THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 677/15
Not reportable

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **APPELLANT**

and

ISHWARLALL RAMLUTCHMAN **RESPONDENT**

Neutral Citation: NDPP *v Ramlutchman* (677/15) [2016] ZASCA 202 (9 December 2016)

Coram: Bosielo, Mathopo and Van der Merwe JJA

Heard: 22 November 2016

Delivered: 9 December 2016

Summary: Prevention of Organised Crime Act 121 of 1998 (POCA) – confiscation order – locus standi of accused person whose estate was sequestrated ─ s 18(2) of POCA – misdirection by regional court – matter referred back to conduct enquiry in terms of s 18(6) of POCA.

ORDER

On appeal from: the KwaZulu-Natal Division of the High Court, Pietermaritzburg (Madam Justice Pillay & Bezuidenhout AJ) sitting as court of appeal):

1 The application for the substitution of the respondent is dismissed with costs.

2 The appeal succeeds to the extent that the order of the high court is set aside and replaced with the following:

'The matter is remitted to the Durban Regional Court sitting as Special Commercial Crimes Court to conduct an enquiry in terms of s 18(6) of the Prevention of Organised Crime, Act 121 of 1998.'

3 There is no order as to costs of the appeal.

JUDGMENT

Mathopo JA (Bosielo and Van der Merwe JJA concurring):

[1] The respondent, Ishwarlall Ramlutchman was convicted in the Durban Regional Court sitting as the Special Commercial Crimes Court (the regional court) of 21 counts of fraud and one count of corruption. The fraud charges were taken together for the purposes of sentence and he was fined R500 000 or ten years imprisonment. A further five years imprisonment was imposed and suspended for five years. In respect of the corruption charge, the respondent was sentenced to five years imprisonment which was suspended for five years.

[2] The common cause facts giving rise to the convictions and sentences as gleaned from the statement in terms of s 112(1) of the Criminal Procedure Act 51 of 1977 handed in by the respondent at the regional court can be summarised as follows: In 2006 the respondent became aware of

opportunities available through registration with the Construction Industry Development Board (CIDB) and decided to apply for a CIDB grading in order to tender for projects advertised by the Department of Public Works KwaZulu-Natal (DPW KZN). By operation of law, it was necessary for contractors tendering for DPW KZN contracts to register with the CIDB and obtain a grading. The CIDB grading awarded to a contractor determines the size and value of the DPW KZN contracts for which he could qualify.

As the respondent sought the assistance of a person who had previously obtained a CIDB grading or who had assisted contractors in obtaining a CIDB grading in this regard, he approached Pat Singh, an accountant and Sandile Ntuli of Sinamandia, a construction company.

The respondent then requested the above persons to make the necessary arrangements to obtain a grading of 7GD or 7CE for him, which would entitle him to tender for large projects. When the respondent made this request he knew that neither he, nor his alter ego AC Industrials Sales & Service (AC), met the requirements for a 7GB or 7CE grading in that he did not have the required track record, nor did he have any qualified professionals in his employ. It is undisputed that the respondent knew that his conduct was unlawful, and that but for the higher grading he would not have qualified for large tender contracts. As a result of this fraudulent grading, the respondent succeeded in securing sixteen construction contracts in respect of which the total amount of R52 190 224.88 was paid to the respondent.

[3] As a result of the respondent's convictions and sentences the National Director of Public Prosecutions (NDPP) applied to the regional court to confiscate the amount of R52 million in terms of s 18 of the Prevention of Organised Crime Act 121 of 1998 (POCA). Section 18(1)*(a)* deals with circumstances under which a court may grant the confiscation order. It provides as follows:

'(1) Whenever a defendant is convicted of an offence the court convicting the defendant may, on the application of the public prosecutor, enquire into any benefit which the defendant may have derived from –

(a) that offence;

(b) . . .

(c) . . .
and, if the court finds that the defendant has so benefited, the court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.'

[4] In brief the section provides that after convicting a person of an offence, a court may on application by a public prosecutor enquire into whether a benefit has been derived from that offence or from related criminal activity and if the court finds that a benefit has risen it may make an order for the payment to the State of any amount it considers appropriate.

[5] Acting in terms of s 18(3) of POCA the regional magistrate initiated an enquiry into the question whether the respondent has received a benefit from the offences of which he had been convicted. The purpose of the enquiry, which is twofold, is that the court first has to determine whether to make an order against the defendant for the payment to the State of an amount of money it considers appropriate. And secondly, it must determine the appropriate amount to be paid. A confiscation order is a civil judgment for payment to the State of an amount of money determined by the court and is made by the court in addition to a criminal sentence. The order that a court may make in terms of chapter 5 is not for the confiscation of a specific object, but an order for the payment of an amount of money to the State.

[6] Section 12(3) of POCA provides that for the purposes of chapter 5, 'a person has benefited from unlawful activities if he or she at any time, whether before or after the commencement of POCA, received or retained any proceeds of unlawful activities'. 'Proceeds of unlawful activities' are in turn broadly defined in s 1 of POCA as:
'. . . any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any

unlawful activity carried on by any person, and includes any property representing property so derived.'

[7] In the exercise of its discretion to make a confiscation order a court must have regard to the main objects of the legislation, which is to strip criminals of the proceeds of their criminal conduct. To this end the legislature has, in chapter 5 of POCA, provided an elaborate scheme to facilitate such stripping. This chapter deals with the making of confiscation orders by a criminal court at the end of a criminal trial. The purpose of chapter 5 is to ensure that no person can benefit from his or her wrongdoing. This court in *National Director of Public Prosecutions v Rebuzzi* (94/2000) [2001] ZASCA 127 (23 November 2001) held that the primary object of a confiscation order is not to enrich the State, but rather to deprive the convicted person of ill-gotten gains. The function of the court in this scheme is to determine the benefit from the scheme, its value in monetary terms and the amount to be confiscated.

[8] As a result of the application for the confiscation order the NDPP and the respondent agreed to a draft order before the regional magistrate regulating further conduct of the application for the confiscation order. The prosecutor filed written statements in terms of s 18(6)*(a)*(iii) read with s 21(1)*(a)* of POCA, dealing with information relating to the 'determination of the value of a defendant's proceeds of unlawful activities'. On the other hand the respondent agreed in terms of s 18(6)*(a)*(iv) read with s 21(3) of POCA to tender to the court a statement in writing under oath or affirmation by him relevant to the court's determination of the amount which may be realised. The prosecutor filed a reply to the respondent's answer. In addition the parties agreed to give notice to interested persons who may have an interest in the property sought to be realised, to allow such person/s to make representations to the court in connection with the realisation of that property in terms of s 20(5) of POCA. These statements formed part of the record before the high court and are also part of the record before us.

[9] It is not in dispute that the respondent has benefited from the offences that he has been convicted of and also that his criminal activity is sufficiently

linked to these offences. What is in dispute is the amount of the benefit to be confiscated. In this regard various competing arguments were advanced by the parties as to the approach to be adopted in determining what constitutes a benefit in terms of the POCA.

[10] It was the appellant's case that the value of the respondent's proceeds of unlawful activities amounted to R52 190 224.88 and this amount, it contended, was a benefit which in terms of s 12(3) of POCA was liable to be confiscated.

[11] The respondent contended that only the nett proceeds constitute a benefit under POCA and that since the appellant had failed to establish the precise amount of the nett proceeds an order for the confiscation was incompetent. The regional court agreed with the respondent's contentions and dismissed the application. Aggrieved by that decision the appellant appealed to the high court and relied principally on the same arguments which it advanced before the regional court.

The high court

[12] The high court agreed with the respondent and upheld the regional magistrate's findings and concluded that the entire contract amount received by the respondent as proceeds of unlawful activities, could not be regarded as a benefit because it was not exclusively a gain or profit. In other words it held that the costs of the construction component of the proceeds could not rationally be equal to a gain or benefit. The high court adopted an approach that to treat the gross proceeds as a benefit would result in the State being unjustly enriched at the expense of the respondent and this would be disproportionate and result in the respondent paying more than the amount which he benefited from and which is prohibited under s 18(2) of POCA. The high court reasoned that it is absurd to seek an order for the full value of the sum total of the contract sums, knowing fully well that the projects were completed and that ownership of the buildings had been transferred to the DPW KZN and that the latter was enjoying its use and not the respondent.

[13] Dissatisfied with what it considered to be the insufficient evidence regarding the exact amount of the benefit sought to be confiscated, the high court dismissed the appellant's appeal. This appeal is with the special leave of this court.

The issues on appeal

[14] The estate of the respondent was finally sequestrated on 2 July 2015. The appellant gave notice to the trustees of his estate of the intention to continue with these proceedings in terms of s 75(1) of the Insolvency Act 24 of 1936. The trustees elected to abide the decision of this court. Thus, there is no need to join the trustees as parties to these proceedings. The appellant, however, filed an application in this court for an order that the trustees be substituted for the respondent. This application was based on the proposition that, as a result of his sequestration, the respondent has no locus standi in this matter.

[15] The preliminary issue in this appeal is therefore whether the respondent has locus standi to participate in these proceedings, notwithstanding the fact that his insolvent estate has been sequestrated. The main issue on the merits is whether the benefit envisaged by sections 12(3) and 18(1) of POCA in the context of this matter is the gross contract value of R52 190 224.88 or the fruits of the unlawful activity which accrued to the respondent. Allied to this issue is whether the value of the respondent's benefit was sufficiently established and whether the regional court was precluded by the provisions of s 18(2) of POCA from making a confiscation order.

Locus standi of the respondent

[16] The NDPP argued that on the appointment of his trustees the respondent was precluded from further participating in this appeal. The contention advanced was that his estate had been taken out of his control and

now vested in the trustees and therefore the only persons competent to deal with his estate, to administer it, to sue in respect of it or to defend action concerning it are the trustees and not the respondent (insolvent). The argument advanced by the NDPP is that because the trustees elected to abide the decision of this court the respondent has no locus standi to bring or defend actions connected with his estate in the absence of any irregularity on the part of the trustees. Dissatisfied with the stance adopted by the trustees the respondent argued that he retained locus standi because his interests were not protected.

[17] It was correctly submitted on behalf of the respondent that his legal disability (insolvency) does not divest him of his right to deal with matters connected to his estate where the trustees, as in the instant case, have expressed a reluctance to participate in the proceedings. In my opinion he has a reversionary interest in the estate. The argument advanced is that because he is the person enumerated in s 18 of POCA against whom the order of confiscation may be granted if the court is satisfied, he should be afforded an opportunity to deal with the order contemplated in s 18 of POCA in so far as it affects him.

[18] The respondent's argument relates to the trustees' reluctance to participate in the proceedings. It is unconscionable that the respondent, with a direct and substantial interest in the outcome of this litigation, would be denied an opportunity to safeguard his interests. In terms of s 34 of the Constitution he has a right to have his dispute resolved before a court. I agree with the respondent that an insolvent always possesses a residuary interest in his estate and does not have to show irregularity or illegality to enforce or protect his rights. It is sufficient if the respondent has a direct and substantial interest in the outcome of these proceedings (see *Zulu & others v Ethekwini Municipality & others* [2014] ZACC 17; 2014 (4) SA 590 (CC) at para 16-23). It is undisputed that if the respondent is successful in this appeal his estate will dramatically change because his liabilities will be greatly reduced and his prospects of applying for rehabilitation will be enhanced. For the

aforementioned reasons the application of the NDPP has no merit and falls to be dismissed.

The proper approach on appeal to the exercise of the discretion by a regional court in terms of s 18 of POCA

[19] I now turn to consider whether the regional court exercised a proper discretion in terms of s 18(1) of POCA when refusing the confiscation order.

[20] In view of the fact that there is a close connection between the criminal conviction and the confiscation order, the discretion conferred upon a court by s 18 is a discretion to determine the amount that it should order a defendant to pay. That determination is made once the court has convicted the defendant of a criminal offence and at the same time imposes a sentence upon such a person. The presiding officer upon whom the discretion is conferred by statute is normally the presiding officer who has presided over the criminal trial and had sentenced the accused. Such a judicial officer would have heard all the evidence and the arguments in the criminal trial and would, in the circumstances, have been appraised of all the issues in the case. Consequently the discretion to deal with the confiscation order is analogous to the discretion to determine the proper sentence to be imposed in criminal proceedings (see *National Director of Public Prosecutions v Gardener & another* [2011] ZASCA 25; 2011 (1) SACR 612 (SCA)). With that in mind the legislature sought to ensure that it would be that court which would determine the appropriate amount to be confiscated. It is only in instances where the presiding officer who convicted the defendant is absent or for any reason not available that another judicial officer may be appointed in his stead in terms of s 18(4) of POCA.

[21] In approaching this question a court will bear in mind that the enquiry as to whether the proceeds should be confiscated is not the same enquiry to be undertaken when resolving disputes of facts in motion proceedings. The purpose of confiscating proceeds of crime is to ensure that criminals realise that they cannot benefit from the ill-gotten gains and that crime does not pay.

When considering the amount to be confiscated a court must have regard to the extent to which the property to be confiscated derived directly from the criminal activities. In certain instances, as in the present case, where the entire contract amount was not retained by the respondent, a balancing act must be done by a court in the exercise of its discretion to determine the precise amount to be confiscated.

[22] In this court the NDPP argued that because the contract value was R52 million, it is that gross value which is a benefit which falls to be confiscated in terms of s 18(1) read with s 12(3) of POCA. The case for the NDPP is that the said sum is a benefit as defined in terms of s 1 of POCA. According to the Oxford English Dictionary the word 'benefit' means an 'advantage or profit gained from something'. In support of its argument the NDPP relied on *S v Shaik & others* 2008 (2) SACR 165 (CC), where the court dealing with the interpretation of the word 'benefit' as in this case held that a person will have benefitted from unlawful activities if he or she has received or retained any proceeds of unlawful activities (see s 12(3) of POCA). It is thus clear that the word 'benefit' cannot be interpreted in isolation from the proceeds or unlawful activities. I agree with the appellant that in *Shaik's* case the section was interpreted to mean that a confiscation order may be made in respect of any property that falls within the broader definition and is not limited to the nett amount. I agree, therefore, that the amount of R52 million paid to the respondent falls within the wide meaning of benefit. Both the regional court and the high court erred in this regard. Whether it was appropriate in the circumstances of this matter to make a confiscation order in that amount, is of course another matter.

[23] It is common cause and was rightly conceded by the NDPP that the respondent had utilised approximately 90 per cent of the sum of R52 million to construct the buildings which on completion he handed over to the DPW KZN. It is thus clear that if the entire amount is declared confiscated there would be no rational connection between the amount R52 million and the confiscation order. In the circumstances it would be unjust to grant a confiscation order for the full amount of the contract. As a matter of fact the projects were

completed by the respondent and ownership of the building now vests with the DPW KZN. It cannot be denied that the DPW KZN is utilising and enjoying the benefits of the buildings completed by the respondent. It would seem to me that the cost of the construction component of the proceeds received is, in the circumstances of this case, a materially relevant factor to the exercise of the discretion in respect of a confiscation order. The respondent, in his answering affidavit, stated that his capital outlay was more than 90 per cent and his profits less than 10 per cent. This was not disputed by the NDPP.

[24] What constituted the appropriate amount for confiscation, is the primary issue in this appeal. The regional court and the high court were not persuaded that sufficient evidence had been placed before them to make an appropriate confiscation order.

[25] Before us, the submission of the appellant was that the regional court should have made a confiscation order in the amount of R5,7 million or R5,2 million. In the alternative the submission made on behalf of the appellant was that the jurisdictional requirements of s 18(6) of POCA requires a judicial officer to direct and control the enquiry in such a manner so as to enable him or her to determine the appropriate amount of confiscation. The contention advanced was that having regard to the common cause facts that (a) the proceeds of the contracts were approximately R52 million; (b) the curator valued the realisable assets at approximately R5.7 million which valuation was not disputed; (c) that the respondent had made a profit; (d) on the respondent's version the profit was between 0 per cent - 10 per cent, it was incumbent upon the regional magistrate to call for such evidence as may be necessary to assist her in determining the precise amount to be confiscated. In this regard the appellant persisted with its argument that the magistrate should have directed the State and the defendant (respondent) to tender statements in connection with any matter relating to the enquiry into the benefits and also to ensure that all persons holding any interests in the realisable property be given an opportunity to make representations in connection with the realisation of the property.

[26] The respondent, on the other hand argued that because the appellant had the machinery to place the necessary evidence before the regional court, the regional magistrate cannot be criticised for the appellant's ineptitude and urged upon us to uphold the findings of the regional court which were endorsed by the high court.

[27] It is clear to me that such an enquiry was not performed by the regional magistrate. Instead she approached the enquiry as if it were similar to an application under the Uniform Rules of the Court. Section 18(2) sets two bases for calculating the upper limit of the amount that may be confiscated. The first which is relevant for the purpose of this case is the amount ordered to be confiscated may not exceed the value of the proceeds of the offences or related criminal activities as calculated in accordance with chapter 5 of POCA. This calculation is obviously based on the definition of the proceeds of unlawful activities as set out in POCA. Section 19(1) of POCA is also relevant in assisting a court in calculating the value of the proceeds to be confiscated. It provides:

'Subject to the provisions of subsection (2), the value of a defendant's proceeds of unlawful activities shall be the sum of the values of the property, services, advantages, benefits or rewards received, retained or derived by him or her at any time, whether before or after the commencement of this Act, in connection with the unlawful activity carried on by him or her or any other person.'

[28] The regional magistrate paid lip service to the provisions of the above section when she dismissed the appellant's claim and lost sight of the fact that the purpose of the enquiry is twofold: first, the court has to decide whether to make an order against the defendant for payment to the State of an amount of money; and, secondly, it must determine the appropriate amount to be paid. The enquiry under s 18(1) does not impose an onus on the appellant. An enquiry in terms of s 18(1) should be contrasted from an application for a forfeiture order in terms of Part 3 of Chapter 6 of POCA. In the latter case the prescribed procedure is akin to a civil application (s 48) and it is specifically provided the application should only be granted on proof of a balance of probabilities (s 50). To the extent that it was found in *York Timbers (Pty) Ltd v*

National Director of Public Prosecutions 2015 (3) SA 122 (GP) para 53 that s 18(1) places a true onus on the State, I respectfully disagree. What the section provides is that the presiding officer must have regard to all the evidence and facts placed before him or her before making an appropriate order. If the presiding officer is not satisfied with the evidence placed before him (as the regional magistrate was), to make a confiscation order, he or she is entitled to call such further evidence as may be necessary to assist him or her. In the present matter the regional magistrate did not do so. There was clearly insufficient information to make a determination and this is borne out by the fact that the appellant's forensic investigator, Mr Akbar Ally (Ally) in the replying affidavit stated as follows:

'I have no knowledge that 90% of the contract price was for material, labour and costs and that 10% of the contract price was the Defendant's profit. I am aware that investigations are being conducted in this regard. I intend to supplement this averment once such investigation is completed.

I submit that it is irrelevant (in determining the value of the proceeds of the Defendant's unlawful activities) whether the payment of R52 million was for re-imbursements for materials, labour and costs or whether the said payment was towards the defendant's profit.'

Ally provided no assistance to the court. It is abundantly clear that by the time the confiscation enquiry was held he had not conducted investigations into the capital outlay and/or profit. A court can only determine whether the proposed confiscation order exceeds the value of the defendant's proceeds if it knows the value of the proceeds. It is only when all the relevant facts are before the court that it will be in a position to do so. Absent any determination the regional court was in the dark about the precise amount that was sought to be confiscated.

[29] There is no doubt that what was placed before the regional magistrate was insufficient for a proper determination. It must be borne in mind that the respondent contended that his profit for the considerable time and effort, which he invested in the project, was less than 10 per cent of the total amount paid to him. The profit margin falls peculiarly within the knowledge of the respondent and he appears to be deliberately vague in this regard. On the

other hand the appellant conceded that the capital outlay was approximately 90 per cent. There was clearly lack of unanimity regarding the amount sought to be confiscated. In terms of s 18(6) it behoved the regional magistrate to adjourn the proceedings on such terms as she deems fit and call for additional evidence. It is plain to me that the regional magistrate did not apply the provisions of the latter section fully. Once the magistrate was of the view that no clear evidence was presented as to the exact amount of the profit, she ought to have adopted a more robust approach and invoked the provisions of s 18(6)*(b)* of POCA and sought additional evidence. Instead she adopted a supine attitude and dismissed the case on the basis that the appellant failed to discharge an onus.

[30] The regional magistrate materially misdirected herself by placing an onus on the appellant and by failing to call for additional evidence in terms of s 18(6) of POCA. Therefore no proper enquiry was conducted prior to the dismissal of the application. These misdirections entitled this court to interfere with the regional court's exercise of its discretion. In the circumstances it will be proper if the matter is remitted to the regional court to conduct an enquiry in terms of s 18(6) of POCA.

Costs

[31] Both parties achieved a measure of success on appeal. In my view it is fair and just that no order be made in respect of the costs of the appeal.

[32] I therefore make the following order:

1 The application for the substitution of the respondent is dismissed with costs.

2 The appeal succeeds to the extent that the order of the high court is set aside and replaced with the following:

'The matter is remitted to the Durban Regional Court sitting as Special Commercial Crimes Court to conduct an enquiry in terms of s 18(6) of the Prevention of Organised Crime, Act 121 of 1998.'

3 There is no order as to costs of the appeal.

_____
R S MATHOPO
JUDGE OF APPEAL

APPEARANCES:

For appellant:	M Gavindasamy SC
	R Naidoo
	Instructed by:
	The State Attorney, Durban
	The State Attorney, Bloemfontein
For respondent:	V Gajoo SC
	J Howse
	Instructed by:
	Garlicke & Bousfield Inc., La Lucia
	Symington & De Kok, Bloemfontein