IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA
(sitting as the East London Circuit Court)

Case no. CC 40/21

In the application between: **REPORTABLE**

DEAN FANOE **First applicant/accused no. 10**
MANTELLA TRADING 522 CC **Second applicant/accused no. 11**

and

THE STATE **Respondent**

In re the trial of:

THE STATE

versus

PUMLANI MKOLO AND 13 OTHERS

JUDGMENT IN RESPECT OF SEPARATION OF TRIALS

STRETCH J.:

[1] The indictment in this matter refers to 27 charges and various alternatives. The first accused (the regional secretary of the ANC) is the only one of the 14 accused who has been charged on all 27 counts. The first applicant (Mr Fanoe) is a member of the second applicant, a close corporation known as Mantella Trading 522. The applicants face one count only, namely count four, and the two alternative charges thereto.[1]

[2] The offences with which the applicants have been charged relate to proceeds of unlawful activities as outlined in chapter 3 of the Prevention of Organised Crime Act 121 of 1998 (POCA). The main count is money laundering, in contravention of s 4 of POCA. The first alternative is assisting another to benefit from the proceeds of unlawful activities, in contravention of s 5. The second alternative is the acquisition, possession or use of proceeds from unlawful activities, in contravention of s 6.

[3] The applicants have brought an application for a separation of trials in terms of s 157 of the Criminal Procedure Act 51 of 1977 (the CPA). Accused number 14, who previously expressed an intention to launch a similar application, failed to deliver his application in compliance with an order made by Tokota J on 22 September 2021, and he is deemed to have abandoned the application. None of the remaining accused have launched, or have indicated that they wish to bring similar applications. But for the prosecution's opposition, the application before me stands unopposed.

[1] The applicants in their application papers and heads of argument (which were prepared before they pleaded in the common but mistakenly held belief that they could launch this application before the commencement of the trial) seem to suggest that they are only facing the two alternative charges to count 4. This is not correct. The applicants have been charged with the main count as well, to which they pleaded not guilty and which they addressed in their plea explanation.

[4] The charges preferred against the accused relate to events which transpired following upon the death of President Nelson Mandela on 5 December 2013. Immediately after the President died, (according to the indictment), national treasury authorised the use of municipal funds for transport services and venue costs associated with various memorial services in his honour.

[5] It is alleged that during December 2013 accused no. 1 (the regional secretary of the ANC in the Amatole region of the Eastern Cape) agreed with a belatedly appointed service provider (one Mr Sokwali, a member of a close corporation known as Victory Ticket 750) that Victory Ticket would submit an inflated quote to Buffalo City Municipality (BCM) for the transportation of mourners to venues, the inflated portion of which, when paid, was distributed by Sokwali as per the instructions of accused no. 1, inter alia, to further the objectives of the ANC political party.

[6] It was also decided, so it is alleged, that part of the municipal funding would be used to pay for T-shirts and for catering. At a meeting held on 9 December 2013, which was not attended by the applicants, accused no. 1 announced that the first applicant would supply T-shirts (presumably for mourners) and that the first applicant would invoice Sokwali and receive payment from Sokwali. The meeting was also attended by accused no. 4 (an ANC member and the speaker of the BCM council), no. 5 (an ANC member and a BCM councillor), no. 7 (the BCM acting director for executive support services) and no. 8 (a business woman and member of accused no. 9, a close corporation which goes by the name "Forty Wings Lodge").

[7] It is alleged that accused no. 3 (an ANC member, and the regional treasurer and executive deputy mayor of BCM) ordered the T-shirts from a supplier in KwaZulu-Natal. They were delivered to the first applicant who paid for the order. After having doubled what he paid for the T-shirts, the first applicant sold the T-

shirts on and submitted an invoice in the second applicant's name, to Sokwali and to Victory Ticket for payment to the tune of R1 380 000. It is alleged that BCM paid the money to Sokwali and that Sokwali (having been instructed to do so by accused no. 1) in turn paid the money over to the second applicant.

[8] It is further alleged that accused nos 1 to 5 (with whom accused nos 6 and 7 made common purpose) used their positions within, and in connection with BCM, to defraud the municipality and to misappropriate municipal funds earmarked for the transportation of mourners to centres where memorial services were to be held. The indictment alleges that accused nos 8 and 9 were beneficiaries of this scheme and were either present or represented when the aforesaid mischief was planned, and were at all times aware that their benefit was derived from the unlawful activities of the aforementioned accused. It is furthermore alleged that the applicants were also beneficiaries of this scheme, and that they (although they did not attend the 9 December meeting), "by necessary inference knew that the procurement of the second applicant's services was not lawful and regular, and knew, or ought to have known" that the funds paid to the second applicant for the T-shirts by Victory Ticket, were the proceeds of unlawful activities.

[9] With respect to count 4 (which is a contravention of s 4 of POCA), it is alleged that the applicants (who knew or ought reasonably to have known that R5 985 000 which BCM had paid to Sokwali, was the proceeds of unlawful activities), and accused 1 (who acted in the execution of a common purpose with accused nos 2 to 9 to commit the offences of fraud and money laundering), entered into an agreement or engaged in an arrangement or transaction amongst themselves and/or with Sokwali and/or with Victory Ticket for payment of municipal funds via Victory Ticket of R1 380 000 to the second applicant for the procurement of the T-shirts, which was expressly prohibited in terms of the

national treasury instructions. This series of events, it is alleged, had the effect, or was likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the money, or its ownership, or any interest which anyone may have had in it, or that it had the effect, or was likely to have had the effect, of enabling or assisting "the accused" to remove or diminish the funds which they had fraudulently acquired from BCM.

[10] In the first alternative, the prosecution alleges that the applicants are guilty of contravening s 5 of POCA, in that during December 2013 the applicants (being persons who knew or ought reasonably to have known that accused no. 1 and/or the ANC, through Sokwali, had obtained R5 985 000, being the proceeds of unlawful activities), unlawfully entered into an agreement with accused no. 1, and/or accused no. 3, and/or Sokwali, and/or "another unknown person" who was acting on behalf of one or more or all of the aforesaid persons, or that the applicants engaged in an arrangement or transaction with accused no. 1 and/or accused no. 3, and/or Sokwali and/or the said unknown person, whereby the said proceeds of unlawful activities were used to acquire property on behalf of accused no. 1 and/or the ANC, "or to benefit them in any other way (to pay for the T-shirts)".

[11] In the second alternative, it is alleged that the applicants are guilty of contravening s 6 of POCA, in that they, being persons who knew or ought reasonably to have known that accused 1 and/or the ANC, through Sokwali, had obtained R5 985 000 (being the proceeds of unlawful activities), nevertheless unlawfully acquired, used or had in their possession R1 380 000 (being part of the R5 985 000).[2]

[2] The statutory penalty for contravening each of sections 4, 5 or 6 of POCA is a fine of R100 million or imprisonment not exceeding 30 years.

[12] At the commencement of this trial, all the accused pleaded not guilty to all of the charges, and with the exception of accused 7 and the two applicants, declined to make any plea explanations. Accused no. 7 (the BCM acting director of executive support services), in her plea explanation, inter alia denied having been part of any meeting on 9 December 2013, or of any other meeting where it was decided that municipal funding would be used to pay for T-shirts and catering. She admitted to having attended a meeting on 11 December 2013 where the BCM council, inter alia, resolved that she should provide a report in respect of the funds that were allocated for the transport of mourners. According to her explanation, she was called by the BCM chief financial officer and acting city manager on 12 December 2013, in order to sign an "application for deviation", which he had prepared. At that same meeting she was informed that a budget of R10 million would be injected into her department, which department would be the "end user". She accordingly signed the application. She denied having been involved in the appointment of Victory Ticket as a service provider, and said that she met Mr Sokwali for the first time on 21 January, when she had summonsed him to provide a detailed report on the disbursements.

[13] The first applicant also made a written statement in terms of s 115(1) of the CPA on his own behalf and on behalf of the second applicant. It is necessary to repeat the entire statement for the purposes of this judgment. It reads as follows:[3]

WRITTEN STATEMENT IN TERMS OF SECTION 115(1)
OF THE CRIMINAL PROCEDURE ACT

1. This statement is made on behalf of Accused numbers 10 and 11 ("the Accused").

[3] This reproduction of the plea explanation is verbatim and no changes have been made in respect of spelling, grammar, syntax, punctuation and the like.

2. The purpose of the statement is to indicate the essential basis of the Accuseds' defence so as to eliminate unnecessary evidence by stipulating exactly what is disputed by the Accuseds' plea to the single charge (Count 4) apparent from the undated indictment served on the Accused in the Magistrate's Court, East London on 28 July 2021 ("the indictment"), being:

2.1 A contravention of section 4, alternatively section 5, further alternatively section 6 of the Prevention of Organised Crimes Act No. 121 of 1998 that;

2.1.1 During December 2013, the Accused knew, or ought reasonably to have known, that R5 985 000.00 was, or formed part of, the proceeds of unlawful activities of which R1 380 000.00 was paid to Accused 11 by Victory Ticket 750 CC for the procurement of T-shirts which payment had the effect, or was likely to have the effect, of concealing or disguising the nature, source, location or disposition of the payment or the ownership of the payment or enabling or assisting the Accused to remove or diminish the payment acquired as a result of the commission of the offence of fraud.

2.1.2 Alternatively (first alternative to Count 4) that the Accused agreed or entered into an arrangement or transaction with Accused 1 and/or Accused 3 and/or Sokwali and/or an unknown person to use the proceeds of unlawful activities of R5 985 000.00 to pay for T-shirts.

2.1.3 Further alternatively (second alternative to Count 4) that the Accused unlawfully acquired, used or had possession of part of the amount obtained by Sokwali of R5 985 000.00, being R1 380 000,00, the Accused knew when, or ought to have known, that R5 985 000.00 and R1 380 000.00 was the proceeds of unlawful activities

3. The Accused plead not guilty to the charge of a contravention of section 4, alternatively section 5, alternatively section 6 of the Prevention of Organised Crimes Act No. 121 of 1988 as stipulated in the said indictment.

4. The Accused admit, in terms of section 220 of the CPA, and do not place in issue, that they contracted with Victory Ticket 750 CC to supply T-shirts, that they sourced and procured the T-shirts from Mcwabe Printers, Pietermaritzburg, paid the said printers from own funds, rendered an invoice to Victory Ticket 750 CC and received payment from Victory Ticket 750 CC. More particularly, the Accused admit in terms of section 220 of the CPA, and do not place in issue:

   4.1 Copies of the invoice of Mcwabe Printers being invoice 947 (with no vat) and quotation 0025 (including vat) annexed marked "A" and "B".

   4.2 A copy of the bank statement of Mcwabe Printers, annexed marked "C", which evidence two payments from Accused 11 of R604 000,00 on 12 December 2013 and R84 560,00 (the vat component) on 11 February 2014.

   4.3 A copy of Accused 11's invoice to Victory Ticket 750 CC for R1 380 000,00 annexed marked "D".

   4.4 A copy of the bank statement of Victory Ticket 750 CC evidencing payment by Victory Ticket 750 CC to Accused 11 for R1 380 000.00, annexed marked "E".

5. The Accused deny, and place in issue, that they knew, or ought to reasonably have known, that the payment or payments of BCMM to Victory Ticket CC of R5 985 000,00 or the payment to Accused 11 of R1 380 000,00 by Victory Ticket 750 CC, was the proceeds of any unlawful activity or the proceeds of theft or fraud.

6. The Accused have no knowledge of whether the allegation that the payment or payments of BCMM to Victory Ticket 750 CC of R5 985 000.00 or the payment to

Accused 11 of R1 380 000.00 by Victory Ticket 750 CC were the proceeds of any unlawful activity or the proceeds of theft or fraud, are true and correct, are unable to dispute such allegations and do not place such allegations in issue.

Dated at EAST LONDON this 18 January 2022.

SIGNED
DEAN WILLIAM FANOE
ACCUSED NO. 10
For and on behalf of
ACCUSED NO. 11

[14] Section 157 of the CPA reads as follows:

157 Joinder of accused and separation of trials

(1) An accused may be joined with any other accused in the same criminal proceedings at any time before any evidence has been led in respect of the charge in question.

(2) Where two or more persons are charged jointly, whether with the same offence or with different offences, the court may at any time during the trial, upon the application of the prosecutor, or any of the accused, direct that the trial of any one or more of the accused shall be held separately from the trial of the other accused, and the court may abstain from giving judgment in respect of any of the accused.

[15] The decision as to whether to grant a separation of trials is a discretionary one.[4] A court may also of its own accord raise the issue of a separation.[5] Generally, it is desirable that persons jointly charged with the same offence or offences should be tried together.[6] The principle test in deciding whether to grant

[4] *R v Bagas* 1952 (1) SA 437 (A)
[5] *S v Ndwandwe* 1970 (4) SA 502 (N)
[6] *Bagas* above at 441

an application for separation is whether it is probable (not merely possible) that the applicants will suffer prejudice if a joint trial takes place.[7]

[16] The likelihood of prejudice to the applicants must be weighed against the likelihood of prejudice to the remaining accused and/or the prosecution if trials were to be separated. This requires the interests of the applicants to be weighed against the wider interests of society. It is trite that society requires that joint offenders be tried together, as separate trials invariably lead to a waste of State resources. Where there is no real danger of prejudice to the applicants, there can be no infringement of their constitutional rights, which infringement would otherwise have been sufficiently compelling for a court to act against the interests of society.[8]

[17] The following is common cause; alternatively, not seriously disputed:

a. that the first applicant was arrested and released on bail on 26 June 2014;
b. that during the four year period following upon his arrest, he appeared in court on 27 occasions at significant costs associated with his legal representation;
c. that the matter was set down for trial in the magistrates' court on two occasions, firstly from 7 to 20 April 2015, and again from 13 to 17 May 2019;
d. that on 10 April 2019 the respondent sought yet another postponement of the trial, with representations resulting in the charges being withdrawn against the applicants on 13 May 2019;

[7] *R v Nzuza & another* 1952 (4) SA 376 (A); *R v McMillan & another* 1958 (3) SA 800 (E); *S v Witbooi & others* 1994 (1) SACR 44 (Ck)
[8] *S v Shuma* 1994 (2) SACR 486 (E), 1994 (4) SA 583 (E); *S v Somciza* 1990 (1) SA 361 (A) at 367E-F

e. that the first applicant was requested to re-appear in court on 19 February 2021 whereafter the matter was postponed on four occasions;
f. that an indictment was served on the applicants on 28 July 2021, calling upon them to appear for trial in the high court on 5 October 2021;
g. that since then the matter has been subjected to judicial case flow management in the high court, with a firm trial date having been set for the entire second term of 2022;
h. that the respondent relies on the evidence of 54 witnesses of which only three mention the applicants but do not implicate them in any fraudulent scheme;[9]
i. that the applicants have a right to have the trial against them finalised within a reasonable time as enshrined at item 35(3) of the Constitution;
j. that the conduct of the applicants' business has been interrupted by court appearances and is likely to be interrupted for an ongoing period of three months when the trial commences.

[18] The applicants have stated on oath that the evidence contained in the three affidavits which I have mentioned, may be summarised as follows:[10]

a. Sokwali alleges that Victory Ticket 750 CC paid the second applicant R1 380 000 for T-shirts. This is common cause.

b. One Shezi from Mncwabe T-shirt Manufacturers in Pietermaritzburg confirms the common cause details around the quotation, order, invoicing and payment for the T-shirts by the second applicant.

[9] The applicants have annexed to their application papers, all the affidavits deposed to by these three witnesses.
[10] This has not been challenged and it is not suggested that there are any other witnesses who will testify against the applicants. It seems that with regard to the applicants, the court will, inter alia, be required to make inferences based largely on circumstantial evidence.

c. Mncwabe, the owner of the T-shirt manufacturing busines also confirms these common cause facts.

[19] The nub of the applicants' case, as repeated in their plea explanation at the commencement of this trial, is set forth as follows in their affidavit in support of the motion for a separation:

> 'It is the case for the First and Second Applicants that they contracted with Victory Ticket to supply t-shirts, that they sourced the t-shirts, paid the manufacturer from their own funds, supplied the t-shirts, rendered an invoice to Victory Ticket and received payment from Victory Ticket.
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> They did this in circumstances of urgency in order to assist their client BCMM where a successful tenderer to BCMM was not immediately in a financial position to pay the manufacturer so as to secure immediate delivery. Also relevant is that Mantella [the second applicant] charged and was paid a substantial profit.
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> … In point of fact, the First and Second Applicants, and certain other Municipal Officials, were the victims of misrepresentation.'

[20] In a nutshell, it is contended on behalf of the applicants that they will suffer prejudice by sitting through a protracted trial day in and day out, wherein which they will not participate due to the fact that lengthy and detailed evidence will be traversed which has no bearing on their alleged guilt. In his affidavit deposed to in support of this application, the first applicant avers that he and the second applicant have a longstanding relationship with BCM, that they have maintained BCM's electrical lighting for some time, and that they regard BCM as their most important client.

[21] Whilst conceding that the case against the applicants is by and large circumstantial, the respondent, on the other hand, contends that there is a real likelihood that the prosecution will suffer irreparable harm should a separation ensue, because of its "inability to place the whole picture in one trial before the presiding judge", and that "part of that picture includes the response by the accused persons to allegations that implicate them as the state's case unfolds or during the presentation of the defence cases." According to the respondent, the charges preferred against the applicants, are "founded" upon the allegations of fraud or theft referred to in count 1, as well as the charges in count 2 relating to contraventions of the Municipal Finance Management Act 56 of 2003 (the MFMA). In the circumstances, so it is contended, it will be necessary for the respondent to prove the commission of these predicate offences. This is particularly so for two reasons: firstly, to show that the funds received by the applicants were the proceeds of unlawful activities, and secondly to enable the trial court to obtain a full picture of the fraudulent scheme, its genesis, the roles played by the various accused, and most importantly, how the applicants became involved and what their respective roles were.

[22] According to the deponent to the respondent's opposing affidavit, Sokwali will testify that there was no business arrangement or agreement between him and the applicants, but that he paid the sum of R1 380 000 to the second applicant in compliance with an instruction from accused no. 1. It is anticipated that evidence will be produced to show that accused no. 1 and the first applicant engaged in regular cell phone communication from the day after the President died, and that three days later, accused no. 1 informed a meeting that the first applicant would provide the commemorative T-shirts.

[23] It is further apparent from the indictment and the affidavits, that the parties are not *ad idem* as to who was responsible for initially sourcing the T-shirts. The

respondent says that according to the first applicant, he sourced them. According to the State, accused number 3 originally obtained a quote from the manufacturers in KZN. The respondent contends that the applicants have not made full disclosure as to who they were approached by accused no. 1 to become involved, and with whom they negotiated the 100 per cent mark-up before re-selling the T-shirts to BCM's service provider. According to the State it was not Sokwali. The prosecution contends that the aforegoing aspects are important and best canvassed at a joint trial, at the very least to furnish the court with an holistic picture, and to assist the court to "determine guilt and respective degrees of blameworthiness".

[24] It is the respondent's contention that the argument that there is no connection in time, space or fact to justify a joint trial is wrong and flies in the face of the available evidence, in that the different counts in the indictment and the roles played by the various accused persons are interwoven. It is alleged that the evidence required to prove the commission of the offences referred to in the first two counts of the indictment (which are charges of fraud and MFMA contraventions preferred against other accused) are highly relevant in order to prove the guilt of the applicants on count 4. Likewise, so it is submitted, the evidence against the applicants will be highly relevant for the determination of the various roles played by some of the accused, in particular, accused nos 1 and 3.

[25] It is trite that when consideration is given to an application for separation, the point of departure is that multiple trials ought to be avoided where possible. As succinctly stated by the learned author Kriegler:

> 'Die vertrekpunt is dat veelvuldigheid van verrigtinge waar moontlik vermy word. Duplikasie veroorsaak verkwisting van tyd, talente en geld – tot nadeel van die gemeenskap. Dit is bowendien gewoonlik in belang van die regspleging dat diegene

> wat op dieselfde aanklag tereg staan saam verhoor word (*Bagas* 441F). Die wetgewer het ook aangedui dat deelnemers, begunstigers en helers saam aangekla kan word (artikel 155) en selfs persone wat op dieselfde tyd en plek oortree het (artikel 156). Daar moet ook in gedagte gehou word dat dit die aaanklaer se reg as *dominus litis* is om sy klagstaat na goeddunke te formuleer. Die Staat moet nie gedwarsboom word in die aanbieding van sy saak nie (*R v Kritzinger* 1952 4 SA 651 (W) 654). Wie dan skeiding aanvra, doen dit teen die voorgaande agtergrond.'[11]

[26] The primary consideration is prejudice. The prejudice which the applicants will suffer should separation be refused, is weighed against prejudice to other parties should it be granted. At the end of the day, the question to be answered is whether separation will be in the interests of justice.[12]

[27] The applicants have made much of the delay which preceded the commencement of this trial. I have no doubt that it has been a thorn in the flesh to many. They also anticipate further delays, but this in itself is not a reason to grant a separation. The other 12 accused are in the same boat. It has also been contended that the State's case against the applicants is not strong. This too, is not a ground for a separation. It may have been a ground in the past for representations to have the charges withdrawn. It may be a good ground in the future to apply for a discharge at the close of the State's case. It may be the *causa* for civil litigation at some stage, but a ground for separation it is not. The stigma associated with being criminally charged is also not a reason to insist on being differently treated to the other 12 accused. All the accused are facing the same dilemma to a greater or lesser extent. If at the end of the day, it turns out that the applicants' exposure to the criminal justice system and the media was a malicious exercise, there will be avenues available to them to deal with such an eventuality.

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[11] Hiemstra: Suid-Afrikaanse Strafproses (5ed by J. Kriegler) Butterworths 1993 at page 405 *et seq*
[12] *Somciza* 367E-F

[28] To my mind, perhaps the most meritorious reason to argue for a separation, is the probability of serious financial prejudice to the applicants, both with respect to the illustrated potential costs associated with the lengthy employment of both senior and junior counsel (which the applicants are entitled to do), and the prospective dire consequences of a lengthy absence from running a not insignificant community serving business concern, with the real prospect of the permanent loss of valued clients and the harm associated therewith.

[29] It is contended that the first applicant (due to the fact that he is not, in a criminal forum, entitled to willy-nilly absent himself from the trial simply because he has no interest in the proceedings), will have to sit in this court day in and day out as part of a pointless exercise, and will be constrained to pay his legal team to do likewise. Naturally, this becomes a costly and time-consuming exercise for the applicants and their legal representatives. On the other hand the possibility that the applicants' co-accused may implicate them in their absence if a separation is granted, or indeed *vice versa*, is there, however remote.[13] Because of what I am about to say, it is not necessary for me to address these all too commonly raised concerns.

[30] Counsel for the respondent has prevailed upon me to give due consideration to distinguishing what is referred to as a POCA matter, from precedents in other matters where applications for separation have succeeded, based on the potential for prejudice. By way of example, in *S v Naidoo*[14], it was held that where there is no connection in time, space or fact between the charges facing two accused, it is indeed irregular and impermissible, that they be tried together in respect of offences in which each is not implicated.[15] The reason for

[13] See *R v Solomon* 1934 CPD 94
[14] 2009 (2) SACR 674 (GSJ)
[15] See also *S v Chawe en n ander* 1970 (2) SA 414 (NC); *S v Ramgobin and others* 1986 (1) SA 68 (N); *S v Stellios Orphanou and six others* (unreported judgment of Leveson J in the WLD delivered on 18 October 1985)

this, so it was held, lies in the potential for prejudice, in that an accused could spend weeks in court while evidence affecting his or her co-accused was dealt with, which had nothing whatsoever to do with the objecting accused and the charges which he/she was facing, merely because "on other counts he was charged with an offence in which his co-accused was connected. This the Criminal Procedure Act does not permit."[16] Blieden J held however, that the situation is different where the State alleges that the various accused (all in different capacities) were involved in an illegal enterprise in contravention of section 2(1) of POCA (racketeering), where the ultimate purpose of the individual accused's offences are to benefit a criminal enterprise formed by all the accused. Accordingly, there was no possibility of any accused running the risk of being in a situation where any evidence led would not, in some way or another, be relevant to the case he has to meet.

[31] I am in full agreement with the respondent's counsel. POCA cases, particularly those relating to racketeering enterprises, are generally distinguishable in applications such as these. That however, is not the end of the matter. Scenarios under the auspices of POCA are also distinguishable *inter se*, and each case must be considered on its own merits. So it is then, that when there are multiple POCA accused and one of them complains that he has to sit through a whole lot of evidence which is of no concern to him, the point of departure would be for the court to give careful consideration to the nature and extent of the charges, and the evidence which the State seeks to present to pursue a conviction.

[32] In *Naidoo*, all the accused, including the appellant, were *charged* with a contravention of s 2(1)(e) of POCA. Under that subsection, terms such as "pattern of racketeering activity" and "enterprise" are used. "Pattern of racketeering

[16] *Naidoo* para. 12 and ss 155 and 156 of the CPA.

activity" is defined as the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in schedule 1, and includes at least two offences referred to in schedule 1, of which one occurred after POCA commenced, and the last occurred within ten years after the commission of the prior offence referred to in the schedule. "Enterprise" includes any individual, partnership, corporation, association or other juristic person or legal entity, and any union or group of individuals associated in fact. Simply put, the ultimate charge which all the accused in *Naidoo* faced was one of racketeering and being part of a *conspiracy* to achieve a criminal result.[17] As stated by Blieden J:

> 'For each of the main counts, and the alternatives thereto, there is only one set of facts which might result in a conviction on the main counts or on one of the alternatives. What is clear is that in relation to each count, or alternative thereto, the evidence relied upon by the prosecution relates to the ongoing, continuing or repeated participation of each of the accused, and in particular accused 1 and the appellant, in the illegal rackets in which they are all participants. Despite the fact that the nature of the part played by each accused could be different from that of another accused, the evidence would remain the same to prove *conspiracy* [my emphasis] between them ….
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> Bearing the above considerations in mind, there is no possibility that any of the accused runs the risk of being in a situation that any evidence led will not be relevant to the case he has to meet. Each of the accused is being tried for the same offence. The fact that accused 1 alone is charged with the contravention of certain sections of POCA in the alternative, does not detract from the fact that the main charge against *each and every one of them* [my emphasis] is that they are guilty of contravening s 2(1)(e) of POCA.'[18]

[33] Thus, the evidence on which the State will have to rely when proving a contravention of s 2(1)(e) of POCA (as opposed to proving contraventions of

[17] *Naidoo* para. 17
[18] *Naidoo* paras 18 and 20

setions 4, 5 and 6 with which the applicants before me have been charged), was defined by the SCA in *S v Eyssen*[19], where the following is stated:

> '…It is a requirement of the subsections in question [dealing with racketeering] that the accused … must participate in the enterprise's affairs. It will therefore be important to identify what those affairs are. It will also be important for the State to establish that any particular criminal act relied upon, constituted participation in such affairs … The participation must be by way of ongoing, continuous or repeated participation or involvement. …
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> Ongoing conveys the idea of not as yet completed. Continuous (as opposed to continual) means uninterrupted in time or sequence. "Repeated" means recurring.'[20]

32.Blieden J, in commenting on *Eyssen*, said the following:

> ' …[It] is necessary for the State to prove all the elements in the common-law offences which make up the illegal enterprise, which comprises the main charge against them, before each can be convicted on count 1. In the circumstances there can be no question of them claiming that they are not being charged with the 'same offence'. The greater offence, of necessity, includes the lesser. …
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> Counsel [for the State] further argued that proving evidence relating to the trap, and the taped conversation, will be akin to the State proving a previous conviction which is tendered to prove mens rea, and is permissible in terms of s 197(d) of the Criminal Procedure Act, as well as s 22 [this should read s 2(2)] of POCA [relevant to racketeering charges only].'[21]

[34] Because of the mischief which POCA seeks to prevent and the ongoing challenges in attempting to do so, s 2(2) of the Act allows the prosecution to lead

[19] 2009 (1) SACR 406 SCA
[20] *Eyssen* paras 7 - 9
[21] *Naidoo* para. 25

evidence, when dealing with offences relating to racketeering activities, which may otherwise be inadmissible at a criminal trial. Thus the court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions (relating to racketeering activities only) provided that such evidence does not render a trial unfair.

[35] What lies at the very heart of racketeering offences, as opposed to offences relating to proceeds of unlawful activities (which is what the accused in this trial have been charged with), is that once it has been established that two or more accused persons are jointly participating or associating themselves (by way of a pattern of ongoing conduct) in the unlawful affairs of an enterprise, evidence about the enterprise or scheme itself (as referred to by counsel for the respondent as the predicate offence) and the individual participation of the accused, will be relevant and admissible against all of them, and the prosecution will also then have *carte blanche* to introduce all sorts of information which would not otherwise be admissible at a criminal trial.

[36] In my view however, before this can happen, the prosecution must at the very least lay a foundation for the introduction of such evidence, based on the doctrine of common purpose. In *Maringa and Another v The State*[22], the appellants appealed against a finding of the court *a quo*, which finding was that they had not been misjoined with their co-accused on altogether 399 counts of fraud, theft, forgery, uttering and corruption. In dismissing the appeal, and in accepting the respondent's contention that all the accused acted in the execution of a common purpose to commit fraud (the predicate offence) *as stated in the charge sheet,* Potterill J remarked as follows:

[22] Unreported judgment of Potterill J delivered in the North Gauteng High Court, Pretoria on 17 September 2013 under case no. A127/2013

'From the charge sheet as well as the summary of substantial facts it is clear that every individual fulfilled a certain role in completing the common purpose. The state conceded that there is no evidence that the appellants were part of the corruption allegedly committed, but the corruption was still a vital requirement to fulfil the common purpose to defraud. It was also argued that … the prejudice to the state is that the matter will be presented on a piece meal basis before different courts and the state will never be in a position to put the complete picture before a particular court. This was submitted will lead to an injustice. It was argued that the magistrate exercised his discretion judicially and correctly in referring to the matter of *S v Naidoo (supra).* Although in the *Naidoo* matter the charges all related to POCA, in the present matter the state alleges that the appellants committed the offences of *fraud with a common purpose* [emphasis added]. The evidence of the witnesses that will testify on the forgery, uttering and corruption charges will at the same time also prove the various allegations made in the fraud charges against the two appellants.

… *In casu* the appellants are charged with their co-accused on not all of the counts, with the corruption charges, being the biggest bone of contention. It was argued that because they are not charged with those counts there is non-compliance with section 156 in that those charges cannot be linked in time and place to the other counts and therefore there is a misjoinder. Section 156 cannot be interpreted so restrictively. Section 156 goes further and makes a joint trial possible even when the charges do not entirely flow from the same facts, but there is nevertheless evidence which implicates more than one of the accused, although not all at the same time; *there need however to be a common purpose.*

... The corruption charges form part of a chronological link without which a court will not be privy to a full picture of the common purpose. … Section 156 goes further than section 155 and makes a joint trial possible also when the charges do not entirely flow from the same facts but there is nevertheless evidence which in the view of the prosecutor implicates more than one of the accused although not all at the same time. *The test is that there need be a common purpose* [my emphasis].

In Hiemstra's *Criminal Procedure* on page 22 – 24 the writer comments as follows:

> "An in depth study of joinder appears in *S v Ramgobin* 1986 (1) SA 68 (N). It is confirmed that it is permissible to charge all the accused jointly with a series of acts, committed by different persons at different times over a period of time in *fulfilment of an all-embracing plan* [my emphasis], as one offence, even though each act could found a separate charge."
>
> In the Naidoo matter the court did not have to rely on the requisites of section 156 because each and every one of the accused were charged with a main charge of contravention of section 2(1)(e) of POCA. … Despite the fact that the nature of the part played by each accused could be different from that of another accused, the evidence would remain the same to prove conspiracy between them.
>
> … When a group of people allegedly have a common purpose to achieve an unlawful goal and each has a different role to play in achieving this goal it is inevitable that due to the separate acts of the accused some evidence would not pertain to each and every accused before a court.'

[37] So then, in *S v Imador*[23] for example (being another POCA matter on which the respondent relies), and where the appellant was similarly charged with money laundering, paragraph (15) of the preamble to the charge sheet made the following very clear, and in my view is a necessary averment (to bring the case within the auspices of one where a separation would be prejudicial and unjust), which is lacking in the matter before me. It says this:

> 'The state alleges that the accused *actively acted in the furtherance of a common purpose* [my emphasis] in that he was actively involved in the conspiracy to obtain money from the complainant.'

[38] This brings me to an examination of those relevant portions of the 57 page indictment where the applicants are mentioned. The indictment comprises a list of the 27 charges and alternatives to these, a preamble dealing with the legal framework for the procurement of goods and services by a municipality, a

[23] 2014 (2) SACR 411 (WCC)

description of the 14 accused and their respective roles, what the alleged scheme entailed, a summary of substantial facts, and a list of the names of 54 witnesses.

[39] For the sake of completeness, I intend reproducing each and every part of this document where mention is made of the alleged role(s) played by the applicants. The applicants are mentioned for the first time at paras 16 – 18 of the preamble, in the following terms:

> 'Accused 10 was at all times relevant to this indictment, a businessman and a member of accused 11 as well as a signatory to the ABSA Bank account number …, held in the name of Accused 11; and
>
> Accused 11 was at all times relevant to the indictment, a Close Corporation registered in terms of the Close Corporations Act, 69 of 1984 … and therefore a Corporate Body as contemplated in Section 332 of the Criminal Procedure Act, 51 of 1977; and
>
> All acts performed, and omissions of acts which ought to have been but was [*sic*] not performed, as set out in the charges listed hereunder against Accused 11, were performed and/or omitted by or on instruction or with permission … given by Accused 10, a member of Accused 11, in the exercise of his powers or in the performance of his duties as such a member, or in furthering, or in endeavouring to further the interests of Accused 11.'

[40] These appear to be necessary averments when a close corporation is charged and are a formality on which nothing turns. I now turn to the roles of the respective accused as set forth in the indictment. This portion of the indictment begins with an averment that the day after the President died, national treasury authorised municipalities to use municipal funds for transportation services and venue costs associated with memorial services. It is alleged that the emailed instruction to the municipalities prohibited them from spending any money on catering, tents/marquees and commemorative advertising.

[41] As I understand the applicants' plea explanation, they bear no knowledge of this instruction, and accordingly cannot dispute it. In the premises it is highly unlikely, should a separation be granted, that the prosecution will be required to lead evidence which was intended for the BCM accused, and not for the applicants, particularly in the absence of an allegation of common purpose.

[42] It is thereafter alleged that the first five accused used their positions and influence to set in motion a scheme designed to defraud the municipality and to misappropriate for personal and political interests, BCM funds earmarked for the transport of mourners. Once again, the applicants have made it quite clear that they were not party to this, that they bear no knowledge of the scheme to defraud, and that they cannot dispute it.

[43] It is then averred that accused nos 6 and 7 (BCM officials) made common purpose with the intention to defraud and manipulate BCM's procurement processes as part of this fraudulent scheme. No mention is made of the applicants, either directly or indirectly.

[44] Thereafter accused nos 8 and 9 (one Ms Vazi and a close corporation which she represented which appears to provide accommodation) are drawn in as beneficiaries who were present during the planning and at information sharing meetings and were aware of the unlawful activities of all the other accused (the affidavit allegedly deposed to by Sokwali and annexed to the application papers speaks to this).

[45] The roles played by the applicants are described at paragraph 28 of the preamble only. It reads thus:

> 'Accused 10 and 11 were also beneficiaries of the scheme who by necessary inference knew that the procurement of Accused 11's services were not lawful and regular and

knew or ought to have known that the funds paid to Accused 11 by Victory Ticket 750 CC were the proceeds of unlawful activities.'

[46] Thereafter accused nos 12 and 13 (one Ms Mati and a close corporation she represented) are described in a similar vein, ending off with the participation of accused no. 14 (who was an employee of BCM), and traversing certain internal procedures and the payment of funds, which is unrelated to the applicants.

[47] Turning to what the scheme entailed, the indictment describes how accused persons, other than the applicants, planned how to misappropriate funds made available for travelling, and to recruit a willing service provider (who, according to Sokwali's alleged affidavit, was Sokwali himself and his close corporation). The applicants are excluded from any meetings or any planning to this end. According to Sokwali's affidavit, accused 1 merely announced at a meeting that accused 10 would supply T-shirts and would invoice Sokwali and receive payment from him. This too, the applicants do not dispute. More particularly, by virtue of what is contained in their affidavits (to which they appear to have annexed everything they could find in the State's discovery relating to them), it seems that there is little if anything which is not common cause between them and the State. They have also gone to some lengths to furnish a prima facie innocent explanation for why they bought the T-shirts and resold them at a profit to Victory Ticket.

[48] The summary of substantial facts too, does not take the State's case any further on the issue of common purpose. Insofar as the prosecution is of the view that it would be prudent to keep accused nos 1 and 3 in the same trial as the applicants (because of cell phone records between accused no 1 and the first applicant, and because *ex facie* a document annexed to the applicants' plea explanation it appears to have been accused 3 who obtained a quote from the T-

shirt manufacturer who subsequently invoiced the applicants instead), this court may have viewed matters differently if it was the State's case that the applicants had, in any manner whatsoever, made common purpose with these accused, or that the applicants were to a greater or lesser degree involved in the scheme in connection with which the remaining accused have been charged. This however is not so. On the contrary, count 4 specifically excludes the applicants from any common purpose to commit fraud or any statutory contraventions under the MFMA, and it also excludes them, under that very money laundering charge, from having made common purpose with any of their co-accused.

[49] The applicants in any event do not dispute that the predicate offences took place. They do not deny that the payment made by Victory Ticket was made with proceeds of unlawful activities. They simply deny knowledge of these offences. It is contended on their behalf (in the light of that which is common cause and that which has been admitted) that any attempt on the State's part to prove knowledge that the payment by Victory Ticket was made with the proceeds of unlawful activities, in any event does not require an assessment of all the evidence which the State intends leading against the other accused. I agree. It is a circumscribed issue.

[50] The applicants have also not denied that there was regular cellular phone activity between accused 1 and the first applicant. According to the applicants BCM was and still is their biggest client. The applicants undertake reticulation and electricity supply maintenance to 66 000 households and 30 000 street lamps in Mdantsane. They do repairs to the ABSA rugby stadium floodlights. According to the first applicant he has known accused no.1 for more than 14 years. During the period in question accused no. 1 was also the president of the Border Rugby Union. They spoke regularly on the phone about electrical outages at Mdantsane

and repairs to the ABSA stadium flood lights. During the relevant period they also spoke on the phone about the supply of T-shirts to BCM. This is admitted.

[51] In the final analysis, for the applicants to remain in a joint trial so that the court can determine the roles played by various other co-accused and the circumstances surrounding the commission of independent offences, in order to holistically consider respective degrees of blameworthiness, when there are no allegations of common purpose, even remotely, would be far more prejudicial to the applicants, than any prejudice which the respondent may suffer through calling (on my understanding) a bare minimum number of witnesses at a separate trial. It would also not be in the interests of justice to detain the applicants any further in what is anticipated to be a very long trial.

[52] The application in terms of s 157 of Act 51 of 1977, for the trial of accused nos 10 and 11 (Mr D. Fanoe and Mantella Trading 522 CC) to be separated from the trial of their co-accused is granted, and the trials are so separated.

I.T. STRETCH
JUDGE OF THE HIGH COURT

Date of application: *20 January 2022*
Date of judgment: *28 February 2022*

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