fortuin and Wenn did indeed clean houses constructed by UTS and were paid by UTS.

724. For the reasons mentioned above, I have grave doubts about the veracity of Jacobs' evidence.

Weighing the evidence

725. It is convenient to deal first with the evidence against Davidson, and thereafter with the evidence against Murphy, UTS and Shafieka.

Davidson

726. The case against Davidson is entirely circumstantial, based on his ownership of and residence at 1[...] R[...] Close in close proximity to where the drugs were packed, his presence at the house at the same time as the three women on two occasions, Murphy's presence at the house at suspicious times in the middle of the night and early hours of the morning, and various cell phone communications with Murphy (in particular his cell phone communications with Murphy at the time when the police raid was taking place on 18 September 2015).

727. In order to convict Davidson on any of the counts with which he is charged, I would have to be able to infer that <u>he knew that the room was being used for the packing and storage of drugs</u>. In the absence of proof of such knowledge, the State cannot prove Davidson's association with and participation in the affairs of the alleged enterprise.

728. The inference of guilty knowledge must be consistent with all the proved facts, which must exclude every reasonable inference save the one sought to be drawn (see *R v Blom* 1939 AD 188 at 202 - 203).

729. To my mind the proved facts do not exclude every inference, save the inference of guilty knowledge. In the first instance, one knows that Davidson rented out rooms in the house to tenants, including Jones in the front section of the house and another tenant in the room behind the garage. It is thus not unusual that he would have rented out the spare room.

730. Nor can one infer that Davidson must have known that Murphy was suspected of being a drug dealer, because one knows that Jones was unaware of that fact until he saw the article in the voice. Davidson's knowledge of the purpose for which the room was being rented would have depended on what Murphy told him. And ones knows from Jones's evidence that Murphy gave him to understand that Shafieka was a nurse who worked shifts. It is not inconceivable that Murphy deceived Davidson regarding the use to which the room would be put.

731. Based on Jones's evidence, which is supported by Davidson's cell phone data, one knows that Davidson was absent from the house during the day when the evidence shows that the three women were present at the house. I could only find two instances in the cell phone data showing that Davidson and the women were present at the house at the same time. Davidson's mere presence in the house at the same time as the women does not give rise to an inescapable inference that he knew what they were doing in the room. They were likely working behind a closed door.

732. And when the women were not there, one knows from the evidence of Fortuin that the room was kept locked, and that Shafieka Murphy had the key. Thus Davidson might well not have had access to the room, and it is not inconceivable that he might have been ignorant of what was taking place there.

733. I carefully scrutinized Davidson's cell phone data for evidence of communications with Murphy between 1 September 2014 and 19 September 2015. I found evidence of communications on 13 days in the entire period, including 18 and 19 September 2015. With the exception of 18 and 19 September 2015, the frequency and intervals of communication were consistent with communication about arrangements for payment of rental or other landlord-tenant issues.[162] The frequency of communication did not support an inescapable inference that Davidson and Murphy were communicating about the affairs of the enterprise.

734. As to Murphy's presence at the house at odd times during the night, one cannot infer that Davidson was necessarily aware of his presence. It is reasonably possible that Murphy let himself in and out of the house undetected while Davidson was asleep.

735. One sees that in the early hours of the morning on 18 September 2015, just after midnight, there were a series of text messages exchanged between Murphy and Davidson between 12h32 and 12h38, followed by Murphy's physical presence in

[162] The dates identified were: 10 February 2015, 24 February 2015, 16 March 2015, 21 March 2015, 11 April 2015, 3 May 2015, 6 May 2015, 15 May 2015, 22 July 2015, 25 July 2015, 27 August 2015, 18 and 19 September 2015.

the vicinity of 1[...] R[...] Close, and by inference at the property, between 12h50 and 01h04. While the circumstances are highly suspicious, they do not sustain a necessary inference that Davidson knew that Murphy was coming to the property to drop drugs and/or money there. Again, Davidson's knowledge would have been based on what Murphy told him, and that one does not know. It is entirely possible that Murphy spun Davidson a yarn to explain his presence there at that time.

736. Much was made by the State of the fact that there were several communications between Davidson and Murphy at the time when the police raid was taking place at 1[...] R[...] Close. One cannot infer, however, that this indicates a knowledge of unlawful activity on the part of Davidson. If Davidson in fact had no clue regarding the illicit drug packing activity, one would expect him to inform Murphy that the police were raiding the premises and to enquire from Murphy why this was happening.

737. In short, while the circumstances are indeed exceedingly suspicious, the proved facts are insufficient to sustain a necessary inference that Davidson knew that drug packing was taking place in the room, and in the absence of such guilty knowledge he cannot be convicted on any of the counts and must be acquitted.

Murphy, Shafieka and UTS

738. Having regard to the panoply of evidence referred to above, I consider that the State has adduced strong inculpatory evidence against Murphy, Shafieka and UTS which makes out a compelling *prima facie* case. While the accused are not under

any obligation to testify, that does not immunize them against the consequences of a failure to provide an explanation which serves to negate the inferences relied on by the State (see *S v Boesak* 2001 (1) SA 912 (CC) at para 24.)

739. Shafieka did not testify herself or call any witnesses. The only evidence put up by Murphy to rebut the State's case is the weak evidence of Jacobs, which I have rejected as false for the reasons set out above. In particular, I reject the evidence that Shafieka, Wenn and Fortuin were being paid by UTS for cleaning newly built houses. I also place no weight on Jacobs' self conscious statement that he observed no unlawful activity on the part of Murphy or UTS.

740. Jacobs' evidence that UTS was engaged in legitimate construction and car sale activities does not provide an answer to the State's case, for it is in the very nature of money laundering to engage in legitimate business activities as a front to conceal the nature and source of funds derived from unlawful activities. The relevant question is whether the UTS bank account functioned as a repository for the proceeds of drug dealing, regardless of whether or not there were legitimate funds in the account as well. On Jacobs' own admission, Murphy was in sole control of all monies coming into and going out of the UTS bank account, and Murphy received all cash payments directly from clients, and gave the cash to Jacobs to deposit into the UTS bank account. Jacobs had no personal knowledge regarding the reasons for and provenance of the cash payments made to Murphy, which Jacobs deposited into the UTS bank account. He also did not explain why the majority of payments into the UTS account were made by way of cash deposits.

741. In contrast with the weak evidence of Jacobs, there is the compelling evidence put up by the State which creates an impenetrable network of interlocking facts: there is the evidence of what was discovered at 1[...] R[...] Close on 18 September 2015, which shows that the operation had been ongoing for some time; there is the evidence of Jones, placing Murphy, Shafieka and the three women at the premises at 1[...] R[...] Close at regular intervals, which is supported by the evidence of Fortuin, and the evidence of the cell phone data, particularly that of Shafieka which places her in the vicinity of 1[...] R[...] Close on every one of the dates specified in the indictment with regard to the drug dealing counts save for four dates; there is the evidence of frequent cell phone communication between Shafieka and Murphy while she was in the vicinity of 1[...] R[...] Close, there is the evidence of purchases by Shafieka and UTS of small plastic packets used for drug packing throughout the relevant period in the indictment; there are the bank statements which show that UTS paid the three women at regular intervals corresponding with the number of days worked in a week, coupled with Fortuin's evidence that the payments were for packing drugs; there is the evidence of Fortuin that the drugs were found and left in a suitcase beneath the bed in the drug packing room, together with the cell phone data for Murphy which places him in the vicinity of 1[...] R[...] Close for short intervals in the middle of the night. The evidence stacks up; each piece of evidence neatly completes the jigsaw puzzle of the State's case.

742. One of the cardinal inferences relied on by the State in relation to the drug dealing counts is that, whenever the cell phone data for Murphy, Shafieka, Wenn and

Fortuin placed them within the vicinity of 1[...] R[...] Close, they were in fact present at 1[...] R[...] Close (save for 18 September 2015 in the case of Murphy, when he was not in fact present at the property during the police raid, but was indeed somewhere in the vicinity of 1[...] R[...] Close, as indicated by the cell phone tower picking by his cell phone activity).

743. For the reasons I have already given, I consider that, given the totality of the evidence, this is a legitimate inference to draw. It bears emphasis that one is not relying on the cell phone data in isolation, but on the cell phone data viewed in conjunction with the panoply of other evidence which puts these individuals on the scene at 1[...] R[...] Close, and which supports and strengthens the inference.

744. In regard to the money laundering charges, and the question of whether or not the State can show that there was “dirty” money in the UTS bank account, or that the money found stored at 1[...] R[...] Close was “dirty”, or that the cash used to pay for the Parklands property was “dirty”, if one accepts that Murphy and Shafieka were engaged in packing drugs at 1[...] R[...] Close, it gives rise to an ineluctable inference that the drugs were then sold on the street for cash. The concealment of a large amount of cash in different denominations in the drug packing room at 1[...] R[...] Close gives rise to a strong inference that the money derived from drug sales. The unusually high incidence of cash deposits into the UTS bank account - with no transparency as to the reasons for the payments - likewise gives rise to a strong inference that drug money was being deposited into the UTS bank account. This inference is strengthened by the evidence of Jacobs that Murphy would receive

cash payments for vehicle sales and get Jacobs to deposit the money into the account. I reject Jacob's evidence that the money derived from the sale of vehicles. To my mind it is highly improbable - indeed beyond reasonable belief - that multiple numbers of *bona fide* vehicle purchasers would present Murphy with stashes of cash to pay for their vehicles.

745. In my judgment, the weight of the evidence adduced by the State is such that it calls for an answer. The evidence points overwhelmingly to the guilt of the accused in relation to the particular counts specified below. In the absence of an explanation by Shafieka, I consider that the evidence is sufficient to establish her guilt. In the case of Murphy and UTS, I consider that the evidence of Jacobs, far from rebutting the State's *prima facie* case, indeed serves to strengthen the State's case, for, as I have found, Jacobs was a lying witness used as a charade to bolster the notion that UTS operated solely as a legitimate business.

746. I therefore conclude that the evidence adduced by the State is sufficient to establish the guilt of the accused on the various counts set out below.

FINDINGS

747. I shall commence with the predicate offences and conclude with the racketeering charges.

Davidson

748. For the reasons referred to above, I find that the State has not met the burden of proof in respect of Davidson, and I therefore find Davidson not guilty on all counts.

The drug dealing counts

749. In relation to drug dealing counts 4 to 47, the evidence points overwhelmingly to the fact that Murphy and Shafieka made common purpose to pack drugs for sale, that Murphy made arrangements for the use of the room in 1[...] R[...] Close for purposes of packing and storing drugs, that Murphy regularly brought drugs to and from the room, and that Shafieka herself packed the tik left by Murphy in the room, and supervised Fortuin and Wenn in the packing of the tik. The same applies to counts 48 to 148. The crucial link which establishes when the drug packing took place is the cell phone data of Shafieka, which places her at 1[...] R[...] Close on all the dates specified in counts 4 to 150, save for the dates in counts 119, 125, 146 and 147 when her cell phone was not picked up by one of the towers servicing 1[...] R[...] Close, leaving a doubt as to whether or not drug packing took place on those particular dates.

750. The only evidence implicating UTS in drug dealing prior to March 2015 is the evidence that UTS's card was used on 17 February 2015 to pay for a purchase of plastic packets used to package tik, which must have been used for drug packing activities from that date. As testified by Jacobs, Murphy was in total control of all money coming into and going out of the UTS account. Therefore, even if he did not make the purchase himself, he had to have approved the purchase. His actions

in doing so amounted to the exercise of his power as member of UTS to manage the affairs of UTS. Therefore the conditions for liability set out in s 332(1) of the CPA are satisfied, and UTS is therefore liable to be convicted on counts 31 to 47 relating to the period from 17 February 2015 to 13 March 2015. UTS must, however, be acquitted on counts 4 to 30 for lack of evidence.

751. From the dates specified in counts 48 to 148 (save for the dates in counts 119, 125, 146 and 147 when drug packing has not been established), UTS was complicit in the drug dealing in that, acting through the controlling mind and hands of Murphy, it paid the women for their drug dealing activities. To my mind the act of paying another person to perform the work of drug packing falls within the broad definition of drug dealing as an act performed in connection with the sale of the drug. Again, the conditions for liability under s 332(1) of the CPA are satisfied inasmuch as when he paid the women, Murphy acted in the exercise of his powers as sole member and managed of the UTS, with the result that his actions and intent are deemed to be those of UTS.

752. For the reasons I have already stated above, a conviction for drug dealing is not competent in counts 4 to 148 because the State was, in the nature of things, unable to adduce scientific proof of the nature of the substance. However, one knows from the evidence of Fortuin, that they believed they were packing tik and intended to pack tik, and the same no doubt goes for Murphy and Shafieka. In the circumstances they may both be convicted of attempted drug dealing.

753. I therefore find Murphy and Shafieka guilty on counts 4 to 118, 120, 121, 123, 124, 126 to 145 and 148 of the attempt to deal in drugs in contravention of s 5(b) of the Drugs Act, in respect of all the dates on which Shafieka's cell phone data placed her at 1[...] R[...] Close, indicating that drug packing took place on those particular dates, with the knowledge and concurrence of Murphy .

754. I find UTS not guilty on counts 4 to 30, and guilty on counts 31 to 118, 120, 121, 123, 124, 126 to 145 and 148 of the attempt to deal in drugs in contravention of s 5(b) of the Drugs Act.

755. In regard to the revised count 150, which relates to the tik and heroin found at 1[...] R[...] Close on 18 September 2015, not only was Shafieka caught red-handed packing drugs, but Murphy's cell phone data places him in the vicinity of 1[...] R[...] Close in the early hours of the morning on 18 September 2015, for approximately 30 minutes, giving rise to an irresistible inference that he visited the house in order to drop off the tik which the women found under the bed in the morning when they arrived there to pack the drug.

756. There is however no evidence implicating UTS in respect of count 150, as the last payment made to the women prior to the raid on 18 September 2015 was made on 11 September 2015.

757. I therefore find Murphy and Shafieka guilty as charged on count 150, and I find UTS not guilty on count 150.

The money laundering counts

The EFT payments

758. In relation to counts 151 to 221 concerning the salary payments made to Shafieka, Wenn and Fortuin from the UTS bank account, and count 224 concerning the purchase of the Worcestor property with funds from the UTS bank account, the State is required to prove first and foremost that the funds in the UTS bank account at the time of the payments consisted in part of money derived from unlawful drug dealing, i.e. “dirty money” or “drug money” as it is commonly referred to.

759. The salary payments were made by EFT between March and September 2015, while the payment for the purchase price of the Worcestor property was made by EFT on 8 April 2015.

760. The panoply of evidence referred to above which serves to establish that Murphy and Shafieka were engaged in the packing of tik between November 2014 and September 2015 also gives rise to the irresistible inference that they were engaged in the sale of tik during that period.

761. In addition, there are numerous suspicious circumstances concerning the bank account of UTS, to which I have referred above, which call for an answer. In particular, there is the evidence of numerous unexplained cash deposits into the UTS bank account throughout the period between November 2014 and September

2015. The cash deposits include regular cash deposits linked to Shafieka through her name and what appears to be her signature on the UTS desposit slip, for sizeable amounts, usually R 70 000.00.

762. There is also the evidence of Jacobs that Murphy would give him cash from car sales to deposit into the UTS bank account. For the reasons set out above, I have rejected the evidence that all the payments attributed to car sales did in fact derive from car sales. To my mind the evidence points to the fact that many, if not all, the cash deposits into the UTS bank account represented monies derived from drug sales.

763. To my mind the circumstances are such as to give rise to an irresistible inference that the UTS bank account was used to conceal funds derived from the sale of illegal drugs, and that, at the time when the salary payments were made to the three women, and when the payment for the Worcestor property was made, the funds in the UTS bank account consisted in part, if not largely, of the proceeds of unlawful drug sales.

764. By virtue of his involvement in the drug dealing activities and his control of the funds in the UTS bank account, there is no doubt that Murphy, and UTS through the controlling mind of Murphy, would have known that the UTS bank account contained the proceeds of unlawful drug sales. To my mind that is also the case with Shafieka. Not only was she involved in the packing of the tik, but her regular, unexplained cash deposits into the bank account of UTS suggest that she was

also selling drugs and depositing at least some of the proceeds into the UTS bank account.

765. In the absence of an innocent explanation on the part of the accused regarding the nature and origin of the cash deposits into the UTS account in the face of the many suspicious circumstances to which I have referred, I find that the State has proved that the UTS bank account at all relevant times contained funds derived from unlawful drug dealing, and that Murphy, Shafieka and UTS were aware that this was the case.

766. I furthermore find that the salary payments and the purchase of the Worcestor property had, or were likely to have the effect, of concealing and disguising the nature and source of the drug money contained in the UTS bank account, as contemplated in s 4(b)(i) of POCA, and of assisting Murphy and Shafieka, who were committing the offence of drug dealing, to avoid prosecution and to remove or diminish the property acquired as a result of the commission of an offence, viz. the proceeds of illegal drug sales, as contemplated in s 4(b)(ii)(aa) and (bb) of POCA.

767. As regards the salary payments made to Wenn and Fortuin, there is no reliable evidence linking Shafieka to those payments. Wenn and Fortuin gave inconsistent evidence on this aspect. Fortuin testified that she opened her bank account of her own accord. Wenn testified that Shafieka told her to open a bank account to receive her salary payments as Shafieka no longer wished to pay her cash. I

consider that no reliance can be placed on Wenn's evidence in this regard because of her tendency to shield Murphy at the expenses of Shafieka. It follows that Shafieka must be acquitted in respect of the charges based on the salary payments to Wenn and Fortuin, as one cannot exclude the possibility that it was Murphy, and not Shafieka, who arranged with Wenn and Fortuin to open bank accounts to receive their salary payments for drug packing.

768. I therefore find that:

768.1. Murphy and UTS are liable to be convicted as charged on counts 151 to 221 (salary payments), and count 224 (purchase of Worcestor property);

768.2. Shafieka is liable to be convicted as charged on counts 171 to 175 (salary payments), but she must be acquitted on counts 176 to 221.

Cash stored at 1[...] R[...] Close

769. The cash stored at 1[...] R[...] Close was made up in mixed denominations of bank notes, which is consistent with the money having derived from illegal drug sales. The fact that it was concealed in close proximity to a stash of illegal drugs strengthens the inference that the cash represented drug money.

770. Murphy's cell phone data places him in the vicinity of 1[...] R[...] Close, and by inference at 1[...] R[...] Close, in the early hours of the morning on 18 September 2015, shortly before the drugs and cash were found there by the police. The

inference is irresistible, in all the circumstances, that it was Murphy himself who placed the cash there (thereby performing an act in connection with the property, as contemplated in s 4(b) of POCA), and that he had direct knowledge of the unlawful provenance of the funds so stored.

771. To my mind the effect, or likely effect, of storing the cash at 1[...] R[...] Close was to conceal Murphy's ownership of or interest in the money, as contemplated in s 4(b)(i) of POCA, and of enabling or assisting Murphy, who was committing the offence of drug dealing, to avoid prosecution and remove the money acquired as a result of the commission of the offence, as contemplated in s 4(b)(ii) of POCA.

772. It follows that Murphy is liable to be convicted as charged on count 223.

Cash payment for Parklands property

773. The amount of R 2.4 million was paid in cash for the Parklands property on 11 March 2015. The cash was made up of various denominations of bank notes, consistent with the money being derived from illegal drugs sales.

774. To my mind the evidence relevant to counts 4 to 47 which establish that Murphy and Shafieka were engaged in drug dealing at that time also serves to establish that the R 2.4 million used to pay for the Parklands property likely derived from the proceeds of drug sales.

775. I also consider it significant that the cash was deposited into the Seeff Trust account instead of being deposited first into the UTS bank account and then paid to Seeff by EFT. The reason which suggests itself is this: if the cash were deposited into the UTS bank account, there would be a "paper trail", making it more difficult to conceal the provenance of the funds.

776. The circumstantial evidence creates a strong prima facie case that the R 2.4 million used to pay for the Parklands property represented the proceeds of illegal drug sales, and that Murphy knew that this was so. In the absence of an innocent explanation from Murphy and/or UTS as to the provenance of the R 2.4 million, I consider that I can infer that this is indeed the case.

777. The effect, or likely effect, of the use of the cash to purchase the Parklands property in the name of UTS, was to conceal or disguise the nature, source and movement of the money (as contemplated in s 4(b)(i) of POCA), and to assist Murphy, who was committing the offence of drug dealing, to avoid prosecution and to remove and diminish funds acquired directly as a result of illegal drug sales, as contemplated in s 4(b)(ii)(aa) and (bb) of POCA.

778. I therefore find that Murphy and UTS are liable to be convicted as charged on count 225.

The racketeering counts

779. I have dealt above with the evidence which serves to establish the existence of an enterprise consisting of a factual association of Murphy, Shafieka, UTS, Fortuin and Wenn, the purpose whereof was to pack drugs for sale, and a pattern of racketeering activities in the form of the planned, ongoing and repeated participation in the offences of attempted drug dealing and drug dealing.

780. I find that the State has discharged its burden of proof in respect of the existence of an enterprise and a pattern of racketeering activity involving Murphy, Shafieka, UTS, Fortuin and Wenn.

781. Insofar as count 1 is concerned, I find that the State has proved all the elements of an offence in terms of s 2(1)(f) of POCA, namely the existence of an enterprise, the pattern of racketeering activity, and the fact that Murphy and Shafieka managed the operations and activities of the enterprise in the knowledge that they and the other members of the enterprise were participating in the offence of drug dealing in a planned, ongoing and repeated manner, i.e., in the knowledge of the facts amounting to a pattern of racketeering activity.

782. I therefore find that Murphy and Shafieka are liable to be convicted as charged on count 1.

783. As regards count 2, I likewise find that the State has proved all the elements of an offence in terms of s 2(1)(e) of POCA, namely the existence of an enterprise, the pattern of racketeering activity, the fact that Murphy and Shafieka managed the

enterprise and UTS was associated therewith through Murphy, and the fact that all three accused participated the affairs of the enterprise through a pattern of racketeering activity, Murphy by depositing the drugs at 1[...] R[...] Close for packing and bringing the women to and from the premises, Shafieka by packing the drugs and supervising Wenn and Fortuin in the task, and UTS by paying the women for packing drugs and holding funds derived from the sale of drugs.

784. I therefore find that Murphy, Shafieka and UTS are liable to be convicted as charged on count 2.

785. As regards count 3, I likewise find that the State has proved the existence of an enterprise and a pattern of racketeering activity. In addition, the State is required to prove that the accused received or retained on behalf of the enterprise property which the accused knew derived from a pattern of racketeering activity, or ought reasonably to have known derived from or through a pattern of racketeering activity.

786. To my mind the ordinary meaning of receive and retain is wide enough to include the following conduct on the part of the accused which was carried out <u>on behalf of the enterprise</u> in circumstances in which the accused must have known that the property concerned derived from a pattern of racketeering activity:

786.1. Murphy's taking delivery of the tik which he deposited under the bed at 1[...] R[...] Close for packing;

786.2. Shafieka maintaining control over the tik while packing it at 1[...] R[...] Close;

786.3. UTS receiving into its bank account the monies derived from illegal drug sales which were used to pay Shafieka, Fortuin and Wenn and can therefore be said to have been received for the benefit of the enterprise (as opposed to monies received into and retained in the UTS bank account for Murphy's own benefit).

787. I therefore find that Murphy, Shafieka and UTS are liable to be convicted as charged on count 3.

INDEMNITY FOR THE S 204 WITNESSES?

788. In order to be indemnified from prosecution in terms of s 204, Fortuin and Wenn were required to answer frankly and honestly all questions put to them.

789. Fortuin and Wenn were both afforded the opportunity to address me during closing arguments as to why they should be granted immunity. Both sought to persuade me that they told the truth and both advanced arguments *ad misericordiam* that they need to remain out of prison to support and care for their children. In Fortuin's case, she emphasized that she had told the truth about her involvement in the crime.

790. The appeals to mercy are unfortunately irrelevant. The relevant question is a narrow one. And in that regard I have found, for the reasons set out above, that both Fortuin and Wenn were lying witnesses who attempted to shield Murphy and Bird. Even although Fortuin disclosed her own involvement in the crime, she did not tell the truth about Murphy. One does not know the nature of the inducement which persuaded Fortuin and Wenn to alter their evidence, but it is irrelevant. The fact of the matter is that they testified falsely, and they will now have to bear the consequences.

791. In the circumstances I must regrettably find that Fortuin and Wenn are not eligible to be discharged from prosecution in terms of s 204 of the CPA.

ORDER

792. For all the reasons set out above, I make the following order:

1. Count 122 is struck from the indictment for lack of particularity in schedule 2 to the indictment.

2. The 4th accused is found not guilty and discharged on all counts.

3. The 1st accused is found guilty as charged on counts 1, 2, 3, guilty of the attempt to deal in drugs in contravention of s 5(b) of Act 140 of 1992 on counts 4 to 118, 120, 121, 123, 124, 126 to 145 and 148, and guilty as charged on counts 150, 151 to 221, 223, 224 and 225.

4. The 1st accused is found not guilty and discharged on counts 119, 125, 146 and 147.

5. The 2nd accused is found guilty as charged on counts 1, 2, 3, guilty of the attempt to deal in drugs in contravention of s 5(b) of Act 140 of 1992 on counts 4 to 118, 120, 121, 123, 124, 126 to 145 and 148, and guilty as charged on counts 150 to 175.

6. The 2nd accused is found not guilty and discharged on counts 119, 125, 146, 147 and 176 to 221.

7. The 6th accused is found guilty as charged on counts 2 and 3, guilty of the attempt to deal in drugs in contravention of s 5(b) of Act 140 of 1992 on counts 31 to 118, 120, 121, 123, 124, 126 to 145 and 148, and guilty as charged on counts 151 to 221, 224 and 225.

8. The 6th accused is found not guilty and discharged on counts 4 to 30 and 150.

9. Ms Zuluyga Fortuin and Ms Felicia Wenn are not entitled to be discharged from prosecution for the offences specified in the indictment as they have failed to answer frankly and honestly all questions put to them, as required in terms of s 204 of the Criminal Procedure Act 51 of 1977.

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D M DAVIS AJ

Appearances:

For the State: Ms A Heeramun, Office of the DPP, Western Cape

For 1st and 6th Accused: Adv J Van der Berg SC, instructed by Mr R Davies, Davies & Associates.

For 2nd Accused: Adv C Van Aswegen, instructed by Ms S C Van Aswegen; replaced on the death of Adv Van Aswegen by Adv A Paries, instructed by Mr D Langeveldt of Langeveldt Attorneys.

For 3rd Accused: Adv V Jantjies, instructed by Mr R Davies, Davies & Associates.

For 4th and 5th Accused: Adv T Twalo, instructed by P A Mdanjelwa Attorneys.

For 7th Accused: Adv T Mafereka, instructed by P A Mdanjelwa Attorneys.