

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case number: 78/2017

In the matter between:

THE STATE

and

MALOME ALFRED MATSITELA	1st Accused
STEVEN LANGA	2nd Accused
AMOS NGUBENI	3rd Accused
ANDRIES MKHUMBUZA	4th Accused

HEARD ON: 16 APRIL – 4 MAY 2018 & 3 - 11 SEPTEMBER 2018

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 12 and 13 SEPTEMBER 2018

I INTRODUCTION

[1] This case turns in essence around copper theft which is prevalent in the Free State Province and apparently also in other parts of South Africa if the law reports and latest legislation are considered. The State has resolved to institute prosecution in terms of the Prevention of Corrupt Activities Act, 121 of 1998

(“POCA”), over and above the several counts in relation to the predicate offence of theft. More will be said about this later. The written authorisations of the National Director of Prosecutions (“the NDPP”) in terms of s 2(4) read with s 2(1)(f) and 2(1)(e) were handed in without objection as Exhibits “A” and “B” respectively.

II THE PARTIES

- [2] Four accused persons have been charged in respect of several offences as set out in the next paragraph. The accused are Messrs Malome Alfred Matsitela (accused1), Steven Langa (accused 2), Amos Ngubeni (accused 3) and Andries Mkhumbuza (accused 4). The State is represented by Advv DJ Pretorius and J Potgieter whilst the accused are represented by Mr P van der Merwe.

III THE CHARGES

- [3] I do not intend to read out the indictment and what follows is merely a summary of the allegations.

Count 1: Accused 1 is accused of managing an enterprise through a pattern of racketeering activities as defined in s 2(1)(f) of POCA during the period January 2014 to March 2014 in the districts of Ficksburg and Senekal, the activities being those related to counts 3 to 8, to wit theft.

Count 2: All four accused are indicted in accordance with s 2(1)(e) of POCA for conducting or participating in the activities of an enterprise through a pattern of racketeering activities during the same period and in the districts as mentioned *supra*.

Counts 3 to 6: These are counts of theft allegedly committed on or about 10 – 11 January 2014 on the farm Valuta in the district of Ficksburg, 23 January 2014 near the Meulspruit Dam in the district of Ficksburg, 23 – 24 January 2014 on the farm Valuta in the district of Ficksburg and between 24 and 26 March 2014 in the district of Senekal. Copper cable of Telkom has allegedly been stolen, except in the case of count 4 where it turned out during the evidence that an optic fibre cable was stolen. All four accused are arraigned in respect of these counts.

Counts 7 and 8: Accused 1, 3 and 4 are charged with theft allegedly committed on or about 24 – 26 March 2014 and 1 April 2014. In the first case power cables of the Senekal Municipality were stolen and in the second instance, certain hardware consisting of bolts, nuts and plates, etc. of Transnet were stolen at the Senekal railway station.

Counts 9 and 10: Accused 3 and 4 are the only accused persons arraigned in respect of these counts. It is alleged in count 9 that on or about 24 to 26 March 2016 and near Glen in the Bloemfontein district Transnet power cables forming part of essential infrastructure as defined in the Criminal Matters Amendment Act, 18 of 2015 (“the 2015 Act”) which came into operation on 1 June 2016, were stolen. Count 10 deals with the

same factual situation, save insofar as it is alleged, relying on s 3 of the 2015 Act, that accused 3 and 4 are also guilty of tampering, damaging and/or destroying essential infrastructure.

IV THE PLEAS

- [4] All four accused pleaded not guilty and tendered no plea explanation. There was some confusion at this stage and I got the impression that accused 2 and 3 wanted to place their defences on record. However Mr Van der Merwe informed me after an adjournment that the matter was discussed and resolved. Therefore all elements of the various offences were placed in dispute. Mr Van der Merwe also confirmed that the accused were informed of the minimum sentences applicable in the event of convictions in respect of counts 1, 2, 7, 9 and 10.

V SUMMARY OF THE EVIDENCE

- [5] Although no admissions were made at the onset, Mr Van der Merwe did not waste time to proceed on lengthy and unnecessary cross-examination of several witnesses that were called to prove that copper cable, FCC cables, an optic fibre cable and certain Transnet properties were stolen. It is apparent that none of the witnesses called in this regard could present factual bases for any estimates made pertaining to the costs of material and/or damages sustained.

- [6] The first witness was Mr M E Motaung, a technician of Telkom stationed at Ficksburg. He explained that dissatisfied landline customers normally contact the Telkom call centre and that Telkom technicians respond accordingly by repairing any faults. On 11 January 2014 at 11h30 he went out to the farm Valuta in the Ficksburg district. He found that approximately 3 kilometres of an overhead copper wire (a telephone line) had been cut and removed. He estimated the damage to be R8 000.00. This was not an isolated incident as many similar offences occurred in the district and to his knowledge the thieves were not apprehended. The offence caused all customers on the particular telephone line to be unable to make outgoing or receive incoming landline calls. He could not repair the line because of the magnitude of the matter and outside contractors had to be contracted.
- [7] Mr R E Mofokeng was the next witness. He is a Telkom technician stationed in Bethlehem. On 23 January 2014 and between 22h00 and midnight when he was on stand-by duty he received a call from colleagues who monitored the Telkom system on a 24/7 basis. He went to the problem area on the Ficksburg/Clocolan road, about 3.3 kilometres from Ficksburg in the vicinity of the Meulspruit Dam. The insulated optic fibre overhead cable was cut and a piece of about 1 000 metres thereof was removed. These optic fibre cables are different from copper wires used for normal telephone connection as it is used for communication between banks, ATM's, and cellphones as well as for normal landline communication across the borders of the country. The problem was fixed during that same morning.

Telkom encountered numerous similar problems and the incident was not an isolated case.

- [8] Mr J A Bester, another Telkom technician stationed at Marquard, testified about copper theft, *i.e.* the removal of overhead copper wires in the Ficksburg district. He usually starts to work at 07h30 where after a meeting follows. After the meeting he normally consults his computer. On 24 January 2014 at approximately 08h00 he found that a call had been logged earlier in respect of a faulty telephone line. He went to the scene. It turned out to be on the same line, a part of which was stolen on 11 January 2014, a few days earlier. Again, the farm Valuta was the thieves' target. This time about 5 kilometres of an overhead copper wire was cut and stolen. He estimated the loss at R14 000. He could not repair the damage and the assistance of outside contractors was required. A process had to be followed in this regard, once the incident was registered on Telkom's TBI system.
- [9] Mr S G van Niekerk, a Telkom technician stationed at Senekal, testified next. On 26 March 2014 at about 08h00 he detected theft of overhead copper wires (the telephone line) on the Senekal/Marquard road. Two pairs of open copper wires over 21 spans – each span 45 metres long - were found to be missing. Two days earlier, on 24 January 2014, he detected a fault on the same line which he repaired at about 16h30. About 38 customers could be serviced by the line. As a result of the magnitude of the theft it was not possible for one person to replace and repair the wires.

[10] Mr P J van den Berg, a specialist investigator in the employ of Telkom testified pertaining to the contents of a computer generated document known as a TBI, which was handed in as Exhibit "C". He was requested to investigate four incidents, *i.e.* those relating to counts 3, 4, 5 and 6. He merely confirmed the information contained in the document such as the time of incidents, the dates on which the matters were resolved, if at all, and the damages suffered. The total costs in respect of count 3 were R16 999.89 which included R5 585.40 for material. This differs substantially from the amount of R50585.40 mentioned in the indictment. He explained that the costs of repairs in respect of the optic fibre cable theft – count 4 – were R15 292.59 which included the costs of material in the amount of R8 538.74 which is the amount stated in the indictment. He contradicted Mr Mofokeng about the exact location where the optic fibre cable was cut, but it is not an issue as he explained based on Exhibit "C" that the network was affected. He testified that optic fibre cables have to be repaired within 24 hours as Telkom may face penalties of up to R3m from cellphone companies such as Vodacom and MTN. He explained that the network provides communication for banks, ATMs and cellphone companies. It also provides international landline communication. The witness was confused as to the date of the second theft on the farm Valuta – the date on the TBI appearing to be the same as the first theft – which could not be correct. Mr Rudman who testified later, explained why the date of 11 January 2014 was also used for the second theft. He confirmed that Telkom decided not to replace copper wires on the particular line, but that the costs for Telkom was recorded to be R2 000, being transportation and inspection

fees. The costs of material were included in the contractor's quotation, although the work was not done. The witness also testified that the copper wires were not replaced in the Senekal district – count 6 – due to economic considerations. In all four cases the incidents have been reported to SAPS as is evident from the CAS numbers appearing on Exhibit "C". The witness made it clear in cross-examination that he cannot testify about costs of material as it did not fall within his field of expertise.

[11] Mr C Rudman was called to testify in his capacity as Operations Manager of Telkom. He testified in respect of counts 3, 5 and 6, *i.e.* the copper wire theft. He explained how Exhibit "C" was generated on the computer system of Telkom. He also confirmed that customer queries are received by Telkom's call centre and that these are then recorded on the system. The second theft on the line at Valuta farm occurred before repairs could be undertaken in respect of the first theft. Therefore the incident date of the first theft was also recorded as that of the second theft. It is clear from the CAS numbers that the two incidents were reported to SAPS on different dates. In cross-examination he was requested to explain the differences in the pricing of copper wires. He testified that wires may differ in thickness and this will have an effect on price. However, as he was not responsible for obtaining of quotations he was not prepared to comment on the amounts set out in Exhibit "C".

[12] Mr H J Klem, an electrician in the employ of the Senekal Municipality, testified in respect of damages found at the Syferfontein waterworks of the Senekal Municipality. It is one of

two sources of water for the Senekal people. He was called out to the site on 26 March 2014. He found that about 50 metres of electrical cables were cut and removed, that the transformer was damaged to remove cable from it and that certain panels were damaged as well. The electrical cables are 70 square mm in width according to him, or as he mentioned, as thick as four of his fingers. The cables are made of copper and are insulated. As a result of the theft, water could not be pumped and supplied to the Senekal community. It took a few days to replace the cables and transformer and to repair the electrical installation. Mr Klem visited the works on 19 March 2014 for the last time before the 26th. However, employees are on duty 24/7 and he was of the view that there were no problems on or before 25 March 2014.

- [13] Mr M I Sithole, a constable in the employ of SAPS testified about a road block held from 01h00 on the night of 24/25 March 2014 and his meeting with accused 3, Mr Amos Ngubeni. The road block was held about 3 kilometres outside Senekal on the way to Winburg. At that position the N5 forms an intersection with the Ventersburg / Marquard road. The road block was set up 100 metres from this intersection on the road to Marquard. At 02h15 a white bakkie travelling from Ventersburg intended to cross the N5 towards Marquard, but at the last moment turned right in the direction of Winburg / Bloemfontein. He regarded the action as suspicious and followed the vehicle which he managed to stop after about 10 kilometres. He requested the driver's licence and established that he was Mr A Ngubeni, accused 3. He questioned the driver who initially informed him that he was on his way to Bloemfontein to fetch a certain Bisa. When he pointed out

that he should have remained on the N1, the shortest route to Bloemfontein, accused 3 mentioned that he was from Johannesburg and not familiar with the surroundings. The witness also arranged for the bakkie's details to be fed into the computer system to establish the owner's particulars as accused 3 could not assist. Later on accused 3 changed his version and said that Bisa had to be picked up in Winburg. Accused 3 provided Bisa's cellphone number to the witness and he dialled the number. A female responded, but she did not know Bisa or accused 3. Accused 3 also gave a number to the witness of the person who instructed him to fetch Bisa, being one Sifiso. Sifiso confirmed that he knew accused 3, but never instructed him to fetch Bisa. Eventually the witness received the details of the owner of the vehicle, a certain Solomon. This person confirmed his ownership, but alleged that the vehicle was in the care of Steven Langa and that it was supposed to be at the O R Tambo airport. Although hearsay evidence was tendered, Mr Van der Merwe did not object initially, but only when the witness referred to Steven Langa. I decided to allow the hearsay and indicated that reasons would be given in my judgment at the end of the case. The witness detained accused 3 and arranged for the bakkie to be taken to the Senekal police station, but does not know what occurred thereafter. This was at about 05h00. It transpired during cross-examination that accused 3 and the bakkie were released later that same day.

- [14] Accused 3's version as put to constable Sithole makes interesting reading. According to him he picked up a female and her two children at Ventersburg who indicated that she needed transport

to Senekal. This was then the reason for the detour. This was vehemently denied by the witness who testified that the bakkie would have turned left at the said intersection in order to drop the passengers in Senekal some 3 kilometres from the intersection, but that this did not happen. According to accused 3 he did not know Bisa, but that he would tow his vehicle back to Johannesburg on the instructions of Sifiso. He would make telephonic contact with Bisa only when he “get near Bloemfontein.”

[15] Mr K A Posholi, a security official in the employ of Transnet, testified about count 8, to wit the missing goods at the Senekal railway station. He testified that during his patrolling duties on 1 April 2014 he observed some missing items inter alia fish plates, nuts and bolts. The list with missing items was handed in as Exhibit “D” without any objection. The fish plates are “solid steel plates bolted together in order to fasten the railway line”. If these fish plates are removed, trains using the railway line may derail. During cross-examination he admitted that he could not say whether the items were stolen a day or three days before his observation. When he patrolled the area earlier, that is five days before 1 April 2014, everything was still in order as stated in his re-examination.

[16] Mr MG Motsumi testified next. He is employed by Transnet in Bloemfontein and has been so employed in this capacity as traction linesman for 14 years. His duties include the construction and maintenance of the electrical overhead lines of Transnet. He was shown a photo album consisting of 98 photos which was handed in by agreement as Exhibit “E”. On 28 September 2016

he drove past Glen on his way to Bloemfontein when he observed that some FCC cables were cut. FCC stands for Feeder Catenary Contact. The purpose of the FCC cables is to feed electricity from the feeder to the contact wires. On 29 September 2016 he and colleagues went back to Glen and during their investigations they found more FCC cables were cut off at a different section of the railway line. This railway line is the main railway line between Gauteng and Bloemfontein which leads to Kimberley/Cape Town and also to East London/Port Elizabeth. At least 60 FCC cables were cut off and stolen. The witness explained that the feeder line is made of aluminium whilst the catenary and contact lines are made of copper. He gave an explanation of the negative consequences that will arise if trains use the particular railway line in the absence of FCC cables. Heavy haulage trains, especially, will be slowed down and even caused to stop due to lack of proper electricity supply. It is also possible that trains may catch fire which will obviously have serious detrimental consequences for passengers and transported goods.

- [17] The witness was cross-examined in respect of the time when the matter was reported to the police as well as the value provided to the police. The value stated in the docket differs from the value mentioned in his evidence in chief. He confirmed that in these instances no alarms went off reporting theft of the cables as could be expected. To the best of his knowledge no trains were impacted as a result of the stolen cables and no delays occurred. In re-examination the witness rectified his evidence and stated that no alarm would go off in the event of the cutting of the FCC cables.

- [18] Mr JA Kritzinger, an employee of Combined Private Investigations (“CPI”), was the State’s 11th witness. He is an area manager in Gauteng with his office in Springs in the East Rand. He confirmed that CPI was contracted by Transnet, Eskom and Telkom to investigate copper cable theft. He received information from his informer on 29 January 2017 pertaining to two phone calls received from a person that wanted to sell copper. The seller was identified as Amos Ngubeni whose name was familiar to the witness as he was earlier identified as one of the syndicate leaders in respect of copper theft. He recorded the suspect’s cellphone number which was listed on the informer’s phonebook as 0784624320. The witness reacted on information that the suspect would be in the Balfour area on 2 February 2017. The description of the suspect’s vehicle, to wit a silver Toyota Tazz with a GP registration number (which the witness could not remember when he testified), was provided to him. I emphasise that throughout this judgment I shall often refer to the last four digits of cellphone numbers for ease of reference as the legal representatives and witnesses did the same. I shall also refer to cellphones being Rica’d, it being the popular description of a cellphone with simcard having been registered in the name of an identified user in terms of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 70 of 2002 (“RICA”).
- [19] The witness acted upon the information received whereupon he came across the particular motor vehicle and stopped it. Both he and the driver thereof disembarked. He introduced himself to the

driver who mentioned that he was Amos Ngubeni. The witness pointed accused 3 out as Amos Ngubeni. At that stage he was aware that a warrant of arrest had been issued for accused 3 in respect of copper cable theft at Glen in the Free State. The witness noticed motor vehicle tubes, strings and a bag in the boot of the suspect's vehicle. He explained that these tubes are cut into pieces of different lengths, 2 to 3 cm in width. A saw or bolt cutter is then fastened to the tubes and branding with a piece of string. In this manner, and by pulling the strings, the FCC wires can be cut or sawn off. He identified similar pieces of tube on photos 26 and 27 of Exhibit "E". He also pointed out on photo 25 a part of the FCC cable that remained after it had been cut off. He explained with reference to photo 15 by using a red pen how an FCC cable is fastened to the overhead electrical lines, indicating two half circles pointing in different directions. The witness found a cellphone with number 0784624320 on accused 3. He took accused 3 and his cellphone and motor vehicle to Kroonstad and handed him and his property over to Mr Doubles van Deventer of CPI, Kroonstad.

- [20] On 21 February 2017 the witness went to an extension of Daveyton between Springs and Benoni where he located accused 3's wife at the address provided by the accused. She confirmed that accused 3 was staying there. The cellphone found on accused 3 was Rica'd in the name of accused 3's wife. She had two phones and accused 3's number was stored on her phone under the name "Lovey."

- [21] The witness also explained that the purpose of the FCC cables was to provide more power from the feeder line to the contact line. These cables are particularly relevant when heavy freight such as coal is transported by electrical trains. One finds these cables on Transnet's Business Units, its more lucrative routes. When FCC cables are missing, especially on inclines, the contact lines are burnt as they cannot handle the freight. The train driver would not know this in normal circumstances, but the train will automatically come to a standstill. It takes Transnet between three and twelve hours to repair depending on the length of the contact line demolished. The witness also explained that the train's pantograph makes contact with the contact line and this provides momentum to move forward. Penalties are imposed by Transnet's customers for late deliveries. FCC cables are stolen countrywide, causing serious problems. These cables consist of solid copper. FCC cables are not connected to Transnet's alarm system, the reason being that if a FCC cable is cut, there is still power on all three lines. Theft is not detected immediately in most cases and consequently FCC cables are popular to steal.
- [22] Mr Van der Merwe conceded that accused 3 was stopped whilst driving his Toyota Tazz. However he denied that the items allegedly found in the car belonged to him. On accused 3's version he was taken away to an office in Springs and when they returned to the vehicle, the witness pointed out the bag and other items inside his vehicle. He also insisted that he was assaulted at the office and at his vehicle. That night he had to sleep on the back of a bakkie parked at a filling station in Balfour and was only taken to Kroonstad the next morning. The witness denied these

allegations. It was also put to the witness that a cellphone was confiscated from accused 3, but that it was a phone with a different number than the one testified to by the witness. This version was denied. It was put to the witness that accused 3 denied any liability and claimed that he was falsely accused. However it was admitted that accused 3's wife had two cellphones, but the phone confiscated from accused 3 was his phone. I just want to record that accused 1, who was taking notes right through the trial, joined in the discussion with accused 2 and 3 when Mr Van der Merwe requested time to consult with accused 3 in court to obtain any further instructions, which were not forthcoming.

- [23] Mr J Koekemoer, also employed at CPI stationed at Springs, explained that they were on the lookout for one Samuel Ngwenya in respect of an outstanding warrant. He was apprehended whilst being a passenger in a motor vehicle on the R29 in the Babsfontein area. Mr Ngwenya and two other persons, the driver of the vehicle, one Matthew, also known as Xolane, and Andries Mkhumbuza who was pointed out to be accused 4 in court, were taken to the Sundra police station. Relevant information was obtained insofar as a data base is kept of all suspects related to copper theft. The information on accused 4's phone book was written down as well as his name, address, the IMEI number of his cellphone and his cellphone number, to wit [...]. Exhibit "F" containing the information was thereupon finally admitted. Accused 4 was not arrested, but allowed to leave hereafter. The witness mentioned that he established later that accused 3 and 4 are brothers. The witness also confirmed that he was involved in

the arrest of Alfred Matsitela, accused 1, the owner of Malvern Scrap Metals in Germiston.

[24] During cross-examination the witness was questioned about CPI's powers of arrest and interrogation. He was called back on Monday, 30 April 2018 to give evidence in respect of a different matter. He testified then that on 17 May 2017 he and members of the East Rand flying squad arrested Mr Lawrence Mavumba for whom a warrant of arrest had been issued. He also obtained his personal details and recorded the information contained in the phonebook of this person's cellphone. The details appear on Exhibit "R". He pointed out two inscriptions, *i.e* of Andries Mkhumbuza with cellphone number [...] and Mkhumbuza cellphone number [...]. After further investigation he found out that the last cellphone number belonged to accused 3, Amos Mkhumbuza, who is also known to him as Amos Ngubeni. He pointed accused 3 out in court. At the time when he prepared the document, he was aware of the existence of Andries and Amos Mkhumbuza. He tried to arrest accused 4 on several occasions, but could never find him at home.

[25] It was put to the witness that accused 4 insisted that neither of the two cellphones as recorded by the witness belong to him. It was also put to the witness that accused 4 and one Xolani were in the vehicle on their way home when they picked up a stranger. The witness denied this and said that they were from their homes when they were apprehended. It was also put to the witness that they were taken to the police station without their consent which was denied. The witness explained that, after the cellphones

were taken and all relevant information recorded, accused 4 was released as there was no evidence against him and Xolani at that time. Mr Van der Merwe informed the court that accused 4 remembers most of the names on Exhibit “F”, that his phone was indeed taken and handed back to him as the witness testified and therefore he could not object to Exhibit “F” which contains the information taken down as testified to by the witness.

- [26] Mr RC Botha, an area manager of CPI stationed in Pretoria, testified about the arrest of accused 4 on Wednesday, 2 August 2017 near Nelspruit. The arrest took place after information was received of theft taking place at the MMC railway line. The perpetrators ran away. The witness called in the assistance of the police who arranged for the search of all vehicles intending to pass through the toll gate near Machadodorp. Accused 4 was found hiding in the cab of a truck. His Nokia cell phone was confiscated. Accused 4 was injured. He had sustained a cut to his nose and was bleeding. The cell phone number was recorded as [...]. Mr Doubles van Deventer fetched accused 4 later. It was put to the witness that accused 4 was busy hitchhiking when he was arrested whilst walking along the road, but this was denied. He conceded that his phone was confiscated and the phone number correctly recorded. However he alleged that he was assaulted in that he was hit with the butt of a rifle in the face, causing an injury to his left eye. The witness was cross-examined in respect of the processes adopted by the witness and CPI instead of allowing the police to affect arrest and carry on with investigations. The witness testified that the police was not prepared to assist whilst accused 4 was an illegal immigrant whom they failed to arrest in

the past. It was put to the witness that the injury to accused 4's left eye was caused during his arrest which was denied.

[27] W/O PL Jooste, a detective of Senekal, obtained a warrant of arrest for accused 1 as well as a search warrant. On 23 October 2015 he went to accused 1's business premises at Malvern Scrap Metal in Germiston where he seized a white bakkie, accused 1's cellphone as well as another cellphone in possession of one of his employees, several registers as well as copper found on the bakkie. Accused 1 and the two employees were arrested. Accused 1's cellphone number is [...] and the number of the other cellphone is [...]. Another cellphone was attached but that number is irrelevant for purposes hereof. He requested cellphone data of the relevant cellphones in terms of s 205. One of the registers which he seized was identified as a counter book, handed in as Exhibit "G". He also obtained documentation in respect of accused 1's licence to trade which was handed in as Exhibit "H". Exhibit "J" was handed in. It contains the front pages of the relevant dockets at that stage. The witness admitted in cross-examination that no stolen items were found on the premises.

[28] Mr GB van Deventer (widely known as Doubles) is the Area Manager of CPI stationed at Kroonstad. He also referred to CPI's mandate to investigate copper theft. CPI worked closely with SAPS headquarters who registered a project in order to apprehend copper thieves. For all intents and purposes he can be regarded as the Investigating Officer although it is accepted that that role is played by a member of SAPS. The witness

prepared a professional document, based on cellphone records received from cellphone companies to show the linkages between the various accused persons and their different cellphones and/or simcards. He testified that copper theft increased since 2011, but since the arrest of the accused he was not aware of any copper theft in his area. He explained that CPI identified a big group of 22 suspects who often worked in smaller groups in the different provinces.

[29] Accused 2 and others were arrested on 10 February 2015 and their cases were finalised in the High Court sitting at Kroonstad later. Accused 1 was not arrested at that stage as they believed that the project should be allowed to carry on for a while in order to apprehend more suspects. Accused 1 was ultimately arrested on 23 October 2015 and charged. His case was also finalised in the High Court sitting at Kroonstad.

[30] Accused 3 and 4 were difficult to arrest. Eventually, and based on information in September 2016 in respect of the theft of FCC cables near Glen, they could connect these two with that offence as by then they already had all their cellphone details. Application was made for s 205 orders by the IO, Sergeant Pheko of Glen. All relevant data obtained was sent to SAPS' Technical Unit who forwarded same also to the witness. Colonel Maree also applied for a s 205 order for the period 2013/2014 relating to accused 2, 3 and 4 in respect of incidents in the Northern Cape. The witness received this data as well. Similarly data was obtained by W/O Jooste of Senekal in respect of accused 1 which was available during his arrest in 2015. Warrants of arrest were

obtained in respect of accused 3 and 4. Amos Ngubeni, accused 3, was eventually arrested in Gauteng. This accused, his cellphone and vehicle were brought to the witness in Kroonstad. Photographs were taken of the relevant items and the accused. Accused 3 was handed over to Sergeant Pheko.

- [31] No doubt, the witness obtained expert skills about cellphones through work experience. His professional approach to cellphone records in order to establish linkages between various phone users and his understanding of an Excell program in order to draft, understand, analyse and explain the different spread sheets is superb and cannot be faulted. Obviously, one must be mindful of the fact that if the core, all, or some of, the information fed into the system is incorrect, the whole analysis becomes a worthless exercise. I shall return to this later.
- [32] Accused 4 was arrested on 2 August 2017. The cellphone found in his possession at the time did not contain relevant information. However relevant information was obtained earlier in respect of a cellphone used by him. The accused was photographed and the witness mentioned the injury to his eye. He was handed over to SAPS, Glen.
- [33] The witness was present when accused 1 was arrested by W/O Jooste on 23 October 2015. Two cell phones, Rica'd in his name, were found and attached together with all registers. All details on the phones were recorded where after these were sent to the SAPS, Technical Unit. The witness testified about the counter book, Exhibit "G" which he referred to as one of accused 1's

“aankoopregisters” (purchase registers). The green flags indicate accused 2, *i.e.* Steven Langa’s involvement pertaining to his sales of copper to accused 1. All inscriptions containing orange flags are irrelevant for this case. The purple flags indicate transactions where money was subtracted from the purchase price to cater for the transportation of goods. Two transactions were dealt with concluded on 12 January 2014 and 26 January 2014 respectively. 1A copper was purchased from one Langa; 298.5 kg in the first instance at a price of R16 417.50 and 309 kg in the second transaction at a price of R16 995.00. In a few instances, on 5 February 2014, 15 February 2014, 9 April 2014 and 17 April 2014 transport costs were deducted from the purchase price agreed upon.

- [34] Exhibit “P”, consisting of four lever arch files, containing proof of cellphone communication between the various phones and alleged linkages between the four accused was handed in and discussed by the witness during his testimony. I prefer to deal with this aspect during the evaluation of the evidence. Suffice to say at this stage that the witness showed how the relevant cellphones were used in respect of the various crime scenes with reference to time and date, the area from where calls were made (where the particular cellphone user found himself) and which phones communicated with any other phones at any given time. It is also indicated how the phones picked up different cellphone towers as the users thereof travelled from Gauteng to either Ficksburg or Senekal and back. The witness confirmed that Exhibit “K” shows the Rica documentation together with the accused persons’ cellphone numbers as well as extracts from

phone books and some of the data analysis and linkages between the accused. I wish to refer to Exhibit "K" page 2. The details were admitted in Exhibit "S" referred to later, save for the information pertaining to phone C – number 1020 - and the phones confiscated from accused 3 and 4. In his summary the witness indicated the links between the CAS numbers, the various accused and the different crime scenes.

- [35] Exhibit "L" was identified as the cellphone towers. The witness confirmed that all information about the cellphone towers is stored on his computer. He prepared the various maps based on coordinates received from clients in respect of the different crime scenes. There being no objection, the document containing the maps was handed in as Exhibit "M". The witness explained the maps for in case the reader thereof needed some education. The maps speak for themselves. It may just be stated that the two closest towers to Malvern Scrap Metals that provide cellphone coverage in that area are the Simmerfield and Wychwood towers. Obviously, as submitted by Mr Van der Merwe, it does not mean that if a cellphone picks up any of these towers, it may be accepted that the user was at accused 1's business premises. There are numerous business and other premises within the area, including other scrap metal dealers. The photographs relating to accused 3, particularly his cellphone, the IMEI and cellphone numbers thereof as depicted on the phone and his vehicle with the items found in the vehicle, were put in an album and handed in as Exhibit "N". It needs to be mentioned that Mr Van Deventer had access to the phonebook of a known copper thief, Charles Sithole, who according to him is at present standing trial in a

different court and who is part of the syndicate to which the accused persons allegedly belong. He wrote down the names and numbers contained in that phone book during Sithole's arrest. The number 1020 was stored therein under the name Elias Navara which the witness ascribed to accused 1, the number that was most often used to communicate with syndicate members.

- [36] Colonel Maree from the detective branch in Kakamas, Northern Cape testified about his involvement with the investigation of copper theft in the Kakamas, Namakwaland area during 2013. Several telephone lines over a huge area have been stolen and Telkom just refused to install new lines, causing a serious communication problem amongst many farmers, many of whom cannot make use of cellphone communication due to the remoteness of the area. The witness compiled a data basis and profiles of suspects. He knows accused 2 and 4 and arrested accused 2 in the past. He met accused 4 at the Kenhardt police station after a Corsa bakkie had been stopped in a police road block and the driver and passenger had run away. Later accused 4 and another person arrived at the police station to collect the bakkie. The colonel consulted both and obtained personal information from them. Accused 4's information was written down on a piece of paper and Exhibit "Q" was handed in without objection. Accused 4's cellphone number was recorded in the document as [...]. This indeed belonged to the cellphone which accused 4 had in his possession that day. The first number in the phone book belonged to Amos Ngubeni, accused 3, and that number is [...]. He telephonically traced accused 3 through a deposit slip obtained during his investigations who confirmed that

the cellphone number was his. He obtained an order in terms of s 205 as well as a warrant for his arrest. On 27 February 2014 he arranged to meet accused 3 in Gauteng, but the accused never turned up. The witness handed the cellphone data obtained by him to Mr Van Deventer.

- [37] In cross-examination it was put to the witness that accused 4's date of birth is 12 June 1974 and not 1974 -01-06 as written down on Exhibit "Q". The witness insisted that he wrote down what accused 4 informed him. The accused did not have an identity number. It was also put to the witness that accused 4 indeed attended the police station, but that he remained outside when his colleague, Joseph Maseko, whom he accompanied to collect the Corsa, and the witness had a discussion inside the police station. The witness denied this and even explained how they were seated in the office of the station commander. He also took photographs of both persons with his cellphone. It was conceded that accused 4 wrote down his name on Exhibit "Q", but denied that his cellphone was ever handed to the witness. The witness stuck to his version. Accused 4 could not say whether Mr Maseko did not perhaps give his cellphone number to the witness, but the colonel was adamant that accused 4 personally gave the cellphone to him. The witness also explained that he had accused 3's number on his data base and he remembered the last four digits thereof, *i.e.* 4776 and could immediately make the connection. The s 205 application was in respect of accused 3's cellphone number.

[38] Mr E Mchunu was the State's last witness. He is a sentenced prisoner, having pleaded guilty in the High Court sitting at Kroonstad. He knows accused 1 well and confirmed that he was also referred to as Navara. The accused had a Navara vehicle. He was part of a group that worked together in order to steal copper in the Free State area. He provided transportation to the people whose duty it was to cut and remove copper cables where after he transported the copper to accused 1's business premises, to wit Malvern Scrap Metal. He was always paid by accused 1 personally, initially by cheque and/or cash and later even by deposits into his bank account. He even knows that accused 1 stayed in a security complex as accused 1 took him there several times for tea which the witness found very refreshing. He explained that he usually left the Free State between 03h30 and 04h00 and arrived at accused 1's business premises between 06h00 and 07h00. One of the copper thieves took him to the business premises the first time and although he did not know the street address, he thereafter knew how to get there.

[39] The witness confirmed that he met Elias who worked for accused 1, but that he and accused 1 parted ways after some time. He knows that others, Mthembu and Ndlovu, were employed by accused 1. Elias helped with offloading of copper as the others did after he had left. The employees would weigh the copper and accused 1 would come in later to pay him. Nobody else paid him at any stage. According to him he would contact accused 1 personally when they were on their way to his business. He did not do business with other scrap metal owners. In cross-

examination the witness was accused of making up a story and it was even put to him that accused 1 does not know him. He vehemently denied this. He admitted that he pleaded guilty as he was indeed guilty. He also testified in the Kroonstad trial against other accused. When he was confronted about alleged lack of communication between him and accused 1, he presented a copy of his phone book. Accused 1's name was stored on his phonebook under the name Boss Malvern with the last digits of the number to be 6456. He also referred to another contact number that is irrelevant in this case. It was at this stage that the witness brought up the invitations for tea at accused 1's home. In re-examination he admitted standing trial in Kroonstad with accused 1 and his two employees, Mthembu and Ndlovu. He also referred to accused 1's home situated in a security complex, an aspect that accused 1 would later confirm in his testimony.

- [40] The accused made several written admissions and the document was handed in as Exhibit "S". These admissions relate to the correctness of cellphone data requested and received from cellphone companies in respect of eight cellphone numbers for the periods 1 January 2014 to 30 April 2014 and 1 to 30 September 2016. The correctness and authenticity of the cellphone data contained in Exhibit "P", the four lever arch files, were admitted. The locations of the cellphone towers as stated in Exhibit "P" were admitted. The Rica particulars regarding ownership of the particular phones of accused 1 and 2 as well as that of accused 3's wife were admitted. It was also admitted that accused 3 and 4 are biological brothers. The admissions were

recorded in terms of s 220 of the CPA where after the State closed its case.

[41] Mr Malume Alfred Matsitela, accused 1, testified in his defence. As could be expected, he stated that accused 2, 3 and 4 were unknown to him before the trial. He came to know them when they appeared together in these proceedings. He is 43 years old, married and has four children. He is the owner of Malvern Scrap Metals which he conducted from 2003 to 2015. He had three employees, Elias Apane, who was his bookkeeper and two others, to wit Nthemu and James Ndlovu who assisted with downloading of scrap metal and weighing thereof. According to the accused he would withdraw cash from the bank which he handed to Mr Apane as his bookkeeper who was responsible for paying sellers of scrap metal. He was also the person that completed the counter books, one of which is Exhibit "G" before the court. The accused never met the last State witness, Mr Mchunu before seeing him for the first time at the High Court sitting in Kroonstad. He therefore denied that he ever bought scrap metal from him or that he made payments to him in whatever form.

[42] According to the accused he never bought scrap metal from anybody, unless there was full compliance with the provisions of the Second Hand Goods Act. I presume he referred to the details to be contained in registers as provided for in s 21 of that Act. According to him Mr Apane completed the counter book when a transaction took place. Mr Apane would then take the seller's full details as required by the Act, such as his full names, identity

number, copy of ID book, contact number and address, to the accused who inserted these details into the register kept at his premises. He insisted that he would not be able to do business without proper record-keeping. Firstly, inspectors of the SAPS regularly carried out inspections and in particular inspected the register to ensure compliance with the Act. Secondly, he sold metal to SA Metal and this company would never buy from him if he did not have proof that he had legally bought the metal from a reputable and identifiable source.

[43] The accused was taken through Exhibit "G". He denied that he was involved with the transactions relating to one Langa. He insisted that Mr Apane was still working for him when he was arrested. At that stage Mr Apane was still on his way to work as it was not yet 08h00. The second phone ending on 6456, confiscated during his arrest, was used by Mr Apane and it was lying in the office at the time. When it rang Nthema picked it up and thereafter it was confiscated whilst in his possession. Phone ending on 6006 was the accused's private phone. According to the accused, CPI and W/O Jooste confiscated all documents and registers; therefore, they must be in possession of the registers that he kept in compliance with the Act. He does not know Charles Sithole and never used a phone ending on 1020. He is not known as Navara.

[44] During cross-examination it was put to him that neither W/O Jooste, nor Mr Van Deventer was ever confronted with the facts that the accused had other registers which complied with the Second Hand Goods Act. He responded that they referred to

registers, but it is clear that they referred to counter books or as Mr Van Deventer put it, “aankoopregisters” and referring to documents similar to Exhibit “G”.

[45] He also insisted, unlike Mr Mchunu testified, that Mr Apane was still working for him when he was arrested. He could not explain why this was not put to the witness. However, he testified that he stayed in a security complex with access control as Mr Mchunu testified.

[46] He denied that he ever had contact from his 6006 cellphone with the other accused or the phone ending on 1020, notwithstanding the admissions made in terms of s 220 of the CPA. He believes that his legal representative would not let him admit aspects that he had placed in dispute and queried the fact that the experts from the cellphone companies failed to testify. He started to refrain that the cellphone experts from Vodacom and other companies failed to testify about the cellphone data and that it cannot be correct. All other accused sang in the same choir when they testified.

[47] He insisted that Mr Apane kept the counter books, but that he completed the registers required by the Act. Mr Apane would come to him on a daily basis with a particular counter book, the copies of the sellers' ID books and all personal details as required by the Act. Based on this documentation he completed the registers on a daily basis, whilst keeping the documentation such as copies of ID books. On this version he should have been in

possession of the contact and address details as well as a copy of the ID book of the seller “Langa”, which the State submits must be a reference to accused 2, Steven Langa.

- [48] He could not explain why deductions were made in some instances for travelling costs and in fact alleged that he had no knowledge thereof. He even suggested that Mr Apane might have defrauded him.
- [49] He never made payments to customers as this was the function of Mr Apane. He would withdraw cash at the bank on a daily basis, usually R10 000.00 at a time, to be kept as a cash float to enable Mr Apane to pay the sellers. If more money was needed, he would find out whether he could withdraw more and if so, arrange an extra withdrawal. Accused 1’s case was closed after his testimony.
- [50] Steven Langa is accused 2. He testified in his defence. He is 47 years old, married with five children. He used to be a taxi driver. He lived in Barcelona, Daveyton. He did short trips in the Daveyton, Benoni and Johannesburg area and long trips which took him to Ficksburg and Bloemfontein as well as Mpumalanga. He did not know or have any contact with the other accused, although he sometimes had a few “cold ones” at accused 4’s tavern which is in the township where he resides. He denied ever having called accused 1 and 4. The accused used a cellphone with number ending on 3180 which was Rica’d on his name. He has no knowledge of a cellphone with number ending on 6437 relied upon by the State in Exhibit “K”. Insofar as the cellphone

data shows that his phone was used in areas where copper theft had taken place, he regarded that as mere coincidence in that he might have passed those areas at the time.

[51] He was arrested on 12 February 2015. It surprised him to be standing trial for these offences and to testify again as he had already been convicted in respect thereof at the court in Kroonstad.

[52] During cross-examination he said that he travelled to Ficksburg once a week, but during the festive season even two to three times a week. This was the position between 2010 and 2015. It was put to him that his cellphone was picked up five times only during the period from 8 October 2013 to 7 May 2014 and that during the period 3 November 2013 to 10 January 2014 the cellphone was not picked up once in the Ficksburg area. Accused tried to avoid the question, but ultimately suggested that the data was not received from MTN. He denied that he made the written admissions handed in by agreement earlier. He insisted that there was no contact between his phone and that of the other accused. When put to him that his phone 3180 had contact on an almost daily basis from 8 October 2013 to 5 December 2013 with phone 4776 Rica'd in the name of accused 3's wife, he merely relied on a lack of knowledge and insisted that the MTN experts should have explained this. Mr Potgieter pointed out all the relevant contacts during the times when theft was allegedly committed and where the cellphones were picked up, but the accused stuck to his response.

[53] Accused 2 insisted that he was never in possession of cellphone 6437 and denied any contact between that phone and phone 4776 Rica'd in the name of accused 3's wife. Although he knows accused 4, he never had contact with him on phone 0995, especially not when the phones were picked up in the same areas, such as Ficksburg. He denied that he was involved in any theft of copper cables with his co-accused and/or that he transported and/or sold copper to accused 1. On a question by the court he said that he did not have his employer and taxi owner, Mr David Sibiya's cellphone on his phonebook as he knew that number by heart. He also mentioned that the white Nissan bakkie driven by accused 3 and stopped by constable Sithole near Senekal was given to him to hold as security as he had lent money to the owner thereof, Mr Solomon. This explains the evidence of constable Sithole in this regard. I stated earlier that I would make a finding on the admissibility of hearsay evidence by constable Sithole in this regard at the end of the trial. Based on the accused's concession, the hearsay evidence is admitted. On his version the bakkie was kept in his possession all the time when the debt remained unpaid.

[54] Accused 3 is 34 years old, married with four children. He stayed at Etwatwa, Daveyton. On his version he used cellphone 7735 during 2013 and 2014. He had no contact with accused 1 and 2. He denied ever been in the Ficksburg area. He confirmed that the person Rica'd in Exhibit "K" whose ID number begins with 850217 is his wife, but he knows nothing about the two phones 4776 and 4320. He knows that her number is 3827. He admitted being stopped by CPI members on 2 February 2017 between

Balfour and Nigel. He was put in their Ford Ranger bakkie. At that stage he handed his phone to them. The number thereof is 3130. He was taken to their offices in Springs whilst being assaulted on the way there. He also explained a vicious assault at the offices. At about 23h00 they took him outside to his car that was brought along and showed him empty bags and a pair of overalls which they insisted belong to him. He was put in the back of CPI's bakkie which was kept in the garage at their offices where he had to sleep the night. The next morning his vehicle was towed to Kroonstad and he was taken there as well. At CPI's offices in Kroonstad he was severely beaten by a woman on the knees with a baton. He admitted that photographs were taken of him and a cellphone which looked like his. However, he denied that the IMEI and cellphone numbers displayed on the photographs were those of his cellphone.

- [55] He also testified about the incident when Constable Sithole stopped him on the N5 to Winburg. He insisted that he gave a lady and her two kids a lift from Ventersburg and that he dropped them at a filling station in town. On his way to Winburg the police stopped him. He denied having been chased as testified by the constable. He told them about Sifiso His cellphone 7735 was taken upon his arrest at about 02h00. He never used his wife's cellphone. In cross-examination and when confronted with the admissions of the two numbers Rica'd in his wife's name, he denied any knowledge thereof. He even suggested that the phones might have been Rica'd in another Ngubeni's name. His wife never visited Ficksburg or Senekal. When he was stopped at

Senekal in 2014, his wife did not accompany him and remained in Daveyton.

[56] He was confronted with the contradictory version of Constable Sithole who said he never turned left from the Ventersburg road in the direction of Senekal, but actually intended to go straight over the N5 to Marquard, but changed direction when he saw the police vehicles. He then said that, coming from Senekal towards Winburg, he stopped at the stop sign when he saw the police. The objective facts are clear: there is no stop sign on the N5 as alleged. He was also confronted with the fact that cellphone 4776 was active in the Senekal area on 25 March 2014 and that during the time that accused 3 was in custody all incoming calls to that number were forwarded to the mail box. After his release the phone was used again. He merely indicated that he had no knowledge of the allegations. He did not respond meaningfully to the question put to him in respect of Mr Kritzinger's version about his contact with accused 3's wife and the two phones Rica's in her name.

[57] His contradictory version firstly as put to Kritzinger about being kept in a bakkie at a filling station in Balfour and his evidence that he was kept in Springs could not be explained properly. The two towns are 40 km apart. Several other aspects were put to the witness that he failed to explain, e.g. that Col Maree recognised his cellphone number 4776 in 2013 from accused 4's phonebook and that Mr Koekemoer also found the same number under the name Amos in accused 4's phonebook in 2015.

- [58] Accused 4 testified in his defence. He is 41 years old and does not have a SA Identity book. He is married with two children. His cellphone number in 2014 was 8428. He did not know accused 1 but saw accused 2 at his tavern before although they never had cellphone contact. Accused 3 is his brother. He admitted the incident when Mr Koekemoer stopped and interviewed him. Without having to deal with it, I merely wish to point out that his version as to how it came about that they were eventually stopped by CPI members differs from the statements put to Mr Koekemoer. He admitted that his phone was taken from him, but that it was later returned and that he was allowed to leave. In cross-examination it was put on his behalf that he knows most of the numbers on Exhibit "F", an extract from his phonebook, but in his evidence he did not want to admit the list. On questions by the court he stated that he remembered three names which he read out, but the next morning in cross-examination he insisted that he is illiterate and he could only read numbers. The previous day he showed to the court that his surname was spelt incorrectly and he admitted that his address was taken down correctly.
- [59] He never used cellphone 0955 and testified at a stage that he knew nothing about Exhibit "F"; the list was not drawn up in his presence. He was hitch-hiking near Nelspruit when he was arrested by CPI members, one of which hit him with a rifle butt on his left eye, causing bleeding and severe damage. He was taken to Pretoria.
- [60] He also testified about the incident in Kenhardt in 2013 relating to Col Maree. He admitted that he wrote his name on a piece of

paper, but denied that Col Maree ever had access to his cellphone in order to peruse his phonebook. He did not agree that Col Maree and Mr Koekemoer could have written down his number as 0955 in 2013 and 2015 respectively. He could not explain the names Mzati 2 and Mzati 3 in his phonebook with accused 1's two Rica'd numbers next to it; also the number 1020 next to "28" which is the number the State ascribes to accused 1 and/or his business. Also, the number attributed to accused 3, to wit 4776 appears in the phonebook under Shoprt, but the accused did not know this person. It must be emphasised that Mr Van Deventer testified about the phone book of Charles Sithole which he examined. He recorded the information. The numbers 6006 and 6456 are stored under the names Alfred and Alfred 2 respectively and number 1020 is stored under Elias Navara (Navara being a nickname of accused 1).

VI RELEVANT LEGISLATION

[61] The 2015 Act is a new piece of legislation. It became operative on 1 June 2016. I could find only one judgment on the topic, to wit a judgment on appeal in the Western Cape Division by Cloete J, with whom Fortuin J concurred. I refer to *Gwadiso and another v The State*, case no A425/2017, delivered on 16 March 2018. This judgment is not directly applicable to adjudicate the merits of the case. Van Zyl J of this Division also gave a judgment in this regard, but I have been informed by my colleague that her written and approved judgment is not available yet. I deem it appropriate to quote the relevant parts of the 2015 Act, but before I do that, it

should be reiterated that the 2015 Act has been enacted to serve several purposes, *inter alia* to impose discretionary minimum sentences for essential infrastructure-related offences, to create a new offence relating to essential infrastructure and to amend POCA as to insert a new offence in Schedule 1 thereof.

[62] Section 1 of the 2015 Act contains the following definitions:

“**‘basic service’** means a service, provided by the public or private sector, relating to energy, transport, water, sanitation and communication, the interference with which may prejudice the livelihood, well-being, daily operations or economic activity of the public;”

“**‘essential infrastructure’** means any installation, structure, facility or system, whether publically or privately owned, the loss or damage of, or the tampering with, which may interfere with the provision or distribution of a basic service to the public;”

“ **‘tamper’** includes to alter, cut, disturb, interfere with, interrupt, manipulate, obstruct, remove or uproot by any means, method or device, and **‘tampering’** shall be construed accordingly.”

[63] A new offence is created in s 3 which reads as follows:

“3.1 Any person who unlawfully and intentionally –

- (a) tampers with, damages or destroys essential infrastructure; or
- (b) colludes with or assists another person in the commission, performance or carrying out of an activity referred to in paragraph (a),

and who knows or ought reasonably to have known or suspected that it is essential infrastructure, is guilty of an offence and liable on conviction to a period of imprisonment not exceeding 30 years or, in the case of a corporate body as contemplated in section 332(2) of the Criminal Procedure Act, 1977, a fine not exceeding R100 million.

(2) For the purposes of subsection (1), a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have

reached are those which would have been reached by a reasonably diligent and vigilant person having both –

- (a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and
- (b) the general knowledge, skill, training and experience that he or she in fact has.”

[64] Part II of Schedule 2 to the Criminal Law Amendment Act, 105 of 1997 was amended by s 6 of the 2015 Act and now includes theft of ferrous or non-ferrous metal which formed part of essential infrastructure as defined in s 1 of the 2015 Act. An offence in s 3 of the 2015 Act now also falls within the scope of Part II of Schedule 2.

VII RELEVANT LEGAL PRINCIPLES

[65] In assessing the evidence a court must in the ultimate analysis look at the evidence holistically in order to determine whether the guilt of the accused has been proved beyond reasonable doubt. This does not mean that the breaking down of the evidence in its component parts is not a useful aid to a proper evaluation and understanding thereof. See *S v Shilakwe* 2012 (1) SACR 16 (SCA) at 20, para [11]. In *S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426f–h the SCA approved of the following *dictum*:

“But in doing so, (breaking down the evidence in its component parts) one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in the trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is

appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood from the trees.”

See also: *S v Mbuli* 2003 (1) SACR 97 (SCA) at 110, para [57]; *S v Van Aswegen* 2001 (2) SACR 97 (SCA) at 101a-e and *S v Trainor* 2003 (1) SACR 35 (SCA) at paras [8] and [9].

[66] It is acceptable in evaluating the evidence in its totality to consider the inherent probabilities. Heher AJA (as he then was) dealt with this aspect as follows:

“The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weigh so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt.”

See: *S v Chabalala* 2003 (1) SACR 134 (SCA) para [15]. I accept that although separate incidents may be considered in compartments, a court should not examine the State and the accused’s cases in isolation. See: *S v Trainor supra*.

[67] In criminal trials presiding officers are often confronted with two mutually destructive and incompatible versions. The presiding officer is entitled to consider the probabilities as mentioned *supra* and to adopt the reasoning of Nienaber JA in *SFW Group Ltd and*

Another v Martell Et Cie and Others 2003 (1) SA 11 (SCA). I quote from para [5]:

“[5] The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the

former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”

- [68] Section 208 of Act 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of any competent witness. There is no magic formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of a single witness and consider its merits and having done so, should decide whether it is satisfied that the truth has been told, despite the shortcomings or defects in the evidence. In evaluating the evidence the court should not allow the exercise of caution to displace the exercise of common sense.

See *S v Sauls* 1981 (3) SA 172 (AD) at 180E – G.

- [69] In *S v Nduna* 2011 (1) SACR 115 (SCA) at 120h–121e, the Supreme Court of Appeal dealt with similar fact evidence as follows:

“[17] It is settled law that, whilst similar fact evidence is admissible to prove the identity of an accused person as the perpetrator of an offence, it cannot be used to prove the commission of the crime itself. This legal principle operates, in addition, to exclude such similar fact evidence from being confirmatory material on another count.

[18] However, the application of the rule is not to be confused with the situation where the rule is invoked to establish the cogency of the evidence of a systematic cause of wrongful conduct, in order to render it more probable that the offender committed each of the offences charged in respect of such

conduct..... This court (per Schreiner JA) stated the rule succinctly in *R v Mathews and others* 1960 (1) SA 752(A) at 758B – C:

‘Relevancy is based upon a blend of logic and experience lying outside the law. The law starts with this practical or common sense relevancy and then adds material to it or, more commonly, excludes material from it, the resultant being what is legally relevant and therefore admissible.... Katz’s case is authority for asking oneself whether the questioned evidence is only, in common sense, relevant to the propensity of the appellants to commit crimes of violence, with the impermissible deduction that they for that reason were more likely to have committed the crime charged, or whether there is any other reason which, fairly considered, supports the relevancy of the evidence’.”

See also: *S v Moti* 1998 (2) SACR 245 (SCA) at 258 where the court found that similar fact evidence of a *modus operandi* was admissible to corroborate inadequate evidence of identification and *S v D* 1991 (2) SACR 543 (A) at 546G – 547B where FH Grosskopf JA said: “Taken together these similarities are sufficiently striking in my judgment to corroborate the other circumstantial evidence pointing to the appellant as the culprit,....”

[70] In assessing circumstantial evidence a court should be careful not to approach the evidence upon a piece-meal basis. The following well-known *dictum* of Davis AJA in *R v De Villiers* 1944 AD 493 at 508-9 should be adhered to:

“The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the

accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.”

- [71] Zulman AJA (as he then was) aptly referred to the following quotation in *S v Reddy and Others* 1996(2) SACR 1 (A) at 8i:

“A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish.....*Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone...*”

- [72] In *S v Boesak* 2000 (1) SACR 633 (SCA) the court dealt at para [48] with the trite legal principle that the “State is not required to plug every loophole, counter every speculative argument and parry every defence which can be conceived by imaginative counsel without a scrap of evidence to substantiate it.”

- [73] The SCA in *Boesak* also reiterated the well-known principle at para [50] that the “cross- examiner should put his defence on each and every aspect which he wishes to place in issue, explicitly and unambiguously, to the witness implicating his client. A criminal trial is not a game of catch-as-catch-can, nor should it be turned into a forensic ambush”. It should not be countenanced that the credibility of a witness be attacked based on speculation and without cross-examination of the witness on pertinent issues.

[74] It is necessary to consider duplication of convictions as Mr van der Merwe raised the issue in his argument with specific reference to theft (count 9) and tampering, damaging or destroying of essential infrastructure in terms of the provisions of s 3 of the 2015 Act. Theft is defined as the unlawful and intentional appropriation of *inter alia* moveable property which belongs to another in order to permanently deprive the person of such property. See: CR Snyman, *Criminal Law*, 5th ed at 483. In terms of s 3 of the 2015 Act an offence is committed if a person unlawfully and intentionally tampers, damages or destroys essential infrastructure. “Essential infrastructure” and “tamper” are clearly defined in the 2015 Act. There is a clear distinction between the elements to be proven by the State to ensure a conviction in respect of these offences. There is no single test to consider duplication of convictions, but two indicators to be used are the test of a single intention and the evidence test. See: *S v McIntyre* 1997 (2) SACR 333 (T) at 336-7 and Du Toit *et al*, *Commentary on the Criminal Procedure Act*, 14-6 and further. It is also appropriate to make use of both tests at the same time, *i.e.* that of intention and evidence. If the elements constituting the offences differ, there cannot be a duplication even though one single act is committed or transaction is concluded.

VIII EVALUATION OF THE EVIDENCE

- [75] I dealt with Mr Van Deventer's evidence in some detail above but failed to mention the cross-examination. Before I deal with that it needs to be pointed out that the witness produced the typed version of Charles Sithole's phonebook written down by him during Sithole's arrest. I refer to Exhibit "K" pp 15 – 21. The two Rica'd cellphone numbers of accused 1 are stored under the names Alfred and Alfred 2 respectively. Another cellphone number is stored under the name Elias Navara to wit 1020, which phone Mr Van Deventer testified was used most regularly. As mentioned the information in respect of these three numbers corresponds with the information obtained from the phonebook of accused 4 as set out in Exhibit "F". It is also important to note that accused 3's number 4776 is stored in Sithole's phonebook under the name Amo Bus and accused 2's phone 3180 is stored under the name Silva. Clearly the accused made use of nick- and or false names to hide the identity of their contacts.
- [76] Mr Van Der Merwe placed on record before the start of his cross-examination that he had instructions not to attack the correctness of the cellphone data. He put it to the witness that accused 3 was arrested with phone number 3130 and not 4320. The witness denied this and stated that there would be no way for him to get into possession of phone 4320, a phone Rica'd in the name of accused 3's wife other than through accused 3. The witness also denied the version that phone 6456 belonged to accused 1's employee, Mr Apane. The witness stated that during accused 1's arrest no manager or bookkeeper was found on the premises, but only two casual workers. When accused 1 was interrogated on the day of his arrest about the inscriptions in his records, he never

mentioned a person such as Mr Apane. When it was put to the witness that the reference to Langa in Exhibit "G" could be any other person, but accused 2, he denied that with reference to the cellphone records. Accused 2's cellphone number was never in dispute and that number had contact with accused 1 more than once before and/or after the transactions were concluded. He also submitted that the copper sold on the two occasions is of a similar weight of those stolen in Ficksburg. He admitted that he relied on an estimate to reach this conclusion. Although he stated that the number 1020 was not found in the phonebooks of the other accused he clearly made a mistake as this number is stored in the phonebook of accused 4 under "28".

[77] When it was put to the witness that accused 2 never had contact with accused 1 and did not know him, he pointed to at least two pages, 1363 and 1369 of Exhibit "P" in support of his version that they had telephonic contact. Numbers 6006 and 1020 were in contact with accused 2. He also disproved a statement that accused 1 never had contact with accused 3 and 4 by referring to Exhibit "P". Contrary to the statement put to him, he insisted that phone 1020 was used by either accused 1 or an employee to have contact with the other accused. Contrary to accused 3's later evidence, it was put to the witness that he never used the two phones Rica'd in his wife's name. The witness responded that if accused 3 did not use those phones, his wife was in regular contact and/or visited crime scenes with accused 1, 2 and 4.

[78] As could have been expected, the evidence of all the witnesses

that testified in respect of theft in the form of cutting and removing of telephone wires, the optic fibre wire and the FCC cables, as well as the removal of fishplates, bolts and nuts have been left unchallenged. These witnesses were merely cross-examined about the actual date and time of theft and the value of the stolen items. Needless to say, it was not possible to be precise. I accept that the items mentioned in the evidence of Messrs Motaung, Mofokeng, Bester, Van Niekerk, Van den Berg, Rudman, Klem, Posholi and Motsumi have been stolen from the respective complainants shortly before the theft was discovered. It is also accepted that none of these witnesses could provide reliable evidence of the exact dates and/or times when the offences were committed or the value of the stolen goods. None of them were called to give expert evidence in respect of valuations. The probabilities are overwhelming to the effect that the theft in each instance occurred close to and within a day or two before it was detected.

- [79] Although the value of the stolen goods may not have been proved with sufficient weight, the consequences of the theft in several cases and the potential consequences in other instances could not be challenged. No doubt, the promulgation of the 2015 Act is a logical consequence of the unacceptably high crime rate relating to infrastructure. Considerable damage may be caused to essential infrastructure by the commission of offences that are in themselves relatively minor. The legislature has recognised this as is apparent from the preamble to the 2015 Act.

[80] Mr Van der Merwe in an able and convincing argument made the following submissions which I shall keep in mind during my evaluation of the evidence:

- (1) The State's case against accused 1 stands or falls with the court's finding on the ownership/possession or lack thereof of cellphone 1020. The cellphone data which was placed before the court mainly deals with this phone and not accused 1's private phone 6006 or another phone Rica'd in his name, to wit 6456, in order to prove contact and therefore co-operation between the accused during relevant times.
- (2) This number 1020 was found in a certain Charles Sithole's phonebook, stored under the name Elias Navara and that phone is not before court. The court cannot find that this is a reference to accused 1. Sithole also did not testify. Mr Mchunu never testified that he contacted accused 1 on that number. There is proof of contact between these two numbers and Mr Van der Merwe argued that nobody would phone himself.
- (3) There are several other scrap metal dealers in the area of accused 1's business and it is not the only reasonable deduction to be made from the proven facts that number 1020 belonged to accused 1.
- (4) Accused 1 is entitled to be acquitted on all charges.
- (5) Mr Van der Merwe submitted that he has instructions from accused 2, 3 and 4 to argue that credibility findings should be made in their favour and against the State insofar as their versions are contradicted by State witnesses.
- (6) Accused 2 is the owner of phone 3180 and his evidence that he as a taxi driver went to Ficksburg on regular visits should

be found to be reasonably possibly true, although there were deficiencies in his version. He did not know accused 3 and 4 and cannot explain cellphone contact between his phone and their phones.

- (7) Even the cellphone data reflects that accused 2 arrived in Ficksburg on 25 January 2014 and thus after the commission of the theft on 23 - 24 January. He should be acquitted on counts 4 and 5.
- (8) Mr Van der Merwe did not make a similar submission in respect of count 3 allegedly committed on 10 -11 January 2014. However, if accused 2 is convicted on this charge, racketeering has not been proven and the accused shall be acquitted on count 2.
- (9) Mr Van der Merwe argued that if the court does not make credibility findings in favour of accused 3, he could not make any further submissions as to why he should not be convicted in respect of counts 2 to 10, save for his argument pertaining to duplication of convictions to be dealt with *infra*. He specifically indicated that he could not think of any reason why s 2(1)(e) of POCA should not be found applicable.
- (10) The same arguments were advanced in respect of accused 4 and it was specifically argued that the evidence of Mr Koekemoer and Col Maree should be rejected and accused 4's version accepted.
- (11) There is no evidence that accused 4 was on the scene during commission of the theft in count 3.
- (12) Accused 4 was only in the Senekal area from 3 April after commission of the theft and could not be involved with the crime in count 8.

- (13) Alternatively, accused 4 may only be convicted on counts 4, 5, 6, 7, 9 and 10.
- (14) Mr Van der Merwe submitted that the State relies on the same set of facts to secure convictions on counts 9 and 10 and this is nothing but a duplication of charges. Also, count 10 relates to damage to infrastructure and *in casu*, whatever was achieved, there was no damage in the sense as intended by the legislature. The trains could still use the railway and the potential to create damage is not sufficient for a conviction. At best for the State accused 3 and 4 could only be convicted in respect of theft, count 9.

[81] Mr Potgieter argued the case for the State, the heads of argument having been prepared by him and his leader, Mr Pretorius. I do not intend to deal with their submissions separately, but shall incorporate that in my evaluation. It is clear that I am called upon to adjudicate in essence who the cellphone users of the relevant phones were at the times referred to in the cellphone analysis. If that is not proven beyond reasonable doubt in respect of one, more or all of the accused persons, the case falls flat in respect of those accused.

[82] In order to analyse the evidence to arrive at my evaluation and final conclusions, I decided to break down the evidence in certain compartments. Before I do that, the uncontested and admitted evidence is recorded in Exhibit "S". I appreciate that the accused testified that they do not agree with some of the admissions in Exhibit "S" which were recorded in terms of s 220 of the CPA. However, these are formal admissions made on their instructions,

signed by them and recorded as such, forming part of the evidential material. There was no attempt to withdraw any admissions. I am satisfied that these admissions have been made after proper consideration of the evidence that the State intended to lead in this regard. In my view the accused persons' attempt to halfheartedly retract from formal admissions tarnish their evidence to such an extent that it must be considered with suspicion.

[83] There is no direct evidence linking any of the accused to any of the offences. Therefore the court is bound to consider the case on the basis laid down in *R v Blom*, *R v De Villiers* and the latest judgment of the SCA, *S v Reddy*. I refer to the *dicta* of the last two judgments which I quoted *supra*.

[84] I am of the view that, based on the authorities quoted, I am entitled to consider the similarities in the manner in which some of the offences were committed.

[85] I also accept that a court does not have to believe an accused's version in order to acquit him/her. If there is reasonable doubt of his/her guilt the accused must be acquitted. The totality of the evidence must be considered in order to arrive at a finding and in doing so, a court is entitled to consider the probabilities as set out in *Chabalala supra*. In my view it is in order to evaluate the evidence as the SCA has done in *Martell supra*, obviously taking into consideration that the court dealt with a civil matter and the test in criminal cases is much more stringent than in civil matters. All State witnesses gave their evidence in a coherent and acceptable manner. No inconsistencies, material or immaterial, can be found in

their versions. They all made a good impression on the court. There are no improbabilities in their versions and I am satisfied that they have told the truth, based on the documentary evidence and objective facts that corroborate their versions. Also, witnesses testifying in respect of different occasions, removed in time and distance from the other, corroborated other witnesses.

[86] The accused tried to retract from the formal admissions made by them and insisted that experts of the cellphone providers should have testified. In doing this, their credibility is tarnished. There are numerous internal contradictions in their versions as well as external contradictions with what was put on their behalf and/or the established facts. All four of them were poor witnesses and their credibility is tainted insofar as they are contradicted by any of the State witnesses. I have no doubt to accept the version of such State witnesses and to find that the accused are not trustworthy. In the next paragraphs I make certain findings but wish to emphasise that some of those findings are based on the cellphone analysis and my conclusions in that regard.

Counts 1 and 2

[87] The following findings are made:

1. Accused 1 is the sole member of Malvern Scrap Metal CC and regarded himself as the sole owner of this business.

2. His private cellphone number is [...] 6006 and the number of a cellphone used in the business is [...] 6456; both these phones were Rica'd in the name of accused 1.
3. The business is situated in Malvern, Germiston, whilst accused 1 resided at Wychwood Lodge in Malvern East, Germiston.
4. Accused 1's business kept counter books, recording purchases of scrap metal, including copper, and one such book for the period January to April 2014 was handed in as Exhibit "G".
5. *Ex facie* Exhibit "G" 298.5 kg of 1A copper was bought from one Langa at a price of R16 417.50 on 12 January 2014 and on 26 January 2014 309 kg of 1A copper was bought from Langa at a price of R16 995.00. This happened just after the incidents of theft in Ficksburg.
6. Accused 1's aforesaid two cellphone numbers were saved under the names Mzati 2 and Mzati 3 in the phonebook of a phone with number [...] 0955 found in possession of accused 4 in 2015 by Mr Koekemoer. The number 1020 is also found in this phonebook under "28".
7. Col Maree found a phone in accused 4's possession in Kenhardt, Northern Cape in 2013 and according to the contemporaneous note made by him, handed in as Exhibit "Q", accused 4's cellphone number was recorded as [...] 0955, exactly the same as what Mr Koekemoer found nearly two years later. Both these two witnesses were single witnesses

who testified about unrelated events. I accept that a cautionary rule applies. I am satisfied that they were not only impressive witnesses, but that they delivered credible and reliable evidence which is in both instances corroborated by the documentary evidence as well as other evidence presented by the State.

8. The cellphone data, contained in four lever arch files and accepted as Exhibit "P", was admitted to be true and correct in Exhibit "S". According to these data there was contact between accused 1's two phones as well as phone number 1020 which the State attributes to accused 1 and/or his business and the cellphones allegedly used by accused 2, 3 and 4 during the periods when thefts were committed during January 2014.
9. I accept as a fact that cellphone 1020 belonged to accused 1 and/or was used by him in his business in order to clinch business transactions - in all probabilities all such deals being illegal - and that is confirmed by the false Rica information in respect of the cellphone. This number was saved on the phonebook of Charles Sithole, a copper thief, under the name Elias Navara. I refer to the version of Mr Van Deventer who gave direct evidence in this regard. Mr Mchunu knows that accused 1 was driving a Navara vehicle and that he was also known as Navara. The cellphone communication corresponds with the dates when the copper theft has taken place in Ficksburg on two occasions and the dates of the purchases of copper from one Langa.

10. The locations of the cellphone towers were admitted, the effect thereof being that the movement of the different cellphone users of the phones attributed to the accused persons as set out in Exhibit "P" must be accepted as correct. The contact between the persons driving from Gauteng to Ficksburg to steal the copper and thereafter returning to Gauteng and accused 1 has been proven.
11. Mr Mchunu testified that he transported stolen copper as member of a syndicate of copper thieves to accused 1, that his contact to indicate that he was on his way to Malvern was with accused 1 personally and although employees offloaded copper, accused 1 always came in to pay him. He also visited accused 1's home situated in a security complex on several occasions.
12. Accused 1 took down notes during the whole trial and when Mr Van der Merwe turned around to obtain instructions from accused 3 in court during cross-examination, accused 1 (and also 2) immediately lent over and took part in the discussion. Accused 1 appeared to be in charge of the accused in court. I am satisfied that accused 1 was the manager and/or person in control of a syndicate involved in copper theft. It is also clear that his business from time to time financed people by paying for their transport in order to assist them to transport copper to his business, only to deduct the loans when the sellers are paid for the copper "sold". I accept that a cautionary rule applies to the testimony of Mr Mchunu who was clearly involved with illegal activities and even pleaded guilty in respect of his role in

copper theft. Although not involved in the present case, he must be seen as a co-perpetrator. However, I have no doubt that he has spoken the truth.

13. Accused 1 failed to live up to the standard expected of a party that should dispute the opponent's case in that he did not dispute the version of W/O Jooste or Mr Van Deventer about the counter books by putting to them that proper registers were kept in compliance with the Second Hand Goods Act. Therefore, the belated version that proper registers were kept is a recent fabrication and must be rejected as false. As stated in *Boesak supra*, a party cannot fail to cross-examine a witness on a specific issue and later testify and/or argue that such witness should be disbelieved.

14. Accused 1's version that he used to withdraw money daily and handed same to Mr Apane who was solely responsible to pay customers and thereby distancing him from his own business is highly unlikely and untenable. He even suggested that Mr Apane might have defrauded him based on the deduction of transport costs. Clearly, accused 1 tried to shift the blame and looked for a scapegoat. Unlike as he testified, Mr Apane did not work for him on the day of his arrest. There is no reason why a senior and trusted employee such as Mr Apane, his bookkeeper, according to accused 1, would leave his work cellphone at work during the night. Mr Mchunu's version lends credence to W/O Jooste and Mr Van Deventer's versions that Mr Apane was not employed there at the time of accused 1's arrest. If Mr Apane was suspected by accused 1 to be the

guilty party who acted illegally behind his back (as should have been the case as he had direct dealing with customers according to accused 1), W/O Jooste would have been informed there and then.

15. I also find that accused 2 was the link between accused 3 and 4 on the one hand and accused 1. The reference to Langa in the counter book can only be a reference to him, bearing in mind the cellphone data and the totality of the evidence. When his ties with accused 1 were broken, no further evidence could be found of cellphone communication between accused 1 and the other accused.
16. Another aspect that plays a role here, but also in respect of the other counts – something that I found in examining Exhibit “P” - is that although there was always sporadic contact between accused 3 and 4, the contact heightened tremendously during the time that theft occurred, not only at Ficksburg, but also at Senekal and Glen. The cellphone records prove this and I refer to some occasions. On 11 and 12 January 2014 there were nine calls between accused 3 and 4 whilst accused 3 was in the Ficksburg area. Just before 06h00 accused 3 phoned 1020 twice, first when on his way to the Wychwood area and secondly, when his phone picked up Wychwood Primary. At that stage three calls were made to and received from accused 2. On 25 January 2014 accused 3 arrived in Ficksburg at 20h46 and he remained in the area for 7.5 hours until the next morning 04h12. During this time there was contact with

accused 4 on twenty occasions. Contact was also made with 1020 hereafter.

17. Accused 2 had regular contact with 4776 of accused 3 from 8 October 2013 and also contact with 1020 on several occasions during October 2013. He also had regular contact with accused 4 from that time onwards. On 10 January 2014 accused 2 was in the Ficksburg area for a short while and before, during and after this time he had contact with accused 3 and 4. On 11 January 2014 accused went back to Ficksburg for a short while and before, during and after the trip he had contact with accused 1, 3 and 4. On 25 January accused 2 found him in the Ficksburg area again. This time he spent 7.5 hours there from 20h46 to 04h11 the next morning. He had numerous contact with accused 4 and once with accused 3. On his way back to Gauteng he also had contact with accused 1. On 27 January 2014 his cellphone picked up the Wychwood tower. He was in that vicinity again on 30 January and 1 February 2014 when he had contact with accused 1.

Counts 3 - 6

[88] All four accused are allegedly involved in the commission of these crimes, to wit the three theft counts in Ficksburg during January 2014 and the count of theft on or about 24 to 26 March 2014 on the Senekal / Marquard road. I indicated that there is no evidence linking accused 1 to the theft in count 6 and the State conceded this. The following are uncontested or admitted

evidence and/or can be accepted, based on the totality of the evidence:

1. The cellphone data contained in Exhibit "P".
2. Accused 3 was arrested on the Senekal / Winburg road in the early hours of 25 March 2014 when he came from Ventersburg intending to cross the N5 towards Marquard, but at the last moment changed direction and headed to Winburg on the N5.
3. The SAPS were on the scene a short distance – about 100 metres - from the intersection in the direction of Marquard and Constable Sithole followed accused 3, but only managed to stop him about 10 km further.
4. Accused 3 was arrested, but released late afternoon on 25 March 2014. During the time of his detention he was not in possession of his cellphone and consequently all calls received went onto voicemail. Before arrest and after his release cellphone communication took place indicating the location of the phone in the Senekal area. Some time after accused 3's release the cellphone user moved in the direction of accused 3's home in Etwatwa, Gauteng. I refer to the cellphone analysis *infra*.
5. The cellphone analysis proves that accused 3 and 4 were in frequent contact with each other prior to, during and after visits to the crime scenes and this carried on in respect of

count 6 relating to the theft in Senekal. However, there is no proof that accused 1 and 2 featured anymore during the March incident as well as thereafter. Mr Potgieter conceded that he could not ask for a conviction in respect of these two accused pertaining to count 6.

6. I refer to the findings made under the heading, “counts 1 and 2” *supra* which should be read herewith. The theft in respect of all these counts, *i.e.* have been proven, save for the remark in paragraph 5 above.

Counts 7 and 8

[89] Only accused 1,3 and 4 are charged with these two offences, to wit theft of the Senekal municipality’s power cable at the Syferfontein dam on or about 24 to 26 March 2014 and theft of Transnet property near the Senekal Railway Station on or about 1 April 2014. I have already indicated during argument that there is no evidence pointing towards the guilt of accused 1 and the State conceded this. The following are uncontested or admitted evidence and/or found to be proven:

1. The cellphone data is contained in Exhibit “P” and I also refer to the cellphone analysis *infra* about the cellphone users’ movements and communication during March and April 2014. The difference is that accused 1 and 2 are not involved anymore. The data speaks for itself. This time, 24 and 25 March 2014, accused 3 spent 16 hours in the

Senekal area. Several contact occurred with accused 4 prior to, during and after the visit.

2. The theft at the Senekal waterworks and railway station on or about 24 – 26 March 2014 and 1 April 2014 respectively is not in dispute.
3. As said, the movements and telephonic communication between accused 3 and 4 are properly recorded in Exhibit “P”. I do not intend to go through the same exercise to show this, but refer to the cellphone analysis *infra*.

Counts 9 and 10

[90] Only accused 3 and 4 are charged in this regard. The offences were allegedly committed in September 2016 which was after the arrest and detention of accused 1 and 2. The following evidence is uncontested or admitted and/or is accepted to be the truth:

1. Accused 3 and 4 were the cellphone users of the cellphones attributed to them during this time and their denial of the evidence of the State witnesses is improbable, false and rejected.
2. Both of them were in the Glen / Bloemfontein area for a long time during the time that the FCC cables were probably cut and stolen. I refer to the cellphone analysis. Accused 4 spent 30 hours in the Bloemfontein area from 22 – 24

September 2016. He had contact with accused 3 on eight occasions during this time as well as before and after his visit. I did not calculate the period spent by accused 3 in the area, but he stayed here for about the same time.

3. The theft of the FCC cables at Glen at about 24 – 26 September 2016 is undisputed.

4. As indicated earlier, both these accused, as well as the other two, were poor witnesses who made a bad impression on the court. I find it difficult to say who of accused 3 or 4 was the poorer, because of the many inconsistencies and improbabilities in both versions. Accused 3 was found in possession of items used to assist with the cutting of copper cables. Accused 4 transformed into an illiterate person during the trial as I have indicated.

[91] Having accepted that the cellphone users have been identified in accordance with the State's version, I have taken the liberty to copy the composite cellphone analysis inserted in the State's heads of argument in order to save time. I wish to add that I carefully noted the explanations of Mr Van Deventer, but went further and did my own examination of the cellphone analysis, some of which I set out earlier. I am satisfied that the information is correct as I verified it with Exhibit "P". Mr Potgieter assured me that they made a correct compilation of the various cellphone records, showing how the accused had contact with each other. I quote from the heads of argument:

“Column 1 indicates the date of the cellphone contact. Column 2 indicates the time of the cellphone contact. Column 3 indicates if and with whom accused 1 had contact at a specific time. Column 4 indicates the location where accused 1’s cellphone picked up at the time of contact. Column 5 indicates if and with whom accused 2 had contact at a specific time. Column 6 indicates the location where accused 2’s cellphone picked up at the time of contact. Column 7 indicates if and with whom accused 3 had contact at a specific time. Column 8 indicates the location where accused 3’s cellphone picked up at the time of contact. Column 9 indicates if and with whom accused 4 had contact at a specific time. Column 10 indicates the location where accused 4’s cellphone picked up at the time of contact.

Count 3

Date	Time	Acc 1	Location	Acc 2	Location	Acc 3	Location	Acc 4	Location
10/01/2014	00:55					4	Fouriesburg	3	N/A
	01:00					4	Fouriesburg	3	N/A
	01:09					4	Fouriesburg	3	N/A
	03:01			4	Ficksburg			2	N/A
	03:29			4	Kommando Nek			2	N/A
	03:44			4	Ficksburg			2	N/A
	03:46			4	Ficksburg			2	N/A
	03:46			4	Kommando Nek			2	N/A
	04:12			4	Kommando Nek			2	N/A
	04:16			4	Ficksburg			2	N/A
	09:53					4	Thembelihle Primary	3	N/A
	09:54					4	Thembelihle Primary	3	N/A
	11:26					4	Etwatwa	3	N/A
	11:46			4	Etwatwa			2	N/A
	14:34			4	Etwatwa			2	N/A
	15:18			4	Etwatwa			2	N/A
	15:18			4	Etwatwa			2	N/A
	20:46	2	Boksburg	1	Etwatwa				

11/01/2014	07:56					4	Thembelihle Primary	3	N/A
	08:08	2	Witfield	1	Etwatwa				
	08:24	2	Wynchwood	1	Etwatwa				
	19:53					4	Ficksburg	3	N/A
	20:00					4	Ficksburg	3	N/A
	20:00					4	Ficksburg	3	N/A
	20:08					4	Ficksburg	3	N/A
	20:11					4	Kommando Nek	3	N/A
	20:14					4	Kommando Nek	3	N/A
	20:15					4	Ficksburg	3	N/A
	20:25					4	Ficksburg	3	N/A
	20:31					4	Ficksburg	3	N/A
	20:35			4	Ficksburg			2	N/A
	20:36			4	Ficksburg			2	N/A
	20:43			4	Ficksburg			2	N/A
	22:23			4	Senekal/Rosendal			2	N/A
	22:35	2	Germiston	1	Senekal/Rosendal				
	22:48			4	Senekal/Rosendal			2	N/A
12/01/2014	00:35			4	Lindley			2	N/A
	00:44			4	Lindley			2	N/A
	01:20					4	Petrus Steyn	3	N/A
	01:21					4	Petrus Steyn	3	N/A
	01:34			4	Lindley			3	N/A
	02:40					4	Heilbron	3	N/A
	02:43					4	Heilbron	3	N/A
	03:30					4	Birmingham	3	N/A
	03:32					4	Birmingham	3	N/A
	03:33					4	Birmingham	3	N/A

	03:38					4	Kragbron	3	N/A
	03:46					4	Kragbron	3	N/A
	03:46					4	Kragbron	3	N/A
	03:47					4	Kragbron	3	N/A
	03:48					4	Coalbrook	3	N/A
	03:49					4	Kragbron	3	N/A
	04:01					4	Kragbron	3	N/A
	04:21					4	Kragbron	3	N/A
	04:39					4	Kragbron	3	N/A
	04:50					4	Birmingham	3	N/A
	04:57					4	Kragbron	3	N/A
	05:08	2	Bird Road	1	Viljoensdrif				
	05:35	3	Primrose			1	Brackendowns		
	05:43	2	Wychwood	1	Meyerton				
	05:46	3	Wychwood			1	Wychwood		
	06:10			3	Bedfordview	2	Simmerfield		
	06:13			3	Bedfordview	2	Primrose		
	06:19			3	Jaquar Road	2	Henville		
	06:57			4	Etwatwa			2	N/A
	13:23	2	Bird Road	1	Etwatwa				
13/01/2014	10:23	2	Wychwood	1	Etwatwa				
	11:35	2	Malvern	1	Primrose				

Counts 4 and 5

Date	Time	Acc	Location	Acc	Location	Acc	Location	Acc	Location
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		1	2	3	4	
22/01/2014	11:21			4	Thembelihle	3 N/A
	23:05			4	Fouriesburg	3 N/A
	23:06			4	Fouriesburg	3 N/A
	23:07			4	Fouriesburg	3 N/A
23/01/2014	00:07			4	Fourieburg	3 Fouriesburg
	01:00			4	Fouriesburg	3 Fouriesburg
	01:06			4	Fouriesburg	3 Fourieburg
	15:56			4	Lakeside Square	3 Benoni
	17:29			4	Etwatwa	3 Etwatwa
	17:33			4	Etwatwa	3 Etwatwa
	17:53			4	Barcelona	3 Etwatwa
24/03/2014	11:34			4	Etwatwa	3 Etwatwa
	18:57			4	Barcelona	3 Etwatwa
	19:24		4	Etwatwa		2 Etwatwa
	21:30		4	Etwatwa		2 Etwatwa
25/01/2014	11:16		4	Etwatwa		2 Daveyton
	12:28		4	Etwatwa		2 Etwatwa
	12:35			4	Thembelihle	3 Etwatwa
	12:37			4	Thembelihle	3 Etwatwa
	12:37		4	Etwatwa		2 Etwatwa
	13:23			4	Thembelihle	3 Etwatwa
	13:24			4	Thembelihle	3 Etwatwa
	15:20			4	Benoni	3 Benoni
	17:03			4	Etwatwa	3 Walkerville
	20:46		3	Kommando Nek	2 Kommando Nek	
	20:48		4	Kommando Nek		2 Kommando Nek
26/01/2014	03:44			4	Ficksburg	3 Ficksburg
	03:44		4	Ficksburg		2 Ficksburg
	03:45		4	Ficksburg		2 Ficksburg
	03:52		4	Ficksburg		2 Ficksburg
	03:54			4	Ficksburg	3 Ficksburg
	03:55		4	Ficksburg		2 Ficksburg
	03:58			4	Kommando Nek	3 Ficksburg
	03:58			4	Kommando Nek	3 Ficksburg
	04:02		4	Ficksburg		2 Ficksburg
	04:04			4	Kommando Nek	3 Ficksburg
	04:05		4	Ficksburg		2 Ficksburg
	04:05		4	Ficksburg		2 Ficksburg
	04:09			4	Kommando Nek	3 Ficksburg
	04:11			4	Ficksburg	3 Ficksburg
	04:11			4	Ficksburg	3 Ficksburg

	04:11			4	Ficksburg			2	Ficksburg
	04:12					4	Ficksburg	3	Kommando Nek
	04:28					4	Rosendal	3	Rosendal/Ficksburg
	04:32					4	Senekal/Rosendal	3	Matwabeng/Senekal
	04:37					4	Senekal/Rosendal	3	Rosendal/Senekal
	04:39					4	Senekal /Rosendal	3	Rosendal/Senekal
	04:41					4	Senekal/Rosendal	3	Rosendal/Senekal
	04:58					4	Senekal/Rosendal	3	N5
	04:59			4	Senekal/Arlington			3	N5
	05:00			4	Senekal			2	Senekal
	05:01			4	Senekal			2	Senekal
	05:02					4	Senekal/Rosendal	3	N5
	05:03			4	Senekal			2	Senekal
	05:04					4	Senekal/Rosendal	3	Senekal
	05:11			4	Senekal			3	Senekal/Rosendal
	05:31					4	Arlington	3	Arlington
	06:18					4	Heilbron	3	Heilbron
	06:36					4	Birmingham	3	Coalbrook
	06:56	2	Witfield	1	Three Rivers				
	06:56	2	Witfield	1	Three Rivers				
	07:00	2	Witfield	1	Rothdene				
	07:04	2	Witfield	1	Meyerton				
	07:21	2	Primrose	1	Meyerton				
	07:47					4	Simmerfield	3	Bedfordview
	07:48					4	Simmerfield	3	Primrose
	07:58					4	Witfield	3	Benoni
	08:16					4	Lesiba School	3	Benoni
	10:42					4	Thembelihle	3	Etwatwa
	14:20			4	Etwatwa			2	Daveyton
	14:34			4	Etwatwa			2	Daveyton
	14:45					4	Etwatwa	3	Etwatwa
	15:09					4	Etwatwa	3	Etwatwa
	17:28					4	Barcelona	3	Etwatwa
	17:28					4	Barcelona	3	Etwatwa
	20:54					4	Barcelona	3	Etwatwa
27/01/2014	07:52			4	Etwatwa			2	Etwatwa
	09:29					4	Barcelona	3	Etwatwa
30/01/2014	08:24	2	Wychwood	1	Walkerville				
	08:44	2	Malvern	1	Wychwood				

Column 1 indicates the date of the cellphone contact. Column 2 indicates the time of the cellphone contact. Column 3 indicates if and with whom accused 3 had contact at a specific time. Column 4 indicates the location where accused 3's cellphone picked up at the time of contact. Column 5 indicates if and with whom accused 4 had contact at a specific time. Column 6 indicates the location where accused 4's cellphone picked up at the time of contact.

Counts 6 and 7

Date	Time	Acc 3	Location	Acc 4	Location
23/03/2014	19:01	4	Thembelihle	3	Etwatwa
24/03/2014	05:49	4	Thembelihle	3	Unknown
	05:49	4	Thembelihle	3	Unknown
	06:04	4	Thembelihle	3	Unknown
	11:36	4	Unknown	3	Petrus Steyn
	18:52	4	Senekal	3	Senekal
25/03/2014	01:19	4	Ventersburg	3	Marquard/Senekal
	02:06	4	Senekal	3	Marquard/Senekal
	05:09	4	Senekal	3	Marquard/Senekal
	05:48	4	Senekal	3	Marquard/Senekal
	06:39	4	Senekal	3	Senekal
	12:04	4	Senekal	3	Ventersburg
	17:20	4	Senekal	3	Southdale
	17:53	4	Senekal	3	Joubertpark
26/03/2014	13:59	4	Barcelona	3	Daveyton
	19:16	4	Thembelihle	3	Marquard/Senekal
	21:18	4	Thembelihle	3	Marquard/Senekal
	22:20	4	Thembelihle	3	Marquard/Senekal
	23:50	4	Thembelihle	3	Kroonstad
27/03/2014	06:17	4	Thembelihle	3	Etwatwa

Count 8

Date	Time	Acc 3	Location	Acc 4	Location
31/03/2014	12:59	4	Thembelihle	3	Etwatwa

	22:23	4	Ventersburg	3	Senekal
	22:55	4	Senekal	3	Matwabeng/Senekal
01/04/2014	00:25	4	Steynsrus	3	N5
	00:26	4	Steynsrus	3	Senekal
	00:49	4	Britsberg	3	N5
	00:51	4	Britsberg	3	N5
	05:00	4	Koppies	3	Koppies
	08:08	4	Thembelihle	3	Etwatwa

Counts 9 and 10

Date	Time	Acc 3	Location	Acc 4	Location
22/09/2016	19:23	4	Avenham	3	Bloemfontein/Brandfort
	19:24	4	Avenham	3	Bloemfontein/Brandfort
23/09/2016	01:40	4	Charles street	3	Avenham
	01:41	4	Eeufees road	3	Avenham
	05:50	4	Glen Agricultural	3	Glen Agricultural
	23:00	4	Glen Agricultural	3	Glen Agricultural
24/09/2016	02:08	4	Ribblesdale	3	Tempe Plots
	02:19	4	Ribblesdale	3	Tempe Plots
	03:06	4	Ribblesdale	3	Tempe Plots
	03:16	4	Ribblesdale	3	Avenham
	12:12	4	Barcelona	3	Barcelona
	14:31	4	Barcelona	3	Barcelona

[92] Finally, and having considered all the evidence in totality, I find that all the cellphones have been correctly attributed to the various accused persons as shown in the exhibits and that all these phones are so-called “guilty” phones, especially cellphone 1020 which I already found was used by accused 1 and/or his business. See *Nxumalo v The State* 9450/2008) [2009] ZASCA 113 (23 September 2009) at paras [10] – [13].

- [93] Just to repeat, I indicated *supra* that cautionary rules apply insofar as single witnesses testified in some instances and even a co-perpetrator in another instance. Notwithstanding this, I am satisfied that, considering that the case must be adjudicated upon circumstantial evidence, the only reasonable inference to be drawn from the proven facts is that the accused persons' guilt has been proven in respect of those counts mentioned *supra*. I say this having considered the pattern of conduct apparent from the cellphone data, the objective evidence such as extracts from phone books and notes, Exhibit "G", as well as real evidence in the form of photographs together with the credible evidence by all the State witnesses corroborated as stated above and the absence of a reasonable explanation for the accused persons' presence at the crime scenes and/or the proven telephonic conversations between them.
- [94] Mr Van Der Merwe did not argue that the provisions of POCA are inapplicable on the basis of a factual finding that all four accused were involved in at least two counts of theft during January 2014. Having found this, I also find that an enterprise in accordance with the provisions of POCA was operated with accused 1 as the manager and accused 1 – 4 as the syndicate members thereof who worked together in stealing copper and sharing the profits.
- [95] I am satisfied that no duplication of convictions will follow if accused 3 and 4 are convicted of both counts 9 and 10. I dealt with the legal position above and I am satisfied that the essential

elements to be proven in respect of the two offences are different. The accused must be well trained in order to understand the risks involved in stealing electrical cables and I accept that they knew or ought reasonably to have known that they were tampering with essential infrastructure and that their actions may interfere with the provision of a basic service to the public, being public transportation of passengers and goods. It would not make any sense to find that there will be duplication of convictions in a situation as *in casu*. Such a finding will negate the whole purpose of the 2015 Act.

IX CONCLUSION

[96] I therefore conclude that the State succeeded in proving beyond reasonable doubt that accused 1, 2, 3 and 4 are guilty of theft in respect of counts 3, 4 and 5 and that all four accused should be convicted on count 2 in that they participated in the activities of an enterprise through a pattern of racketeering activity. Accused 1 was the manager of this enterprise and he should be convicted on count 1. The State failed to prove accused 1 and 2's involvement in respect of count 6 and accused 1's involvement in counts 7 and 8. Accused 3 and 4 were involved in counts 6, 7 and 8 and their guilt has been proven beyond reasonable doubt. I am also satisfied that a proper case has been made out against accused 3 and 4 in respect of counts 9 and 10.

X VERDICT

[97] The following orders are issued;

Count 1 – Accused 1 – guilty of contravening s 2(1)(f) of Act 121 of 1998 (POCA) during January 2014.

Count 2 – Accused 1, 2, 3 and 4 – guilty of contravening s 2(1)(e) of Act 121 of 1998 (POCA) during January 2014.

Counts 3, 4 and 5 – Accused 1, 2, 3 and 4 – Guilty of theft.

Counts 6, 7 and 8 - Accused 1 and 2 are acquitted on count 6 and accused 1 is acquitted on counts 7 and 8. Accused 3 and 4 are convicted of theft in respect of these three counts.

Counts 9 and 10 – Accused 3 and 4 are convicted as charged.

JP DAFFUE ADJP

12 September 2018