



Reportable	YES
Circulate to Judges	YES

IN THE HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE DIVISION, KIMBERLEY]

CASE NO: 2027/2012

(KS 20/2013)

Date heard: 28 September 2016
Date delivered: 06 December 2016

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

And

ALFEUS SCHOLTZ

FIRST DEFENDANT

TRIFECTA INVESTMENT HOLDINGS(PTY) LTD

SECOND DEFENDANT

TRIFECTA HOLDINGS (PTY) LTD

THIRD DEFENDANT

TRIFECTA TRADING 434 PROPERTY 4 (PTY) LTD

FOURTH DEFENDANT

TRIFECTA TRADING 434 PROPERTY 5 (PTY) LTD

FIFTH DEFENDANT

TRIFECTA TRADING 434 PROPERTY 7 (PTY) LTD

SIXTH DEFENDANT

TRIFECTA TRADING 434 PROPERTY 11 (PTY) LTD

SEVENTH DEFENDANT

JOHN FIKILE BLOCK

EIGHTH DEFENDANT

CHISANE INVESTMENT (PTY) LTD

NINTH DEFENDANT

JUDGMENT: CONFISCATION

Phatshoane J

INTRODUCTION:

- [1] On 25 January 2016 the National Director of Public Prosecutions (NDPP) brought an application for an enquiry to be conducted in terms of s 18(1) of the Prevention of Organised Crime Act, 121 of 1998 (POCA), against Mr Alfeus Christo Scholtz, Trifecta Investment Holdings (Pty) Ltd, Trifecta Holdings (Pty) Ltd; Trifecta Trading 434 Property 4 (Pty) Ltd, Trifecta Trading 434 Property 5 (Pty) Ltd, Trifecta Trading 434 Property 7 (Pty) Ltd, Trifecta Trading 434 Property 11 (Pty) Ltd, Mr John Fikile Block, and Chisane Investment (Pty) Ltd, the first to the ninth defendants. The enquiry follows on the conviction of the defendants on various counts of corruption and money laundering.
- [2] The convictions of the defendants are predicated on the following facts. In a nutshell, the Northern Cape Department of Social Services and Population Development entered into six lease agreements with the Trifecta Group of Companies (Trifecta GOC) and related entities from the period 01 May 2006 to 01 August 2008. Mr Scholtz and the Trifecta GOC were found guilty of corruption in that they and their representative, the late Mr Sarel Breda, offered benefits and/or gratification to the late Ms Yolanda Botha in the form of 10% Shares to her nominated trust, the Jyba Investment Trust; renovated her house in the amount of R 1 265 611,99; and gave her cash payment in the amount of R15 000.00. The trial court found that Ms Botha had nefariously circumvented the prescribed procurement processes by ensuring that the Department of Social Development and or the South African Social Security Agency (SASSA) entered into the following lease agreements with the Trifecta GOC:
- 2.1 Old Oranje Hotel, the Upington Lease Agreement;
 - 2.2 14 Van Riebeeck Street, Springbok Lease Agreement;
 - 2.3 Summer Down Place Office Campus, Kuruman Lease Agreement;
 - 2.4 Keur en Geur Building, Douglas Lease Agreement;
 - 2.5 Du Toitspan Building, Floor 5, 6, and part of 7, Kimberley Lease Agreement; and
 - 2.6 Du Toitspan Building, Floors 9, 10 and 11, Kimberley Lease Agreement.

- [3] The Departments of Sports Arts and Culture and the Department of Agriculture and Land Reform also entered into lease agreements with Trifecta on 22 October 2005 and 09 November 2005. Mr Block was found guilty of corruption in that he exerted his political influence upon Mr Crouch, a director of property management in the Department of Transport, Roads and Public Works, to corruptly assist his friend, Mr Sarel Breda, to secure the mentioned leases for benefit of Trifecta. Mr Block in return received gratifications or benefits from Trifecta in the form of R 228 000.00 (paid to Chisane Investment on 07 March 2006); R 500 000.00 (paid to Mr Block on 26 April 2006); R 338 521.25 (paid to Duncan and Rothman for the benefit of Mr Block on 20 August 2007); R 298 151.95 (paid to Mr Block between 30 October 2007 to 29 April 2008); and on 08 September 2006, 25 Ordinary Shares in Trifecta Resources and Exploration (Pty) Ltd, a subsidiary in the Trifecta GOC, were awarded to Mr Block; and in addition, his guesthouse was renovated. Mr Scholtz and the Trifecta GOC were similarly found guilty of corruption in that they and/or their representatives offered the aforesaid gratification to Mr Block and Chisane investment.
- [4] Having carefully considered the arguments I authorised the enquiry to be commenced with and granted further ancillary relief with regard to the timeframes for the filing of the statements in terms of s 18(6)(a)(iii) (iv) read with ss 21(1)(a); 21(2)(a) and (b) and 21(3)(a) of POCA. These statements pertained to information relating to the determination of the value of all the defendant's proceeds of unlawful activities derived from the offences they were convicted of and the filing of the statements by them, in the event they disputed the correctness of any of the allegations in the statements made on behalf of the NDPP. In the course of the enquiry, which had been postponed several times, various issues were raised pertaining to, *inter alia*, non-disclosure of documents by Mr Scholtz and the Trifecta GOC, which were relevant to the computation of the amount liable to be confiscated. There were also meetings between the parties in an attempt to distil common positions with regard to the calculation of certain amounts. This process

significantly delayed the finalization of the enquiry and indeed the sentencing proceedings.

[5] Section 18 of POCA provides in part:

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

(a) that offence;

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

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

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

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

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

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

[6] The Supreme Court of Appeal (SCA) pronounced on the purpose of the confiscation enquiry as follows in *National Director of Public Prosecutions v Gardener and Another* 2011 (4) SA 102 (SCA) at 107D-108A paras 18-19:

“[18] The purpose of the enquiry is twofold: first, the court has to decide whether to make an order against the defendant for payment to the State of an amount of money; and, secondly, it must determine the appropriate amount to be paid. In this regard the court exercises a discretion, which, as O'Regan ADCJ said in *S v Shaik and Others* [2008 (5) SA 354 (CC)]:

'is peculiarly a matter for the court which has convicted the relevant person; that is no doubt the reason why the legislature sought to ensure that it would be that court which, in the first instance, would determine the appropriate amount to be confiscated. It will only be interfered with by an appellate court where that court is satisfied that the court which determined the amount acted unjudicially or

misdirected itself or where the appellate court is of the view that the amount confiscated is disturbingly inappropriate.'

[19] In the exercise of its discretion a court must bear in mind the main object of the legislation, which is to strip sophisticated criminals of the proceeds of their criminal conduct. To this end the legislature has, in Ch 5 of POCA, provided an elaborate scheme to facilitate such stripping. The function of a court in this scheme, as appears from what I have said above, is to determine the 'benefit' from the offence, its value in monetary terms and the amount to be confiscated. It is undoubtedly so that a confiscation order may often have harsh consequences, not only for the defendant, but also for others who may have innocently benefited, directly or indirectly, from the criminal proceeds. This is what the legislation contemplates, and a court may not, under the guise of the exercise of its discretion, disregard its provisions — harsh as they may be...

- [7] The Court articulated further in this manner on the primary object of a confiscation order in *National Director of Public Prosecutions v Rebutzi* 2002 (2) SA 1 (SCA) at 7E-G para 19:

"[19] The primary object of a confiscation order is not to enrich the State but rather to deprive the convicted person of ill-gotten gains. In my view, it is therefore not significant that in some cases the State might end up receiving nothing. It is because the purpose of such an order is to prevent the convicted person from profiting rather than to enrich the State that the court's inquiry in terms of s 18(1) is directed towards establishing the extent of his benefit rather than towards establishing who might have suffered loss. Indeed, in the case of so-called 'victimless' crimes, such as drug-dealing and the like, there will be no person who could be said to have suffered a loss. That a confiscation order might not be necessary in order to deprive the convicted person of the proceeds of crime (ie where there is an identifiable victim who has suffered loss) does not seem to me to be a reason to withhold such an order. It still serves the purpose of ensuring that, irrespective of whether claims are in due course established, the convicted person will not remain in possession of the proceeds."

- [8] The confiscation order sought in respect of Mr Scholtz and the Trifecta GOC is primarily founded on their conviction for corruption, for obvious reasons, that the funds pertaining to money laundering would not have flowed to them but to the late Ms Botha and Mr Block. I deal with the case of Mr Block and Chisane Investment later on because in that case the parties reached an agreement resolving all the issues and agreeing on the amount liable for confiscation.

THE ENQUIRY IN THE CASE OF MR SCHOLTZ AND THE TRIFECTA GOC:

[9] It is important to mention that in the case of Mr Scholtz and the Trifecta GOC the parties have also reached an agreement which disposed of a substantial part of the evidence. In particular, they have agreed that the aggregate nett proceeds of the leases liable for confiscation is approximately R6 043 960.00 whereas the grand total of the added advantage (the capital gain) is in the amount of R53 763 021.84.¹

[10] The following matters of principle were placed in dispute:

10.1 Whether the NDPP is entitled to a confiscation order in terms of s 18 of POCA;

10.2 Whether the NDPP established that Mr Scholtz and the Trifecta GOC received the proceeds of crime as envisaged in s 18 of POCA, with reference to the income received as rental from several lease agreements referred to earlier; and lastly

10.3 Whether the NDPP established that Mr Scholtz and/or the Trifecta GOC received proceeds of crime as envisaged in s 18 of POCA, as a result of the increase in value of any of the buildings in relation to the lease agreements, referred to as the added advantage.

[11] As foreshadowed in the preceding paragraphs these issues fall within the narrow compass of whether the nett profit from the rental and the increase in the capital value of the lease buildings are benefits as contemplated in s 18(1) and therefore liable for confiscation to the State.

[12] In his initial statement filed in terms of s 21(1)(a), signed on 23 February 2016, Mr Trevor Sean White, a deponent to the NDPP statement explained:

“77 The properties that Trifecta leased to various government departments were sold to third parties with the corruptly obtained leases in place. The fact that these were long term leases with the government departments in place would have enabled Trifecta to sell these building so as to further benefit from their

¹ The agreement was handed in evidence as Exhibit A1, with Annexure A2 and A3 thereto.

crimes. In the absence of the requested documents I am unable to determine such further benefit.”

- [13] In a statement filed on 10 June 2016 by Mr White with regard to the preliminary partial calculation of the added advantage he further propounded the rationale for the added advantage as follows at paras 34;35; 37 and 38:

“34 The fact that the corruptly obtained lease agreements had a significant effect on the value at which the buildings were sold is evident from the two agreements, TSW 39 and TSW 41 that I have managed to obtain copies from Mr Shawn Williams, the appointed *curator bonis* in this matter.

35 These agreements are titled “Sale of Rental Enterprise Agreement” and it is very clear from reading them that the purchaser, apart from buying the respective building, was actually purchasing the “Rental Enterprise” which included “all right, title and interest of the Seller in and to the relevant leases.” This is further spelt out in clause 14.1 thereof, which states that “the Purchaser will effect from the effective date take over and complete all leases for his own account.

37 The relevant defendants gained additional advantage (beyond the profit made on the tainted lease contracts) in the form of profits made on the sale of the buildings that included the corruptly obtained leases.

38 Therefore, if confiscation of the full lease contract is found to be disproportionate (as the defendants submit), a proportionate appropriate confiscation order would reflect the profit gained under the lease contract, together with the value of the additional advantage. This is the advantage in addition to the rental income that was received that the relevant defendants would not have received or retained had it not been for the corruptly acquired or obtained lease agreements”.

- [14] Adv Van der Linde SC, for the NDPP, argued that the leases in issue had a positive effect on the Trifecta GOC’s business and the increase in value of the leased buildings. He contended that without the corrupt activities there would have been no lease agreements, no profit from the lease agreements, no increases in the rental and no enhancement in the value of the buildings. Counsel contended that the nett profit derived by Mr Scholtz and the Trifecta GOC from the corruptively concluded leases, is a benefit directly derived from the crime of corruption. The same also applied to added pecuniary advantaged (capital gain) in respect of the lease premises.

[15] In support of his argument that the added advantage was a benefit prone to confiscation Mr Van der Linde relied on the United Kingdom Supreme Court Decision in *R v Waya* [2010] EWCA Crim 412, handed down on 14 November 2012, in particular the following dictum at para 42:

“42 In economic terms, the benefit that Mr Waya obtained from the offence for which he was convicted was obtaining credit, on better terms than those that he could expect to get if he told the truth. With that credit came the prospect of obtaining a handsome capital gain if the market for high-grade residential property in London continued to rise (as it did). If on the other hand the market had fallen substantially, the mortgage lender’s security might have proved inadequate, and the mortgagor’s personal covenant to repay principal and interest might have been shown to be worthless. Depriving him of that prospective capital gain, or a proportionate part of it, would therefore be the appropriate way of making the confiscation order fit the crime. Moreover that is the way in which the provisions of POCA apply in this case, on a fair and purposive construction that takes account of section 3 of HRA (Human Rights Act, 1998) and the need for proportionality under A1 P1”.

[16] Mr Van Der Linde referred also to the English decision in *Regina and Peter John Sale* [2013] EWCA Crim 1306. In that case the Court remarked in para 52:

“It seems to us that there are certain important features of this case which require close consideration. Firstly, this is not, in our judgment, a case analogous to one where goods or money have been entirely restored to the loser. True it is that Network Rail received value for money, but Mr Sale had obtained contracts for his company by corrupt means on a continuing basis so that every contract for his company obtained was tainted by it. Moreover, in a case of this nature it is wholly unrealistic to regard Network Rail as the only victim of crime. Corruption of this nature clearly impacts on others. The company obtained contracts with a client with whom it had had no previous business relationship. Existing contractors with Network Rail were cheated out of the tendering process. The substantial market in Network Rail contracts of this type was distorted, with the company gaining a market share to the detriment of others. Tendering costs were avoided.”

At para 57 the Court then held;

“However we have already alluded to the pecuniary advantage gained by obtaining market share, excluding competitors, and saving on costs of preparing tenders. A proportionate confiscation order would need to reflect those additional pecuniary advantages and, it seems to us, that an order for profit gained under these contract, together with the value of pecuniary advantage obtained, would

represent a proportionate order which will avoid double counting. There is no difficulty in attributing these items to the Appellant as proportionately representing his benefit since he was the sole shareholder in the company”.

- [17] Adv Cilliers SC, for Mr Scholtz and the Trifecta GOC, argued that there is no factual or legal basis for a finding that the defendants derived any benefit from the offences committed. He contended that the State cannot succeed in confiscating the nett proceeds or the added advantage because Mr Scholtz and the Trifecta GOC were acquitted on all the charges pertaining to fraud which were premised on, *inter alia*, misrepresentation; and that they allegedly inflated the rentals. He argued that the State departments received full value for the rental amount they paid in that they occupied the leased premises. In any event, he contended, there is no nexus between the offence of corruption and the leases that were concluded.
- [18] Mr Cilliers on his part relied on *National Director of Public Prosecutions v Ramlutchman* 2016 (1) SACR 362 (KZP) for the proposition that the state received full value for its money and therefore is not entitled to any confiscation order. In that case the respondent was charged with twenty-one counts of fraud under the Criminal Procedure Act, 51 of 1977, read with s 51 of the Criminal Law Amendment Act, 105 of 1997, and one count of corruption in terms of the Prevention and Combating of Corrupt Activities Act, 12 of 2004, for giving a benefit. The defendant created fake documents that he submitted to the Construction Industry Development Board (CIDB) to support an application for a 6GB Grade by the CIDB. The defendant was not entitled to such grading. He fraudulently misrepresented the status of his business AC Industrials Sales and Service that he registered with the CIDB. This resulted in him and his business being awarded tenders based on fraudulent documentation and information submitted to CIDB.

At 376 para 33 of that judgment the Court held:

“[33] The appellant sought to persuade the trial court as it does this court that ‘benefit’ means the same as ‘proceeds of unlawful activities’, which in this case was the entire proceeds of the contract. Reasoning in reverse, the contract

was the consequence of the crime; depriving the defendant of the proceeds of the contract would eliminate the benefit. With respect, the reasoning is flawed, the approach mechanical for all the reasons advanced above and more. On a purely factual and common sense approach the entire amount received as the proceeds of unlawful activities cannot be a benefit if it is not exclusively a gain or profit. The cost of construction component of the proceeds received cannot rationally be equal to a gain or benefit. To treat it as such and order its confiscation would result in the state unjustly enriching itself at the expense of the respondent. It would be disproportionate and an imbalance between effectiveness and fairness. Furthermore, it would amount to the respondent paying more than the amount by which he benefited which is prohibited under s 18(2)(a). Similarly to *Mtungwa [National Director of Public Prosecutions v Mtungwa 2006 (1) SACR 122 (N)]* the appellant failed to prove the value of the benefit the respondent received in this case.”

[19] Mr Cilliers further argued that the office space provided by the Trifecta GOC accorded with the lawful transactions following the proper procurement process. Counsel was at pains to demonstrate with reference to some of the extracts from the record of the criminal proceedings that the evidence of the state witnesses was to the effect that there was no improper or unlawful influence from either the late Ms Botha or anyone of the members of the Bid Evaluation Committee (BEC) or the Bid Adjudication Committee (BAC) during the procurement of the leases. I must immediately point out that I have said in the main judgment², for reasons fully articulated therein, that the evidence by some of the state witnesses to the effect that there was nothing untoward in the procurement processes followed by the BEC or BAC or that they had not been influenced in the execution of their duties was less than frank. This was a factual determination which only the Court could make. They had unquestionably been influenced.

[20] Mr Cilliers further contended that the added advantage (benefit) was not part of the initial confiscation order sought and that it was never the NDPP’s case that the added advantage amount be confiscated. He went on to argued that the immovable property increased in value not because of crime but because of the normal market related factors and conditions. No court in this country has ever confiscated the added advantage, he argued. A reading of Mr White’s affidavit in

² The verdict on the convictions of the defendants.

particular the extracted paragraphs referred to in para 12 and 13 above demonstrate that the NDPP's case had at all relevant times being that the added advantage ought to be confiscated.

[21] For purposes of determining whether Trifecta benefited from the proceeds of their unlawful activities I find it expedient to refer to some of the findings that were made in the main judgment with regards to multifaceted procedural flaws in the procurement of the office space that advantaged and unduly benefited Trifecta. For example:

21.1 With regard to the Old Oranje Hotel, the Upington lease, a finding was made that for the period 31 May 2006 to January 2012, 69 payments of rental in the amount of R18 390 008.49 were made by SASSA to Trifecta Trading 434 Property 5 (Pty) Ltd, (the fifth defendant). From May 2006 to 2007 Trifecta received rental payments in the amount of R 1 651 516.86 even though its premises were not yet occupied by the department (Social Development)/SASSA.

21.2 With regard to the Kuruman Lease it was found that the Bid Evaluation Committee (BAC) had resolved that the Trifecta's bid be accepted and that amongst others, the lease period of five years with an option to renew for another five years; and the 8% annual escalation be negotiated. The late Ms Botha, former accused No 8 in the criminal trial, deviously approved the memo that had been forwarded to her by the BAC: "*With proviso that the lease period be extended to 10 years (120 months) with an option to renew for another 10 years and a 9.5% annual escalation.*"

21.3 With regard to the Keur and Geur Building, the Douglas lease, the Department of Social Development initially required 205 m². It was saddled with 400 m². The difference being 195 m². Mr White calculated the 195 m² difference at the rental escalation rate of 9.5% over the five-year lease period. That came down to a total of R790 106.57. In view of

the fact that only two employees were accommodated in this office as at August 2012, this expenditure had been deliberately made in vain.

[22] Section 12(3) provides that for purposes of Chapter 5³ a person has benefited from unlawful activities if he or she has at any time, whether before or after the commencement of this Act, received or retained any proceeds of unlawful activities. The onus is on the NDPP to prove on the balance of probabilities that they are entitled to a s 18 confiscation order⁴. On the reading of s12(3) it is apparent that the NDPP has to establish the nexus between the unlawful activity and the proceeds of the crime.

[23] Regard being had to the facts of this case there can be no doubt that the corrupt relationship that existed between Mr Scholtz and the Trifecta GOC or their representative and the government officials or persons in positions of influence was the *sine qua non* for the acquisition of the various leases in issue and the proceeds of the unlawful activity, in this case the rental paid by the State to Trifecta GOC.

[24] The ConCourt dealt with what would constitute a benefit for purposes of s 18 of POCA in *S v Shaik and Others* 2008 (5) SA 354 (CC) at 379B-E para 60 as follows:

“[60].....What constitutes a benefit, therefore, is defined by reference to what constitutes 'proceeds of unlawful activities'. It is not possible in the light of this definition to give a narrower meaning to the concept of benefit in s 18, for that concept is based on the definition of the 'proceeds of

³ Chapter 5 which deals with proceeds of unlawful activities.

⁴ Section 13 provides in part:

“(1) For the purposes of this Chapter proceedings on application for a confiscation order or a restraint order are civil proceedings, and are not criminal proceedings.

(2) The rules of evidence applicable in civil proceedings apply to proceedings on application for a confiscation order or a restraint order.

(3)

(5) Any question of fact to be decided by a court in any proceedings in respect of an application contemplated in this Chapter shall be decided on a balance of probabilities.”

unlawful activities'. That definition goes far beyond the limited definition proposed by the appellants. 'Proceeds' is broadly defined to include any **property, advantage** or reward derived, received or retained directly or indirectly in connection with or as a result of any unlawful activity. A further difficulty with the appellants' argument is to be found in s 18(2). **That section expressly contemplates that a confiscation order may be made in respect of any property that falls within the broader definition, and is not limited to a nett amount.** The narrow interpretation of 'benefit' proposed by the appellants cannot thus fit with the clear language of s 18 and the definition of 'proceeds of unlawful activities'. To interpret the section as suggested by the appellants would require giving a meaning to the section which its ordinary wording cannot sustain..." (Own emphasis)

At paras 381F-382E paras 69 -71 the ConCourt gave the following seminal considerations relevant to the exercise of the discretion by the Court in terms s 18:

"[69] First, a court considering what will constitute an appropriate amount as contemplated by s 18 will have regard to all the circumstances of the criminal activity concerned. Secondly, in considering what will be appropriate, a court will bear in mind that the definition of 'proceeds of unlawful activities' in the Act makes it possible to confiscate property that has not been directly acquired through the commission of crimes. It also makes it possible to confiscate property that has been acquired not through crimes of which the defendant has been convicted, but through related criminal activity. **One of the key considerations a court will take into account will be the extent to which the property to be confiscated derived directly from the criminal activities.** In most circumstances it will be entirely appropriate that all direct profits of crimes of which the defendant has been convicted be confiscated. So, a bank robber caught red-handed in possession of R50 million which he or she has just stolen from the bank may quite appropriately be required to pay that money back. In these circumstances, the primary purpose of the Act - to ensure that a criminal does not enjoy the fruits of his or her crime - will be directly served.

[70] On the other hand, the more removed the derivation of the property from the commission of the offence, the less likely it may be that it will be appropriate to order the full confiscation of the property. In taking this consideration into account, however, a court must take care to remember that often criminals do seek to disguise the profits of their crime. One of the purposes of the broad definition of 'proceeds of unlawful activities' is to ensure that wily criminals do not evade the purposes of the Act by a clever restructuring of their affairs.

[71] A third consideration relevant to determining what constitutes an 'appropriate' amount will be the nature of the crimes that fall within the express contemplation of the Act. The closer the crimes or criminal activity concerned to the ambit of organised crime, the more likely it will be that the appropriate amount will constitute all the proceeds of the unlawful activities as defined in the Act. The reason for this is that the larger the value of the confiscation order, the

greater the deterrent effect of such an order. The Act clearly seeks to impose its greatest deterrent effect in the area of organised crime; and so where organised crime is involved, the purpose of general deterrence will often be best achieved by a maximum confiscation order, although of course that will always be subject to a full consideration of all the relevant circumstances. In asserting this principle, too, it is important to bear in mind the difficulty of prosecuting organised crime successfully as is noted in the preamble to the Act. The difficulties are many. To name just one, crime syndicates are often organised in a manner that makes it possible for senior members of the syndicate to evade prosecution, because many of the crimes committed are committed by junior members of the syndicate.”

With regard to the offence of corruption the Court pronounced, *inter alia*, at 384B para 75:

“[75](I)t is clear that corruption is a serious crime which is potentially harmful to our most important constitutional values. Moreover, it is clear that both our Parliament and the international community recognise the close links between corruption and organised crime. In the circumstances, it seems to me that corruption is one of the offences closely related to the purposes of the Act and a court should bear this in mind when determining the 'appropriate' amount contemplated in s 18 of the Act.” (My emphasis)

[25] The argument that the State Departments received full value for the rental amount they paid ignores the fact that the leases were corruptly concluded. Mr Johannes Lodewyk Bower, who attested to the Trifecta defendants’ statement in terms of s 21(2)(3) of POCA, stated at para 19:

“Although I do not suggest that the principle in all cases should be that only benefit/profit should be considered for confiscation, I respectfully submit that in this case it should be the principle to apply...”

It is therefore remarkable that an argument would be made that the State cannot demand that part of the rental (the nett proceeds of the leases) be paid back to it and if the confiscation order is granted it will be enriched in the amount of approximately R6 million, being the nett proceeds of the lease as agreed to between the parties. It is incomprehensible that an astute business man in the position of Mr Scholtz would have entered into or allowed the leases to be concluded with the State departments in the absence of some benefit that would have accrued to his business empire. Trifecta is a multimillion rand corporation

due to, *inter alia*, the tainted leases. On the facts of this case I am satisfied that the NDPP is entitled to a confiscation order in terms of s 18 of POCA in respect of the income generated (the nett proceeds of the rental) on the leases entered into between Mr Scholtz and the relevant Trifecta GOC on one hand and the relevant Government Departments on the other hand.

[26] It is clear from *Shaik* supra that a benefit as envisaged in s 18 is not limited to the nett amount. A benefit includes the value of the appreciation of the assets that were acquired with the criminal proceeds, and not just the appreciation in the money benefit the defendants received.⁵ I find the following view expressed in *R v Waya* supra at 15 para 26 apposite:

“...To embark upon an accounting exercise in which the defendant is entitled to set off costs of committing his crime would be to treat his criminal enterprise as if it were a legitimate business and confiscation a form of business taxation. To treat (for example) a bribe paid to an official to look the other way, whether at home or abroad, as reducing the proceeds of crime would be offensive, as well as frequently impossible of accurate determination. To attempt to enquire into the financial dealings of criminals as between themselves would usually be equally impracticable and would lay the process of confiscation wide open to simple avoidance”.

[27] I am satisfied that the NDPP established on the balance of probabilities that the value of the capital gain (the added advantage) less the capital gains tax plus the CPI on capital gain is a benefit as contemplated in s 18 of POCA.

[28] Mr Cillier sought to argue further that a confiscation order, if made, would amount to the punishment of Mr Scholtz and the Trifecta GOC. A confiscation order cannot be equated to a punishment. The purpose of sentencing is to punish an offender for his or her criminal wrongdoing whereas the main purpose of a confiscation order is to deprive offenders from deriving any benefit from their ill-gotten gains.⁶

⁵ See *National Director of Public Prosecutions v Gardener and Another* 2011(4) 102 (SCA) at 111 para 32

⁶ See *National Director of Public Prosecutions v Gardener and Another* 2011 (4) SA 102 (SCA) at 108 para 23

- [29] For purposes of proportionality, it is important to bear in mind that the NDPP does not seek that the full extent (the gross rental amount) of the benefit paid to Trifecta GOC be confiscated. All it requires to recoup is the nett proceeds of the rental received and the value of the added advantage flowing from the leases.
- [30] The value of the Trifecta GOC's realizable assets is in excess of R500 million. The amount sought to be confiscated (R 6 043 960.15 in respect of the nett proceeds of the lease including CPI and the amount of R53 763 021.85 in respect of the added advantage) fall within the ambit of s 18(2) in that it does not exceed the value of the Trifecta defendants' proceeds of the offences. I am satisfied that these amounts stand to be confiscated.

THE ENQUIRY IN THE CASE OF MR BLOCK AND CHISANE INVESTMENT:

- [31] The NDPP, Mr Block and Chisane Investment (Pty) Ltd, the eighth and ninth defendants, entered into an agreement on the amounts to be confiscated which was handed in evidence as Exhibit "A4" at the proceedings of 28 September 2016 and sought that it be made an order of the Court. I am satisfied that this settlement accords with the facts and principles enunciated hereinbefore.
- [32] In the result I make the following order:

Order:

A. In respect of Mr Christo Alfeus Scholtz and the Trifecta GOC the following order is made:

1. A confiscation order in the sum of R6 043 960.15 is made against Mr Alfeus Christo Scholtz, Trifecta Investment Holdings (Pty) Ltd, Trifecta Holdings (Pty) Ltd; Trifecta Trading 434 Property 4 (Pty) Ltd, Trifecta Trading 434

Property 5 (Pty) Ltd, Trifecta Trading 434 Property 7 (Pty) Ltd, Trifecta Trading 434 Property 11 (Pty) Ltd (the first to the seventh defendants), jointly and severally the one paying the other to be absolved.

2. A confiscation order in the sum of R53 763 021.85 is made against the first to the seventh defendants, jointly and severally the one paying the other to be absolved.
3. The confiscated amounts in para 1 and 2 of this order are payable to the State within 30 calendar days from date of this order.
4. The confiscation order shall be satisfied by a deposit into the National Treasury Account Number: [...] held at ABSA Bank of the stated amounts within 30 calendar days from the date hereof and such payment to the Bank shall be deemed as payment of the confiscation order amounts to the State;
5. The first to the seventh defendants are to pay the fees of the *curator bonis*, Mr Shawn Williams.
6. This order is a civil judgment against the first to the seventh defendant and interest on the aforesaid amounts will run at the prevailing legal rate from due date for payment to date of payment.

B. *In respect of Mr John Fikile Block and Chisane Investment (Pty) Ltd, the eighth and ninth defendants, by agreement between the parties the following order is made:*

1. A confiscation order, together with the fluctuation of the value of money calculated from the dates of receipt of R1 364 673.20 to May 2016 is made in the sum of R2 069 966.62 in respect of Mr John Fikile Block and Chisane Investment (Pty) Ltd, the eighth and the ninth defendants.

2. The confiscated amounts referred to in para 1 of this order are payable to the State within 30 calendar days from date of this order.
3. The confiscation order shall be satisfied by a deposit into the National Treasury Account Number: [...] held at ABSA Bank within 30 calendar days from the date hereof and such payment to the Bank shall be deemed as payment of the confiscation order amounts to the State.
4. The sum of R123 047.82 pertaining to the appointed curator's fees and disbursements will be deposited by the eighth defendant within 30 calendar days from date of this order into the appointed curator's Bank account Number: [...] held at ABSA.
5. This order is a civil judgment against the eighth and the ninth defendants and interest on the aforesaid amounts will run at the prevailing legal rate from due date for payment to date of payment.

MV PHATSHOANE

JUDGE

NORTHERN CAPE HIGH COURT

Appearance for the first to the seventh defendants : Adv. J.G Cilliers SC assisted by Adv. MMW Van Zyl SC

Instructed by W.A Du Plessis Attorneys

Appearance for ninth and the tenth defendants : Adv. S Joubert SC assisted by Adv Tshavhungwa

Instructed by Mjila & Partners

Appearance for the NDPP: Adv. H Van der Linde SC assisted by Adv. N K Ndzengu

Instructed by The National Director of Public Prosecutions