



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

REPORTABLE

CASE NO: SS13/12

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

and

WILLIE JAKOBUS VAN RENSBURG

Defendant

Coram: P.A.L.Gamble, J

Date of Hearing: 26 February 2019

Date of Ruling: 25 April 2019

RULING DELIVERED ON 25 APRIL 2019

GAMBLE, J:

INTRODUCTION

[1] On 5 September 2017 the defendant was convicted (along with 4 others) of a series of offences arising from his involvement in the illegal exporting of abalone, including a contravention of s2(1)(e) of the Prevention of Organized Crime Act, 121 of 1998 (“POCA”). On 19 March 2018 the defendant was sentenced to an

effective 8 years' imprisonment and subsequent thereto his applications for leave to appeal his conviction and sentence were refused by this court and the Supreme Court of Appeal ("*the SCA*").¹

[2] During sentencing proceedings in this court the applicant launched an application in terms of s18 of POCA for a confiscation order in respect of certain of the defendant's property which was alleged to be the proceeds of crime. On 6 February 2018 this court made an order authorizing the institution of that application and setting a timetable for the filing of papers and the hearing of the application.

[3] At that stage the defendant was represented by counsel who had appeared for him in the trial, Adv. D.A.J. Uijsschen SC on the instructions of Legal Aid South Africa, while the applicant has been represented throughout by Adv. M.P. Getye of the Asset Forfeiture Unit ("*the AFU*"). Subsequent to being sentenced and since late May 2018, the defendant has been represented by Adv. H.F. van Zyl SC on the instructions of DGF Attorneys of Bellville.

[4] This inquiry was originally set down for hearing on 15 June 2018 but was postponed by agreement between the parties because at that stage the defendant's application for leave to appeal was still pending before the SCA. The applicant thereafter filed a set of supplementary papers while the defendant also supplemented his papers and lodged a detailed affidavit deposed to by his wife Ms.

¹ S v Miller 2018 (2) SACR 75 (WCC). In the indictment in the criminal trial and in all subsequent documents generated in the trial, the defendant was erroneously referred to as "*Willem Jacobus van Rensburg*." His identity document and antenuptial contract correctly reflect his names as **Willie Jakobus** van Rensburg. The defendant's names have accordingly been changed in the court heading in these proceedings to reflect his correct name.

Kim Gabrielle Jaak van Rensburg (“*Ms. van Rensburg*”)² on 31 January 2019. Ms. van Rensburg filed a supplementary affidavit dated 4 February 2019, in which she sought to clarify certain aspects of her earlier affidavit.

[5] In terms of s18(1) of POCA the court which convicted the accused is required to deal with any confiscation application which is said by the statute to be adjunct to the sentence imposed in the matter. The rationale behind the trial court hearing the application is because that court has a full understanding of the issues at hand and, importantly, since it is familiar with the evidence adduced at the trial it is not required of a new court to have to read the record of proceedings, which in this case runs to more than 11 000 pages³.

[6] The confiscation application was accordingly heard by this court on 26 February 2019 whereafter judgment was reserved. During argument Mr. van Zyl SC made submissions on behalf of the defendant, Ms. van Rensburg and the parties’ 2 minor children, all of whom were said to be effected by the order sought by the applicant under s18. The court is indebted to counsel for their heads of argument and oral submissions in court.

THE PURPOSE OF A CONFISCATION ENQUIRY

[7] The purpose of an application such as this, which resorts under Chapter 5 of POCA, is to procure a civil judgment against a convicted person for payment of a

² Ms van Rensburg also makes use of her maiden name “*Sabbe*” on occasion in the course of some of her business dealings.

³ S v Shaik and others 2008 (2) SACR 165 (CC) at [65]

monetary award in favour of the State. It is not an application for the preservation and surrender of any particular asset of the convicted person as is contemplated in Chapter 6 of POCA. Rather, the purpose of such a confiscation order is –

“..aimed at depriving... [POCA]...offenders of the proceeds of their criminal conduct. Its purposes are to punish convicted offenders, to deter the commission of further offences and to reduce the profits available to fund further criminal enterprises. These objectives reflect not only national but also international policy.”⁴

[8] While it is referred to as a confiscation order the process does not contemplate the attachment and subsequent disposal of any particular asset belonging to the convicted person. As the Supreme Court of Appeal noted in Rebuzzi⁵

“the primary object of a confiscation order is not to enrich the State but rather to deprive the convicted person of ill-gotten gains.”

[9] In Shaik O'Regan ADCJ stressed that the confiscation process is constitutionally permissible.

“[52] From this primary purpose, two secondary purposes flow. The first is general deterrence: to ensure that people are deterred in general from joining the ranks of criminals by the realisation that they will be prevented from enjoying the proceeds of the crimes they may commit.

⁴ R v Rezvi [2002] 1 All ER 801 (HL) at [14] cited with approval in Shaik at [55]

⁵ NDPP v Rebuzzi 2002 (1) SACR 128 (SCA) at [19]

And the second is prevention: the scheme seeks to remove from the hands of criminals the financial wherewithal to commit further crimes. These purposes are entirely legitimate in our constitutional order...

[57] In my view, understanding the purposes of ch 5 of the Act is best done on the terms of ch 2 of our Constitution and our own legislation. Upon a proper construction of [POCA], I am not persuaded that a primary purpose of ch 5 is the punishment of offenders. Its primary purpose seems rather to be to ensure that criminals cannot enjoy the fruits of their crimes. It may well be that the achievement of this purpose might at times have a punitive effect, but that is not to say that the primary purpose is punitive."

CONSIDERATIONS RELEVANT TO THE EXERCISE OF THE DISCRETION UNDER SECTION 18 OF POCA.

[10] O'Regan ADCJ went on to note that there is a fundamental difference between the purposes of a confiscation order under Chapter 5 of POCA and the confiscation of any instrumentality of crime under Chapter 6. It is not necessary to consider those differences for the purposes of this judgment other than to note that care should be taken not to apply the jurisprudence which has developed under Chapter 6 to Chapter 5 cases.

[11] The learned Justice made the following observations in relation to Chapter 5 cases.

“[69] First, a court considering what will constitute an appropriate amount as contemplated by s18 will have regard to all the circumstances of the criminal activity concerned. Secondly, in considering what would 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 the 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 deprivation 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 a 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.”

[12] It is common cause that the extent of any s18 order which this court may make is limited to the sum of R7,125m. That figure is the alleged benefit which accrued to the defendant as a consequence of his involvement in the abalone

smuggling ring of which he has been convicted and is arrived at by calculating the volume of the abalone involved (28,5 tons of frozen abalone) at the applicable erstwhile rate of R250/kg. Both the volume of abalone and the rate were accepted by Mr. van Zyl SC as correct for the purposes of this application.

THE STRUCTURE OF THESE PROCEEDINGS

[13] In terms of ss13(1) and (5) of POCA proceedings such as these are of a civil nature and the State is required to establish its application on a balance of probabilities while s18(1) expressly prescribes that the nature of the proceedings is an enquiry.

“18. Confiscation orders.

(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.

[14] In Ramlutchman⁶ the SCA observed that there was no question of the State bearing any onus in such an enquiry and that the presiding officer was duty bound to intervene in the enquiry if necessary and, for example, call for further evidence or hear further submissions from interested parties in order to exercise the wide powers which POCA confers on the convicting court to make orders that are effective and fair in the circumstances.

[15] As s18(1) directs, the focus of the enquiry is to establish whether the convicted person has received any benefit arising out of the crime(s) in question or any other criminal activity sufficiently closely linked to such crimes. To establish whether there has been any such benefit one looks, firstly, to s12(3)⁷ and then to s1

⁶ NDPP v Ramlutchman 2017 (1) SACR 343 (SCA) at [28]

⁷ **12. Definitions and interpretation of Chapter [5]. – ...**

(3) For the purposes of this Chapter, 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."

of POCA for the definition of what constitutes the proceeds of such unlawful activities.⁸

[16] The aforesaid definition of unlawful activities is cast in wide language and is designed to encompass any –

- property
- service
- advantage
- benefit, or
- reward

which has been –

- derived
- received, or
- retained

⁸ **1. Definitions and interpretation of Act –** (1) In this Act, unless the context otherwise indicates –

“**proceeds of unlawful activities**” means any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived;”

directly or indirectly, in the Republic or elsewhere, before or after the commencement of POCA –

- in connection with,
- or as a result of

any unlawful activity carried out by **any** person and includes any property “representing” (i.e. which has replaced) the original property. One cannot conceive of a definition which has much wider import than this and it is apparent that it was the intention of the Legislature to give the courts the wide powers required to achieve one of the cornerstones of POCA, namely that “(t) *he purpose of confiscating proceeds of crime is to ensure that criminals realize that they cannot benefit from the ill-gotten gains and that crime does not pay.*”⁹

[17] Finally, in deciding what property is capable of confiscation under Part 2 of Chapter 5, s14 is also of wide compass, incorporating –

- any property held by the convicted person; and
- any property held by a person to whom the accused has made, directly or indirectly, an “*affected gift*” as defined in s12(1) of

⁹ Ramlutchman. [21]

POCA.¹⁰

[18] Presently, and subject to what is set forth hereunder, the defendant does not appear to personally own or control any assets of substance. There are, however, instances where the defendant has disposed of his interest in corporate entities in favour of his wife (which ultimately accrued for the benefit of his minor children) at times which may or may not be relevant in relation to the progress of the criminal case brought against him. The nature of these dispositions fall to be considered in the context of whether they constitute affected gifts as defined and/or property representing such affected gifts, as contemplated under the definition of the proceeds of unlawful activities.

THE ASSETS SOUGHT TO BE CONFISCATED

[19] In presenting her case to the court, the applicant has relied on an affidavit made by Mr. Deon de Jager which serves as the prescribed statement made in terms of s21 of POCA. Mr. de Jager says that he is a captain in the SA Police Service with 29 years' experience as an investigator into general and organized crime and has been designated as the financial investigator in this matter. As alluded to above, Mr. de Jager's first affidavit was deposed to on 19 February 2018. After the

¹⁰ “**(A)ffected gift**” means any gift –

- (a) made by the defendant concerned not more than seven years before the fixed date; or
- (b) made by the defendant concerned at any time, if it was a gift –
 - (i) of property received by that defendant in connection with an offence committed by him or her or any other person; or
 - (ii) of property, or any part thereof, which directly or indirectly represented in the defendant's hands property received by him or her in that connection, whether such gift was made before or after the commencement of [POCA]...”

defendant had filed an answering affidavit dated 11 May 2018, Mr. de Jager conducted certain further investigations and deposed to a supplementary affidavit on 10 January 2019. Thereafter, the defendant signed a supplementary answering affidavit on 19 January 2019 while Ms. van Rensburg deposed to an affidavit on 31 January 2019 in which she sought to protect her own proprietary interests and those of her minor daughters, aged 13 and 10. As noted above, this affidavit was supplemented on 4 February 2019.

[20] In his first affidavit, Mr. de Jager lists the defendant's interests in property in 3 distinct categories – immovable property, movable property and an interest in certain businesses.

Immovable property

[21] In the founding statement of 19 February 2018 Mr. de Jager refers to 2 immovable properties in which he says the defendant had an interest, namely Erf 93, Gansbaai on which a shopping centre is located in Main Road, Gansbaai, and Erf 797, Hermanus which similarly incorporates a shopping centre in central Hermanus. Both properties are owned by a close corporation, Infoteam Investments 66 CC (*"Infoteam"*).

[22] Then, in his supplementary statement of 10 January 2019 Mr. de Jager states that he conducted further searches and established that there were a further 3 properties in Gansbaai owned by Infoteam – Erven 119, 120 and 2925. In that supplementary statement, Mr. de Jager also refers to 11 sectional title units in a sectional title scheme in Goodwood acquired by Ms. van Rensburg on 23 October

2010. Lastly, in the supplementary statement Mr. de Jager refers to Erf 1737 Gansbaai which was purchased on 3 May 2018 and registered in the name of an entity called Sea Point Sidewalk CC (“SPS”).

Movable Property

[23] Mr. de Jager lists 4 vehicles which he says are owned by the defendant-

- An Isuzu KB 280 bakkie, with registration number CEM 19786;
- An Opel Corsa bakkie, CEM 3454;
- A trailer, CEM 3890; and
- A Mercedes Benz ML 63 SUV, CA 427257.

The Mercedes is registered in the name of Infoteam and the other vehicles are registered in the name of the defendant personally.

Interests in Businesses

[24] Having conducted a companies’ search, Mr. de Jager says in the founding statement that he established that the defendant originally (on 24 January 2003) held 100% of the members’ interest in Infoteam. Later, (on 23 August 2004) Ms. van Rensburg acquired 50% of that interest and eventually (on 1 February 2007) she acquired the entire 100% thereof.

[25] In the supplementary statement, Mr. de Jager says that a further companies' search revealed that on 21 June 2005 the defendant acquired 100% of the members' interest in Sea Point Sidewalk CC ("SPS"). When the defendant resigned as the sole member of SPS on 3 March 2015, Ms. van Rensburg acquired the entire members' interest. Mr. de Jager says that on 1 December 2015 Ms. van Rensburg gave up her membership in SPS in favour of the parties' 2 daughters who then held 50% each

I shall deal with the various assets separately commencing with the movables.

MOVABLES

[26] During the criminal proceedings it was said by the witness Salvin Africa that the defendant drove a Mercedes Benz motor vehicle at some stage while the witness A.J.Theunissen recounted how the defendant and the erstwhile accused no 5, Mr. Liebenberg, arrived together at his premises on more than one occasion in 2006 driving a Mercedes Benz ML class SUV. It is not clear in whose name the latter vehicle was registered.

[27] In the founding statement Mr. de Jager dealt with the 4 vehicles referred to above and attached the relevant licensing documents which track their registration. These reflect that –

- the trailer, CEM 3890, was acquired by the defendant personally in 2000 and was accordingly an asset owned by him at the time of his arrest in November 2006;

- the Isuzu bakkie, CEM 19786, was acquired as a second hand vehicle by the defendant personally on 16 February 2013, more than 5 years after his arrest when it was owned by one van der Riet;
- The Opel Corsa bakkie, CEM 3454, was acquired as a second hand vehicle by the defendant personally in May 2014, having been owned by one Baldwin at the time of his arrest.

There is no current valuation of any of these vehicles reflected in the papers.

[28] In regard to the Mercedes Benz ML 63 series SUV, CA 427 257, the documents reflect that it is a 2011 model which was acquired by Infoteam in April 2013 from a Mercedes Benz agency at Century City. The documents suggest that the vehicle had been repossessed in January 2013 by Wesbank and was later sold by the agency as a used vehicle financed by Mercedes Benz.

[29] The financial statements for Infoteam for the tax year ended February 2014 financial year show that the company then owned a “*Toyota 2,7*” vehicle (presumably a bakkie) which had been bought for R198 738, a Mercedes Benz which had been previously been bought for R900 000 and was sold during that financial year for R870 000, and then replaced by another Mercedes Benz which cost R980 000 and was financed in the amount of R599526,59.

[30] The financial Statements of Infoteam for the tax year ended February 2006 annexed to Ms. van Rensburg’s affidavit reflect that in the period 2005/6

Infoteam owned a Mercedes Benz ML 500 SUV which was purchased for R608 850. This suggests that the Mercedes Benz SUV which Mr. Theunissen saw the defendant driving was owned by Infoteam (of which the defendant was then a member) and not his abalone export company, S&W Fishing.

[31] In my view, and in light of the definition in s1 of POCA of “*proceeds of unlawful activities*” which render the replacement of assets at any time capable of confiscation, it is necessary that the defendant and Ms. van Rensburg clarify the acquisition and disposal of these luxury vehicles over the years.

ERF 93 GANSBAAI

[32] Mr. de Jager says that Erf 93 Gansbaai was bought on 16 January 2004 for R1 105 800 and was partly financed with a mortgage bond of R700 000. Its current municipal valuation is said to be R2 070 000. In his answering affidavit of 11 May 2018 the defendant confirms the purchase price of this property and the provision of bond finance and goes on to explain that the balance of the purchase price was financed by a loan from him to Infoteam. He says that he does not know property's current value and points out that it was bought and paid for before the date on which the first offence listed in the indictment was allegedly committed. Such an allegation is however irrelevant if regard be had to the definitions referred to and, in any event, does not afford the defendant a defence to the claim for confiscation. The defendant does not say in that affidavit how Infoteam sourced the funds used for the balance of the purchase price (R405 800).

[33] In his supplementary affidavit of 19 January 2019 the defendant refers to the affidavit of his wife of 31 January 2019 and seeks to rely on the contents thereof to correct the earlier allegation that he contributed the balance of the purchase price of Erf 93 Gansbaai on loan account to Infoteam. He says that he was mistaken and had confused that loan with another loan which he had made in respect of the purchase of another property in Hermanus, Erf 772, to which I shall refer later. The defendant's supplementary answering affidavit suggests that the complete answer to the applicant's allegations is to be found in his wife's affidavit of 31 January 2019 and I shall accordingly deal with that affidavit separately.

ERF 797 HERMANUS

[34] In the founding statement Mr. de Jager says that Erf 797 Hermanus was bought on 12 September 2005 for R8,8m and that a bond of R6m was registered over the property. The current municipal valuation is said to be R9,5m. In his answering affidavit of 11 May 2018 Mr. van Rensburg confirms the purchase price and the bond finance but says that he does not know what the current municipal valuation is. He goes on to point out that the balance of the purchase price was advanced to Infoteam by Ms. van Rensburg on loan account. As pointed out above, at that stage the defendant and his wife each held 50% of the members' interest in Infoteam. In his supplementary founding statement Mr. de Jager says that the value of the property in January 2019 was R10m and that there is still a bond of R6m registered over it.

ERF 772 HERMANUS

[35] The defendant says in his answering affidavit of 11 May 2018 that all properties bought by Infoteam over the years were intended to be income-producing commercial assets whose rentals were used to service the respective bonds passed over them. He says that, to this end, in 2004 Infoteam bought Erf 772 Hermanus for R1,5m. A bond of R700 000 was registered to partly finance the purchase and the balance of R800 000 was sourced from “*private loans*”.

[36] The defendant says that this property was sold “*a few months later*” for R2m. It is common cause that up to 23 August 2004 the defendant held the full members’ interest in Infoteam, whereafter he transferred 50% thereof to his wife. The defendant’s affidavit does not establish, however, when in 2004 either the purchase or sale of this property took place, nor from whom the private loan of R800 000 was sourced.

ERVEN 119, 120 AND 2925 GANSBAAI AND UNITS 1-11 IN GOODWOOD
SECTIONAL TITLE SCHEME 27467

[37] The Goodwood properties were all acquired directly by Infoteam in October 2010 at a time when Ms. van Rensburg held 100% of the members’ interest therein. She has stated in her affidavit of 31 January 2019 that, since the applicant does not allege that the acquisition of these properties are to be construed as “*affected gifts*” as defined under POCA, she declines to deal with them further.

[38] Annexure DDJ 9 to Mr. de Jager's supplementary statement contains a printout by an entity called "*Datasearch*" which details the acquisition of, *inter alia*, the remaining 3 Gansbaai properties referred to above. This search reflects that Erf 119 Gansbaai was acquired by Infoteam on 15 August 2007 at a cost of R3 372 714, that Erf 120 was purchased by Infoteam on the same day for R3 438 642, as also Erf 2925 for R13 688 642. The seller of each of these 3 properties was the Basie Wessels Familie Trust and the combined deal (with an aggregate value of R20 499 998) was evidently financed with a covering mortgage bond registered in favour of ABSA Bank in the amount of R5 916 666. The printout does not reflect how or where the balance of the purchase price (R14 583 332) was sourced.

[39] Ms. van Rensburg's response to the acquisition of these properties is similar to the Goodwood properties: that she held the entire members' interest in Infoteam as of August 2007 and that since the applicant made no allegation that these were "*affected gifts*", she did not intend dealing therewith either.

SEA POINT SIDEWALK CC ("SPS")

[40] In his supplementary affidavit of 10 January 2019 Mr. de Jager refers the court to a companies' search on SPS and furnishes details of its corporate history. SPS was registered on 19 May 2005 with a certain Anel de Morney as the sole member until 21 June 2005 when the defendant acquired the entire interest therein. Given the manner in which shelf-companies are often formed it is not uncommon for the initial interest in the company to be registered in the name of a person employed by the entity registering the shelf-company. In this case, Annexure DDJ 14 to the founding statement reflects that Ms. de Morney's residential address was located at

commercial premises in Bellville. Furthermore, on 21 June 2005 the name of the company was changed from “*High Tide Trade 45*” to SPS. SPS was clearly then a shelf company when it was acquired by the defendant.

[41] Annexure DDJ 14 also reflects that the registered address of SPS changed from time to time – from residential addresses in Green Point and Fresnaye to Killarney Gardens, which is a commercial area. Further, it demonstrates that 100% of the members’ interest in SPS was held by the defendant until 3 March 2015 when he resigned as such. From then until 1 December 2015 Ms. van Rensburg is reflected as the only member of SPS although the printout suggests that she made no member’s contribution in respect of the acquisition thereof since her “*Member size*” is reflected as “0%”.

[42] Then, from 1 December 2015 until 26 April 2018, the entire 100% of the members’ interest in SPS was held by Mr. Clive Eric Coetzee, whose residential address is reflected as being in the Cape Town suburb of Edgemoor. The document suggests that Mr. Coetzee acquired that interest for R100. On 26 April 2018 the defendant’s daughters, Zara van Rensburg (then aged 12 years) and Gabrielle van Rensburg (then aged 9) each acquired 50% of the members’ interest in SPS, with a member’s contribution of R50 each.

[43] In the supplementary founding statement Mr. de Jager notes further that SPS purchased Erf 1737 Gansbaai on 3 May 2018 for R3m, ostensibly for cash: there is no bond registered over that property. Annexure DDJ 15 to his supplementary affidavit reflects the seller of this property as Infoteam which appears to have purchased it a year before from Hermanus Liquor Store CC on 2 February 2017 for

R3m. There is no evidence reflecting either ownership or control of this latter close corporation.

MS VAN RENSBURG'S EXPLANATORY AFFIDAVIT

[44] As indicated earlier, the defendant's supplementary answering affidavit is short and relies, in the main, on the explanatory affidavit of his wife. This is understandable given that the defendant is serving a sentence and the furnishing of instructions to his current legal representatives may be hamstrung accordingly.

[45] Ms. van Rensburg says that she and the defendant were married on 19 March 2004 out of community of property. She says that she grew up in a home in which property transactions were everyday – her late father, Mr. Carlos Sabbe, owned a very successful coastal estate agency known as Carit Estates which was involved in various property developments throughout the Western Cape. When Mr. Sabbe died in 2016 his estate was said to be worth in excess of R300m.

[46] Ms. van Rensburg herself has also been involved in the property business for many years, holding a B.Comm degree and various diplomas. She says that when she married the defendant in 2004 she was already successfully established in the industry and ran a thriving business called Hermanus Estate Agency. For that very reason she says her father advised her that she marry the defendant out of community of property with exclusion of the accrual system. Ms. van Rensburg offers the following explanations in relation to various of the assets which the applicant has targeted for confiscation in these proceedings.

Erf 93 Gansbaai

[47] Ms. van Rensburg says that she fortuitously came upon this property in November 2003 while valuing another property in Gansbaai. After discussing the matter with her father, says Ms. van Rensburg, she decided to buy the property for R970 000 plus VAT of R48 500 as it presented a good commercial opportunity.

[48] At the time, she says, the defendant owned Infoteam which was a dormant company – it did not even have a bank account – and they decided to house Erf 93 Gansbaai therein. Ms. van Rensburg says that she accordingly lent R498 000 to Infoteam to finance the purchase of the property and the defendant put in R2000 of his own. A bank loan was secured on mortgage for the balance of the purchase price.

[49] Attached to Ms. van Rensburg's affidavit of 31 January 2019 are various contemporaneous financial statements of Infoteam which reflect loans to the corporation by her in the amount of R500 000 and by her mother in the amount of R84 834,10, as also documents supporting the allegation regarding the purchase of the property and the opening of Infoteam's bank account on 1 December 2003.

[50] Ms. van Rensburg points to an error in the defendant's answering affidavit of 11 May 2017 in which he stated that he had lent money to Infoteam, which together with a bond from ABSA bank had been used to finance the acquisition of Erf 93 Gansbaai. She attributes this mistake to the peculiar circumstances surrounding the drafting of that affidavit – her husband's recent incarceration and the stress which accompanied it, as well as a possible misunderstanding on the part of Adv Uijs SC (who drafted the affidavit) regarding his instructions.

[51] In his supplementary affidavit of 19 January 2019 the defendant explains the mistake in his earlier affidavit and says that he confused the alleged loan to Infoteam in respect of Erf 93 Gansbaai with a later loan in relation to the purchase of Erf 772 Hermanus.

Erf 772 Hermanus

[52] In her affidavit of 31 January 2019 Ms. van Rensburg says that in September 2004 Infoteam purchased Erf 772 Hermanus for R1,5m. She says that the defendant made a payment of R429 900 into the account of Infoteam and these funds were used in part to finance the purchase of this entity. She says that those funds were sourced from the defendant's erstwhile abalone exporting company (Ligitprops 3016 CC¹¹) while the balance of the purchase price was made up from a bank loan with ABSA advanced on mortgage as well as "*funds from Infoteam*" which were evidently monies loaned to Infoteam by Hermanus Estate Agency.

[53] Ms. van Rensburg goes on to say that in April 2005 Infoteam received an offer on the property of R2,2m (which included commission) and that she and the defendant decided to sell it, making a quick gross profit of R 500 000 on the deal. Capital gains tax in the amount of R 72 500 was paid and Infoteam accordingly realised a net profit of R427 500. Ms. van Rensburg attaches to her affidavit the financial statements for Infoteam for the tax year ended 28 February 2006 from which, she says, this transaction may be verified.

¹¹ During the criminal trial there was evidence that the defendant and a certain Mr. Sean Smith were members of this CC which traded in Hermanus as "*S&W Fishing*" – the acronym being derived from its members' first names, Sean and Willie.

Erf 797 Hermanus

[54] Ms. van Rensburg says that during September 2005 her father came to know of the availability of Erf 797 Hermanus on the market. He regarded it as a property with business potential and advised her to purchase it. The asking price was high (R8,8m) and because the bank did not value it as highly as that, Ms. van Rensburg says that she was required to provide self-funding of approximately R2m. Acting on the advice of her father she says she decided to house that property in Infoteam but was only prepared to do so on condition that she owned the entire members' interest in the CC.

[55] To do this Ms. van Rensburg says it was necessary to settle the defendant's loan to Infoteam and during the period 12 to 22 September 2005 four payments of R100 000 each and one payment of R30 000 were allegedly made to the defendant. An Infoteam bank statement for that period is attached to the affidavit reflecting payment of four alleged tranches of R100 000. However, the identity of the recipient of those payments does not appear from the statement nor is there proof of the alleged payment to the defendant of R30 000 on 22 September 2005. Nevertheless, the financial statements of Infoteam for the 2005 and 2006 financial years do reflect a loan by the defendant to Infoteam in the amount of R429 000 and the subsequent liquidation of the indebtedness to him via drawings *qua* member.

[56] Ms. van Rensburg goes on to say that with repayment of this member's loan, the defendant no longer had any financial interest in Infoteam and he accordingly agreed to transfer his 50% members' interest to her. Because Infoteam's liabilities then exceeded its assets, the parties apparently agreed that there was no

value in the defendant's interest which was transferred to Ms. van Rensburg without payment of any consideration. Because of administrative delays in the offices of the registrar of companies, says Ms. van Rensburg, the change of membership was only eventually recorded with effect from 1 February 2007.

[57] Ms. van Rensburg says that since the repayment of the defendant's loan in September 2005 he has had no further involvement in the affairs of Infoteam, notwithstanding the fact that the transfer of his interest only occurred almost 18 months later and just a couple of months after his arrest on the POCA charges. She has attached to her affidavit a variety of documents which she says indicate that it was she alone who acted on behalf of Infoteam in purchasing Erf 797 Hermanus including an acknowledgment of debt drawn in favour of her late father, Mr. Sabbe, for a loan of R2m, allegedly used to make up the balance of the purchase price, the deed of sale and correspondence with the transferring attorneys.

[58] In support of the allegation that there was no value in Infoteam at the time of the transfer of the defendant's 50% interest to her, Ms. van Rensburg says that she recently procured an opinion from a certain Mr. Keith Bowman, a director of the accounting firm BDO Cape Incorporated, which she attaches to her affidavit. The document in question is in the form of a short, cryptic statement signed by Mr. Bowman but it is not an affidavit. In that statement it is said that certain adjustments were made by Mr. Bowman to the audited financial statements issued at the time by Infoteam's Accounting Officer, J.de W. Koegelenberg of Hermanus, who also happened to be the Accounting Officer for the defendant's erstwhile abalone business, S&W Fishing.

SPS

[59] The defendant makes no mention of SPS in his first affidavit and there is only a brief mention thereof in his second affidavit, leaving it to his wife to deal with SPS. Ms. van Rensburg says that from the time that the defendant acquired ownership of SPS in June 2005 until she acquired it in March 2015, the corporation was dormant. She says that in 2015 she was contemplating buying a shopping centre in Bloubergstrand and was advised by her father to use a separate corporate entity for such a venture. Ms. van Rensburg says that she “*accordingly acquired a members’ interest in SPS to act as a vehicle in this transaction.*” However, that deal did not materialize.

[60] Ms. van Rensburg says that Mr. Clive Coetzee is a family friend and at dinner one night he mentioned that he wanted to start a business venture. She says that since she was not “*using*” SPS at the time she offered the members’ interest to Mr. Coetzee. He appears to have accepted the offer since Ms. van Rensburg says that she transferred the interest to him on 1 December 2015.

[61] Ms. van Rensburg goes on to say that, although Mr. Coetzee’s business was initially successful, “*in 2017 it started picking up financial problems which resulted in its closure in March 2018 with an assessed tax loss.*” Ms. van Rensburg claims that she wished to acquire a vehicle to house certain investments on behalf of her daughters and, since SPS had an assessed tax loss which she could make use of, she and Mr. Coetzee agreed that the members’ interest could be transferred to the two young girls in equal shares at no cost.

[62] The daughters' investments were ostensibly the product of effective tax planning on Ms. van Rensburg's behalf for purposes of limiting her own estate duty. She says that since 2008 she and the defendant's mother have made use of a statutory tax benefit in terms whereof an amount of R100 000 could be donated annually to each child without attracting donations tax. Initially, these amounts were allegedly deposited into a money market account and later into Infoteam where they evidently attracted better rates of interest. The financial statements of Infoteam reflect such loans and the children's' income tax returns are attached to Ms. van Rensburg's affidavit in an endeavour to demonstrate that all is above board. It is alleged that by 28 February 2018, each child had a loan account in Infoteam of R1,42m.

[63] Ms. van Rensburg says that she subsequently bought Erf 1737 Gansbaai in the name of SPS, thereby securing an effective 50% interest for each child in that property. She does not say how the property was financed other than to allege that the purchase price was paid by Infoteam and that the children's' loan accounts would be adjusted accordingly. Once the latest financial statements for SPS and Infoteam are prepared, says Ms. van Rensburg, they will reflect a loan by each child to SPS of R1,5m each. She denies that the acquisition by SPS of Erf 1737 or her children's' interest in SPS constitutes an affected gift under POCA.

THE DEFENDANT'S CURRENT ASSETS

[64] In para 29.2 of his affidavit of 11 May 2018 the defendant refers, in relation to his current assets, to "*my interest in the goodwill of the business in which I am presently involved.*" He does not, however, furnish any details in relation to such business. In the circumstances the court is unable to fully evaluate whether the

defendant in indeed still possessed of assets which are the proceeds of crime, or any assets which have replaced such proceeds.

EVIDENCE GIVEN IN THE CRIMINAL TRIAL

[65] The veracity of the explanations put up by the defendant and his wife fall to be considered in the context of the evidence adduced at the trial. Firstly, it was common cause that the defendant was arrested on 14 November 2006 when he surrendered himself to the SAPS in Bellville South. There were thereafter various appearances in the lower courts in 2007 before this matter came before the High Court on trial in 6 October 2008.¹² The transfer by the defendant of his 50% interest in Infoteam and entire membership in SPS must accordingly be considered in light of the fact that he had been arrested and faced serious charges under POCA for which he was successfully prosecuted and convicted.

[66] After certain of the accused had tendered guilty pleas, and after some had skipped bail, the trial before this court (in which the defendant was arraigned as accused number 2) commenced on 10 August 2014. While the defendant did not testify in the trial there were 2 interlocutory rulings which went against him and which would have had significant implications for his assessment of the case. The first was a ruling on 2 September 2015 (the so-called “*ECTA Ruling*”) which effectively rendered evidence regarding cellphone traffic between certain of the accused and State witnesses admissible. The second was a ruling on 16 February 2016 (the so-called “*Passport Ruling*”) which had important consequences for the defendant’s denial that

¹² See S v Chao and others 2009 (1) SACR 479 (C) at [8] – [16]

an identified cellphone number had been used by him. The rearranging of the financial affairs of the defendant and Ms. van Rensburg must be considered in light of these dates.

[67] Then there is the defence put up by the erstwhile accused no 4, Mr. Toni Peter du Toit, to explain his regular cellphone contact with the defendant. It was said that the defendant operated a business in Killarney Gardens which manufactured security spikes and that in 2006 Mr. du Toit assisted with the installation thereof. This was said to account for the cellphone traffic between the 2 men during the period April to October 2006.

[68] After conviction in September 2017 the defendant adduced the evidence of his wife in mitigation of sentence in February 2018. In that evidence¹³ Ms. van Rensburg dealt, *inter alia*, with the business of SPS. She said that at the time that she and the defendant were married in March 2004 he and Mr. Coetzee were already in business importing steel products from China, including wall-mounted security spikes¹⁴. Ms. van Rensburg pointed from the witness box to Mr. Coetzee who was sitting at the back of the court room and identified him. The court was then able to identify Mr. Coetzee by name: he was a very familiar face having been in court throughout the trial almost on a daily basis.

¹³ See the transcript of proceedings at pp 11533 to 11594.

¹⁴ Record p11548.8

[69] Ms. van Rensburg testified that the steel business was called “CKW Steel”¹⁵ and had originally been the trading name of SPS. She went on to say that Mr. Sean Smith used the defendant’s arrest under the POCA charges as a mechanism to work him out of S&W Fishing. When this happened, said Ms. van Rensburg, the defendant started his own abalone exporting business but continued in the steel business through his association with Mr. Coetzee in SPS.

[70] While the defendant says nothing about the steel importing business, the impression is created through this evidence of Ms. van Rensburg that SPS (allegedly trading as CKW Steel) was an active company¹⁶ that was profitable, even before the defendant’s arrest in November 2006¹⁷. This would accord with the evidence of Mr. du Toit that he and the defendant had spoken with each other telephonically about the installation of spikes in 2006. Further, it is said that the company was VAT registered which suggests that it must have attained a fair level of turnover to meet the relevant fiscal threshold.

[71] Ms. van Rensburg also testified¹⁸ that in December 2016 they had

“problems with the name, Sea Point Sidewalk, so we then decided to actually take our trading name¹⁹ and register it. We registered it, the VAT applications, the import and export licenses and with (sic) the intention to transfer it all over to that company, and that was it, ja.”

¹⁵ The name was said to be an acronym for “Clive, Kim and Willie”.

¹⁶ Record p11569.20 – 11570.10

¹⁷ Record p11541.12 - 15

¹⁸ Record p11570.15 - 20

¹⁹ i.e. CKW Steel

[72] The “*partners*” in that new business (“*CKW Steel*”) were said to be the defendant and Mr. Coetzee²⁰. However, Ms. van Rensburg almost immediately thereafter contradicted herself and said that the sole member of SPS was Mr. Coetzee and the sole shareholder of CKW Steel was the defendant²¹. She went on to say that SPS was still then (in February 2018) trading in steel products but that it was facing poor “*economic factors*” and might be forced to close down if the defendant was not around to run it.²² This decision would depend on various considerations that allegedly would be assessed at the end of the financial year in question.

[73] In her evidence the witness constantly referred to the steel business using the pronoun “*we*”, suggesting a degree of involvement from her side in the affairs thereof. Be that as it may, there was no question when Ms. Van Rensburg testified in February 2018 (at the time of the launch of the s18 application) that within a couple of months the business would be closed and the company used as a shell to house an investment for the children. It is fair to infer that this plan would have been known to her when she testified.

[74] Ms. van Rensburg also testified that the defendant had an interest in a business that manufactured fiberglass storage tanks for the abalone industry. This business was apparently also conducted through CKW²³ with the defendant being the only person with an interest therein. When asked by the court what the defendant’s assets were at that stage, Ms. van Rensburg said that it was just his interest in CKW.

²⁰ Record p11571.4

²¹ Record p11572.1-10

²² Record p11572.15-25

²³ Record p11573.13-21

She was unsure what the value of that interest was but suggested that it was probably negligible²⁴.

[75] The financial statements for Infoteam for the tax year ended February 2006 reflect that Ms. van Rensburg introduced cash of R2m into the business during that year on loan account. Documentation annexed to her affidavit shows that she electronically transferred that sum of money to the conveyancing attorneys attending to the transfer of Erf 797 on 18 November 2005. However, the source of these funds is not verified with reference to any bank statements.

[76] In her evidence in mitigation of sentence Ms. van Rensburg also referred to the success of S&W Fishing at the time of the defendant's arrest and said that a turnover figure of around R30m was bandied about by the defendant and Mr. Smith.²⁵ The financial statements for Ligitprops for the tax year ending February 2005, however, only reflect a turnover of some R5, 2m. While this figure certainly represents a substantial increase over the previous year's turnover of R1, 9m, it is a far cry from the amounts mentioned in evidence. It is necessary therefore for the court to be satisfied that income from the unlawful disposal of abalone has not been laundered by the defendant, for example, through Infoteam.

[77] Lastly, Ms. van Rensburg was asked about the parties' accommodation at the time of the defendant's arrest. She said that the defendant then owned residential property in Hermanus which they occupied throughout the year in conjunction with a flat in Clifton which they were required to vacate during the summer

²⁴ Record p11582.10-11583.11

²⁵ Record p11563.17 – 11564.6

months (November to February)²⁶. She added that at the time of his arrest the defendant owned the flat in Hermanus – at no.2 Breakwater in Westcliff Road²⁷ - which was sold quite a while after the birth of their first child in 2006²⁸.

[78] The property at no.2 Breakwater was not identified by either of the parties with reference to its erf number but it cannot be either Erf 797 nor Erf 772, which are said in the Deeds Office searches conducted by Mr. de Jager to be at 133 Main Road, East Cliff and 13 Aberdeen Street, East Cliff respectively²⁹. Further, the companies' search in respect of Infoteam conducted by Mr. de Jager on 4 December 2018³⁰ reflects the residential address of both the defendant and Ms. van Rensburg to be at No 2 Breakwater Lodge, Marine Drive, Hermanus.

[79] The evidence given by Capt. Brink in the criminal trial suggests that this property was visited immediately after the defendant's arrest as part of the process to verify the latter's residential address. It would appear, therefore, that there is a residential property which was owned by the defendant personally in 2006 which has not yet been identified by either Mr. de Jager, the defendant or his wife and whose history and current ownership is unknown to the court.

²⁶ Record p11579.21-11580.2

²⁷ Record p11540.10-21

²⁸ Record p11541.22

²⁹ See Annexure DDJ 9 to the supplementary founding statement.

³⁰ See Annexure DDJ 10 to the supplementary founding statement

INTERIM CONCLUSIONS

[80] It will be apparent from the foregoing that there are significant inconsistencies in the evidence of Ms. Sabbe given in the criminal trial and deposed to in this application. There are also certain facts which are required to be clarified before the court can come to a proper conclusion in this application for confiscation. During argument I understood counsel to accept that the powers which the court exercised in an enquiry such as this were wide enough to permit the court to issue directives with which the parties were required to comply before a final determination on the confiscation application was arrived at.

[81] In the result it seems to me that the interests of justice will be served if the applicant, the defendant and Ms. van Rensburg are directed to take the following additional steps set forth below. In light of the fact that the defendant is incarcerated at a prison outside of the city it seems fair to grant the parties an extended period of time in which to do so. Further, it is proper that Mr. Coetzee formally be given notice of these proceedings in order that he may protect any of his interests which may potentially be effected by any order made herein. Finally, should any of the parties require electronic extracts from the transcript of the proceedings in the criminal trial, they may do so on written application to this court's registrar

**IN THE CIRCUMSTANCES THE FOLLOWING DIRECTIONS ARE HEREBY
ISSUED**

- A. A copy of the full set of papers herein is to be served by the applicant on Mr. Clive Coetzee at his residential address being No 2 The Bend, Edgemean, 7441, Western Cape;
- B. Mr. Coetzee is given leave to file an affidavit in these proceedings in relation to any issue which he considers might affect his proprietary interests, such affidavit to be filed with the court and served on all other parties by close of business on Friday 28 June 2019;
- C. The Defendant is directed to file a further supplementary affidavit with the court and to serve same on all other parties by close of business on Friday 28 June 2019 and to inform the court as follows –
 - i. When he acquired the immovable property situate at No 2 Breakwater Lodge, Marine Drive, Hermanus;
 - ii. What the purchase price thereof was;
 - iii. Whether such property was thereafter held in the defendant's name or through some other legal entity, and if so, the full details of such entity;
 - iv. How the acquisition of such property was financed;

- v. When such property was disposed of, to whom and for what consideration;
- vi. Whether capital gains tax was paid on the disposal, and if so, when, and in what amount;
- vii. When he disposed of his interest in Ligitprops 3016 CC (*"Ligitprops"*), to whom and for what consideration;
- viii. To furnish the Court with copies of the annual financial statements of Ligitprops for the period 1 March 2006 until the disposal of the defendant's interest therein;
- ix. To furnish the court with copies of the income tax returns of Ligitprops for the period 1 March 2005 until the disposal of the defendant's interest therein;
- x. The name of the entity (in which the defendant was directly or indirectly involved) and which traded in steel products during the period 1 January 2004 to 28 February 2018, as alleged by Ms. Kim van Rensburg in her evidence in the criminal trial before this court on 5 and 6 February 2018;
- xi. To furnish the court with copies of the annual financial statements, income tax returns and bank statements for any such entity which traded in steel products as

aforesaid for the period 1 January 2004 to 28 February 2018;

- xii. What the source was of the funds referred to by Ms. van Rensburg in para 8.16 of her affidavit of 31 January 2019 filed herein and which emanated either directly or indirectly from the defendant. In this regard, the defendant is directed to identify such sources with reference to the Annexures to Ms. van Rensburg's affidavit or any other relevant documentation which he may have at his disposal;
- xiii. To identify (with reference to bank documents in respect of any accounts held by him) receipt of the amounts allegedly repaid by Infoteam to the defendant, as alleged by Ms. van Rensburg in para 8.19.1 of her aforesaid affidavit;
- xiv. Copies of the annual financial statements, income tax returns and bank statements in respect of Sea Point Sidewalk CC for the period 19 May 2005 to 3 March 2015;
- xv. The identity of the business referred to in para 29.2 of the defendant's affidavit of 11 May 2018;

xvi. To the extent that the particulars furnished above may not do so, the defendant is to furnish full details of the business known as “CKW Steel” including but not limited to –

- The name of the entity in which the business was housed;
- The date of incorporation or establishment thereof;
- A full history of the business of the entity;
- Details of its bank accounts;
- Copies of all bank statements for the period 1 January 2004 to 28 February 2018; and
- Copies of all income tax and VAT returns for the period 1 January 2004 to 28 February 2018.

D. The defendant is directed to verify all factual allegations made in response to the issues set out above with reference to relevant documentation.

E. Ms. Kim van Rensburg is directed to file a supplementary affidavit by close of business on Friday 28 June 2019 and to inform the court therein of the following -

- i. When Infoteam Investments 66 CC (*“Infoteam”*) acquired an interest in Erf 1737 Gansbaai;
- ii. From whom, and for what consideration, such interest in the said Erf 1737 was acquired by Infoteam;
- iii. What the source of the funds was for such acquisition of the said Erf 1737 by Infoteam;
- iv. When Infoteam disposed of such interest in the said Erf 1737 and to whom such disposition was made;
- v. Whether capital gains tax was paid by Infoteam in respect of such disposition and if so, when and in what amount;
- vi. What consideration accrued to Infoteam in respect of such disposition;
- vii. What became of the proceeds of any such consideration received by Infoteam;

viii. What the commercial rationale was for the disposal by Infoteam of the said Erf 1737;

ix. To furnish full details of any Mercedes Benz or other luxury vehicle registered in the name of Infoteam during the period 24 August 2004 to 28 February 2018 including but not limited to –

1. The registration number of each such vehicle;
2. The date and cost of acquisition thereof;
3. The date of disposal thereof and the amount accruing to Infoteam upon such disposal;
4. The name of the person who had the day-to-day use of such vehicle.

F. Ms. Kim van Rensburg is directed to verify all factual allegations made in response to the issues set out above with reference to the relevant documentation.

G. Ms. Kim van Rensburg is directed to procure the opinion expressed in Annexure KvR 17 to her affidavit of 31 January 2019 in an affidavit and to ensure that the opinion so expressed is contained in clear and understandable form in such affidavit;

- H. The applicant will be entitled to file a further supplementary replying affidavit in response to any further affidavits filed by the defendant (or on his behalf), Ms. van Rensburg and/or Mr. Clive Coetzee by close of business on Friday 26 July 2019.
- I. The consideration of all issues of costs will stand over for later determination.

GAMBLE, J