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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

**Reportable
CASE NO.: CA 45/2020**

In the matter between:

JULIAN BROWN	1 st Appellant
EUGENE VICTOR	2 nd Appellant
BRANDON CRAIG TURNER	3 rd Appellant

and

THE STATE	Respondent
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APPEAL JUDGMENT

GQAMANA J

Introduction

[1] The appellants were charged with various counts for contraventions of *inter alia*, Regulation 36(1) (a) read with Regulation 96 of the Regulations promulgated in the Government Notice R111 and published in the Government Gazette 19205 of 2 September 1998 read with regulation 1 and read with various provisions of the Marine Living Resources Act 18 of 1998 (the MLRA) (relating to abalone), contravention of the provisions of section 2 (1) (f) read with sections 1, 2(2), 2(3), 2(4) and 3 of the Prevention of Organised Crime Act 121 of 1998 (POCA) (the racketeering and money laundering offences), obstructing the course of justice, fraud and the contraventions of the National Road Traffic Act 93 of 1996. The first appellant was convicted on counts 1 and 4.¹ The second appellant was convicted of counts 1, 2, 7, 8, 9, 10 and 11.² The third appellant was convicted of counts 2 and 6.³ The first appellant was sentenced to 18 years'

¹ Count 1, unlawful management of the operation or activities of an enterprise and knew that any person whilst employed by or associated with that enterprise, conduct or participate in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity. Count 4, unlawful engaging in fishing, collecting, disturbing, keeping, controlling, storing, transporting or be in possession of abalone without a permit.

² Count 1, Contravention of Section 2(1)(f) read with sections 1, 2(2), 2(3), 2(4) and 3 of Act 121 of the Prevention of Organised Crime Act 121 of 1988 (POCA); the operation or activities of an enterprise and knew or ought reasonably to have known that any person whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity. Count 2, Contravention of Section 2(1)(e) read with sections 1, 2(2), 2(3), 2(4) and 3 of the Prevention of Organised Crime Act 121 of 1988 (POCA); managing or employed by or associated with any enterprise, conducts or participates in the conduct directly or indirectly, of such enterprise affairs through a pattern of racketeering activity. Count 7, Contravention of regulation 36(1)(a) read with the regulation 96 of the Regulations promulgated in Government Notice R1111 and published in Government Gazette 19205 of 2 September 1998 read with regulation 1 and section 58(4) of the Marine Living Resources Act, 18 of 1998, and further read with section 250 of the Criminal Procedure Act, 51 of 1977. Count 8, Fraud. Count 9, Forgery and Uttering. Count 10, the Contravention of Section 12(a) read with section 1, 34 and 89 of the National Road Traffic Act 93 of 1996 (Driving without a driver's license). Count 11, Contravention of regulation 36(1)(a) read with regulation 96 of the regulations promulgated in Government Notice R1111 and published in Government Gazette 19205 of 2 September 1998 read with regulation 1 and section 58(4) of the Marine Living Resources Act, Act 18 of 1998 Act, and further read with section 250 of the Criminal Procedure Act 51 of 1977.

³ Count 2, Contravention of Section 2(1)(e) read with sections 1, 2(2), 2(3), 2(4) and 3 of Act 121 of 1998 (POCA) managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, or such enterprise's affairs through a pattern of racketeering activity. Count 6, Contravention of regulation 36(1)(a) read with regulation 96 of the Regulations promulgated in Government Notice R1111 and published in section 58(4) of the Marine Living Resources Act 18 of 1998, and further read with section 250 of the Criminal Procedure Act 51 of 1977.

imprisonment on count 1 and, 3 years on count 4 (the sentence to run concurrently). The second appellant was sentenced to 15 years each on counts 1 and 2, 3 years on count 7, two years each on counts 8,9,10 and 3 years on count 11. The third appellant was sentenced to 15 years on count 2 and 3 years on count 6. The appeal on conviction is before this Court with the leave of the Supreme Court of Appeal, whilst leave was granted by the trial court in respect of sentence on the second and third appellants.

- [2] For purposes of this appeal, the only relevant charges are those relating to abalone and racketeering.

Summary and background of material facts

- [3] The allegation by the State is that the appellants were involved in abalone poaching and racketeering. Further, it was alleged that the first and second appellants made a living by means of managing an enterprise which was engaged in the illegal fishing, collecting, keeping, controlling, processing, transportation and possession of abalone. The first and second appellants managed the affairs of the enterprise and in order for the enterprise to engage in the illegal abalone trade, they gave instructions to various employees of the enterprise including the third appellant to possess, transport, keep and process the abalone in the execution of the business of the enterprise.
- [4] Furthermore the allegation was that the appellants and other persons, known and unknown to the State, involved themselves directly or indirectly in the conduct or participated and or managed the enterprise and or participated in the conduct of the affairs of the enterprise engaging in abalone poaching. The allegation was that the enterprise which was formed by the first and third appellants conducted its affairs through a pattern of racketeering activities

stretching from 22 March 2015 to 30 September 2015 as set out below and that all racketeering activities are Schedule 1 offences in terms of POCA. Those racketeering activities are:

- “1. **Racketeering Activity 1:** On the 22nd of March 2015 [first appellant] phoned Reinier Ellerbeck and enquired where he was. Soon thereafter [second appellant] phoned Ellerbeck and instructed him to go and collect abalone bags in the Noord Hoek area of Marine Drive. Ellerbeck collected 7 bags of abalone and at his (Ellerbeck’s) house, the abalone was processed with the assistance of Edgar Clulow and others. Edgar Clulow took possession and transported the abalone from the house of Ellerbeck. Later during the day [first appellant] again phoned Ellerbeck and instructed him to go and collect the remaining bags of abalone. Ellerbeck adhered to the instruction and was seen by the police in collecting the bags of abalone. [First appellant] was on the scene and tried to prevent the police from arresting Ellerbeck. After Ellerbeck’s arrest, [first appellant] had an attorney appointed to act on Ellerbeck’s behalf.
2. [Racketeering Activity 2] On the 6th, 26th and 29th of April 2015 and at the residence of Reinier Ellerbeck, [first and second appellants] and Andre van Rensburg, Edgar Clulow and other employees of the enterprise unlawfully and wrongfully engaged in the fishing, collecting, disturbing, keeping, controlling, storing, transporting or possession of abalone by sorting, packing and weighing of abalone brought to Ellerbeck’s house. [Third appellant] on one occasion, arranged the transport of the abalone, after it was weighed, to an abalone store.
3. [Racketeering Activity 3] On the 16th of April 2015 [second appellant] was seen, driving a red Kombi busy collecting divers along Marine drive and taking them to a house at 5[...] H[...] g[...] s[...], Forest Hill, Port Elizabeth. The following day abalone that belonged to the enterprise was found at this address. JP van Zyl, an employee of the enterprise was found in possession of the abalone.
4. [Racketeering Activity 4] The police observed [third appellant] collecting abalone from the house of Ellerbeck in Algoa Park. The abalone was taken to [...] D[...] Street, Westering,

Port Elizabeth where it was frozen, processed and stored. On the 11th of May 2015 the police found [third appellant] in possession of the abalone he kept on behalf of the enterprise. The police confiscated the abalone and a white Golf vehicle which was used to transport the abalone.

5. [Racketeering Activity 5] Edgar Clulow was employed to transport the abalone from the house of Ellerbeck in Algoa Park to a store unknown to the police. Clulow used a Jetta vehicle to transport the abalone. On the 28th of May 2015 Clulow was arrested in possession of 1011 units of abalone at his house, [...] C[...] C[...], Sherwood, Port Elizabeth. The State alleges that this abalone belonged to the enterprise and the house was made available to Clulow by [the first appellant].
6. [Racketeering Activity 6] Abalone which belonged to the enterprise was processed at the house of Jan Smuts on the premises of the Department of Correctional Services, North End, Port Elizabeth. The police, through observation, established that the abalone was stored at 1[...] N[...] Street, Kama Park, Port Elizabeth. On the 12th of July 2015 Pierre Schultz was arrested at the house 1[...] N[...] Street in possession of abalone. The State alleged that this abalone belonged to the enterprise
7. [Racketeering activity 7] On the 4th August 2015 the police searched the house of Jan Smuts and arrested him in possession of abalone which the State alleges belongs to the enterprise. Edgar Clulow was observed delivering the abalone at this house.
8. [Racketeering activity 8] On the 26th of August 2015[second appellant] was found in possession of abalone, near Jansenville, whilst busy transporting the abalone. The State alleges that the abalone belongs to the enterprise.
9. [Racketeering activity 9] On the 26th August 2015 Edgar Clulow was caught in possession of abalone at his house at [...] C[...] C[...], Sherwood, Port Elizabeth. The State alleges that this abalone belonged to the enterprise.
10. [Racketeering Activity 10] On the 30th September 2015 the police kept observation at the premises situated at [...] C[...] S[...], Sidwell, Port Elizabeth. [Second appellant] delivered

abalone at this address. The police arrived and found the abalone and arrested Mr Plaatjies in possession of abalone. The State alleges that this abalone belonged to the enterprise.

11. [Racketeering Activity 11] On the 11th of April 2016 an explosion occurred at premises situated on the corner of Lindsay and Buitekant Street in Neave Township, Port Elizabeth. The explosion was caused by the ignition of gas at an illegal fish processing establishment. Two persons died as a result of the explosion. These two persons were employed by the enterprise or someone involved with the enterprise to process the abalone. [First appellant] had supplied the drying shelves which was used to dry the abalone.”

[5] In addition it was alleged that, the first appellant contravened regulation 36 (1) read with regulations 1 and 96 and section 58(4) of the MLRA in that, on 22 March 2015, at Marine Drive, Port Elizabeth, he together with Ellerbeck unlawfully and wrongfully engaged in the fishing, collecting, keeping , controlling, storing, transporting or possession of 218 units of abalone without a permit.⁴

[6] In respect of the third appellant, it was further alleged that, he was observed by the police collecting abalone from Ellerbeck’s house in Algoa Park and delivered to [...] D[...] Street, Westering, where it was frozen and stored. Again on 11 May 2015, he was found in possession of abalone that he kept on behalf of the enterprise. The abalone and the car that was used in transportation of same were confiscated by the police.⁵

[7] In respect of the second appellant, it was alleged that on 16 August 2015, he was found in possession of abalone at or near Janesville, which he was transporting on behalf of the enterprise.⁶ In addition it was alleged that he

⁴ Count 4.

⁵ Counts 5 and 6.

⁶ Count 7.

was observed by the police when he delivered abalone, on 30 September 2015, at house number [...] C[...] Street, Sidwell, Port Elizabeth, which abalone belonged to the enterprise.⁷

- [8] The State's case rested largely on the search warrants, the evidence that was obtained as a result of the searches conducted some with warrants and others without warrants and the section 204 witnesses who were involved in the racketeering activities mentioned above. The validity of the aforementioned search warrants and the evidence obtained as a result thereof were hotly contested at trial and are at the heart of this appeal.
- [9] The appellants in their defence pleaded not guilty. The first appellant made a comprehensive statement explaining his plea in terms of the provisions of section 115 of the Criminal Procedure Act 51 of 1977. He denied any involvement in the enterprise as alleged by the State and that he was in possession, keeping, controlling, storing or transporting of abalone. Further it was contested on his behalf that some of the section 204 witnesses were arrested after the searches of their properties in terms of search warrants which were issued by either a senior member of the police or by a local magistrate and that none of the search warrants were valid.
- [10] The second and third appellants tendered no plea explanation but they also denied any involvement with the enterprise as alleged and possession, controlling, storing, processing or transportation of abalone.
- [11] In light of the challenge on the validity of the search warrants, a trial-within-a trial was called, to determine same and the admissibility of the evidence

⁷ Count 11.

obtained as a result of such warrants. Numerous witnesses, mainly those that were involved in the application for search warrants, that conducted and participated in the searches and in the arrest of the appellants testified.

[12] After having heard evidence of the police officials on the searches in respect of the racketeering activities, the trial court ruled and found Exhibits B, C, D and L to be invalid. It further ruled that the State would be allowed to lead evidence so that it could be able to make a determination in terms of section 35(3) of the Constitution at the end of the State's case.

[13] Section 35(5) reads:

“Evidence obtained in a manner that violates any rights in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice”.

[14] Further the trial court found to be valid, the searches on Ellerbeck's car on 22 March 2015 at Noordhoek,⁸ Ellerbecks' video recordings of abalone processing on 6, 26 and 29 April 2015 at his house,⁹ the search of JP Van Zyl on 17 April 2015 at Forest Hill,¹⁰ the search of Edgar Clulow's car (junior) on 28 May 2015 at [...] C[...] Street, Sherwood,¹¹ the search warrants of the first and second appellants.

⁸ Racketeering Activity 1.

⁹ Racketeering Activity 2.

¹⁰ Racketeering 3.

¹¹ Racketeering Activity 5.

- [15] No ruling was made on the search with a warrant of the third appellant on 11 May 2015 and on the search without a warrant of the second appellant's car outside Jansenville.¹²
- [16] It is common cause that the trial court did not make a determination in terms of section 35(5) at the end of the State's case, although evidence was led by the State about various searches and the abalone that were found as a result of the searches including those searches based on invalid search warrants as well as those conducted without warrants.

Issues to be decided

- [17] The central issues on conviction are; firstly at what stage of the proceedings should the trial court have made its decision in terms of section 35(5) of the Constitution on the admissibility of the evidence gained as a result of the searches that were carried out; secondly, the admissibility of the evidence obtained as a result of the searches be it with the invalid and valid search warrants and without warrants; thirdly, whether the case against the appellants was proved beyond reasonable doubt; fourthly, to consider the sentences imposed by the trial court.

When should the decision have been made in terms of section 35(5) of the Constitution

- [18] Right at the pleading stage of the proceedings, the appellants made known its contestation on the validity of the search warrants. It was their contention that none of the search warrants were in compliance with the prescriptive

¹² Racketeering Activity 8.

requirements. As a result, the trial court ruled that the case and evidence would commence with a trial-within a trial.

- [19] In *NDPP v Van Der Merwe*,¹³ Mogoeng J (then) stipulated what an affidavit in the application for a warrant and the warrant itself must contain. It held that a search warrant must contain the following: the statutory provisions in terms of which it is issued, the identity of the searcher, the authority it confers upon the searcher, the identity of the person or premises to be searched, the article to be searched has to be described with sufficient particularity and the offence which triggered the criminal investigation and the names of the suspected offender must be specified.
- [20] On hearing of the evidence from the police officials and at the end of the trial within the trial, the trial court ruled that the search warrants in respect of racketeering activities 6, 7, 9 and 10 were invalid because of lack of compliance with the prescriptive requirements set out by the Constitutional Court in the *Van der Merwe* matter. However, in respect of racketeering activities 1, 2, 3 and 5, it ruled that the searches conducted were valid. It made no ruling on the searches in respect of racketeering activities 4 and 8, i.e. the searches of the third appellant's house at number 6 Deborah Street, Westering on 11 May 2015 and the second appellant's car outside Jansenville on 16 August 2015 respectively.
- [21] Counsel for the State conceded, correctly so, that the missing warrant in respect of racketeering activity 4 in all probability would have also been invalid. However, he argued that the third appellant gave consent to the search. In respect of the search of the second appellant's car outside

¹³ 2011 (2) SACR 301 (CC) at 316–317.

Jansenville, it was submitted that such search was not the subject of the trial within trial but was challenged in the main trial and therefore his right to challenge such evidence was not impeded.

- [22] It is common cause that the trial court made no determination in terms of section 35(5) of the Constitution at the end of the trial within a trial. Instead it ruled that the State would be allowed to lead evidence so that it would be able to make such determination at the end of the State's case. Even at the end of the State's case no such ruling was made.
- [23] The appellants argued that the trial court erred and committed an irregularity by not making such determination at the end of the trial within the trial. In advancing such argument, it was contended that the appellants' right to a fair trial was impeded, because they had no idea what evidence was properly before the court.
- [24] Further it was also argued on behalf of the first appellant that, although he testified at trial, the late pronouncement on the validity of some of the searches also impeded his right to challenge such evidence through cross examination.
- [25] The appellants also argued that the evidence which was obtained during such searches in respect of racketeering 4 ad 8 was also unlawfully obtained and should have been excluded in terms of section 35(5) of the Constitution.
- [26] In *S v Van der Walt*,¹⁴ the Constitutional Court found that the pronouncement on the admissibility of the exhibits after the accused had closed his case (at

¹⁴ 2020 (2) SACR 371 (CC).

the stage when the main judgment was given) had rendered the trial unfair, because the accused was ambushed by the late pronouncement.

[27] Counsel for the State argued that, the provisions of section 35(5) places no onus either on the State or the accused to prove that the admission of the evidence obtained in an unconstitutional manner would render the trial unfair or otherwise be detrimental to the administration of justice. He submitted that the wording of section 35(5) involves a value judgment at the end of the case as a whole.

[28] I disagree with his submission. A ruling on the admissibility of evidence should be decided at the end a trial within a trial, or at the least, at the end of the State's case.¹⁵ The reason for that is because, at the end of State's case' it should be clear to all the parties;(the prosecution and the accused) what the case is and what the accused have to meet. In this matter no determination in terms of section 35(5) was made either at the end of the trial within a trial or at the end of the State's case.

[29] When the State's case was closed the appellants had no idea what evidence was admissible or not admissible. In the circumstances, the trial court committed an irregularity by not making the determination in terms of section 35(5) at the end of the trial within a trial or at the end of the State's case. I now turn on to consider the second issue.

The admissibility of the evidence gained as a result of the searches that were carried out

¹⁵ S v Molimi 2008 (3) SA 608 (CC) para [54] and S v Ndhlovu 2002 (6) SA 305 (SCA) at para [18].

[30] The appellants had objected upfront to the admissibility of the evidence obtained as a result of the searches that were carried out, some with search warrants and others without the search warrants. Therefore, the trial court had to decide on the admissibility of such evidence.

[31] There are two legs of enquiry in terms of section 35(5). The court must determine whether the admission of such the evidence would render the trial unfair or otherwise be detrimental to the administration of justice. In *Zuko v S*,¹⁶ Plasket J (then) said the following with regard to section 35(5):

“This provision seeks to achieve a balance between the due compliance with the law and the Constitution in the investigation and prosecution of crime on the one hand, and the efficiency of the criminal justice system on the other hand. It does so by providing for the exclusion of unconstitutionally obtained evidence if its admission would result in an unfair trial or prejudice to the administration of justice. In doing so, it also allows for admission of unconstitutionally obtained evidence if that will not result in an unfair trial or will not be detrimental to the administration of justice.”

[32] In this case, the trial court only decided on the validity and invalidity of some of the search warrants and searches, but it did not test such evidence against the provisions of section 35(5). In *Zuma v NDPP and Others*,¹⁷ Langa CJ stressed the importance of an understanding of the range of protections for the right to privacy at different stages of a criminal investigation and trial.

[33] The appellants argued that the trial court did not make a pronouncement on the evidence which was obtained as a result of invalid warrants and also did

¹⁶ 2009 (4) All SA 89 (E).

¹⁷ 2008 (2) SACR 421 (CC).

not consider the provisions of section 35(5). Therefore, such failure rendered the trial unfair.

[34] On the other hand, counsel for the State argued that in respect of racketeering 6, 7, 9 and 10 the trial court considered the relevant evidence in terms of section 35(5) and, found by means of value judgment, that the searches did not impact any of the appellant's right to a fair trial. He further submitted that, the appellants failed to show a causal connection between the unlawful searches and their right to a fair trial. In addition, he argued that the trial court correctly allowed the evidence which was obtained as a result of the searches to remain on record and to make a value judgment at the end of the case as a whole.

[35] Section 35(5) requires the court to exclude admission of evidence if its admission would either render the trial unfair or otherwise be detrimental to the administration of justice.¹⁸ The court must exercise a value judgment in ascertaining whether either of the two conditions for exclusion exists.¹⁹

[36] Counsel for the State submitted that, prior to the exclusion of evidence, a causal relationship, a link, between the Bill of Rights violation and the obtaining of the evidence must be established. In advancing such argument, he argued that where an accused seeks exclusion of evidence to be used against him and such evidence was obtained in violation of a third party's constitutional right, an accused cannot rely on section 35(5) to exclude the evidence obtained in violation of the third person's personal rights. For this

¹⁸ S v Soci 1998 (2) SACR 275 (E).

¹⁹ S v Pillay 2004 (2) SACR 419 (SCA).

proposition, he placed reliance in a foreign judgment in *R v Goldhart* 1996 107 CC 481.

- [37] In the above-mentioned case, the accused was a joint tenant with one Mayer. The police suspected that the accused was cultivating dagga inside the house but did not have sufficient evidence to obtain a search warrant. The police approached the house under pretense that they wanted to speak to the occupants in order to establish who was the owner of the house. As they were walking about the property, they detected a smell of dagga and on the strength of that information they obtained a search warrant. The house was searched and dagga plants were found. Mayer was arrested and shortly after his arrest he made an incriminating statement to the police. He also pleaded guilty and decided to testify against Goldhart. The prosecution tried to prove their case by calling Mayer but the defence applied in terms of section 24(2) [a provision similar to s 35 (5)] to exclude his testimony on the basis that it was obtained from an illegal search. The defence objection was dismissed by the trial court and Goldhart was convicted. On appeal to the Supreme Court, the latter held that, the trial court erred in finding that Mayer's testimony was sufficiently connected to the improper search to justify the triggering of section 24(2). It further held that it must be demonstrated in each case that the evidence sought to be excluded is not too remote from the initial Charter breach.
- [38] Based on the above judgment, Counsel for the State submitted that the appellants failed to show the required causal connection between the invalid search warrants and their constitutional rights.

- [39] I disagree. In *S v Mthembu*,²⁰ it was held that section 35(5) requires the exclusion of the evidence unconstitutionally obtained from any person, not only from the accused. The fact that those persons whose rights were violated testified as section 204 witnesses is immaterial. The admissibility of the evidence that was obtained in violation of their constitutional right had to be tested against the provisions of section 35(5). I accept that even though the evidence may have been obtained unconstitutionally, it would not necessary render the trial unfair. But before such evidence is admitted the trial court was required to ascertain whether the admission of such evidence would not render the trial unfair or otherwise be detrimental to the administration of justice.
- [40] The trial court did not apply its mind to section 35(5) at all. But in its judgment, one can see that it also relied on the evidence which was obtained as a result of the searches in arriving at its conclusion that the appellants were guilty of the charges relevant to this appeal. I find that to be an irregularity sufficient to render the trial unfair. It was compulsory for the trial court to consider whether the admission of such evidence would not have resulted in an unfair trial or would not be detrimental to the administration of justice. The trial court did not do so. An important aim of the right to a fair trial is to ensure that innocent people are not wrongly convicted.
- [41] As a court of appeal it is not within our powers to make such a determination in terms of section 35(5) which the trial court omitted. Accordingly, as a result of such irregularity by the trial court, the convictions in respect of the charges relevant on this appeal are unsustainable.

²⁰ [2008] 3 All SA 517 (SCA).

[42] In the light of these findings it is unnecessary for me to consider the issue of sentence.

[43] In the circumstances, the following order is issued:

1. The appeal is upheld.
2. The convictions of the appellants and the resultant sentences on counts 1, 2, 4, 5, 6, 7, and 11 are set aside and replaced with the finding of NOT GUILTY. The appellants are accordingly acquitted and discharged on those charges.

N GQAMANA
JUDGE OF THE HIGH COURT

I agree:

N G BESHE
JUDGE OF THE HIGH COURT

I agree:

P H S ZILWA
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for 1ST Appellant : *Adv F van Zyl SC and H Bakker*

Instructed by : Danie Gouws Inc. Attorneys
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Counsel for 2nd and 3rd Appellants : *Adv E Theron*

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Counsel for the Respondent : *Adv M L Le Roux*

Instructed by : Director of Public Prosecutions
Makhanda

Heard on : 7 August 2023

Judgment Delivered on : 23 January 2024