

REPORTABLE

National Director-Du Preez Judgment

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

APPEAL CASE NO: A406/08

CASE No: 111/00271/2004

In the matter between:-

27/1/2010

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

Appellant

(Applicant in the court a quo)

and

DELETE WHICHEVER IS NOT APPLICABLE

REPORTABLE: YES/NO.

HER JUDGES: YES/NO.

BARRY HILTON DU PREEZ

First Respondent

(Deceased)

ETRIECIA DU PREEZ

Second Respondent

JUDGMENT

- [1] This is an appeal against the judgment and order dismissing an application for a confiscation order, as contemplated in section 18 of the Prevention of Organised Crime Act 121 of 1998 ("POCA"), of the learned magistrate, Mr D Nair, in the Regional Court of the Regional Division of Gauteng ("the court a quo"), handed down on 23 November 2007 and amplified by further reasons on 22 April 2008.

[2] The salient facts appearing from the record of appeal are the following:

2.1 On 4 April 2006 the first respondent pleaded guilty to and was convicted by the court *a quo* of 301 counts of theft relating to the total amount of R4,338,671.85 stolen over a period of 18 months from March 2003 to September 2004.

2.2 On 29 June 2006 the appellant brought an "APPLICATION FOR A CONFISCATION ORDER IN TERMS OF SECTION 18 OF THE PREVENTION OF ORGANISED CRIME ACT, No. 121 OF 1998" against the first respondent in which the court *a quo* was requested to, *inter alia*, conduct an enquiry in terms of section 18(1) of POCA into any benefit which the first respondent may have derived and, if so, to determine the amount of the confiscation order.

2.3 The application was supported by a short affidavit of one Willem Johannes van Zyl, a senior state advocate

employed by the Specialised Commercial Crime Unit, in which the following was, *inter alia*, stated (or rather, submitted):

"7. *Once a Defendant has been convicted, the court may make a Confiscation Order if it is satisfied that the Defendant has benefited from that offence or any related criminal offences.*

8. *Apart from the conviction of the Defendant, the only requirement for the making of a Confiscation Order is the existence of a benefit on the part of the Defendant from his criminal activity and/or related criminal activity.*

BENEFIT

9. *The Act describes the term 'benefited' as follows in section 12(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.'

10. *Proceeds of unlawful activities are defined as follows:*

'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 included any property representing property so derived'.

11. *A person has thus received a benefit from unlawful activity if he or she has received or retained any property or any service advantage, benefit or reward which was derived, received or retained in connection with or as a result of any unlawful activity carried on by any person.*

Defendant has benefited

12. Defendant was found guilty on 04 April 2006 on the charges set out in the charge sheet.

13. It is respectfully submitted that Defendant received a benefit in that he retained or received property, namely, money.

14. It is further submitted that Defendant benefited from the misrepresentations made to the complainants in that he unlawfully retained or received money, thus creating actual losses for the complainants.

VALUE OF THE PROCEEDS OF UNLAWFUL ACTIVITIES

15. It is respectfully submitted that once the court has found that the Defendant received a benefit, as it is submitted that the Defendant did in this matter, the court then should proceed to enquire into the value of

the proceeds of unlawful activity of the Defendant's offences or related criminal activities.

16. *The Act sets out what is regarded as the value of the proceeds of unlawful activities in section 19(1) which reads as follows:*

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

17. *It is respectfully submitted that the value of Defendant's proceeds of unlawful activity is at least R 4 338 671-85, being the victim's actual loss as a result of Defendant's fraud and theft.*

18. *Applicant is aware that Defendant has realisable*

property available. In the absence of an explanation as to what the Defendant did with the proceeds of his unlawful activity and prove by the Defendant that he does not have sufficient realisable property to satisfy a confiscation order in the amount of the Defendant's proceeds of unlawful activity, a confiscation order in the amount of R 4 338 671-85 should be granted."

2.4 On 29 June 2006 the court *a quo* ordered the institution of an enquiry in terms of section 18(1) of POCA and granted accompanying relief. The determination of the amount of the confiscation order was postponed to 31 October 2006.

2.5 On 4 July 2007 the first respondent deposed to an answering affidavit in which he stated that he utilised the money he stole solely for gambling. He stated, *inter alia*, the following:

2.5.1 "6. *I did receive money from my unlawful activities; I however utilized the money I stole solely for gambling."*

2.5.2 "7. I however respectfully submit that apart from a Hundai Getz motor vehicle I bought for approximately R116 300.00 the proceeds of the unlawful activities were solely utilized for gambling. I did not derive, receive or retain any assets in connection with or as a result of my unlawful activities."

2.6 As regards his financial position, the first respondent stated:

"I respectfully submit that I do not have any realisable property available as follows:

"8.1 I worked at the following employers:

8.1.1 South African Police Services for the period of
1982 – 2001

8.1.2 Development Trust for members of the SAPS
2001-2002

8.1.3 Off Beat Holiday Club for members of the
SAPS 2002 – 2004

8.1.4 PH Tosen Promotions trading as Clearzone

8.1.2 *I received a salary from all these employers. At the last employer I earned a basic salary of R6 000.00 and worked on a commission basis. My salary was sufficient to contribute to the joint household. The payment towards the property was deducted from my salary.*

8.1.2 *Despite the fact that I earned a salary my former wife in addition to the salary she received from her employer, had to borrow money from family and friends to pay our debts. I furthermore took additional loans apart from the bond loan for our property to maintain my gambling addiction.*

8.1.3 *My former wife's salary was utilized to pay our expenses and loans, in a certain sense I was financially dependant on her due to my gambling addiction.*

8.1.4 *I avidly started gambling during 1994 – 2004. This led to the misappropriation of company funds which led to my conviction.*

8.1.5 *I stole more than 4 million rand solely for gambling. Apart from a Hyundai Getz motor vehicle I bought for my former wife I never used this money to enrich myself or my family. My former wife and my children are still suffering financially and did not gain anything in terms of the amounts of money which I stole from the companies. This was also confirmed by Claudina Van Wyk, a social worker. I respectfully refer this honourable court to the record, page 19, lines 5 – 15, annexure **BMD1***

8.1.6 *I furthermore also used the proceeds of my unlawful activities to buy Ephedrine. I started to use Ephedrine during 2004 although I am of the opinion that I was not addicted to drugs I needed the drugs to stay awake when I gambled through the night. I refer this*

*honourable court to the record, page 25, lines 4 – 15, annexure **BMD1***

8.1.7 *My former wife and I were in arrears most of the times with the payment on the bond. I also applied for further loans from Saambou and SA Home Loans to maintain my gambling addiction. It was apparent that my gambling addiction caused severe financial and emotional hardship for my family to such an extent that my former wife filed for a divorce and we obtained a divorce order on the 3rd of June 2005.*

8.1.8 *In terms of the settlement agreement it was agreed on the 16th day of March 2005 that my former wife, Etrieca du Preez shall retain as her sole and exclusive property the Nissan Sentra 160, 1997, motor vehicle; the immovable property Erf. [sic] 1256 situated at 304 Malherbe street, Capital Park, Pretoria and the other movable property. The*

immovable property was registered in both parties' names and it was further agreed that I would transfer my 50% interest in the immovable property to her, provided that she take full responsibility of the bond. We agreed that each party will keep his or her pension money. I received approximately R200.000.00 pension money from my previous employer and solely used the money to gamble.

- 8.1.9 *It is my respectful submission that the transfer of my 50% interest in the immovable property and the movable property to my former wife, Etrieca du Preez was not a gift to her as she was entitled to the property. Even though the monthly installments [sic] of the bond was [sic] in arrears on various occasions and Etrieca du Preez had to borrow substantial amounts of money from family and friends to prevent us from losing the property. To my knowledge she has not been able to repay the money she borrowed from her family and friends.*

8.1.10 I lost everything as a result of my uncontrollable gambling addition I therefore have no assets left. I worked with Mrs. Stefanie van Rensburg, a social worker, she renders her services for the National Responsible Gambling Programme, and according to her she classified me as a pathological gambler who had reached the second last stage of gambling namely the desperate phase. I refer this honourable court to the report, Annexure **BMD2** page 9, paragraph 6.

8.1.11 The only asset I bought from the proceeds of my illegal activities was a Hyundai Getz, 1.6, RBS 031 GP. I bought the vehicle as a gift to my former wife, she had to sell the vehicle to obtain money for my bail and bail application. The bail money in the amount of R40 000.00 was forfeited to the State.

9.

9.1 *It is my respectful submission that my family obtained no benefit whatsoever from the proceeds of my unlawful activities. The proceeds were solely utilized to maintain my gambling addiction.*

10.

*It is therefore my submission that the settlement agreement between my former wife, Etrieca du Preez and me is valid as she has a legitimate interest in the property and it is apparent that the settlement agreement was entered into solely because she was entitled to the property. It is therefore not a gift as contemplated in the act. I respectfully refer this honourable court to Etrieca du Preez's affidavit annexure **BMD4***

11.

It is furthermore my respectful submission that due to the

fact that I do not have any immovable and movable realisable property available, a confiscation order cannot be granted."

2.7 In her confirmatory affidavit, the second respondent, *inter alia*, stated:

" **2.**

I was married to the Defendant, Barry Hilton du Preez in community of property and we obtained a divorce order on the 3rd of June 2005. I refer this Honourable Court to annexure BH1

3.

In terms of the settlement agreement it was agreed on the 16th day of March 2005 that I shall retain as my sole and exclusive property the Nissan Sentra motor vehicle. The immovable property situated at 304 Malherbe street, Capital Park, Pretoria was registered in both parties names and it was agreed that the Defendant would

transfer his 50% interest in the immovable property to me, provided that I take full responsibility of the bond. I furthermore keep the household contents. I respectfully refer this Honourable Court to the settlement agreement, annexure BH2.

4.

It is my respectful submission that the fact that the Defendant's 50% interest in the property situated at 203 Malherbe Street Capital Park, Pretoria was awarded to me is not a gift as contemplated in the act for the following reasons:

4.1 We signed an offer to purchase the said property on 17 November 1998. The South African Police Service gave a letter to confirm that they will guarantee R50 232.00 for the loan amount of R251 158.00 and that the Defendant will receive a monthly contribution in the amount of R958.00. I refer this Honourable Court to annexure BH3.

5.2 On the 1st of December 1998 Saambou Property Finance approved our loan in the amount of R240 000.00 under account number 014130047002. I refer this Honourable Court to annexure BH4.

5.3 The Defendant obtained a further loan in the amount of approximately R16 000.00 to pay some of his debts and to sustain his gambling addiction. I refer this honourable court to annexure BH5.

5.4 On 2 May 2002 we approached SA Home Loans and obtained a further loan in the amount of R112 000.00 for the same reason as set out in paragraph 5.3. Our monthly instalment was R4 006.50. I refer the Honourable Court to the bank statement from SA Home Loans, annexure BH6.

5.5 I had in addition to my salary borrowed money from family and friends to pay all our debts. I specifically borrowed on numerous occasions a substantial amount of money from my father who passed away this year and my sister, M.E. Naude. I respectfully

refer this Honourable Court to a letter from my sister indicating that we have borrowed an amount of R211,051.00 from her, annexure BH7.

5.6 My son, Arno Pieter du Preez also borrowed [sic] an amount of R24 000.00 to the Defendant to pay the outstanding electricity and water account. When I made enquiries at the accounts department it was evident that the Defendant failed to pay the outstanding amount despite his undertaking to pay the outstanding amount as the account was R28 000.00 in arrears.

5.7 The Defendant's uncontrollable gambling addiction caused our family extreme financial and emotional hardship. I purchased all the household contents and maintained the household. Due to the fact that I contributed to the joint estate more than my respective share, the fact that I had to borrow substantial amounts of money from family and friends to pay our debts the Defendant and I decided that it was only just and fair that his 50% share in the

joint property, the vehicle and the household contents be awarded to me.

6.

The marriage between us had broken down irretrievably and the relationship has reached such a state of deterioration that there was no reasonable prospect of the restoration of a normal marriage relationship between us. The Defendant's uncontrollable gambling addiction got worse two years prior to the divorce. I had no alternative but to file for a divorce on 15 April 2005.

7.

The Defendant pleaded guilty on 4 April 2006 and was sentenced on 29 June 2006 to 8 years imprisonment whereof 3 years was suspended. It is clear as set out above that we signed the settlement agreement 1 year before the Defendant was convicted.

8.

*Apart from the Hyundai Getz the Defendant bought me, which I sold to pay for the Defendant's bail and debts I received no financial benefit or gifts from the Defendant from the proceeds of his unlawful activities. Furthermore the bail money was forfeited to the state. I respectfully refer the Honourable Court to the **ex parte** application under case number 29554/05, annexure BH8*

9.

It is my respectful submission that I obtained no benefit whatsoever from the proceeds of the Defendant's unlawful activities. The Defendant and I maintained an average lifestyle. The Defendant utilized the proceeds of his unlawful activities solely to maintain this gambling addiction. Despite the fact that the Defendant and I earned salaries we never had money available and I usually had to borrow money from family and friends to pay our debts.

10.

I was employed for a period of 10 years at the South African Police. Thereafter I worked as a medical receptionist and assistant at Medi Cross Gezina. I was also employed as a receptionist and medical assistant for Dr. D.J. Nutt for a few years, I also worked at Off Beat as an administration officer from 2002 until 2004. I received a salary from all these employers and contributed diligently more than [sic] my fair share to the joint household.

11.

The Defendant also worked for the South African Police thereafter he worked At PH Tozan Promotions trading as Clear Zone as chief executive officer. Both our salaries were taken into account when we applied for loans.

12.

I therefore respectfully submit that the Defendant and I

had legitimate sources of income, sufficient to justify our interest in the property. It is evident from the above that the Defendant and I did not obtain the immovable and movable property from the proceeds of his illegal activities. I therefore respectfully submit that the property should not be confiscated."

2.8 In his replying affidavit, Willem Johannes van Zyl dealt with the purpose of a section 18 enquiry and denied that the first respondent did not derive, receive or retain a benefit from his crime. As regards the divorce of the first and second respondents, he made the following allegations and submissions:

"11.3. *The defendant and his wife were married in community of property.*

11.4. *The decree of divorce was granted on 3 June 2005 and by that time the Defendant was aware of the criminal charges against him.*

11.5. *The Defendant knew very well that the State*

will attempt to recover the proceeds of his unlawful activities and he therefore decided to transfer all the remaining assets in their estate namely his 50% interest in the immovable property, the Nissan Sentra and other movable assets to Etricia du Preez under the guise of a divorce. He basically dissipated the remainder of his estate in this way.

11.6. *The submission that the divorce took place for this main purpose is supported by:*

11.6.1. *The timing of the divorce after a marriage of more than 20 years;*

11.6.2. *The fact that he rents a flat a 100 metres from "their house" (see BMD1, p 10 lines 14-16);*

11.6.3. *The fact that Etricia du Preez sold the vehicle to pay Defendant's bail (see par 8.1.11 of Defendant's statement);*

- 11.6.4. *The fact that they still have regular contact and that she supports him irrespective of the divorce (see MBD2 p5) and*
- 11.6.5. *The fact that Etricia du Preez still describes herself as defendant's "only friend" (see BMD2 p 8).*
- 11.7. *The money stolen by Defendant over the period of March 2003-October 2004 represents a debt against the joint estate of Defendant and Etricia du Preez.*
- 11.8. *This debt was not disclosed to the court during the divorce proceedings.*
- 11.9. *If the normal rule were to be applied relating to dissolving a marriage and the resultant estate, no money would have been available which could by agreement be donated to Etricia du Preez.*

11.10. *I therefore submit that the immovable property and the motor vehicle are affected gifts donated to Etricia du Preez to place it outside of the hands of creditors or the victims of Defendant's crimes.*

11.11. *As a result these assets are realisable property.*

11.12. *The Defendant has also admitted that he was solely responsible for the payment of the bond. This provides another reason why the entire property should form part of realisable property. Etricia du Preez enjoyed the benefit of staying at the premises for the past 6 years. Defendant produced no evidence that she ever made any contribution towards the payment of the bond. She therefore received a gift in that regard.*

11.13. *Even the pension money of Etricia du Preez, if*

paid out whilst the joint estate was still in existence, would fall within the joint estate and should have been used to satisfy the debts of the estate incurred by any of the parties during the existence of the joint estate. Neither Defendant nor Etricia du Preez provided evidence as to when the pension money was paid out to them.

11.14. *Furthermore, it is my respectful submission that the Defendant reached a divorce settlement solely for the purpose of preventing his property from being attached. I deal with this issue in detail **supra**".*

2.9 It is not clear from the record on exactly what date the first respondent was sentenced. Apparently it was on 29 June 2006, but it could also have been on 31 October 2006. Be that as it may, he passed away on 30 August 2007 whilst serving his term of imprisonment.

2.10 There is no indication in the record that an executor was

appointed in the deceased estate of the first respondent and, if so, that the executor desired to be substituted for the deceased as contemplated in rule 15(3) or that the procedure contemplated in section 24(2) of POCA was followed. On the approach followed in this judgment it is, however, unnecessary to deal with this aspect.

[3] On 23 November 2007 the court *a quo* dismissed the application for a confiscation order. In its reasons for dismissal, dated 22 April 2008, the court *a quo* stated that it was not satisfied that the divorce of the respondents was one of convenience for the purpose of disposing of assets that were acquired with the proceeds of the first respondent's unlawful activities and, further, that it was not satisfied that the realisable property then in the possession of the second respondent amounted to an affected gift as contemplated in POCA.

[4] The grounds of appeal raised by the notice of appeal are that:

4.1 The court *a quo* erred in law and in fact by holding that

the first respondent did not derive a benefit as a result of the crime of theft committed by him. The first respondent patently benefited from his crime in that he received the sum of R4,338,671.85. That he subsequently dissipated this benefit through gambling is irrelevant;

4.2 The court *a quo* erred in law and in fact by finding that the second respondent did not share in the proceeds of the first respondent's activities. The court *a quo* should have found that the joint estate was liable for 50% of the benefit derived from the first respondent's fraudulent activities;

4.3 The court *a quo* erred in law and in fact by finding that the transfer of the first respondent's interest in the house owned by the joint estate to the second respondent was not an affected gift. The court *a quo* should have found that the transfer constituted an affected gift as provided for in POCA.

[5] Mr Freund SC, who appeared on behalf of the appellant, submitted that the appeal essentially involves two issues,

namely (a) whether the first respondent derived any benefits from the proceeds of his unlawful activities and (b) whether any of the assets transferred to the second respondent are affected gifts.

[6] Mr Freund SC submitted, if I understood him correctly, that the second respondent has been the beneficiary of an affected gift as contemplated in section 16 of POCA because the joint estate (which has benefited from the stolen amount), at the time of the divorce, owed a debt to the victims of the thefts in the sum of R4,338,671.85, which amount falls to be deducted before the joint estate is divided as a consequence of the divorce. If that is not done, then to the extent that the second respondent receives more than she should have received on a proper division of the joint estate, she has been the beneficiary of such an affected gift.

[7] The argument presented by Mr Freund SC cannot be sustained:

7.1 The divorce order granted on 3 June 2005 (i.e. almost a

year before the first respondent was convicted) stands until such time as it is properly set aside. In ***Jacobs v Baumann NO 2009 (5) SA 432 (SCA)*** at 439G-H it was reiterated that an order of court stands until such time as it is properly set aside. The Supreme Court of Appeal quoted Lord Radcliffe in ***Smith v East Elloe Rural District Council and Others [1956] 1 All ER 855 (HL)*** at 871G-H:

"An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

- 7.2** There is no indication in the record that the divorce order has been set aside prior to the date of dismissal of the application by the court *a quo* or that proceedings to set aside the order were pending at any relevant time.

7.3 On the facts of the case the divorce order was the sole and only cause of the transfer of the assets to the second respondent under the circumstances described in the respondents' affidavits. There is simply no other basis for the transfer of the property and, in particular, no possible claim in favour of the appellant existed prior to the date of the divorce order.

7.4 In the premises, the transfer of the assets alluded to in the record took place in terms of a valid court order. Consequently, this transfer cannot be described as an affected gift as contemplated in section 16 of POCA (See ***National Director of Public Prosecutions v Pillay and Others 2009 (2) SACR 607 (D)***).

[8] I now turn to the first issue, namely whether the first respondent derived any benefits from the proceeds of his unlawful activities. Mr Freund SC submitted that the first respondent did derive such benefits in the amount of R4,338,671.85 as that amount is the sum of the value of the property derived by him. Consequently, so it was

submitted, the court *a quo* was entitled to make a confiscation order up to the amount of R4,338,671.85.

[9] In terms of section 20(1) of POCA, the amount which might be realised at the time of the making of a confiscation order shall be the amount equal to the sum of:

"(a) *the values at that time of all realisable property held by the defendant; and*

(b) the values at that time of all affected gifts made by the defendant,

less the sum of all obligations, if any, of the defendant having priority and which the court may recognise for this purpose." (emphasis added)

[10] The concept of "*realisable property*" is defined in section 14 of POCA to mean:

"(a) *any property held by the defendant concerned; and*

(b) *any property held by a person to whom that defendant has directly or indirectly made any affected gift.*"

[11] The first respondent has, in the light of the divorce order referred to above, neither directly or indirectly made an affected gift to the second respondent. Consequently, no realisable property exists for purposes of the making of a confiscation order as contemplated in the sections of POCA referred to above. In the premises, the argument of Mr Freund SC cannot be sustained.

[12] Lastly, it is clear from the provisions of POCA that a court, in granting or refusing a confiscation order, exercises a discretion that must be done judicially and upon a due consideration of all the relevant facts. In view of the following, I am not prepared to interfere with the discretion exercised by the court *a quo*:

12.1 The assets which the appellant seeks to confiscate are all assets affected by a divorce order obtained in a *bona fide* and lawful manner;

- 12.2 There is no evidence in the record as to the value of the immovable property either as at the date of the appeal or as at the date from which any possible confiscation order should be granted;
- 12.3 There is no evidence whatsoever as to the funding of the purchase of the Nissan Sentra, or, for that sake, any of the movable property transferred to the second respondent in terms of the divorce order;
- 12.4 The second respondent was also a victim of the first respondent's unlawful activities. This is clear from that portion of her affidavit quoted above;
- 12.5 In the circumstances of this case, it is just and equitable that the second respondent's access to adequate housing (i e the immovable property concerned) be preserved.

[13] There remains one aspect to be dealt with:

- 13.1 Section 17(b) of POCA provides that the proceedings

contemplated in Chapter 5 of that Act are concluded (*"shall be concluded"*) when, *"subject to section 18(2), the court convicting the defendant of an offence, sentences the defendant without making a confiscation order against him or her"*;

13.2 In terms of section 12(1) of POCA, the term *"confiscation order"* means an order referred to in *"section 18(1)"*;

13.3 The words *"subject to section 18(2)"* in section 17(b) clearly contemplates a situation where the determination in terms of section 18(1) has already been made on the date of sentencing and the only aspect that must still be attended to after sentencing is the determination, by the court, of the amount contemplated in section 18(2), i.e. the amount which the defendant is to pay to the State. In other words, if both the finding of a benefit in terms of section 18(1) and the order in terms of section 18(2) still have to be made *after* the defendant has been sentenced, the proceedings in terms of Chapter 5 against the defendant are concluded as stipulated in section 17(b) because the court has sentenced the defendant

without making a confiscation order against him or her;

13.4 On 29 June 2006 the court *a quo* ordered the institution of an enquiry in terms of section 18(1) of POCA consequent upon the appellant having brought an application for such an order on that date and postponed the determination of the confiscation order to 31 October 2006;

13.5 I have already pointed out above that the date of sentence is not clear: it could be either 29 June 2006 or 31 October 2006. Be that as it may, it is common cause that the court *a quo* only on 23 November 2007 found that the first respondent did not benefit from the offences of which he was convicted. Had the court on that date, in terms of section 18(1), found that the first respondent so benefitted, the proceedings contemplated in Chapter 5 would already have been concluded against the first respondent by virtue of the provisions of section 17(b) and any confiscation order made by the court *a quo* on that date would have been *ultra vires* the provisions of section 17(b);

13.6 If, on appeal, the order of the court *a quo* is to be set aside and substituted with a confiscation order as contended for by the appellants, such order will have retrospective effect to 23 November 2007. For the reasons set out above, the order of this court would then also be *ultra vires* the provisions of section 17(b) of POCA.

[14] Since the point mentioned above was not argued extensively on appeal, I will refrain from making any findings in that regard and my views are merely *obiter*.

[15] In the premises I propose that the appeal be dismissed with costs.


VAN LOGGERENBERG: AJ

I agree: It is so ordered


BERTELSMANN: J

25/1/2010
(Date)

For App: Adv AJ Freund S
Instructed by State Attorney At

For Resp: Adv M K. Steenkamp
Instructed by Pretoria
Justice Centre.

Heard on 10 December 2009.