IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Reportable

CASE NUMBER: SS13/2012

5 DATE: 4 SEPTEMBER 2017

In the matter between:

THE STATE

and

PHILLIP JAMES MILLER Accused 1

10 **WILLEM JACOBUS VAN RENSBURG** Accused 2

ADRIAAN GAVIN WILDSCHUTT Accused 3

TONY PETER DU TOIT Accused 4

JOHANNES EMIL LIEBENBERG Accused 5

RODNEY ONKRUID Accused 6

15 **STANLEY SIFISO DLAMINI** Accused 7

DESMOND DAVID PIENAAR Accused 8

GREGORY ABRAHAMS Accused 9

J U D G M E N T

20

GAMBLE, J:

INTRODUCTION

25 1. *Haliotis midae* is a species of mollusc which is found in

the colder, intertidal coastal waters of the Western and Southern Cape. Locally known as "*perlemoen*" or "*perlie*", it is universally called abalone. The mollusc consists of a large circular shell, which resembles a shallow dish, ideally about 12
5 to 15 centimetres in diameter, to which is attached through a thick muscular stem, a slimy, hard, muscular foot about two to four centimetres thick. The foot affixes the mollusc, through a natural suction mechanism, to rocky outcrops on the ocean floor.

10

2. Abalone meat is considered by some to be the ultimate marine delicacy. It is scarce, difficult to dive out and given the hard impenetrable nature of its flesh (rather like a piece of old car tyre), preparation of abalone is an arduous task: each
15 cook has a special recipe to bring out the delicate flavour in this otherwise unappetising piece of marine life.

3. Abalone is a prized delicacy in the Orient, where, says Wikipedia Online Dictionary, it is served on special festive
20 occasions such as weddings and the like. Some suggest also that it has aphrodisiac qualities. The popularity of abalone in the East has led to large quantities of the mollusc's muscular food being exported from South Africa from the 1980's to date. The evidence in this case suggests that the vast majority of
25 these exports have been illegal, resulting in a state of collapse

and near extinction of the resource, although local news reports from time to time during the course of this trial, regarding seizure by the law enforcement authorities of quantity of abalone, suggest that the poaching of abalone
5 continues unabated in the Western Cape. News reports on the News24 Online service during the currency of this trial (*inter alia* on 27 September 2016, 25 November 2016, 10 March 2017, 1 June 2017, 11 July 2017 and 9 August 2017) indicate that the law enforcement authorities continue to seize large
10 quantities of illegal abalone worth many millions of Rand and make arrests in that regard in the Western Cape.

THE ARREST OF THE ACCUSED

15 4. The nine accused charged in this matter were arrested, along with a number of others, in 2006 on statutory charges relating to the illegal possession for commercial exploitation of abalone during the years 2005 to 2006. After a number of appearances in the Regional Court, Cape Town, the matter
20 was transferred to this court for a trial which commenced in 2008 before Erasmus, J. At that stage there were 19 accused, about half of whom were represented by counsel on paid briefs, and the remainder by the Legal Aid Board.

25 5. The proceedings before Erasmus, J, commenced with

certain preliminary points being taken by the accused then before court, and in some instances detailed rulings were delivered by that court. See, for example, S v Chao & Others 2009(1) SACR 479 (C). During the time that the matter was
5 before Erasmus, J, one of the accused, Jyeng Chang Ku aka Jerry Ku, skipped bail and a warrant for his arrest was issued. Proceedings before that court were delayed from time to time, as the accused hired and fired their legal representatives. There was some further delay in the matter while the parties
10 awaited a decision from the Constitutional Court, relating to the constitutionality of certain aspects of the Prevention & Organised Crime Act 121 of 1998 ("POCA"), which evidently impacted on certain of the charges they faced. See Savoi and Others v National Director of Public Prosecutions and Another
15 2 014(1) SACR 545 (CC). That matter had commenced in the High Court in Pietermaritzburg in 2012, where a ruling on constitutional validity had been made, which ruling was confirmed by the Constitutional Court in March 2014.

20 6. Certain of the accused before Erasmus, J, tendered pleas of guilty, which the State accepted and in respect whereof non-custodial sentences were imposed. Once the guilty pleas had been disposed of the trials were separated. The matter was removed from the trial roll and remitted to this
25 court's criminal pre-trial procedural roll. The matter was

eventually sent to trial before this Court, sitting with two Assessors, on 10 August 2014.

7. During the pre-trial phase in 2014, another of the
5 accused, Yu Chen Chao aka Richard Chao, failed to appear after he had skipped bail. Once his bail had been estreated, the matter continued against the nine accused listed in the indictment. At the first appearance before this Court on 10 August 2014, a postponement was requested for a week to
10 enable the defence and the State to attend to certain additional pre-trial issues. When the matter recommenced on 18 August 2014, accused 7, Stanley Dlamini, a citizen of Swaziland, who had evidently returned home in the interim, failed to appear and the matter continued in his absence.
15 Subsequently Dlamini's bail was estreated after he failed to return to South Africa.

8. By the time the case against the remaining accused was ready to proceed, their financial resources had been depleted
20 by the earlier proceedings and they were all obliged to avail themselves of the service of counsel appointed by Legal Aid South Africa. Accused 1 was represented by Advocate L Joubert, accused 2, 4 and 5 by Advocate D A J Uijs SC, accused 3 by Advocate C Mellor, who took over when Advocate
25 D Theunissen, who originally appeared for numbers 3, 8 and 9

was given leave to withdraw on October 2014, accused 6 by Advocate S Banderker and accused 8 and 9 by Advocate V Fransch (who also took over after the withdrawal of Advocate Theunissen). The State was initially represented by
5 Advocates D Greyling and A Heeramun. In August 2016, Ms Greyling was replaced by Advocate J van der Merwe. The Court wishes to express its sincere thanks to all the counsel for the professional and collegial manner in which the matter has been conducted. The case has been plagued by a number
10 of unavoidable systemic delays of the type which are often associated with protracted criminal trials, involving multiple accused, and everyone's patience has been stretched at times. The Court would also like to thank at this stage, the two Assessors who assisted us throughout the case and in
15 particular the sterling work done by Mr Vismer in the last couple of weeks in helping the preparation of this judgment. We have also been greatly assisted by the court registrar, the usher, who has always been there to help us and the stenographer.

20

THE CHARGES PREFERRED AGAINST THE ACCUSED

9. The charges against the accused are formulated in three broad categories. The first category relates to contraventions
25 of POCA, the second category relates to various

contraventions of the Marine Living Resources Act 18 of 1998 ("the MLRA") and the third category is fraud.

POCA CHARGES

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10. The POCA charges, based on the contention that the accused were part of an unlawful enterprise, as defined under that Act, arise from the alleged contravention of two sections of that Act.

10 10.1 On count 1, accused 1 to 5 were charged with contravening Section 2(1)(f), read with Sections 1, 2(2) and 3 of POCA, that is unlawfully managing an enterprise conducted through a pattern of racketeering activity.

15 10.2 On count 2, accused 1 to 9 were charged with contravening Section 2(1)(e), read with the same subsections of the same Act. The substance of the charges against them, is that they unlawfully conducted an enterprise through a pattern of

20 racketeering or were associated therewith.

MLRA CHARGES

11. Approximately half of the 116 charges which the accused

25 collectively and individually face, relate to contraventions of

the MLRA. There are five alleged contraventions of Section 18(1) of the MLRA, read with Sections 1 and 58(1)(b) thereof, and also read with Section 250 of the Criminal Procedure Act 51 of 1977 ("the CPA") i.e. unlawfully operating a fish 5 processing establishment. I shall refer to these as the FPE charges.

11.1 Section 18 of the MLRA reads as follows:

"18.1 No person shall undertake commercial fishing 10 or small scale fishing, engage in mariculture or operate a fish processing establishment, unless a right to undertake or engage in such an activity, or to operate such an establishment, has been granted to such a 15 person by the Minister."

11.2 In the definitions clause of the MLRA (Section 1): a fish processing establishment is defined as:

"Any vehicle, vessel, premises or place where any substance or article is produced from 20 fish by any method, including the work of cutting up, dismembering, separating parts of, cleaning, sorting, lining and preserving of fish or where fish are canned, packed, dried, gutted, salted, iced, chilled, frozen or 25 otherwise processed for sale in or outside the

territory of the Republic."

11.3 Fish is defined in the MLRA as:

"The marine living resources of the sea and seashore, including any aquatic plant or animal, whether piscine or not, and any mollusc, crustacean, coral, sponge, holothurians or other echinoderm, reptile and marine mammal and includes their eggs, larvae and all juvenile stages, but does not include sea birds and seals."

11.4 On count 3, the FPE charge is said to have been perpetrated by only accused 1 and 3, and then only as an act of racketeering.

11.5 On counts 99, 101 and 103, the FPE contraventions are said to have been perpetrated only by accused 1, 3, 6 and 7.

11.6 On count 114, the FPE contravention is said to have been perpetrated only by accused 1, 2, 4 and 5.

11.7 The remainder of the counts under the MLRA are alleged contraventions of Regulation 39(1)(a) of the Regulations as promulgated under Government Notice R1111 and published in Government Gazette 19205 of 2 September 1998, read with Regulation 1 and 96 of the said regulations, as issued in terms of Section 77 of the MLRA ("the MLRA Regs"), read

with Sections 1 and 58 thereof and Section 250 of the CPA, i.e. unlawfully collecting, keeping, controlling or processing abalone for commercial purposes.

5 11.8 Regulation 39(1)(a) in the aforesaid Government Gazette reads as follows:

"No person shall, except on the authority of a permit:

(a) Engage in fishing, collecting, keeping or
10 controlling of, or be in possession of abalone for commercial purposes."

11.9 On count 4, accused 1 and 3 are charged with contravening this section of the MLRA Regs only as an act of racketeering.

15 11.10 On counts 13, 18, 20, 24, 33, 36, 37, 40, 44 to 47 and 51, accused 1, 3, 8 and 9 are charged jointly with contraventions of the MLRA Regs.

11.11 On counts 5 to 12, 14 to 17, 19, 21 to 23, 32, 34, 35, 38, 39, 41 to 43, 48 and 49, accused 1, 2, 4, 5,
20 8 and 9 are charged jointly with contraventions of the MLRA Regs.

11.12 On counts 100, 102 and 104, accused 1, 3, 6 and 7 are charged jointly with such contraventions.

11.13 On count 105, accused 1, 2, 3, 4, 5, 8 and 9 are
25 charged jointly with the contravention of the MLRA

Regs.

11.14 On counts 106 and 109, accused 1, 3, 8 and 9 are charged jointly with such contraventions.

11.15 On counts 107 and 108, accused 1, 2, 4, 5, 8 and 9 are charged jointly with similar contraventions;

11.16 On counts 115 and 116, accused 1, 2, 4 and 5 are charged jointly with similar MLRA Reg contraventions.

FRAUD CHARGES

12. The State alleges that the fraud charges are required to be read with Section 51(2) of the CPA. The substance of the charges is that the accused defrauded SARS, more particularly its Department of Customs & Excise, by failing to disclose that the product which was being exported by the enterprise from South Africa, was a combination of abalone and pilchards as opposed to just pilchards, which were disclosed to the customs authorities in the relevant shipping export documents. The State alleges that this misrepresentation occasioned prejudice or potential prejudice to SARS.

12.1 On counts 60, 65, 67, 71, 80, 83, 84, 87, 91 to 94, 97 and 98, accused 1, 3, 8 and 9 are charged jointly with fraud.

12.2 On counts 52 to 59, 61 to 64, 66, 68 to 70, 72 to 79, 81, 82, 85, 86, 88 to 90, 95 and 96, accused 1, 2, 4, 5, 8 and 9 are charged jointly with this offence.

5 12.3 On counts 110 and 113, accused 1, 3, 8 and 9 are charged jointly with this offence; and

12.4 On counts 111 and 112, accused 1, 2, 4, 5, 8 and 9 are charged jointly with this offence.

For the sake of convenience, it is noted that the fraud

10 charges effectively mirror the MLRA contraventions, so that each MLRA charge has a matching fraud charge.

RESPONSE TO THE CHARGES AND GENERAL CONDUCT OF PROCEEDINGS

15

13. At the commencement of the case, each of the accused pleaded not guilty to the charges preferred against them. None of the accused disclosed the bases of their defences at that stage. However, during the course of the trial, a number

20 of admissions were made by the defence, which admissions were recorded in terms of Section 220 of the CPA. I shall deal with the particularity of those admissions as the need arises during the course of this judgment.

25 14. As already averted to, the case was plagued by a number

of unavoidable lengthy postponements for a variety of reasons, including illness on the part of all parties involved in this litigation and a conflict of interest, which necessitated the appointment of new counsel for accused 3, 8 and 9, but eventually the State closed its case on 29 February 2016, the 95th day of the trial. When doing so, the State abandoned certain charges against some of the accused. As a consequence thereof, the following accused were acquitted at that stage of the following charges:

14.1 Accused 1: Charges 5, 6, 7, 8, 9, 49 and 96.

14.2 Accused 2: Charges 4, 5, 6, 7, 8, 9, 10, 49, 57 and 96.

14.3 Accused 3: Charges 13, 18, 20, 27, 60, 65, 67 and 71.

14.4 Accused 4: Charges 5, 6, 7, 8, 9, 10, 49, 57 and 96.

14.5 Accused 5: Charges 5, 6, 7, 8, 9, 10, 49, 57 and 96.

14.6 Accused 8: Charges 5, 6, 7, 8, 9, 49 and 96.

14.7 Accused 9: Charges 5, 6, 7, 8, 9, 49 and 96.

15. After the close of the State case, counsel for each of the accused indicated that they had been instructed to apply for their respective clients' discharge in terms of Section 174 of the CPA. By prior arrangement, the Court did not sit during the second term of 2016 as I was on long leave which had been postponed a year earlier. In the result, the matter stood

down until 1 August 2016 to enable counsel for the defence and the State to prepare detailed written argument in regard to the discharge applications. On 15 August 2016, the Court delivered its ruling on the Section 174 application and the
5 orders made pursuant thereto are a matter of record. By way of summary, all of the accused charged with the contravention of Section 2(1)(f) of POCA, i.e. the management of an illegal enterprise, were acquitted while accused 1 was acquitted on all the MLRA charges which he faced in relation to the
10 operation of a fish processing facility. There were further acquittals of some of the accused on individual MLRA and fraud charges, and these also appear from the record and will not be repeated now.

15 **THE STATE CASE**

16. The State led the evidence of some 32 witnesses, a number of whom were warned as potential accomplices in terms of Section 204 of the CPA. In addition, hundreds of
20 documents were admitted into evidence by agreement, while in respect of others, admissibility was placed in issue and it was necessary for the Court to rule thereon. Those rulings, the adjudication of which took up a fair amount of court time, are a matter of record and will not be revisited at this stage.

25

17. For purposes of this judgment, I do not intend traversing the full details of each and every witness' testimony. That evidence too is a matter of record and much of it has been debated in final argument by the parties, and considered by 5 the Court in the process of finalising this judgment. I shall attempt to encapsulate in this judgment what we consider to be the essence of the relevant evidence adduced by the State and it will be conveyed in a narrative form.

10 THE *MODUS OPERANDI* OF THE ALLEGED JOINT ENTERPRISE

18. In relying on POCA, the legal implications whereof I shall discuss in more detail later, the State has alleged that the 15 accused were participants in a "joint enterprise" as defined in that legislation. I consider that it will be useful at this stage to describe the *modus operandi* of the alleged enterprise to provide the background for the discussion regarding its alleged existence and the participation, if any, of the accused therein. 20 Much of what I shall describe is covered in the evidence of the Department of Marine & Coastal Management ("MCM") officials adduced by the State.

19. As I have said earlier, abalone is to be found in the 25 intertidal zone along the coastline of the waters of the Western

Cape, stretching from Cape Columbine on the Cape West Coast to Cape Agulhas at the southern tip of the African continent. It is customarily prized off the rocks by a diver, using a flat edge instrument like a screwdriver or a tyre lever,
5 which is swiftly and deftly inserted between the rock and the mollusc before it has an opportunity to cling fast to the rock. Traditionally these divers were recreational sportsmen and women, who were allowed to take from the sea their daily bag limit, as stipulated in a permit issued by MCM and its
10 predecessors. Recreational divers were precluded from selling their abalone to the public or to the catering industry.

20. The commercial abalone industry is strictly controlled by MCM regulation and permit holders are restricted to the
15 number of individual units they may remove from the sea at any given time. Whereas recreational divers were required to use conventional snorkelling equipment to access their catch, commercial divers are permitted to use compressed air piped to them from a vessel on the surface, so as to be able to
20 spend longer periods of time under water. However, the use of scuba equipment by any divers to fish for abalone is absolutely proscribed.

21. The MCM evidence describes how over time the legal
25 abalone trade burgeoned. The prime sites for poaching were

in the vicinity of Cape Hangklip, which is the eastern promontory to False Bay, eastwards along the coast from Hangklip to Betty's Bay and then Hawston, which lies between Betty's Bay and Hermanus and from Gansbaai, which lies across Walker Bay from Hermanus, along the coast through Pearly Beach towards Cape Agulhas. Indeed, Hawston and Gansbaai have become household names associated with abalone smuggling. A casual stroller along the coastline would know, when coming across a large pile of empty abalone shells on the rocks in the areas referred to above, that abalone poachers had most likely been active in the area.

22. The MCM evidence demonstrated photographically how individual abalone divers are customarily accompanied by large groups of local residents, some of them armed with semi-automatic firearms, as they make their way to the sea. The apparent approach of "safety in numbers" means that the poachers are invariably able to outsmart and outnumber the MCM officials, of whom there are regrettably very few. High powered semi-inflatable boats are utilised by the poachers to access more remote spots, and modern day electronic location equipment is the order of the day. In the recent News24 report of 9 August 2017, to which I referred earlier, it is said that a group of more than 120 people set upon and raided a mariculture facility near Danger Point where abalone was

being farmed.

23. Once retrieved from the sea, the abalone is brought ashore and shucked on the rocks. This involves the removal of
5 the abalone from the shell, by inserting a sharp, decent sized knife between the foot and the shell and severing the connecting muscle. The shucked abalone is then placed in large transparent plastic bags, which are hidden at prearranged points along the coastline where they are later
10 picked up by those responsible for the transportation of the product. From there the abalone's long journey towards the Orient commences.

24. The plastic bags are loaded into vehicles for
15 transportation through to their next point of handling. These vehicles are said to often travel in an informal convoy, with outriders on the look-out for law enforcement officers and others bringing up the rear. In this process, cell phones and radio equipment, as well as firearms and fast cars, are
20 indispensible tools of the trade. So, for example, the State witness, David Walter le Roux, himself an admitted link in this train of unlawful procurement, described to the Court how he travelled from Cape Town to Somerset West to collect shipments of abalone from a temporary storage facility in the
25 garage of a private home belonging to one, Michael Winter.

Presumably that abalone had been delivered through the transportation route just discussed. Le Roux described how he then drove his bakkie through to the parking lot of a shopping centre in Bellville, where it was parked at a prearranged spot, 5 leaving the ignition keys under the floor mat or the sun visor.

25. Le Roux told the Court how, after spending an hour or so in a nearby coffee shop, he would return to his bakkie, which had in the interim been driven off, relieved of its cargo and 10 returned to the parking area with the keys hidden as before. Le Roux was at pains to impress upon the Court the need for secrecy and security during the entire operation and stressed that he was not to know who was responsible for the pick up and return of his vehicle.

15

26. The next step in the journey was described in detail by Dawid Jacobus Botha aka Jaco, another accomplice witness, who fell upon hard times up country and travelled down to Cape Town, after a promise of work was made by a relative in 20 Bellville. He was given a fairly lucrative job by a family member, as a driver-cum-general assistant in an informal, illegal abalone processing facility, run out of a double garage at a house effectively rented by accused 4 in Kendal Road in the suburb of Durbanville. Botha explained how he would go 25 out and collect a load of abalone stashed in plastic bags on

the back of a parked bakkie near the public rose garden in Durbanville. The bags were dropped off at the Kendal Road property and the bakkie returned to its original spot.

5 27. Botha described how the abalone was thereafter processed in the garage. Firstly, it was scrubbed to remove the slime, colloquially referred to as "*melk*", which covered the exterior and then hosed down. Thereafter, the abalone was put in plastic bags, which were packed into galvanised metal
10 trays and placed in large chest type deep freezers, where it was frozen until solid. The frozen block of abalone was then tipped out of the tray and slotted into a cardboard box - A standard type cardboard ordinarily used for the export of 10kg packs of pilchards - the trays having been custom made so as
15 to allow the frozen contents to fit snugly into the 10kg boxes. When a sufficient number of boxes of frozen abalone had been packed, the cargo was loaded on to a one ton Nissan Hardbody bakkie and transported through to a cold store facility, initially in Maitland and later in Brackenfell Industria,
20 where it was temporarily housed.

28. From Maitland, and later Brackenfell Industria, said Botha the boxes were taken through to a large commercial cold store facility in Cape Town Harbour, where they were delivered
25 to a company known as V&A Cold Storage. For the sake of

convenience, I shall refer hereafter simply to this facility as V&A. On arrival at V&A, the boxes of abalone, bearing a stamp marked "BAIT", were palletised, i.e. they were loaded on to a wooden pallet and partially concealed by 10kg boxes of
5 genuine pilchards, before being enclosed with plastic wrap. For transport from the temporary holding facility at Maitland to V&A, use was made of a larger vehicle, described as a 1.3 ton Kia, which Botha collected from commercial premises in the light industrial area north of Cape Town known as Montague
10 Gardens.

29. Certain loads arrived at the V&A palletised, while those that were not, were palletised on the loading bay outside the cold store, given that the cold store refused to accept product
15 that was not palletised. After the temperature had been checked by V&A's quality control officer, using a probe, the pallets were then booked into the V&A facility, often with the assistance of accused 8, Desmond Pienaar, with each pallet being individually tagged by staff from the cold storage facility,
20 using a computer generated bar-coded adhesive label. Thereafter the pallets were stored in one of the large freezer rooms operated by V&A. The pallets could be readily located by the staff of V&A at any stage after storage, by virtue of a computerised system, which recorded the details on the bar-
25 coded label and which reflected, through a numbering system,

exactly where in the cold store the product had been stored. So at any given time, the person for whom the product had been stored could arrive at V&A and ask for a pallet marked, say XYZ 123 to be retried from the store and made available 5 for onward transmission to its destination, for example, in a refrigerated ocean container, on a container vessel.

30. Before the frozen abalone could be so exported by sea, it had to be inspected by officials from a government agency 10 known as the Perishable Products Export Control Board ("PPECB"). These officials were required to ensure the integrity of the container and the product from a freezing point of view and ensure its suitability for export generally. It was said that any product that was not adequately frozen below 15 minus 12C could not be loaded into the container for export. In addition, documentation had to be completed for transfer of the product from the cold store to the quayside and the eventual loading thereof on board the relevant container vessel bound for the East.

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31. To that end, a pre-cooled refrigerated container was taken by truck to V&A, where the frozen pallets were retrieved from the cold store and loaded into the container. To ensure that the abalone was not located near the doors of the 25 container, where it might have been seen by the PPECB

inspector, the pallets containing mixed boxes of abalone and pilchards, were loaded first into the container, and then only so as to partially fill the container. The remainder of the container was then filled up with pallets containing boxes of
5 various fish products, but generally 10kg boxes of pilchards. These boxes of pilchards were used so as to "plug up the gaps", so that if the doors of the container were opened by the PPECB inspector, or any law enforcement official, they would encounter only boxes of frozen pilchards.

10

32. Once the container had been filled, it was transported to the container basin in the Cape Town docks by road, from where it was kept in what is known as a stack, until the necessary documentation had been obtained, after which it
15 was loaded on board the designated vessel for transhipment, primarily to Hong Kong. The documentation consisted of bills of entry/export and bills of lading, which were drawn up by a local freight agent and which always reflected the cargo as frozen pilchards. Upon delivery of the container at its final
20 destination, payment was supposed to have been made in South Africa by the consignee for a cargo of pilchards, which payment would have been significantly less than the value of the actual cargo of abalone. We do not know as a fact whether such payments were ever made.

25

33. The court was told, and shown photographs, of the abundance of abalone on sale in shops in Hong Kong and it was said that the South African product was amongst the most sought after in Hong Kong, selling for as much as US$3000 per kilo in 2006. From that which I have described, it can be concluded that the illegal export of abalone from South Africa to foreign shores, presents major business opportunities for local operators generating vast amounts of income which do not attract VAT or income tax.

34. Against that general backdrop, it can be seen that the process of procuring abalone illegally, processing it at an illegal FPE, packing and storing it in a safe cold store facility, loading it on board a vessel for transhipment overseas, and the diversion of the proceeds of sale thereof from the tentacles of the revenue authorities, *prima facie* fits what the State says constituted "a pattern of racketeering activity" by an "enterprise", as defined in POCA and later discussed in this judgment. But before considering the POCA charges, I intend to deal with the various police raids in which some of the accused were arrested and which exposed the abalone supply chains, which the State claims constituted the unlawful enterprise as contemplated under POCA.

THE FOXHOLE FARM RAID - 8 FEBRUARY 2006

35. Acting on a tip-off, a contingent of police offices, under the command of Captain Lodewyk Brink, visited an agricultural holding known as Foxhole Farm, near Koelenhof in the district
5 of Stellenbosch, on the afternoon of 8 February 2006. The police officers were all then attached to the police's erstwhile Organised Crime Unit, stationed at Kasselsvlei Road in Bellville South. It appears that after restructuring, this unit later became known as the Directorate of Priority Crimes and
10 is now commonly referred to as The Hawks. Brink told the Court that at the time he had extensive experience in the investigation of abalone related cases, and he had been asked by his colleague, Warrant Officer André Potgieter, the investigating officer in this matter, to assist with the raid. To
15 avoid confusion, I shall hereafter refer to Warrant Officer Potgieter simply as Potgieter and to his senior colleague, Lieutenant Colonel Lisa Potgieter, as Lieutenant Colonel Potgieter.

20 36. At Foxhole Farm, said Potgieter, the police focused their attention on a free-standing cottage, some 150 metres away from the main farmhouse. On his arrival, he found the cottage unoccupied and noticed that the curtains were drawn. He peered through one of the windows and saw that there were a
25 number of large chest type deep freezers inside. Prior

experience would have informed him that this was the hallmark of an abalone storage facility. From information obtained by Potgieter, Brink was sent to intercept the lessee of the building and arrest him, which he later did. Suspecting that there may
5 be people coming to the house, the police stood off and took up a position on a hill behind the cottage. At that vantage point, the cottage itself was obscured from their vision.

37. Brink, who had returned to the stake-out, said that
10 towards sunset, he saw a silver Toyota Condor vehicle, (a smaller type of minibus) with registration number MLN 644 GP, being driven away from the cottage. He checked its registration number on the police system and found it belonged to somebody called Wei Liu Liu. This accorded with
15 information already at his disposal, that Liu was the lessee of the cottage. The vehicle was stopped by the police, who found two men in it. Brink said the driver was accused 3, Gavin Wildschutt, but that he was uncertain of the name of his passenger. Upon inquiry as to his intentions, number 3 told
20 Brink that he was at the farm to meet a Chinese friend to collect study notes from him, but he did not elaborate on the extent of his Oriental studies. Brink noticed that the rear seat of the Condor had been removed. This, he said, was often the configuration of such vehicles, so as to enhance their packing
25 space for the transportation of goods such as abalone.

38. The police requested the two men to accompany them to the cottage which was then searched. In so doing, the police surprised two other men, who were busy packing cleaned 5 abalone into silver galvanised trays for storage in the freezers. After a thorough search of the premises, the police seized 5050 units of abalone and arrested accused 3, together with Messrs Jerry Witbooi, Jerome Browne and Ashley Browne, and a case was registered at the Stellenbosch Police Station. 10 Brink observed that shortly after their arrival at the Stellenbosch Police Station, an attorney by name of Wynand du Plessis arrived to represent the persons who had been arrested at Foxhole Farm. Mr Du Plessis was well known to Brink, having formerly been a police officer in the selfsame 15 unit.

39. When those arrested at Stellenbosch appeared before the Regional Court sitting in Hermanus on 28 April 2006, accused 3, together with his co-accused in that matter, 20 negotiated a plea bargain with the State in terms of Section 105A of the CPA. The State produced a certified copy of the charge sheet in that matter, which records that, *inter alia*, accused 3, in that matter cited as accused 5, pleaded guilty to two charges, namely operating a fish processing establishment 25 in contravention of Section 18(1) of the MLRA and possession

of abalone for commercial purposes in contravention of Regulation 39(1)(a), both counts similar to those with which the accused has been charged herein. The charges were taken together for purposes of sentence and number 3 was
5 sentenced to a fine of R40 000,00 or in default of payment, 18 months imprisonment.

40. A series of contemporaneous photographs taken during the Foxhole Farm raid, revealed in graphic detail to the Court
10 what was taking place inside the cottage. One sees plastic bags of abalone, shucked but not yet cleaned, a number of metal pans for freezing, chest freezers and cardboard boxes marked "pilchards" for packaging and distribution. There can be little doubt that this was a fish processing facility, handling
15 the processing of large quantities of abalone, hence accused 3's guilty plea in the Regional Court.

THE BELLVILLE RAIDS - 19 JUNE 2006

20 41. At about midday on 19 June 2006, members of the Organised Crime Unit, once again acting on a tip-off, raided two premises in the greater Bellville area. One was a commercial yard at 49 Hercules Street, Bellville South and the other a private residence at 15 Faraday Street, Belhar.
25 Fortuitously, the yard in Hercules Street is just a couple of

streets away from the Bellville South Police Station and the erstwhile offices of the Organised Crime Unit. Hercules Street runs parallel with Kasselsvlei Road two streets to the north of it. The yard was leased by Adam Wildschutt, the uncle of 5 accused 3 and was ostensibly used for the storage of firewood and a variety of decrepit transport vehicles.

42. Potgieter testified that he had received information regarding a white Toyota bakkie which was expected to deliver 10 abalone to the premises in Hercules Street. He kept those premises under surveillance, assisted by his colleagues Brink, Xolile Machaba aka Shakes and Lieutenant Colonel Potgieter, who is no relation. Potgieter explained that he saw the white Toyota entering the yard, where it remained for some time. 15 When it emerged from the yard, it was apparent that the vehicle was heavily loaded. Lieutenant Colonel (then Captain) Potgieter and Brink, the latter in his own vehicle, followed the white Toyota bakkie with registration number CY 191083, to a house in Belhar, a residential area, a couple of kilometres to 20 the south of Hercules Street. Machaba and Potgieter remained behind with another colleague, and continued surveillance of the yard.

43. Brink explained to the Court how the white Toyota 25 reversed into the driveway of the house at number 15 Faraday

Street and stopped with its tailgate facing a tip-up garage door which was open. The police swooped on the premises and discovered a large quantity of fresh, shucked abalone in plastic bags, stashed under a piece of old carpeting on the back of the white Toyota, which was fitted with a canopy. There was also a light blue Toyota bakkie parked in the driveway between the white Toyota and the garage door. This vehicle also had a canopy on the rear and was found to contain boxes of frozen abalone marked with the word "Bait".

44. In the garage the police found a number of chest freezers, steel trays, (some empty and others containing frozen abalone), and cardboard boxes into which the frozen abalone slabs could fit. On the outside these boxes also carried the word "Bait", which had evidently been printed there with a rubber stamp. Potgieter said that the abalone processing operation was in full production when the police arrived at Faraday Street. Connected to the garage, via an interleading door, was a bedroom in which items such as plastic crates and piles of cardboard, yet to be folded into boxes, were found. All of this was photographically recorded and upon perusal of Exhibit C, there can be little doubt that a fish processing facility, as defined, was being operated at the Faraday Street premises.

45. A number of people were arrested at the house, including Lydia Wildschutt, the wife of Adam Wildschutt, Jerry Witbooi, Jerome Browne and Ashley Browne. Potgieter, having arrived from Hercules Street, then took over the scene. Adam
5 Wildschutt, himself, was arrested at the Hercules Street yard a little later. Both Adam and Lydia Wildschutt immediately offered their assistance to the police and through the intercession of their legal representative, a certain Mr José, both subsequently furnished the police with affidavits,
10 implicating accused 3, their nephew, as the person in charge of the FPE operation being conducted at their house.

46. Potgieter testified that he returned to Hercules Street, where he and Machaba entered the premises for the purposes
15 of conducting a search. In one corner of the yard, the police came across a wooden lean-to shed, in which an assortment of freezers was found, some containing frozen abalone still in bags. There was a large quantity of fresh, shucked abalone in clear plastic bags, as also an industrial size scale and several
20 large 19kg gas bottles, of the sort associated with restaurants/commercial premises. Also under the lean-to were several 50kg bags of coarse salt. Potgieter explained that as an experienced investigator in abalone matters, he was aware that salt was often used in the processing of dried abalone.

25

47. Potgieter said that 10788 units of abalone were found at Hercules Street and a further 1114 units at Faraday Street. Included in this number were 41 units of dried abalone. There was no obvious drying facility at Faraday Street and the
5 relevance of this discovery will emerge later. Accused 6, Rodney Onkruid, was arrested at the yard in Hercules Street, along with a number of others. The suspects arrested at both scenes, were amongst those who tendered guilty pleas during the initial phase of the prosecution before Erasmus, J.

10

48. In the middle of the yard, opposite the entrance from Hercules Street, the police found a large blue shipping container mounted on the back of a rusty old Mercedes Benz truck, which can be seen on a number of the photographs
15 relating to that scene. Emblazoned on either side of the container were the words "KIEN HUNG", evidently the name of some Oriental shipping business. When the doors of the container were opened, the police discovered several items of interest inside. These included blue metal drums of sodium
20 hydrosulphate which Lieutenant Colonel Potgieter later told the Court was a chemical used in the drying of abalone. There wa also a variety of unmade cardboard boxes, several plastic dishes, gas bottles and shelving made from steel mesh. Potgieter told the Court that this was the sort of
25 apparatus usually associated with the drying of abalone.

All of the items of relevance found at the yard and in the container, were photographed and are included in Exhibit C.

5 49. The number plate on the rear of the Mercedes Benz truck, read NDB 811 GP. Potgieter searched the cab of the truck and found, *inter alia*, a cross-border transport permit in the name of a certain Bertie Basson. He followed up the number plate and traced the vehicle to the ownership of
10 Mr M Chuang. The accused later admitted this ownership, as well as the fact that Chuang left South Africa on 21 June 2006. Potgieter said he was able to trace Basson in Johannesburg at the time and established from information conveyed to him by Basson, and later Lieutenant Colonel Potgieter, that the truck
15 had crossed the border from South Africa to Namibia and back on 12 and 14 April 2006 respectively.

THE RAWSONVILLE RAID - 19 AND 20 JUNE 2006

20 50. During the course of the Bellville raids, the police received information about a suspected abalone processing facility on a farm near Rawsonville in the Boland. Rawsonville is a farming town, which nestles amongst vineyards not far from Worcester and is about an hour's drive along the N1 from
25 Cape Town. Lieutenant Colonel Potgieter was tasked with co-

ordinating a raid on those premises. She travelled through to Rawsonville the same evening and arranged for a search warrant for the premises in question, (a farm serendipitously called "Volmoed"), with the local police chief. She and her
5 colleagues then proceeded to a cottage on the farm, which was a short distance from the main house, in which Ms Hester Mouton, an elderly widow in her 70's, then resided.

51. It was immediately apparent to the police that the cottage
10 was being used for the processing of fresh abalone, in this case by drying it. The police found a large number of steel drying racks on the premises and seized 24672 units of dried abalone. Also on the premises they found basic industrial cooking equipment, suggesting that the abalone had been
15 boiled in large containers before being put on the steel racks to dry. Lieutenant Colonel Potgieter told the Court that they found no one in the house while conducting their search, but as they were in the process of concluding their search, the police heard a noise in the roof and were suddenly confronted
20 by two men, who fell through the ceiling and landed on the floor. It later transpired that they were illegal immigrants of Mozambican extraction, who were later repatriated to their country of origin. Although the police seized a large quantity of abalone at these premises, none of the accused before
25 Court was arrested at Volmoed.

52. Potgieter also participated in the Rawsonville raid, and during his search of the premises, he came upon a large industrial type scale, as well as a smaller domestic scale. He 5 found the packaging pertaining to the latter and was also handed a Clicks Stores till slip by a colleague participating in the raid, Captain Carstens, which reflected that the domestic scale had been purchased from a branch of that store in Dainfern, Gauteng. The till slip contained a reference to a 10 Clicks loyalty card and through some smart detective work, Potgieter was able to link that number to Wei Liu Liu, the owner of the Toyota Condor, which was seized during the Stellenbosch raid.

15 53. In a subsequent interview with Ms Mouton, Potgieter established that a written agreement of lease had been drawn up in respect of the cottage on Volmoed by attorneys in the Strand, in which the lessee was recorded as one Steven McDonald. The lessee recorded his ID number as 20 60010557006082 and his address as c/o Kellogg's Consumer Affairs at Springs in Gauteng. Further investigation revealed that payment of the monthly rental in respect of the cottage for the months of March to May 2006 had been made by way of a cash deposit into Ms Mouton's bank account, with the 25 signature of the depositing party being recorded as

"M Wildschutt". According to Potgieter, accused 3's wife is Merilyn Wildschutt, a fact which later appeared to be common cause. The deposit made on 29 March 2006 recorded Kellogg's as the depositors name, while on the other deposit 5 slips, the name is left blank.

THE V&A COLD STORAGE RAID - 19 SEPTEMBER 2006

54. During the early hours of Tuesday, 19 September 2006, 10 the police, again acting on information and having obtained a search warrant, conducted a raid at the premises of the V&A Cold Storage facility in Cape Town Harbour. As already indicated, this was a large commercial cold storage facility, at which any number of a variety of products were stored for 15 private clients prior to transhipment elsewhere. Of interest to the police were a number of pallets containing pilchards that had been stored at V&A by two companies known to them as Syroun Exports (Pty) Limited and Rapitrade 109 (Pty) Limited. These will henceforth be referred to as "Syroun" and 20 "Rapitrade".

55. Certain of the pallets in question were retrieved from the cold rooms in which they had been stored and inspected by the police in the presence of certain of the staff members of V&A, 25 including accused 9, Gregory Abrahams, the erstwhile cold

store manager. These pallets were found to contain boxes of pilchards and abalone, packed in a very specific manner, with the abalone at the bottom and the pilchards on top. The boxes were similar in colour and size and were all stamped with the
5 word "Bait". It was established that the pilchards had been stored by Rapitrade and Syroun. In addition there was also a pallet stored by Aqualina. It later emerged in the evidence that "Bait" was synonymous with pilchards and that Aqualina was a company controlled by a certain Salvin Africa
10 personally. Arrangements were made for the seized items to be transported to the cold storage facility, operated by MCM in Paarden Eiland, where they were fully examined, counted and inventorised. The V&A raid on 19 September 2006 uncovered 82 749 units of abalone. Of this number, 64 435 units were
15 frozen and 8 014 units were dried abalone.

56. As a consequence of the V&A raid, Salvin Africa was arrested at his home in the Cape Town suburb of Heathfield on the same day. He was said to be the person in charge of
20 Syroun and Rapitrade for whom the product at V&A had been stored. During a search and seizure operation conducted at the time of Africa's arrest, the police took possession of a large quantity of documents and a number of cell phone handsets which had been found in his house.

25

57. Africa and his wife, Anthea, co-operated with the police and the two of them went into police protection almost immediately after his release on bail. As a consequence thereof, the police were able to obtain firsthand knowledge of
5 the way in which the exporting arm of the alleged enterprise operated and, in particular, they were able to review a welter of documentation relating to the export activities of Syroun and Rapitrade, companies in respect whereof Africa was registered as the sole shareholder and director.

10

58. The police investigation revealed that at the time there were at least four containers on the high seas destined for Hong Kong. The authorities were able to head off the containers as the vessel transporting them passed through the
15 port of Singapore and the containers were eventually returned to South Africa, where they arrived in October 2006 and were inspected by the police and officials from MCM.

59. This inspection revealed that the containers contained a
20 large number of pallets containing just pilchards and a smaller number of pallets containing a combination of pilchards and abalone, the latter being packed in similar fashion to those which the police had found at V&A earlier. They also noted that the container was packed in the manner already
25 described, with the pallets containing abalone, having been

loaded first, and the pallets with only pilchards bringing up the rear, as it were. The prohibited contents of these containers were also stored at the MCM facility and when counted, it was found that there were 145 632 units of abalone, weighing some
5 38 712 kilograms, that is, in excess of 38 tons.

60. Whilst on bail, Africa agreed to co-operate with the police on condition that he was granted immunity from prosecution. His disclosure to the police no doubt enabled them to further
10 their investigation in regard to the activities of this particular smuggling certificate, and it would seem that there were further arrests as a consequence of this co-operation. At the end of the day, the State presented the evidence of Africa, who was duly warned in terms of Section 204 of the CPA, as
15 its primary accomplice witness.

THE DURBANVILLE RAID - 6 OCTOBER 2006

61. On 6 October 2006, the police swooped on residential
20 premises located at 33 Kendal Road, Durbanville which, by outward appearance, was an ordinary suburban house in a quiet neighbourhood in the Northern suburbs of the Cape Peninsula. In a double garage adjoining the house, they came upon an abalone processing facility in full operation. Units
25 of abalone were being cleaned, packed in galvanised metal

trays and then slid into 10kg cartons, similar to those found at Foxhole Farm, Faraday Street and V&A Cold Storage. In total 1 706 units of abalone were seized on that day.

5 62. A number of people were arrested at Kendal Road, a property which it subsequently transpired, had been leased in the name of accused 4's daughter, Michelle, and his uncle, Daniel du Toit aka Oom Des. Some of those who were arrested at Kendal Road, gave evidence on behalf of the State, 10 having been warned in terms of Section 204 of the CPA. Principal among these, was Jaco Botha, who explained the workings of the operation to the Court in detail. The other witnesses were Percy Clack and Harold Bauchop, both of whom worked at the facility and were similarly warned in terms 15 of Section 204.

THE BRACKENFELL INDUSTRIA RAID - 6 OCTOBER 2006

63. In the course of the Durbanville raid, the police received 20 information which led them to the premises of A&T Air Conditioning in Brackenfell Industria near Kraaifontein. There an ice-making business was being conducted by one Andrew Theunissen aka AJ. The business incorporated a number of large portable freezer rooms which were rented out to clients 25 for self-storage of their product. According to Theunissen, one

such storage room was used by Jaco Botha and a person he called Koos, (and who Theunissen later pointed out in court as accused 5, Johannes Emil Liebenberg), who stored, what Theunissen was led to believe, to be, fish contained in large
5 Styrofoam boxes. Upon arrival at these premises, the police searched the storage facilities and came across 1 969 units of abalone stored in Styrofoam boxes. They are depicted on certain of the photographs contained in Exhibit J.

10 64. Subsequent to the Durbanville and Brackenfell raids, the police obtained warrants for the arrest of, *inter alia*, accused 1, 2, 3, 4, 5 and 7, as also Richard Chao and Jerry Ku. Accused 1, Phillip Miller, was arrested on 14 November 2006 at the smallholding on which he then resided near Paarl.
15 Accused 2, Willem van Rensburg, handed himself over to the police at Bellville South on 14 November 2006 by prior arrangement with his attorney, as did accused 4, Tony du Toit and accused 5, Johannes Liebenberg aka Koos, on 14 November 2006. Accused 8 was arrested on 22 September
20 2006 at Bellville South Police Station and number 9 on 14 November 2006. Both of them were employed in management positions at V&A at the time of the September raid.

25 65. During the course of their ongoing investigations in 2006,

the police had noticed a pattern of criminal conduct in relation to the export of abalone and sought permission from their superiors for the registration of a special project for investigation. This was subsequently approved after an
5 internal administrative process and dubbed "*Operation Mask*" in recognition of the manner in which the exports were concealed in containers through the use of vast quantities of pilchards.

10 **THE POCA CHARGES AND THE UNLAWFUL ENTERPRISE**

66. The provisions of Section 2(1)(e) of POCA, the remaining offence under that Act with which all of the accused are charged, are to the following effect:

15 "2. **Offences:** (1) Any person who-

....(e) whilst managing or employed by or associated with any **enterprise**, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs, through
20 **a pattern of racketeering activity**...

within the Republic or elsewhere, shall be guilty of an offence."

25 67. In Section 1 of POCA, one find the following definitions

which are relevant to the offences created in Section 2:

> "**enterprise**" includes any individual, partnership, corporation, association or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity; and
>
> "**pattern of racketeering activity**" means the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1, and it includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act, and the last offence occurred within 10 years (excluding any period of imprisonment) after the admission of such prior offence referred to in Schedule 1."

68. As part of its opening address in terms of Section 150(1) of the CPA, the State placed before the Court an organogram depicting what it alleged to be the structure of the unlawful enterprise which fell foul of the provisions of POCA. The structure reflects Richard Chao, Salvin Africa and accused 1, Phillip Miller, as a triumvirate heading up the enterprise. Beneath that it showed two distinct lines of supply of product to the enterprise. On the one hand there is the Rapitrade line, which is said to have been managed by accused 2, 4 and 5 in contravention of Section 2(1)(f) of POCA, and on the other

hand there is the Syroun line, which was said to have been similarly managed by accused 3 and Ku. Accused 6 is said to have been an employee/associate in the Syroun line, while Jaco Botha and others were employees/associates in the
5 Rapitrade line. The function of accused 8 and 9 as employees of V&A at the port of exit of the shipments of abalone, is reflected as auxiliary to both lines.

69. In the ruling on the Section 174 application we found that
10 Richard Chao was obviously the manager of the enterprise and that none of accused 1 to 5 could have been found to have managed the enterprise in the sense in which that verb has been interpreted by our courts. (See S v De Vries 2009 (1) SACR 613 (C) at [388]). We found also that it did not appear
15 to be in issue at that stage of the proceedings, that an enterprise as defined in Section 1 of POCA had been conducted during the period 2005 to 2006.

70. This fact was later confirmed when accused 4 took the
20 witness stand and described his working relationship with Chao and Africa. The import of his evidence was that Chao was in effective control of the enterprise, whose principal business it was to export abalone overseas. In light of accused 4's defence that he believed his activities at all times
25 to have been conducted lawfully, the existence of the

enterprise as such was not seriously challenged in final argument by Advocate Uijs. Nor did we understand any of the other counsel to take issue therewith. I shall return to this issue later in the judgment.

5

71. Having regard to the totality of the evidence adduced by the State, as also the testimony of accused 4 and his frank concessions under cross-examination, we are satisfied that the State has proved beyond reasonable doubt the existence of
10 the enterprise contended for. What really is in issue in this matter, is whether the State has established the involvement of accused 1, 2, 3, 5 and 6 therein, and in the case of accused 4, whether his involvement was lawful as he claimed it to be. As regards accused 8 and 9, the issue is whether they directly or
15 indirectly participated in the activities of the enterprise through the control of the product when it was stored at V&A. It further falls to be determined whether the State has proved that accused 8 and 9 knew that the enterprise's activities were unlawful (i.e. that it was storing abalone and not pilchards)
20 and whether they accordingly, knowingly participated in such activities.

72. I shall revert to a discussion of the import of the POCA charges later in this judgment, but firstly some foundational
25 principles in relation to the evaluation of the evidence need to

be discussed.

THE GENERAL PRINCIPLES APPLICABLE TO CONSIDERATION OF THE EVIDENCE

5

73. It is trite that the State bears the onus to establish the guilt of each of the accused beyond reasonable doubt. This does not mean beyond **any** doubt, but on the other hand if any of the accused puts up a defence which is found to be
10 reasonably possibly true in the circumstances, he is entitled to be acquitted. (I shall hereinafter refer to all pronouns in the masculine, given that the accused are all male.) The approach was usefully summarised in S v van der Meyden 1999(1) SACR 447 (W) at 449j - 450b:

15 "The proper test is that the accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate
20 to the application of that test in any particular case, will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached, whether it be to convict or to acquit, must account for all of the evidence. Some
25 of the evidence might found to be false, some of it might

found to be unreliable and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored."

5 74. The State has adduced direct evidence against some of the accused, which it says conclusively establishes guilt and it has also adduced facts from which it has asked the Court to infer an accused's guilt. In applying inferential reasoning the Court is required to have regard to the cumulative effect of all
10 the evidence. It is not permissible to take the evidence piece by piece, evaluate it in isolation and accept or reject it. In R v De Villiers 1944 AD 493 at 508, the Appellate Division suggested the following approach:

"The court must not take each circumstance separately
15 and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so, that the accused is entitled to the benefit of any reasonable doubt
20 which it may have."

75. One must be careful not to confuse inference with assumption. In S v Naik 1969(2) SA 231 (N) at 234, the court followed an earlier *dictum* in the House of Lords in England
25 (Caswell v Duffryn Associated Collierires Ltd [1939] 3 ALL ER

722 at 733) which cautioned as follows:

> "Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish... But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left, is mere speculation or conjecture."

76. As mentioned earlier in this judgment, the State has relied heavily on the evidence of accomplice witnesses, who have been cautioned in terms of Section 204 of the CPA. The mere fact that those witnesses are accomplices, irrespective of their veracity and demeanour in the witness box, requires the Court to approach the evidence with caution. As persons who face prosecution unless they "answer...frankly and honestly all questions put to ...[them]", they may be inclined to falsely implicate others in the plot, merely to diminish their own culpability. It is, therefore, important to look where possible for corroboration of the evidence of such witnesses. See S v Hlapezula & Others 1965(4) SA 439 (A) at 440D-H; S v Sauls & Others 1981(3) SA 172 (A) at 180E-G.

77. In his final argument, Mr Uijs, SC, urged the Court to approach the evidence of Africa in particular with the utmost of

caution, since, as counsel put it, Africa was required to "sing for his supper", i.e. his immunity from prosecution is contingent upon him implicating those before the Court in the offences with which they are charged. The correct approach in 5 such circumstances was set out in S v Masuku & Another 1969 (2) SA 375 (N) at 376H-377D:

(1) Caution in dealing with the evidence of an accomplice is imperative, even where the requirements of Section 257 [of the former CPA] 10 have been satisfied.

(2) An accomplice is a witness with a possible motive to tell lies about innocent accused, for example, to shield some other person or to establish immunity for himself.

15 (3) Corroboration not implicating the accused, but merely in regard to the details of the crime, not implicating the accused, is not conclusive of the truthfulness of the accomplice. The very fact of his being an accomplice enables him to furnish the 20 court with details of the crime, which is apt to give the court the impression that he is, in all respects, a satisfactory witness or has been described "to convince the unwary that his lies are the truth".

(4) Accordingly, to satisfy the cautionary rule if 25 corroboration is sought, it must be corroboration

directly implicating the accused in the commission of the offence.

(5) Such corroboration may, however, be found in the evidence of another accomplice, provided that the
5 latter is a reliable witness.

(6) Where there is no such corroboration, there must be some other assurance that the evidence of the accomplice is reliable.

(7) That assurance may be found where the accused is
10 a lying witness or where does he not give evidence.

(8) The risk of false incrimination will also, I think, be reduced in a proper case where the accomplice is a friend of the accused.

(9) In the absence of any of the afore-mentioned
15 features, it is competent for the court to convict on the evidence of an accomplice only where the court understands the peculiar danger inherent in an accomplice's evidence and appreciates that acceptance of the accomplice and rejection of the
20 accused, is only permissible where the merits of the accomplice as a witness, and the merits of the accused as a witness, are beyond question.

(10) Where the corroboration of an accomplice is offered by the evidence of another accomplice, the latter
25 remains an accomplice and the court is not relieved

of its duty to examine his evidence also with caution. He, like the other accomplice, still has a possible motive to tell lies. He, like the other accomplice, because he is an accomplice, is in a
5 position to furnish the court with details of the crime, which is apt to give the court, if unwary, the impression that he is a satisfactory witness in all respects."

This dictum was confirmed by the Full Bench in that division in
10 S v Van Vreden 1969(2) SA 524 (N) at 531H-532F and accords with the approach in, *inter alia*, Hlapezula.

78. Finally, in regard to the assessment of the evidence, the Supreme Court of Appeal in S v Hadebe & Others 1998(1)
15 SACR 422 (SCA) at 426e-I, cited with approval the decision of the Lesotho Appeal Court in Moshephi & Others v R (1980-1984) LAC 57 at 59F-H, in which an overall evaluation of the sum total of the evidence was required:

"The question for determination is whether, in the light of
20 the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts, is obviously a useful aid to a proper understanding and evaluation of it, but in doing so, one
25 must guard against a tendency to focus too intently upon

the separate and individual parts of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial, may arise when that aspect is viewed in isolation. Those doubts may be set at rest
5 when it is evaluated again, together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every
10 component in a body of evidence, but once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees."

15 **THE FAILURE BY AN ACCUSED TO TESTIFY AND THE FAILURE TO CROSS-EXAMINE**

79. Finally, it is necessary to refer to two important principles relating to the manner in which the accused
20 conducted their defences, which may have potentially negative consequences for them. The first is the failure to testify.

80. An accused person has a constitutional right under Section 35(3)(h) to remain silent in criminal proceedings. This
25 means that there is neither a duty to testify nor may an

accused be compelled to take the witness stand. However, that right, when exercised, is not free of consequences. In S v Boesak 2001(1) SA 912 (CC) at paragraph 24, the Constitutional Court cautioned as follows:

5 "The fact that an accused person is under no obligation to testify, does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of 10 such evidence, a court may well be entitled to conclude that the evidence is sufficient, in the absent of an explanation, to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the 15 remarks of Madala, J, writing for the court in Osman & Another v Attorney-General Transvaal, when he said the following:

'Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish 20 a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that absent any rebuttal, 25 the prosecution's case may be sufficient to prove the

elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted it would destroy the fundamental nature of our
5 adversarial system of criminal justice.'"

81. A second issue which must be considered in the evaluation of the evidence, is the failure of an accused to challenge by way of cross-examination evidence presented by
10 the State or one of the other accused. In President of the Republic of South Africa & Others v South African Rugby Football Union & Others 2000(1) SA 1 (CC) (a case usually referred to as "SARFU"), the Constitutional Court stressed the importance of this duty and the consequences of the failure to
15 observe it:

"[61] The institution of cross-examination, not only constitutes a right, it also imposes certain obligations. As a general rule it is essential when it is intended to suggest that a witness is not
20 speaking the truth on a particular point, to direct the witness' attention to the fact by questions put in cross-examination, showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving
25 any explanation open to the witness and of

defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness' testimony is accepted as correct. This rule was enunciated by the House of Lords in Brown v Dunne and has been adopted and consistently followed by our courts...

[63] The precise nature of the imputation should be made clear to the witness, so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should also be made clear not only that the evidence **is** to be challenged, but also **how** it is to be challenged. This is so, because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witnesses or others, and to explain contradictions on which reliance is to be placed." (Emphasis added).

AN OVERVIEW OF THE EVIDENCE OF SALVIN AFRICA

82. It is in our view appropriate at this juncture to provide a thumbnail sketch of the evidence of the main accomplice witness, Salvin James Africa, given that his testimony

traverses the larger part of the State's case against the accused and importantly, because he purports to implicate each of the accused before Court in the various offences in one way or another. However, before dealing with the
5 evidence in which Africa implicates the accused, it would be useful to consider some background facts and circumstances and his role in the enterprise.

83. Africa is an intelligent person, who comes from the poor
10 working-class neighbourhood of Parkwood on the Cape Flats. To this Court's knowledge, from the many cases that come before it on review from the lower courts, that area is gang infested with a high incidence of violent crime and substance abuse. Africa appears to have risen above the adversity
15 around him and obtained a matric pass from his local high school. After school he commenced work as a till operator with a local supermarket chain, and later he worked as a machinist in a workshop, but had to give up that work when he lost a finger in the workplace. He then took to white-collar
20 work and in about 1996 he took up employment as an operations clerk with a large firm, Commercial Cold Storage, which operated out of Cape Town docks. While employed with Commercial, Africa quickly gained useful experience in handling the myriad documents necessary for the storage and
25 exportation of fresh and frozen products and in 1997, he was

promoted to the position of operations supervisor at Commercial, with a team of about 50 employees reporting to him.

5 84. Africa is of friendly disposition and has an engaging personality. He is, however, not particularly articulate and much of his evidence was littered with jargon and local vernacular. In addition, in the witness box he spoke quickly and softly, tending to swallow his words at time. The result
10 was that even though he sat just a few metres from the Bench, it was not always easy to follow his evidence, and both the Court and counsel regularly had to ask him to speak up or repeat himself. He seems to have a good memory, particularly for numbers, something which the Court remarked on, on
15 occasion.

85. Africa testified that in April 2002, he resigned his employment with Commercial in the face of a looming disciplinary inquiry relating to the disappearance of products
20 from the cold store under his control. As a consequence he fell upon hard times and was financially embarrassed. It is common cause that Africa and accused 1, Phillip Miller, knew each other from the time that Africa was employed at Commercial, while Miller was working for a local fishing
25 company called Hispano, which evidently did business with

Commercial. Africa described Miller as a friendly and benevolent person, who gave him money from time to time. His affinity and respect for Miller was apparent to us when he testified, although we should immediately add that the feelings
5 did not seem to be mutual as far as accused 1 was concerned.

86. Africa, who was living at the time in the suburb of Heathfield, made contact with Miller after he left Commercial and inquired whether he knew of any work that may be
10 available. Thereafter, a meeting took place one Saturday in Lakeside, where Miller was busy with the training of naval cadets. Shortly thereafter, Miller reverted to Africa and told him that he may have found a job for him with someone he knew, which involved the exportation of fish. Africa said that
15 he understood from Miller that the proposal involved completing the paperwork to export the product, and in addition to a monthly retainer of R3 000,00, Africa would be paid a commission of R2 000,00 on each container loaded.

20 87. Miller lived at the time in the suburb of Tokai and Africa appears to have been so desperate to take up the job on offer, that he walked the appreciable distance from his home to Miller's to participate in a job interview. At that initial meeting, Miller introduced Africa to Richard Chao, a South African
25 citizen said to be of Chinese extraction. Chao had a business

which manufactured rustic furniture from old railway sleepers, which operated from premises in the light industrial area of Montague Gardens. But that was not his only venture.

5 88. Chao also exported relatively small quantities of fish to the East, mainly Jacopever and pilchards, which he often sourced from Miller, who ran his own company called Fish Trader Extraordinaire (Pty) Limited or FTE for short. Africa said that Miller told him at Lakeside that Chao was looking to
10 expand his fish business and needed someone to do the paperwork. At the meeting at Tokai, Chao first told Africa that he was looking for a truck driver, but Africa could not be of assistance, as he did not have a licence to drive a truck. He impressed upon Chao that he was competent with paperwork.

15

89. We are able to infer, with a degree of confidence, that the Tokai meeting must have been in about April or May 2002. In the result, Chao appears to have been taken by Africa and agreed there and then to employ him. Subsequent to that
20 meeting, said Africa, Chao gave him R15 000,00 with which to buy a car to get to work and financed the purchase of office equipment, including a computer, a printer and a fax machine. These items were delivered to Chao's premises by accused number 1.

25

90. And so Africa commenced employment with Chao doing what he knew best. He told the Court how he was required to complete the necessary paperwork to export a container of frozen fish products. First there was a GRV (goods received
5 voucher), which was a document issued by the cold store facility upon receipt of the product from an exporter such as Chao or FTE. Then there was a GIV (goods issued voucher), which was issued by the cold store when the goods, which had been stored earlier, were retrieved for onward transmission by
10 refrigerated container. It was also necessary for the exporter to provide an invoice for the product, which was loaded into the container at the cold store, as also a bill of entry export and a bill of lading. The latter two documents were usually completed by the shipping agent responsible for arranging
15 space for the container on a vessel.

91. There were also a number of official documents relating to customs and excise protocols which had to be completed, and a certificate which had to be issued by an inspector from
20 the PPECB. The importance of the latter was that no container could be certified ready for transhipment unless the product had been certified by the inspector to be adequately frozen. To ensure this, the inspector was required to personally inspect the container and its contents before it was closed up
25 and sealed.

92. Initially Africa prepared documentation for the export of a species of local fish called Jacopever through a company controlled by Chao called Tresso Trading 500 (Pty) Limited ("Tresso 500"). This fish had been sourced by Miller, who took a commission on the sale thereof to Tresso 500. After about four loads had been exported through V&A Cold Storage in the Waterfront, Africa said Chao instructed him to oversee the removal of a load fish packed in 20kg boxes, (which Africa thought was Jacopever), through to the Sea Freeze Cold Store in Hout Bay Harbour. He was late for the loading and eventually caught up with the truck carrying the load en-route to Hout Bay.

93. Africa said that during the offloading process, the manager at Sea Freeze expressed concern about the fragility of these boxes. Africa said that this person told him he would speak to Miller about the problem and if things did not improve, Sea Freeze would not receive further deliveries from them. Africa said that he noticed that at Sea Freeze the cardboard boxes were loaded on to four wooden pallets and taken into the cold store, where they were kept until the export container arrived for packing. Africa said that he did the necessary paperwork the following day and told Chao of the concerns of the person at Sea Freeze and asked what the

problem was. Africa testified that at this stage Chao told him that the product was, in fact, abalone and not fish, inquiring from Africa whether he was not already aware of this.

5 94. Africa was an old hand in the trade, and he would have realised immediately that he was dealing with contraband. He said that he took a decision immediately to start working from home rather than at the premises in Montague Gardens, the clear import of his evidence being that he did not wish to be
10 visibly associated with Chao's business.

95. Not long hereafter, Chao told Africa that he wished to set up a separate company to deal with these exports and arranged for a lawyer to do the necessary to procure the
15 registration of such a company. Accordingly, on 26 June 2002, an attorney from Rondebosch, Mr Adam Pitman, attended to the registration of a new company called Tresso Trading 588 (Pty) Limited ("Tresso 588") in which Africa was registered as the sole director and shareholder. Africa said that accused 1
20 informed him in advance of this arrangement and took him to Mr Pitman's offices so that the necessary documentation could be signed. Thereafter, as we understand it, Tresso 588 was the corporate vehicle used to export Chao's product overseas in containers during the second half of 2002.

25

96. Africa recalled (and Miller subsequently confirmed under oath) that he collected Africa at his house in Heathfield before taking him through to Pitman's offices for the registration of Tresso 588. The significance of this allegation is that it is
5 reasonable to infer that when Africa signed the documents, he was already working from home and would therefore have known what the true nature of the export product was. It is also debatable as to whether Miller would have know of this, but more about that later.

10

97. Africa testified that he made use of a local company called Linmar Shipping as his shipping agents, and was regularly in contact with Mr Melville Meihuizen to that end. After exporting various containers during the period 2002 to
15 2004 from Cape Town docks where the product had been stored at V&A Cold Storage, Africa said he was told by Chao to move the operation to Sea Freeze Cold Storage in Hout Bay at the end of 2004. His evidence in this regard was not clear - whether the instruction came from Miller or Chao - and we
20 shall accordingly assume in favour of accused 1, that it was indeed Chao.

98. At the instruction of Chao, a second company called Rapitrade 109 (Pty) Limited, was set up by Mr Pitman in
25 January 2003 with the same directorship and shareholding as

before. On this occasion, Africa travelled through to Rondebosch alone. At a later stage, probably in late 2005, Tresso 588's name was changed to Syroun Exports (Pty) Limited and Chao made use of this entity as an export vehicle
5 in 2006 when he returned his operation to V&A.

99. During 2003 to 2004 Africa dealt with Chao's brother-in-law, a certain Mohammed, and the latter's business associate one Shahied, both of whom were said to be of Moroccan
10 extraction. The evidence was to the effect that abalone was delivered to the V&A Cold Storage by either Mohammed or Shahied, where accused 8, Desmond Pienaar, attended to the receipt thereof, (through the issue of a GRV) and later the discharge, (by issuing a GIV) of the goods. Tresso 580,
15 Chao's original exporting company, was the corporate vehicle through which the movement of these goods took place. Africa said that Chao and Mohammed fell out towards the end of 2004 and it was necessary to source a new supplier of abalone.
20

100. Towards the end of 2004, and at the instruction of Chao, Africa made contact with accused 4, who then became the principal supplier to Chao of abalone, which was exported by Sea Freeze, always under the name of Rapitrade. Africa
25 testified that Du Toit personally delivered abalone to Sea

Freeze in 10kg boxes, using an ordinary one ton bakkie. The contact person at Sea Freeze, who was responsible for booking in the product, was Cyril Akers, who was responsible for issuing that company's GRVs and GIVs.

5

101. It is common cause that accused 4 delivered abalone throughout 2005 and up to January 2006 to Sea Freeze. In his evidence, Du Toit dealt with this in some detail. Africa was always present when the product was offloaded and he
10 assisted with the necessary paperwork in that regard. Africa testified that when there was sufficient abalone stored in the freezers, a pre-cooled refrigerated container was procured and filled at the Sea Freeze loading bay. From there the container was taken by road to the container terminal in Cape Town
15 Harbour, where it was loaded on board a vessel, invariably destined for Hong Kong.

102. Africa testified that at Sea Freeze, 10kg boxes of pilchards (which were similar in size to the boxes of abalone
20 delivered by Du Toit, but were marked "Pesca Atlantica") were used to partially conceal the abalone, firstly in storage and later in the container. In the latter event, the abalone was loaded in first on wooden pallets and pushed in to be flush with the closed end of the container. The container was
25 thereafter filled up with pilchards, so that when the PPECB

inspector checked the loaded cargo, he would only be able to probe the boxes closest to the rear of the container, i.e. at the doors, where he was always only every likely to encounter pilchards. By design, it was claimed that the inspector was kept well away from the abalone.

103. Africa said that he was always able to distinguish the abalone delivered by accused 4 from the pilchards in the cargo, by the recordal in the GRV and the GIV as to the source of the product. To this end he developed a coding system whereby abalone received from number 4, was noted as being the product of Rapitrade. He also used product allegedly sourced from "V&A" or "Cross Berth" (another cold storage facility in Cape Town Harbour) to denote abalone, while the pilchards were recorded as being from one of the recognised pilchard suppliers. At Sea Freeze the main supplier was Pesca Atlantica, while Balobi, Viskor and Komicx were some of the other suppliers he used later at V&A. In the witness box, Africa was taken through a multitude of Sea Freeze GRVs and he testified as to who the supplier of the abalone was and what the quantity of each load was. He was also able to identify the supplier of the pilchards used to mask the abalone in the container.

104. At some stage, we infer in late 2005, Africa said there

was a police raid at Sea Freeze, but as things turned out, there was no abalone present on the premises at the time. On the instructions of Chao, said Africa, the export of abalone via Sea Freeze was later terminated, and V&A was once again 5 used from early 2006.

105. Africa said that in February 2006, accused number 4 personally stopped delivering abalone when Jaco Botha took over as the bakkie driver. From then until 19 September 2006, 10 all abalone delivered by Jaco on behalf of accused number 4, was booked in at V&A under the name Rapitrade. Through this subterfuge, Africa said, he was able to distinguish the abalone from pilchards, which were invariably booked in under the name of the original supplier, such as Balobi, Viskor or Pesca 15 Atlantica.

106. Africa said that early in February 2006, he met accused 3, who he got to know as Gavin, at a Caltex Filling Station at the entrance to the Cape Town Waterfront, having been 20 introduced to him by Jerry Ku. He said that number 3 thereafter commenced delivering abalone to V&A on the instructions of Chao and Ku, and his product was recorded in the GRVs as originating from Syroun. Africa said that accused 3 only attended the V&A premises on one occasion, thereafter 25 deliveries were made by his cohorts, (regularly referred to by

Africa in evidence as "Gavin's guys" and we shall, therefore, refer to them similarly), after a prior arrangement for each delivery had been telephonically concluded with Africa. Africa identified accused 6, Rodney Onkruid, as one of Gavin's guys, 5 who he saw on one occasion at V&A.

107. Africa described, with reference to a multitude of documents, (first copies and later when they were fortuitously discovered in a police storeroom after a change of office 10 premises, the originals), how deliveries were made to V&A in 2006 by either Jaco Botha or the aforesaid Gavin's guys. The source of supply was always identified in the GRVs, with reference to either Rapitrade or Syroun - this was how Chao was then able to distinguish whether the product emanated 15 from either accused 4 or 3 respectively. Africa said that he was always present when abalone was offloaded, and that he was he who told the clerk booking in on behalf of V&A, what description was to be given to each batch delivered.

20 108. Africa went on to explain that when a container was to be loaded, he would be called in advance by Chao, given the necessary shipping details so that he could prepare the paperwork and told to arrange for the export of the stored abalone. He was also informed by Chao when the container 25 would be delivered to V&A and he would make the necessary

arrangement with Meihuizen and always be present to oversee the loading of the container. Africa said that he would communicate with V&A staff, (usually accused 8), by fax or e-mail, giving notice that he wanted to load a container. Some 5 pallets would contain a mixture of abalone and pilchards, while others would only contain pilchards. The latter were used to mask the abalone once it had been loaded into the container.

109. Once again, the description of the pallets on the GIVs 10 reflected Rapitrade and/or Syroun, and the pilchards were described with reference to the original supplier under whose name the pilchards had been stored at V&A. It was later claimed by Miller that the batch description always remained the same inside the cold store for purposes of product 15 integrity. So, for example, if Pesca had initially delivered a quantity of pilchards to the V&A for storage purposes and later sold those pilchards to Rapitrade or Balobi or any other entity, they would always retain the batch description, "Pesca", even though a transfer of ownership had taken place.

20

110. According to Africa, accused 8 and 9 were well known to him as employees at V&A. Abrahams, the more senior of the two, was the operations manager and Pienaar the operations supervisor. It was the function of the operations supervisor to 25 oversee the offloading of the vehicles delivering product to

V&A, the palletising thereof, if necessary, and the storage of the product in the cold store. When the time came for a container to be packed, the operations supervisor would once again be on duty and see to the withdrawal of the pallets from 5 the cold store for the purposes of loading into the container. Africa said that in the event that Pienaar was for some unexpected reason not available, Abrahams would oversee his functions in his absence.

10 111. Africa testified that Abrahams and Pienaar were both aware that abalone was being stored at V&A and were jointly paid R10 000 per container to ensure "safe passage" (as he put it) of the product through the storage and loading phase. Initially Africa said that they were paid by accused 1, but that 15 in 2006 accused 8 and 9 complained that payments were starting to become irregular because Miller had moved to Paarl and was less accessible to them. In the result Africa said he took over payment of accused 8 and 9 directly with money advanced to him by Chao in 2006. In the process, said Africa, 20 he hoodwinked Chao into paying him an additional R10 000, ostensibly to bribe a PPECB official. The truth however was that Africa pocketed R6 800 for himself and Abrahams and Pienaar were each paid an additional R1 600, so he said.

25 112. In our view this act of dishonesty towards Chao provides

a timely caution to the evaluation of the evidence of Africa. He seems to us to be one of those people who will not miss an opportunity to make easy money. That he is open to influence in this regard is further demonstrated by an incident which occurred some months after his arrest. He agreed to meet accused 1 at the Milnerton lighthouse ostensibly to tell Miller (and Chao who was lurking in the background) why he had implicated them in the offences. Many years later, and with the prospect of a trial looming, Africa sent Miller a text message (Exhibit S) in which he cryptically referred to Chao and implied that his evidence could be influenced by payment of a suitable gratuity.

113. Africa was asked about Exhibit S under cross-examination by Ms Joubert and his explanation was that he had been short-changed by Chao who still owed him payment for the last batch of abalone exported in September 2006 and that he was short of money. Whatever the true position may be, we believe that this text message adequately demonstrates that Africa is capable of being influenced to attenuate his evidence by the payment of money.

114. There are various other examples of Africa's opportunism and dishonesty but it is not necessary to go into further detail in that regard since the State accepted without reserve that

Africa's evidence had to be approached with caution - not only because as an accomplice his criminal conduct was at the very core of the illegal operation spearheaded by Chao, but because he demonstrated, time and again, a propensity
5 towards questionable dealings. While the defence harmoniously claimed that Africa presented as an inherently dishonest and corrupt individual, the State was less condemnatory of his character. But either way, there is no doubt that he exhibited an all too pervasive human frailty – an
10 attraction to the lure of easy money. And, it must immediately be added, in the pursuit thereof he was indubitably ruthless and would not hesitate to compromise his integrity.

115. In the circumstances we accept implicitly that on material
15 issues regarding the alleged involvement of the various accused in the offences with which they are charged, Africa's evidence requires to be suitably corroborated to the extent that we are satisfied beyond reasonable doubt that he can be relied upon in relation to those issues.

20

116. We consider that the most practical way to deal with Africa's evidence is to consider it in the context of the allegations upon which the State relied in argument in respect of the evidence pointing to the guilt of each of the accused.
25 And when we do so, we will consider his evidence in the light

of the cross-examination on behalf of each such accused, the evidence tendered on behalf of accused numbers 1, 4 and 8, the absence of any evidence by any of the other accused, the evidence of other State witnesses and, where necessary, the 5 probabilities.

THE ROLE OF CELL PHONE EVIDENCE IN THE TRIAL

117. In as much as the cellphone has become 10 an indispensable tool of communication in modern life, so too has its utilisation become commonplace in the commission of crime. In the result, the investigation of crime these days often leans heavily on the evaluation of cell phone evidence, not only to see which parties were talking to 15 each other but where the instruments were when calls were made.

118. In this matter the State adduced the evidence of Brink for the analysis of the cell phone evidence and we shall revert to 20 that in due course. Suffice it to say that the Court must be satisfied as to the integrity of the analysis of the cell phone evidence: this commences with the seizure of handsets, SIM cards, phone records and user-accounts all of which must follow due process or at the very least depend on acceptable 25 processes of seizure, and it culminates in the accuracy of

communication between cellphone numbers and the locality at which a particular handset was situated when a call was either made or received.

5 119. As his point of departure, Brink took the various handsets which had come into the possession of the police and analysed them individually. Using appropriate software he was able to access the list of contacts on each instrument thereby establishing a directory of cell phone numbers on any 10 particular instrument, or on any particular SIM card. These lists were then downloaded by Brink (the term "dumping" was used) and stored on his computer. Not unexpectedly, some of these contact lists recorded names through the use of abbreviations or nicknames to ensure confidentiality and to 15 promote subterfuge. He compiled a detailed list comprising, *inter alia*, handsets with their unique international reference numbers (the so-called IMEI number), SIM cards, lists of contacts and the telephone numbers of such contacts. These are contained in Exhibit 3.

20

120. Through an arrangement which the police had at the time with the three cell phone service providers in South Africa, Brink made use of subpoenas issued in terms of Section 205 of the CPA to procure detailed billing records of a variety of 25 cellphone numbers for specific periods. That information was

made available to the police by the service providers through an email service in which the data requested was deposited in a dedicated mailbox accessible only to authorised police officers.

5

121. The information so provided was contained in spreadsheet form with columns indicating, *inter alia*, the SIM card number (in reality the telephone number), the IMEI number of the handset into which the SIM card had been
10 inserted, the date and time (measured by hour, minute and second) that the communication (usually a call or an SMS) was made, whether the communication was outgoing or incoming, the duration of the call measured in seconds and the locality of the cell phone transmitter tower through
15 which the call had been routed. Such tower would reflect the locality of the handset making or receiving the communication i.e. the handset which was the subject of the particular enquiry.

20 122. Brink then analysed the information furnished to him by the service providers using a software program known as "Analyst Notebook", evidently a tool readily available commercially. Analyst Notebook enabled Brink to produce spreadsheet tables of his own and to compile more limited
25 records of cell phone traffic than contained in the original data

supplied to him. The software also enabled him to produce a diagrammatic representation of cell phone traffic between numbers which interested him.

5 123. So, for example, if he was analysing Africa's communications on a particular SIM card, the diagram would reflect Africa's cellphone in the middle of the page and the communications with other numbers selected from the original data spread around the periphery of the page with lines 10 connecting those numbers to Africa's phone. These diagrams, which had the appearance of spider webs, were conveniently referred to by the parties in evidence as "spiders" and are contained in Exhibit 4. The lines connecting the numbers at the periphery to the number at the core of the diagram contained 15 digits reflecting the total number of communications between those numbers. Such communications are made up of outgoing and incoming calls as well as text messages, (SMS) sent and received.

20 124. In the result, Exhibit 4 comprised a multitude of spiders each supported by its own table in which the call data procured by the cellphone service providers was recorded in spread sheet form. For the sake of convenience I shall refer in this judgment to a 'spider' (with its relevant exhibit number) and its 25 supporting table.

125. During the cross-examination of Brink by Mr Uijs SC, it transpired that the number of communications recorded on some of the spiders between some of the instruments did not
5 tally with the number of calls recorded in the supporting table which Brink had prepared. So, for example, counsel observed in respect of Exhibit 4.7 that 569 calls were recorded between Ku and Africa, Chao, accused numbers 2 and 3 and Stanley Dhlamini whereas the supporting documentation contained in
10 spreadsheet which verified it in fact showed the number of calls to be 490. Counsel then mounted an attack on the integrity of the Analyst Notebook software suggesting that it had not properly captured the information fed in by Brink. It was also suggested that Brink had manipulated the data to suit
15 his needs.

126. Brink explained this dissonance by pointing out that the software was particularly sensitive to the manner in which a cell phone number was recorded. So for example, if the
20 number was preceded by the South Africa international dialling code (0027), it might not necessarily have been picked up by Analyst Notebook and might not appear in the spider. In the result, where there was a difference (and it must be said that by the end of the trial this was in respect of a very limited
25 number of spiders), the supporting tables could always be

relied upon for having accurately reflected the call data.

127. In light of this cross-examination the State later adduced the evidence of witnesses from two cell phone providers, MTN and Vodacom, who were subpoenaed to bring all of the original data which had been supplied to the police in terms of the sec 205 subpoenas. Accordingly a plethora of cell phone records was placed before the court in some 6 files making up Exhibit 4. The integrity of those records (which I will call the "core data") was not challenged by any of the accused and at the end of the case the accuracy of the core data so supplied by the cell phone providers was not in issue.

THE CONSTITUTIONAL CHALLENGE TO THE CELL PHONE EVIDENCE

128. During his concluding argument, Mr Uijs SC, attacked the admissibility of the cell phone evidence on the basis that its emergence part-way through the State case had infringed the rights of accused 2, 4 & 5 to a fair trial as guaranteed under Section 35(3) of the Constitution of 1996.

129. At the outset it is apposite to point out that in National Director of Public Prosecutions v King 2010 (2) SACR 146 (SCA) Harms DP made the following trenchant remarks, in an

interlocutory application for docket discovery in a criminal trial, regarding the concept of a fair trial in our constitutional dispensation:

"[4] It is well to remind oneself at the outset of a number of basic principles in approaching the matter. Constitutions call for a generous interpretation in order to give full effect to the fundamental rights and freedoms that they create. The right to a fair trial is, by virtue of the introductory words to Section 35(3) of the Bill of Rights, broader than those rights specifically conferred by the fair trial guarantee therein and embraces a concept of substantive fairness that is not to be equated with what might have passed muster in the past. This does not mean that all existing principles of law have to be jettisoned nor does it mean that one can attach to the concept of a "fair trial" any meaning whatever one wishes it to mean. The question remains whether the right asserted is a right that is reasonably required for a fair trial. A generous approach is called for. This is a question for the trial judge and there is in general not an *a priori* answer to the question whether the trial will be fair or not. Potential prejudice may be rectified during the course of the trial and the court may make

preliminary rulings depending on how the case unfolds and may revoke or amend them. Irregularities do not lead necessarily to a failure of justice.

5 [5] There is no such thing as perfect justice - a system where an accused person should be shown every scintilla of information that might be useful to his defence – and discovery in criminal cases must always be a compromise. Fairness is not a one-way 10 street conferring an unlimited right on an accused to demand the most favourable possible treatment but also requires fairness to the public as represented by the state. This does not mean that the accused's right should be subordinated to the 15 public's interest in the protection and suppression of crime; however, the purpose of the fair trial provisions is not to make it impracticable to conduct a prosecution. The fair trial right does not mean a predilection for technical niceties and ingenious 20 legal stratagems, or to encourage preliminary litigation - a pervasive feature of white-collar crime cases in this country. To the contrary: courts should within the confines of fairness actively discourage preliminary litigation. Courts should further be 25 aware that persons facing serious charges - and

especially minimum sentences - have little inclination to co-operate in the process that may lead to their conviction and 'any new procedure can offer opportunities capable of exploitation to
5 obstruct and delay'. One can add the tendency of such accused, instead of confronting the charge, of attacking the prosecution." (Footnotes omitted)

130. It must be said in passing that it is considered to be
10 unusual to raise the claim of an unfair trial in final argument before the trial court. Ordinarily the claim is raised in an appellate court only once there has been a conviction. As Harms DP observes, fundamental to a conviction flowing from an allegedly unfair trial is the issue of irremedial prejudice,
15 and while the trial is still underway, such prejudice can of course be sought to be ameliorated at any stage. It is only once the evidence and all the vagaries of procedure in the trial court are cast in stone through a conviction that it can truly be determined whether the trial proceedings were fair or not. I
20 shall return to this point later. Be that as it may, the unfair trial argument underwent refinement during the course of counsel's five day address but ultimately we understand the accused's objection to be based on the following facts and circumstances.

25

131. Cell phones belonging to some of the accused and certain State witnesses were retrieved by the police during arrests relevant to the case in September and October 2006: in some instances the handsets were seized at the time of
5 arrest and in other cases, were handed over by the accused when surrendering themselves for purposes of arrest during November 2006.

132. According to Brink, he began analysing some of these
10 phones towards the end of 2006. This was after he and Potgieter had procured subpoenas in terms of Section 205 of the CPA and obtained the necessary records from Vodacom and MTN. At the end of that year Brink was transferred to George and the cell phone analysis seems to have been put on
15 hold. After spending approximately two years in George, Brink returned to Cape Town and evidently completed his analysis of the cellphone records. This, it was argued, would have been during 2009 to 2010.

20 133. Mr Uijs SC, submitted that the defence should have been placed in possession of this analysis around 2010, whereas the cellphone records only emerged in this prosecution some six months after the trial commenced. This happened when the lead prosecutor, Ms Greyling, informed the Court on
25 9 March 2015 that it had recently come to her attention that

such records were in the possession of the police. She indicated that the prosecutors had been caught unawares and that she had given the police instructions to conduct further investigations before formally making the evidence available to
5 the defence in electronic form on 16 March 2015.

134. As the record of proceedings herein reflects, the defence initially experienced difficulty in accessing that electronic evidence. The State assisted, first by providing electronic
10 tools with which the defence could access the evidence and ultimately providing hard copies to the defence of the extensive records produced by Vodacom and MTN. Defence counsel were afforded as much time as they required to inspect and assess the cell phone records and were not
15 required to cross-examine any witnesses before they had done so.

135. We did not understand Mr Uijs, SC, to complain that the defence had not been given sufficient opportunity to deal with
20 the evidence once it had been produced by the prosecution. Rather, it was said that the police (and in particular Brink) were at all material times aware of the existence of the records and had intentionally suppressed the information with the intention of prejudicing the accused in the preparation of their
25 respective cases. Because the evidence had come at such a

late stage of the proceedings, said counsel, the court should ignore all references to it, thereby ensuring that the trial was fair.

5 136. When pressed to explain which of the fair trial rights protected under Section 35(3) of the Constitution had been infringed, Mr Uijs SC, submitted, as a general proposition, that the accused were entitled to know in advance what the case was that they had to meet and to prepare for it. That 10 submission is undoubtedly well-grounded in the provisions of Section 35(3) (a) and (b) of the Constitution. When pressed to give content to the prejudice occasioned to the accused in question by the late introduction of the evidence, counsel complained that the accused were caught unawares, at an 15 advanced stage of the State case, of evidence which might be potentially prejudicial to their cases. The complaint was that the State was conducting "trial by ambush", as counsel put it.

137. The suggestion by Mr Uijs SC, that Brink (and to a lesser 20 extent Potgieter) had intentionally suppressed the cell phone evidence with the intention of ultimately embarrassing the accused is without doubt a serious accusation to make and this is more particularly so in a case where it is made in relation to long-serving, experienced (and in the case of Brink, senior) 25 police officers. The primary problem that we have with that

submission is that the principles in SARFU were not observed in that the police witnesses were not cross-examined on the point and afforded the opportunity of explaining or exonerating themselves. In the result the issue was not fully traversed in
5 evidence and in such circumstances we are not prepared to draw the adverse inference of *mala fides* contended for by Mr Uijs SC.

138. When it was pointed out to counsel by the Court that the
10 prosecution appeared to have played open cards with the Court and was seemingly not to blame for the late production of the evidence, Mr Uijs SC, fairly accepted that that was the case. In the result the position seems to us to be that it cannot be said that the cellphone analysis (and the implication
15 of the accused thereby) has been intentionally withheld from the accused. The non-availability of the analysis to the defence at an earlier stage of the trial, and in particular before the commencement thereof, does therefore not appear to us to attract blame to any particular party. Rather, it seems as if this
20 is one of those situations where perhaps the left hand did not know what the right hand was doing.

139. In Nortje and Another v Attorney-General, Cape and Others 1995(2) SA 460 (C), a Full Bench of this Division was
25 asked, on appeal against a ruling by a trial court in criminal

proceedings, to direct the prosecution in the trial court to hand over witness statements in the police docket to the defence. This case is one of a string of cases heard in the various Provincial Divisions which ultimately led to the decision of the
5 Constitutional Court in Shabalala and Others v Attorney-General, Transvaal and Another 1996(1) SA 725 (CC) , the so-called "docket case".

140. The decision in Nortje was based on the right of access
10 to information in the possession of the State founded in Section 23 of the Interim Constitution, 1993 (which right is now incorporated in Section 32 of the 1996 Constitution) and as amplified in Section 25(3)(b) of the Interim Constitution, the precursor to the current Section 35(3)(b). In a detailed and
15 searching enquiry, Marais, J, (as he then was) looked at a myriad considerations applicable to the exercise of the Section 23 right in the context of a criminal prosecution.

141. At 483E the learned judge dealt with the essence of the
20 right thus:

> "What is the essential content of that right in the present context? It is the right to information in the hands of the prosecutor which persons charged with the commission of offences reasonably require in order to exercise or
25 protect their rights. The right they wish to exercise or

protect is their undoubted right to defend themselves effectively against the charges laid against them. The essential content of the right to information in this particular context is access to whatever information the
5 prosecution has in its possession which could be of use to the applicants in preparing for trial and defending themselves at the trial. The evidence which has been collected by the State plainly falls into that category of information. The statements taken by the State from
10 witnesses are ordinarily the most important element in that evidence."

142. As to the consequences of the failure to afford an accused person access to such information, the learned judge
15 said the following at 484A:

"To deny to an accused person, in all criminal prosecutions, use of the right conferred by Section 23, and so prevent the accused from having pre-trial access to what ordinarily will be the bulk of the evidence to be
20 given against him or her, is so extensive and material a limitation on that right that it is difficult to see how it can be said that it does not negate the essential content of the right."

25 143. But it must be stressed that the judgment in Nortje was

delivered in response to an application for pre-trial disclosure of information by the prosecution. In that context, Marais, J, noted the following reservation at 484J:

"I emphasise that I am not concerned here with the
5 question of when precisely an entitlement to such disclosure arises. This investigation is complete and the trial was about to commence. It has not been suggested that it would be undesirable to make disclosure now. It would plainly be untenable to allow an accused access to
10 the statements of each witness immediately after it has been minuted. That would result in a situation in which the suspect would be virtually breathing down the neck of the investigating officer, and in a position, by reason of his knowledge of the course of the investigation, to take
15 steps to obstruct it. A limitation as to when the accused would become entitled to disclosure of the statements, provided it was not later than a reasonable time before trial, would not derogate from the essential content of the right and would be both reasonable and justifiable within
20 the meaning of Section 33."

144. In Shabalala, Mahomed, DP, dealt with the various and differing approaches in the earlier Provincial decisions. Ultimately, the learned Deputy President of the Constitutional
25 Court held that there could be no blanket docket privilege and

permitted the State, in appropriate circumstances, to argue what information might or might not be disclosed to the defence, stressing that the approach was a case by case assessment to be exercised on an incremental basis by the
5 High Court:

> "[52] Even in such cases, however, it does not follow that the disclosure of the statements concerned must always be withheld if there is a risk that the accused would not enjoy a fair trial. The fair trial
> 10 requirement is fundamental. The court in each case would have to exercise a proper discretion balancing the accused's need for a fair trial against the legitimate interests of the State in enhancing and protecting the ends of justice.......
>
> 15 [58] The details as to how the Court should exercise its discretion in all these matters must be developed by the Supreme Court from case to case but always subject to the right of an accused person to contend that the decision made by the Court is not
> 20 consistent with the Constitution."

145. In this case the defence was given full access to the police docket (in electronic format) well in advance of the trial but only given access to Brink's cell phone analysis at about
25 the same time that the prosecution was i.e. well after the

commencement of the trial. *Prima facie* that constitutes a potential violation of the fair trial rights protected under Sections 35 (3) (a), (b) and (i) of the Constitution, which read as follows:

5 "Section35 (3): Every accused person has a right to a fair trial, which includes the right-

(a) to be informed of the trial with sufficient detail to answer it;

(b) to have adequate time and facilities to

10 prepare a defence...

(i) to adduce and challenge evidence."

146. The question then is what falls to be done in such a situation? It seems to us that we should approach the matter

15 in accordance with the *dictum* of Melunsky, AJA, in S v Smile 1998(1) SACR 688 (SCA), in which the facts bear some resemblance to this matter. The accused in that case had been charged with murder and robbery and before the trial commenced their legal representative applied for an order

20 compelling the prosecution to hand over to the defence evidence summaries of evidence to be given by each of the witnesses whom the State proposed to call. The application was refused and the matter proceeded in the absence of such documentation.

25

147. On appeal the accused challenged their convictions before the trial court on the basis of the fair trial provisions incorporated in Section 25(3) of the interim Constitution of 1993 whose provisions are to all intents and purposes the
5 same as those under consideration in this matter. On appeal, the challenge was described thus by Melunsky, AJA, at 690d:

> "In this Court Mr Notshe argued that the appellants had been deprived of the right to a fair trial on the ground that the State had refused to furnish them with
> 10 summaries of statements of witnesses before the hearing. He submitted that the subsequent change of stance by counsel for the State, while the State case was already under way, was of no consequence, as the appellants were entitled to the summaries of the
> 15 statements before the commencement of the trial to enable them to prepare properly. The denial of that right, according to the argument, carried with it the inevitable result that the appellants' constitutional fights to a fair trial, in terms of Section 25(3) of the
> 20 Constitution of the Republic of South Africa Act 200 of 1993 ('the interim Constitution'), had been violated."

148. Melunsky, AJA, observed that courts of appeal were, as a matter of principle, required to consider whether the
25 proceedings in the lower court had been vitiated by

constitutional irregularities. This, said the learned judge of appeal, brought a number of competing rights into play as appeared from the judgment of Mohamed, CJ, (then sitting **in** the Namibian Supreme Court) in S v Shikunga and Another

5 1997(2) SA 470 (Nm) at 484 b-f:

> "Where the irregularity is so fundamental that it can be said that in effect there was no trial at all, the conviction should be set aside. Where one is dealing with an irregularity of a less severe nature then, depending on
>
> 10 the impact of the irregularity on the verdict, the conviction should either stand or be substituted with an acquittal on the merits. Essentially the question that one is asking in respect of constitutional and non-constitutional irregularities is whether the verdict has
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> 15 been tainted by such irregularity. Where this question is answered in the negative the verdict should stand. What one is doing is attempting to balance two equally compelling claims - the claim that society has that a guilty person should be convicted, and the claim that the
>
> 20 integrity of the judicial process should be upheld. Where the irregularity is of a fundamental nature and where the irregularity, though less fundamental, taints the conviction the latter prevails. Where however the irregularity is such that it is not of a fundamental nature
>
> 25 and it does not taint the verdict the former interest

prevails. This does not detract from the caution which a Court of appeal would ordinarily adopt in accepting the submission that a clearly established constitutional irregularity did not prejudice the accused in any way or
5 taint the conviction which followed thereupon."

149. After considering various authorities including the *dictum* in Shikunga, Melunsky, AJA, observed as follows at 692d:

"The remaining question on the preliminary point is
10 whether the appellant's rights were violated. The submission of the appellant's counsel was that the failure to supply the summaries of statements of each witness before the commencement of the trial per se amounted to a denial of the right to a fair trial which justifies this
15 Court in setting aside the convictions. As Mahomed, CJ, pointed out in Shikunga's case at 483i - 484b, it is not every constitutional irregularity committed by the trial court that justifies the Court in setting aside the conviction on appeal. Whether or not there has been a
20 fair trial must ultimately be answered having regard to the particular circumstances of each case. (See Shabalala and Others v Attorney-General, Transvaal and Another 1996(1) SA 725 (CC) at 743 C-D, para's 35 and 36).

25 It is common cause in this case that the statements of

the prosecution witnesses who had not yet testified were handed to the defence in August 1994. It is true that the statements of the witnesses who had previously testified were not delivered to the defence but counsel for the
5 State offered to furnish the defence with their statements if they were required. No requests for statements made by the defence were refused. There is also no reason to doubt that the Court would have acceded to the defence's application for the recall of any witness whose evidence
10 had been concluded, but no application for any such recall was made. Although the initial refusal to furnish the appellants with statements of prosecution witnesses was a constitutional irregularity, it is not, in the circumstances of this case, a ground for setting aside the
15 convictions. Unlike other conceivable classes of irregularity which are irremediable once they have occurred, this irregularity was potentially remediable. It is therefore not possible to regard it as an irregularity of so fundamental a kind that it immediately vitiated the trial
20 and necessitates setting aside the convictions. It is necessary therefore to have regard to the conduct of the trial as a whole in order to decide whether the irregularity persisted and thus tainted the convictions and resulted in an unfair trial. In August 1994 the statements of
25 prosecution witnesses were made available to the

defence. Any initial unfairness attending the trial was thereby purged. At that stage the State case had not been closed, the defence could have applied to recall witnesses who had already testified and sufficient time
5 was available to consider the contents of the statements and to prepare for the further conduct of the trial. Under these circumstances the contention of the appellants' counsel on the preliminary point cannot succeed. It may be noted that the Full Court of the Cape Provincial
10 Division in Nortje and Another v Attorney-General Cape and Another 1995(2) SA 460 (C) was not prepared to accept the proposition that a failure to make pre-trial disclosure of the statements of witnesses *ipso facto* rendered the trial unfair although later disclosure of
15 statements during the trial was made (at 483A-D). But it should be emphasised that this does not mean that it is open to the State, as a matter of course, to postpone the disclosure of the statements of prosecution witnesses provided only that they are disclosed at some time before
20 the close of its case. Disclosure of statements should usually be made when the accused is furnished with the indictment or immediately thereafter in accordance with the practice suggested in Shabalala's case at 752A-F paragraph 56."

25

150. In assessing the competing interests inherent in the late production of the cell phone analysis in this case, the Court asked counsel to deal with the question of prejudice to the accused. Mr Uijs SC, stressed that the prejudice lay in the
5 fact that it was unfair to ask an accused now to explain the ambit, extent and content of phone calls made more than ten years earlier and then to hold it against him when he was unable to accurately recall what was discussed. As a general proposition, there is certainly merit in that submission.
10 However, and on the other hand if the facts suggest, for example, that persons who would not ordinarily have had the need or reason to call one another, were in fact communicating, then it is not unfair to enquire from an accused what the general purpose or gist of such a communication
15 might have been. And the answer to such a question might then be interrogated as to the probabilities and its veracity.

151. In our view, although the evidence was produced well after the commencement of the State case it was not at such
20 an advanced stage of the proceedings that the situation was irremediable. The prosecution informed the Court on the 36th day of a trial which lasted until August 2017, (in excess of 150 days exclusive of the delivery of judgment), of the existence of the cell phone evidence. As I have said the defence were
25 given time to deal with it and ultimately the opportunity arose

and was utilised by certain counsel, to cross-examine Africa in relation to certain of the telephonic communications when he was recalled to testify on the 66th day of the trial on 13 October 2015.

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152. Mr Uijs SC, accepted that the defence had been given ample opportunity to consider the late evidence, take instructions thereon and to question the relevant State witnesses including applying for the recall of such witnesses
10 whose testimony had already been completed. Further, he very properly conceded, essentially by way of a *mea culpa,* that he would have to shoulder some of the blame for not appreciating the full extent of the cell phone evidence at the time that it was presented and that he should perhaps have
15 done more by way of preparation when cross-examining the relevant witnesses.

153. In our view there are various factors which fall to be considered on this point. Perhaps the most important
20 consideration is the fact that the prosecution of the larger group of accused arrested in this matter effectively stood still from late 2009 (when Erasmus, J, delivered the ruling referred to earlier) until early 2012, when the pleas of guilty by some were tendered and the trials separated. During that time the
25 parties awaited the outcome of the pending POCA litigation in

the Savoi matter and no trial preparation took place. It can certainly not be said that the cell phone analysis and records were liable to be handed over before 2012.

5 154. In the result, the availability of the information contained in the police docket only truly became an issue in about 2012, when sights were finally focussed on defending the remaining accused after the matter had been declared trial ready. If the cellphone evidence had been brought to the attention of 10 accused 2, 4 and 5 at that stage, it is notionally possible that their powers of recollection might have been less impaired than after say ten years, but one would never know how much more was forgotten in the subsequent four years. In that context can one really complain of prejudice, if one would not 15 have been able to deal with it earlier?

155. In Nortje at 469D-E, Marais, J, cautioned against indiscriminate claims by counsel of an "ambush":

> "As for deprecatory remarks, which are sometimes to be 20 found, about trial 'by ambush', those who make them tend to accept with equanimity the fact that most systems allow the accused to 'ambush' the State and its witnesses to his or her heart's content. In any event, in my view, the 'ambush' analogy is overworked and overblown. 25 Properly understood, it is a word devised to describe the

situation where an entirely unsuspecting person is suddenly set upon, without warning, by another. Litigants and witnesses are hardly unsuspecting and suddenly set upon. They know they are involved in court proceedings and that they will be cross-examined. There is little resemblance between them and the victims of an ambush."

156. In this matter, the accused, that is 2, 4 and 5, knew from the time of their respective arrests that the police had seized their cell phones and common sense would have informed them that the police (and ultimately the prosecution services) would have been interested in who was communicating with whom, and when. So much for their claims now that they were caught unawares. Rather, it is apparent from Mr Uijs SC's, concession in argument that the fault lay at his door for failing to fully appreciate the import and extent of the cell phone evidence. In our view it would not be fair to the State for an accused person to be the beneficiary of his legal representative's laxity in preparation of his cross-examination. That is not what we understand the denial of a fair trial to embrace. Furthermore the objection raised on behalf of accused 2 and 4 can only really relate to one cell phone number used by each of them, since, as will be seen later, each of them denied use of a second number. This perforce

reduced the number of documents which they were required to pursue and in respect whereof they could give an answer.

157. In conclusion we note that the objection to the cellphone
5 evidence was made only on behalf of accused 2, 4 and 5. The remaining accused acquiesced in the evidence being adduced late and did not claim an ambush. Finally, we did not understand Mr Uijs SC, to suggest that any of the cell phone evidence had been improperly obtained in breach of the CPA
10 or the Constitution so that we are not dealing with so-called "tainted evidence" (see S v Pillay and others 2004(2) SA 419 (SCA) at para 91) which might otherwise have affected the admissibility of such evidence.

15 158. In the result we are of the view that the fair trial rights of accused 2, 4 and 5 have not been infringed and that it is proper for us to have regard to the cell phone evidence in considering our judgment.

20 **POCA AND THE PREDICATE OFFENCES**

159. Both the State and the defence were in agreement regarding the application of the provisions of POCA in this matter. It is accepted that before any of the accused can be
25 said to have contravened Section 2(1)(e) of POCA, it must be

established beyond reasonable doubt that the conduct of each such accused constituted a pattern of racketeering activity as defined in Section 1 of POCA. The provisions of each of these sections have been recited above and will not be repeated 5 now.

160. The term 'racketeering' is derived from the American legislation on which POCA is based (The Racketeer Influenced and Corrupt Organizations Act of 1970 or 'RICO'). While the 10 word as such is not defined in POCA, the Shorter Oxford Dictionary defines a 'racketeer' as "a person participating in or operating a dishonest or illegal business, frequently practising fraud, extortion, intimidation, or violence." The essence of the dictionary definition then is a criminal business with the 15 emphasis on the latter.

161. The offences which fall under the definition of "racketeering activity" for the purposes of POCA are listed in Schedule 1 thereto and include, under Item 19, "fraud" and 20 under Item 33, "any offence the punishment wherefore may be a period of imprisonment exceeding one year without the option of a fine." It is common cause that a contravention of Regulation 39(1)(a) of the MLRA Regs (possession or control of abalone for commercial purposes) attracts a maximum 25 sentence under Section 58(4) of the MLRA of a fine not

exceeding R800 000 or to imprisonment not exceeding two years. Accordingly, those accused charged with contravening this regulation resort under the broad category of offences referred to in Item 33 by virtue of the potential penal sanction 5 applicable to a contravention of Regulation 39(1)(a).

162. A contravention of Section 18(1) of the MLRA (the unlawful operation of a fish processing facility) attracts a sentence under Section 58(1)(b) of that act of a fine not 10 exceeding R2-million or imprisonment not exceeding five years. In the circumstances those accused charged with contravening this section also fall within the purview of Item 33.

15 163. Ordinarily, the State would have been be entitled to adduce evidence to show that any of the accused had committed any number of offences in his capacity as a participant, that is a racketeer, in an illegal business involved in a "pattern of racketeering". However, POCA is intentionally 20 structured in such a manner that the State is afforded a less onerous procedural basis to prove the criminal conduct of the racketeer. And so, in terms of Section 2(1)(e) a person commits an offence

- by managing;
25 • being employed by; or

- being associated with;

an unlawful enterprise while

- conducting; or
- participating;
- either directly or indirectly in;

its affairs through what is termed 'a pattern of racketeering'.

164. The jurisprudence relating to POCA is still developing and there are relatively few cases upon which a court of first instance can rely for guidance. In the only text book on the topic currently available in South Africa, Organized Crime and Proceeds of Crime Law in South Africa, at page 24, Albert Kruger stresses with extensive reference to the American jurisprudence on RICO, that the purpose of anti-racketeering legislation is to target the organisation rather than the criminal:

> "The racketeering offence targets the organisation, not individual criminal acts (events). The accused must be found to have participated in the organisation (enterprise) by managing some aspect of it or by performing acts for the enterprise, by participation or involvement."

165. At page 22 Kruger stresses the importance of continuity

in determining whether there has been a pattern of racketeering activity which lies at the heart of the various offences contemplated under Section 2(1) of POCA:

5 "Although POCA does not require any relationship between the two predicate offences, in assessing whether the offences are "planned, ongoing, continuous or repeated" the court will have regard to the nature of the predicate offences. The nature of the predicate offences and the relationship between the offences will
10 guide the court in determining whether there is continuity."

166. And at page 23 the author suggests what the elements of an offence involving a "pattern of racketeering activity" under
15 POCA incorporate.

"In order to convict an accused of any contravention of Section 2 (1), the state will have to prove that:

(a) at least two offences contemplated in Schedule 1 of POCA were committed (not necessarily by the
20 accused)

(b) at least one of those offences occurred after 21 January 1999, and

(c) the last or second offence occurred within ten years of the first offence, and

25 (d) participation must have been planned, ongoing or

repeated, and

(e) *mens rea* was present in the manner set out in Section 1 (2) and (3)."

5 167. Certain principles have been laid down by the Supreme Court of Appeal in regard to the approach to POCA prosecutions. In Eyssen v The State [2009] 1 All SA 32 (SCA) the court considered the criminal conduct of members of a street gang known as "The Fancy Boys" which was habitually 10 involved in housebreaking and robbery in the Cape Peninsula. The appellant was charged and convicted in this Division with contravening both Sections 2(1)(e) and (f) of POCA and on appeal the court discussed the import of these sections and the interplay between them:

15 "[5] The essence of the offence in subsection (e) is that the accused must conduct (or participate in the conduct of) an enterprise's affairs. Actual participation is required (although it may be direct or indirect). In that respect the subsection differs 20 from subsection (f), the essence of which is that the accused must know (or ought reasonably to have known) that another person did so. Knowledge, not participation, is required. On the other hand, subsection (e) is wider than subsection (f) in that 25 subsection (e) covers a person who was managing,

or employed by, or associated with the enterprise, whereas subsection (f) is limited to a person who manages the operations or activities of an enterprise."

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168. After reciting the definition of "enterprise", the learned judge of appeal continued as follows:

"[6] .....It is difficult to envisage a wider definition. A single person is covered. So it seems is every other type of connection between persons known to the law or existing in law; those which the Legislature has not specifically included will be incorporated by the introductory word 'includes'. Taking a group of individuals associated in fact, which is the relevant part of the definition for the purposes of this appeal, it seems to me that the association would at least have to be conscious; that there would have to be a common factor or purpose identifiable in their association; that the association would have to be ongoing; and that the members would have to function as a continuing unit. There is no requirement that the enterprise be legal, or that it be illegal. It is the pattern of racketeering activity, through which the accused must participate in the affairs of the enterprise that brings in the illegal

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element; and the concepts of 'enterprise' and 'pattern of racketeering activity' are discreet. Proof of the pattern may establish proof of the enterprise, but this will not inevitably be the case.

5 [7] It is a requirement of the subsections in question that the accused in subsection (e).... 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

10 establish that any particular criminal act relied upon, constituted participation in such affairs..... The participation may be direct, or indirect."

169. Turning to the aforesaid definition of "pattern of

15 racketeering activity" the learned judge of appeal comments as follows:

"[8] .....In my view, neither unrelated instances of proscribed behaviour, nor an accidental coincidence between them constitute a 'pattern' and

20 the word 'planned' makes this clear.

[9] The participation must be way of ongoing, continuous or repeated participation or involvement. The use of the word 'involvement' as well as the word 'participation' widens the ambit of the

25 definition. So does the use of the words 'ongoing,

continuous or repeated'. Although similar in meaning, there are nuances of difference. 'Ongoing' conveys the idea of 'not as yet completed'. 'Continuous' (as opposed to 'continual') 5 means uninterrupted in time or sequence. 'Repeated' means recurring.

[10] Some limitation is introduced into the definition by the requirement that the participation or involvement must be in any Schedule 1 offence. 10 The limitation is, however, not substantial. Schedule 1 lists a considerable number of offences, both statutory and common law, and includes (as item 33):

> 'Any offence the punishment wherefore may 15 be a period of imprisonment exceeding one year without the option of a fine.'"

170. More recently in S v Prinsloo and Others 2016(2) SACR 25 (SCA), a case involving a so-called "Ponzi Scheme", the 20 Supreme Court of Appeal followed the interpretational approach set out in Eyssen.

"[57] We are in agreement with counsel on behalf of the State that, in construing the provisions of POCA, 25 and in particular Section 2(1)(e) and (f), a liberal or

broad construction is to be preferred. This would be in accordance with the broad objectives of POCA set out in the preamble thereto. In National Director of Public Prosecutions and another v Mohamed NO and others 2002(4) SA 843 (CC) para's 14 to 16 the Constitutional Court, with reference to its preamble, emphasised the importance of POCA to curb the rapid growth of organised crime, money laundering, criminal gang activities and racketeering which threatens the rights of all in the Republic and presents a danger to public order, safety and stability, thereby threatening economic stability. To curtail the ambit of Section 2(1)(e) and (f), as suggested by counsel for the first accused, would in our opinion, be contrary to the intention of the legislature......

[61] This brings us to count 2 i.e. the contravention of Section 2(1)(e) of POCA. What the State was required to prove is that, whilst managing an enterprise (the scheme) the first accused directly or indirectly participated in the conduct of the scheme's affairs through a pattern of racketeering activity. As emphasised above, this court in Eyssen (para 5) held that the essence of the offence referred to in Section 2(1)(e) is actual participation

(be it direct or indirect) in the enterprise's affairs, as opposed to knowledge, not participation, which is the essence of an offence in terms of Section 2(1)(f)......

5 [63] We should add that, as in the case of count one, counsel for the first accused submitted that the State failed to prove that she had the necessary criminal intent in the form of *dolus* to contravene the provisions of Section 2(1)(e) of POCA. In our
10 view, this submission failed to take proper account of the definitional elements of this statutory contravention, i.e. participation in the affairs of the enterprise through a pattern of racketeering activity. As emphasised in Eyssen, participation in
15 the affairs of the enterprise is the offence. Kruger at 13, observes that an accused "is guilty by virtue of (a) being involved in an enterprise being part of the group of racketeers, and (b) being involved in the commission of two or more predicate
20 offences' listed in Schedule 1 of POCA.

[64] To summarise, it is now well-settled that the essence of the offence in terms of Section 2(1)(e) of POCA is participation through a pattern of racketeering activity and not knowledge. Once it is
25 proved that the accused has participated in the

conduct of an enterprise's affairs through a pattern of racketeering activity, i.e. by committing two or more predicate offences listed in Schedule 1 of POCA, he or she is guilty of a contravention of
5 Section 2(1)(e) of POCA. There is no need for a further enquiry as to an additional *mens rea* requirement over and above the *mens rea* required by the predicate offences. "

10 171. The case of S v Dos Santos and Another 2010(2) SACR 382 (SCA) concerned a diamond smuggling syndicate operating in the West Coast town of Port Nolloth. The main perpetrators were charged with various offences under the Diamonds Act of 1986 and POCA and duly convicted in this
15 Division. On appeal to the Supreme Court of Appeal, a number of issues fell for determination by that court. In his judgment Ponnan, JA, made the following remarks regarding the application of POCA to the facts before the court:

"[39] For a pattern of racketeering activity, POCA
20 requires at least two offences committed during the prescribed period. In this court, as indeed the one below, counsel argued that the 'offence' in that context meant a prior conviction. Absent two prior convictions, so the submission went, POCA could
25 not be invoked. Underpinning that submission is the

contention that an accused person must first be tried and convicted of the predicate offences (here the charges in terms of the Diamonds Act) before he/she could be indicted on the racketeering charge in terms of POCA. Allied to that submission is the argument that in this instance there has been an improper splitting of charges, resulting in an improper duplication of convictions.

[40] In my view, whether to prosecute and what charge to file or bring before a before court are decisions that generally rest in the prosecutor's discretion. Nor would it be necessary, it seems to me, for the court to return a verdict of guilty in respect of the predicate offences for the POCA racketeering charges to be sustained. It may well suffice for the court to hold that the predicate charge has been proved without in fact returning a guilty verdict. But that need not be decided here......

[43] Prosecutions under POCA, as also the predicate offences, would usually involve considerable overlap in the evidence, especially where the enterprise exists as a consequence of persons associating and committing acts making up a pattern of racketeering. Such overlap does not in and of itself occasion an automatic invocation of an

improper splitting of charges or duplication of convictions. As should be evident from a simple reading of the statute, a POCA conviction requires proof of a fact which a conviction in terms of the
5 Diamonds Act does not......

[45] [S v Whitehead and Others 2008(1) SACR 431 (SCA)] recognised that a single act may have numerous criminally relevant consequences and may give rise to numerous offences. Our
10 legislature has chosen to make the commission of two or more crimes within a specified period of time, and within the course of a particular type of enterprise, independent criminal offences. Here the two statutory offences are distinctly different.
15 Since POCA substantive offences are not the same as the predicate offences, the State is at liberty to prosecute them in separate trials or in the same trial. It follows as well that there could be no bar to consecutive sentences being imposed for the two
20 different and distinct crimes, as the one requires proof of a fact, which the other does not. Although a court in the exercise of its general sentencing discretion may, with a view to ameliorating any undue harshness, order the sentences to run
25 concurrently. Thus by providing sufficient evidence

of the five predicate acts, the State has succeeded in proving the existence of the 'racketeering activity' as defined in POCA."

5 172. Finally I must refer briefly to the judgment of the Supreme Court of Appeal in De Vries which is reported at 2012(1) SACR 186 (SCA). The case involved a criminal syndicate which robbed delivery trucks of their valuable cargoes of cigarettes and then on-sold the bounty to other
10 parties. After referring to the judgment in Dos Santos, the learned judge of appeal observed as follows:

"[48] In order to secure a conviction under S2(1)(e) of POCA, the State must do more than merely prove the underlying predicate offences. It must also
15 demonstrate the accused's association with an enterprise and a participatory link between the accused and that enterprise's affairs by way of a pattern of racketeering activity. In light of this, an offence under S2 (1) of POCA is clearly separate
20 and discrete from its underlying predicate offences and in my view, the decision in Dos Santos in regard to this issue is undoubtedly correct......

[56] By receiving the cigarettes for himself well knowing they were stolen, the appellant made himself guilty
25 of theft as it is a continuing crime. By proceeding to

use the cigarettes as part of his stock in trade as a wholesaler as if they were goods lawfully acquired, and thereby disguising or concealing the source, movement and ownership of the cigarettes and
5 enabling and assisting the robbers to either avoid prosecution or to remove property acquired in the robberies, the appellant clearly made himself guilty of a contravention of S4 [of POCA]. Doing so involved different actions and a different criminal
10 intent to that required for theft. In these circumstances there was no improper splitting of charges."

<u>THE APPLICATION OF THESE PRINCIPLES TO THIS CASE</u>

15

173. How then do these principles find application in the present case? In the first place, none of the accused now before court are any longer liable to conviction under S2 (1)(f) of POCA. It is only S2 (1) (e) that remains applicable and
20 nothing more need be said in regard to the former.

174. Further, and in light of the definition of racketeering activity, the State is entitled to prove a minimum of two contraventions of either S18(1) of the MLRA or Regulation
25 39(1)(a) of the MLRA Regs, and, provided the contraventions

are shown to be causally linked to the enterprise in question, ask the court to find that an accused who is guilty of such contraventions is then to be regarded as a racketeer who has participated in a pattern of racketeering activity and is liable to
5 conviction under S2(1)(e) of POCA. Of course, the State must establish not only that an accused actually committed an MLRA offence but that he had the requisite criminal intent (or *mens rea*) to sustain such a conviction.

10 175. At least one such MLRA contravention must have taken place after 21 January 1999 which is the date of the promulgation of POCA while a second contravention may have been committed after such promulgation or within a ten year period preceding the specific contravention after 21 January
15 1999 relied upon by the State. Having regard to the indictment, the State has relied on illegal activities commencing in 2004, and it may then notionally ask the Court to have regard to acts of racketeering going back as far as 1994. As a matter of fact, however, the dates alleged in the
20 indictment range between 2004 and 2006 and are dates obviously falling within the operation of POCA.

176. Lastly, to secure a conviction under S2(1)(e) of POCA the State must establish that each of the accused committed
25 the respective predicate offences with the knowledge that

there was an illegal enterprise in existence, or to use the language of Eyssen, it must be shown that the accused consciously participated in the racketeering activity attributable to him.

5

THE UNLAWFUL ENTERPRISE

177. The Court referred earlier to the fact that there did not appear to be any dispute regarding the existence of an
10 enterprise as required for the purposes of the application of POCA and we have found that the enterprise was undoubtedly controlled by Chao. In summary, we consider that it was he who:

- recruited Africa as his administrative assistant-cum-office
15 manager to attend to all the necessary paperwork, to manage the entire logistics chain, to oversee the delivery of product to the cold storage facilities and the loading of the containers prior to transhipment;
- lawfully established 2 corporate entities (Rapitrade and
20 Syroun) as the public face of the enterprise;
- remained the so-called "guiding mind" of these corporations, notwithstanding the appointment of Africa as the sole director and shareholder of each of them;
- gave instructions as to when batches of abalone were to
25 be stored at the cold storage facilities, loaded into

containers and shipped overseas;

- effected payment of the expenses of the corporations where necessary, and
- ultimately received the benefits of the product once
5 exported.

All of these activities suggest that the affairs of the enterprise were conducted with a high degree of planning as contemplated in the definition of "pattern of racketeering activity".

10

178. The core business of the enterprise was obviously the export of abalone, given its extraordinarily high value. We consider that the export of pilchards may be regarded as incidental to the core business given that its ultimate purpose
15 was to mask the abalone once loaded into a container, rather than to constitute a separate source of revenue. To appreciate the illegality of the business of Chao's enterprise, it is necessary to consider how a lawful business had to operate.

20 179. The evidence of the MCM officials, and in particular Mr Angus MacKenzie establishes that during the period in question (2004 - 2006) the export of abalone was strictly controlled by government through the issue of permits. This was done on the basis that the Department of Agriculture,
25 Forestry and Fisheries (DAFF), of which MCM was a unit,

would annually fix the quantity of abalone that could lawfully be harvested for commercial exploitation. This was known as the "Total Allowable Catch" or "TAC" and was fixed with a view to maintaining a sustainable natural resource. During 2004 the
5 TAC for abalone was 237 tons and in 2006 it dropped to 125 tons.

180. Commercial ventures interested in lawfully exploiting abalone were required to apply to the DAFF for the right to fish
10 for abalone and if successful would be issued with a permit which fixed the total tonnage of abalone (with the shell on and before shucking) which the permit holder was permitted to harvest during the year in question. It further designated the particular coastal zone in which the abalone could be
15 harvested.

181. A permit holder was required to deliver the abalone to a designated "fish processing establishment" (FPE) where it was to be cleaned and prepared for sale commercially. The permit
20 holder could elect to either sell the catch to the FPE, or to instruct the FPE how the product should be processed before the permit holder personally disposed of it. No processing of abalone outside of a licensed FPE was permitted.

25 182. Mr Mackenzie said that the illegal commercial

exploitation of abalone was rife and in the years when the TAC was of the order of 100 to 200 tons, more than tenfold that quantity was poached and shipped, mostly to the Far East. He went on to explain that there had previously been a
5 dispensation in terms whereof recreational divers could take out a limited number of abalone per day for personal consumption provided they were in possession of a licence issued through MCM. However, this was stopped completely in 2003 because of the scarcity of the resource due to poaching
10 which was said to have increased at an alarming rate.

183. The evidence of the MCM officials establishes that neither Chao, nor Rapitrade nor Syroun were ever issued with permits to fish for abalone nor to conduct an FPE and it
15 follows from this that any abalone which was possessed or controlled by any of these entities for commercial purposes was in contravention of Regulation 39(1)(a) and therefore unlawful. Similarly, any FPE's conducted by these entities, or on their behalf, were unlawful.

20

184. It was suggested in cross-examination of the MCM witnesses by Mr Uijs, SC, on the instructions of accused 4, that Chao may have bought from MCM abalone which had previously been seized and forfeited to the State and that his
25 business may thus have been conducted lawfully. The MCM

evidence confirmed that such purchases had been permitted at a stage in the late 1990's and early 2000's but that the practice had been without a legal basis for a protracted period thereafter and that the auction of such product only
5 recommenced in October or November 2006 - after the various raids relevant to this case had taken place. Certainly, no such sales had taken place in the period 2004 to 2006.

185. But whatever the factual position may have been,
10 possession per se of such recycled abalone would nonetheless have been subject to the issue of a permit contemplated in terms of Regulation 39(1) (a) and the processing thereof subject to the necessary permit issued in terms of Section 18(1)(b) of the MLRA. No admissible evidence has been
15 adduced to rebut the MCM evidence to establish that Chao, Rapitrade or Syroun were not in possession of any such permits, thus confirming the illegality of the operations of the enterprise.

20 186. Looking at the evidence sequentially one sees the following scenario. Freshly shucked abalone packed in large, clear plastic bags was available for collection at the home of one Michael Withers in Somerset West. Acting on the instructions of a person of Oriental extraction known to him
25 only as Chris, David le Roux regularly collected such bags and

delivered them to a prearranged drop-off point in Bellville not far from the home of accused 4 where the latter admits that the product was stored and later processed on behalf of Chao. On one occasion in February 2006 a quantity of similar product
5 was delivered by Le Roux to accused 3 in similar fashion in Stellenbosch at a time when a processing facility was operating on Foxhole Farm in the Stellenbosch district.

187. During the period late 2004 to 2006 fresh abalone
10 processed initially in accused 4's garage in Hoheizen, and later at the house rented in Durbanville, was transported through to two cold storage facilities in either the Cape Town docks or Hout Bay harbour where they were stored on behalf of Rapitrade, before being packed into a container and
15 exported on behalf of that corporation to the Far East, initially consigned to addresses in Hong Kong.

188. During 2006, at the time that fresh abalone was being processed at Foxhole Farm, Faraday Street, Hercules Street
20 and Volmoed farm, Rawsonville, deliveries of the product were made to the V&A cold storage facility in Cape Town docks where it was stored on behalf of Syroun and Rapitrade before being similarly containerised and exported to the East. In so far as the evidence establishes beyond reasonable doubt a
25 continuous line of supply and production, culminating in a

multitude of regular containerised exports of abalone during the period 2005 to 2006, it can be concluded with the requisite degree of certainty that the activity of the enterprise was "ongoing" as contemplated in the definition of "pattern of
5 racketeering activity".

189. In the circumstances we are satisfied that the State has established beyond reasonable doubt that the commercial operation conducted by Chao utilising the businesses of *inter*
10 *alia* Rapitrade and Syroun constituted an unlawful enterprise as contemplated under POCA. What remains is for us to consider the potential contravention of the predicate offences by each accused, the potential involvement of each accused in this "pattern of racketeering" and the criminal consequences
15 thereof, if established. Before we can convict an accused of a predicate offence we must be satisfied beyond reasonable doubt that each such accused had the requisite criminal intent to commit the crimes with which he has been charged. That brings us to the element of *mens rea*.

20

MENS REA

190. Before any of the accused can be convicted of the predicate criminal offences they face the State must establish
25 his culpability and show that the accused acted with the

requisite degree of criminal intent or *mens rea*. Such intent may be direct (*dolus directus*) or indirect (*dolus eventualis*). In the context of this case, an accused's criminal intent may fall into either category. A person may, for example, have the
5 direct intention to collect, keep, control or possess abalone for purposes of commercial exploitation. We note, in passing, that the offence created in terms of Regulation 39(1)(a) makes no mention of possession for purposes of export – only commercial purposes – and so any allegation in the indictment
10 to that effect is superfluous.

191. But it is not only direct intention to possess etc that attracts criminal liability. For purposes of a conviction under either Regulation 39(1)(a) or S18(1), the State is entitled to
15 rely on *mens rea* in the form of *dolus eventualis.* Much has been written and said about *dolus eventualis* in the wake of the decision of the Supreme Court of Appeal in the Oscar Pistorius case which is reported at 2014(2) SACR 314 (SCA). For the sake of this judgment we prefer to have regard to the earlier
20 decisions of the SCA in S v Humphreys 2013(3) SACR 1 (SCA) and S v Makgatho 2013(2) SA 14 (SCA).

192. In Makgatho, Shongwe, JA, with reliance on *inter alia* Snyman Criminal Law, 6th Ed and Burchell and Hunt Vol 1
25 described the position as follows:

"[9] A person acts with intention in the form of *dolus eventualis*, if the commission of the unlawful act or the causing of the unlawful act is not his main aim, but he subjectively foresees the possibility that in striving towards his main aim, the unlawful act may be committed or the unlawful result may ensue, and he reconciles himself to this possibility... In other words, it must be shown that a real – as opposed to a remote – possibility of that consequence resulting was foreseen. "

193. Humphreys involved a collision of a school bus with a train at the notorious Buttskop level crossing near Blackheath. In stressing the importance of proof of subjective foresight, Brand, JA, added the following words of caution:

"[13] For the first component of *dolus eventualis* it is not enough that the appellant should (objectively) have foreseen the possibility of fatal injuries to his passengers as a consequence of his conduct, because the fictitious reasonable person in his position would have foreseen those consequences. That would constitute negligence and not *dolus* in any form. One should also avoid the flawed process of deductive reasoning that, because the appellant should have foreseen the consequences,

it can be concluded that he did. That would conflate the different tests for *dolus* and negligence. On the other hand, like any other fact, subjective foresight can be proved by inference.
5 Moreover, common sense dictates that the process of inferential reasoning may start out from the premise that in accordance with common human experience, the possibility of the consequences that ensued would have been obvious to any person of
10 normal intelligence. The next logical step would then be to ask whether, in the light of all the facts and circumstances of this case, there is any reason to think that the appellant would not have shared this foresight, derived from common human
15 experience, with other members of the general population."

EVALUATION OF THE FRAUD CHARGES

20 194. As indicated at the beginning of this judgment various of the accused were charged with the common law offence of fraud. Accused 1, 3, 8 and 9 were charged with this offence on counts 60, 65, 71, 80, 84, 87, 91, 98, 110 and 113. Accused 1, 2, 4, 5, 8 and 9 were similarly charged on counts
25 52 to 59, 61 to 64, 65, 67 to 70, 72 to 79, 81, 82, 85, 86, 88 to

90, 95, 96, 111 and 112. At the conclusion of the State's case, and pursuant to the application by the defence in terms of S174 of the CPA, the following acquittals were granted:

- Accused 1, 3, 8 and 9 were all acquitted on count 71;
- Accused numbers 1, 2, 4, 5, 8 and 9 were all acquitted on count 96;
- Accused 2, 4 and 5 were acquitted on count 57; while
- Accused 3 was acquitted on counts 60, 65 and 67;
- Accused 1 was also acquitted on charge 114.

195. Turning to the indictment on the fraud charges the State makes the following allegations:

> "In that on or about the dates mentioned in column 12 of schedule B and at or near Table Bay Harbour and or Hout Bay Harbour in the district of Cape Town and Wynberg, the accused did wrongfully, unlawfully, falsely and with intent to defraud and to the prejudice or potential prejudice of Ebenhaeser Beukes of Customs and Excise and/or the South African Revenue Services give out and pretend to Ebenhaeser Beukes of Customs and Excise and/or the South African Revenue Services that containers described in column 4 of the schedule exported by the company in column 3 contained frozen pilchards to the value of the amounts in column 7.
>
> Whereas in truth and in fact when the accused gave out

and pretended as aforesaid he/she/they knew that in truth and in fact the containers contained a combination of abalone and pilchards. "

5 196. In the sixth edition of his authoritative textbook Criminal Law at page 523, Professor CR Snyman offers the following definition:

"Fraud is the unlawful and intentional making of a misrepresentation which causes actual prejudice or which

10 is potentially prejudicial to another."

In S v Gardener 2011(1) SA 570 (SCA) at para 29 the Supreme Court of Appeal approved of a substantially similar definition. The elements of the crime are therefore:

(i) a misrepresentation;

15 (ii) prejudice or potential prejudice;

(iii) unlawfulness; and

(iv) intention.

197. We are in agreement with the argument advanced by the

20 defence, (in particular Mr Uijs SC) that the evidence of Meihuizen and Beukes establishes that the only document which might contain misrepresentations to the Department of Customs and Excise was the so-called "Bill of Entry Export". We did not understand tile State to take issue with this

25 argument.

198. The Bill of Entry Export (a *pro forma* document bearing the designation "DA 550") is a statutory document prepared by a shipper of goods which contain a number of important details in relation to a cargo which is to be exported overseas. These include details of the exporter (with its duly issued "customs code") the consignee, the name of the vessel on which the container is to be conveyed together with the number and date of the voyage, a description of the product with its appropriate customs tariff code and value and the name of the shipping agent responsible for the completion of the documentation. The DA 550 also contains a block headed "Endorsements" in which provision is made for the shipper to tick three discrete boxes which read "F 178 NOT REQUIRED", "F178 PRODUCED" and "EXPORT PERMIT NOT REQD". Lastly, there is a block for the Department of Customs to place its official stamp on the document, presumably as an indication that it is satisfied with the contents of the documentation and that the goods described therein may be exported.

199. The evidence in this case given by both Beukes and Meihuizen demonstrates that the Bill of Entry Export was submitted to the Department of Customs at its offices in the Cape Town harbour by Linmar Shipping in each instance prior to the loading of a container for export to the East. And once

received, the Department would subsequently impliedly authorise the export of the contents of the container by placing its rubber stamp on the document.

5 200. As we understand the evidence, the primary purpose of the document was to enable the Reserve Bank to monitor the flow of foreign funds in and out of the country. The Bill of Entry Export provides for the disclosure of the value of the goods being exported and in the event that such value exceeds
10 R50 000, the exporter is required to furnish further documentation to the Reserve Bank to demonstrate that the proceeds of the export have in fact found their way back into the Republic. As such the disclosure of value in excess of R50 000 in 2006 would trigger a paper trail, (the Form 178),
15 from which the Reserve Bank could then monitor these flows.

201. Mr Beukes was an employee of the South African Revenue Service charged with the investigation of the tax, customs and excise implications implicit in the criminal
20 activities involved Project Mask. He was not a person to whom the Bill of Entry Export was customarily submitted and there is no evidence that any such documentation was in fact ever submitted to him for consideration at the time of export. In the circumstances it follows that the allegation by the State that
25 the misrepresentations which form the basis of the fraud

charges were made to Mr Beukes is factually incorrect and such misrepresentations have not been established. There can therefore be no question of Mr Beukes having been misled at the time by the manifestly false declarations contained in 5 these documents that the containers contained only pilchards whose transaction value never exceeded R50 000.

202. However, that is not the end of the enquiry in relation to the fraud charges. The indictment goes on to allege that the 10 falsehoods contained in the Bill of Entry Export were made in the alternative to the South African Revenue Services. To the extent that, according to Mr Beukes, the Department of Customs is in effect a sub-department within the Revenue Services, it is fair to say that a more generalised 15 misrepresentation to SARS can be established on the evidence. That is that the submission of a document containing an obvious false declaration to the customs authorities at Cape Town Harbour could ultimately be said to be intended to be a misrepresentation to the Revenue 20 Services.

203. Accepting that to be the case, the next enquiry is what prejudice, or at the very least potential prejudice, was occasioned to the Revenue Services by the making of such a 25 false representation? As we have just said, the purpose

behind the declaration in the Bill of Entry Export as to the value of the cargo is to enable the Reserve Bank to track the flow of money in and out of the Republic. By fixing the declaration limit at R50 000 per export transaction, the
5 Reserve Bank was effectively saying that it was not particularly interested in the repatriation of the proceeds of smaller exports. But as soon as the cargo exceeded that amount, said Mr Beukes, a completely different procedure followed. In such event the exporting party was required to
10 complete the F178 form which necessitated a far greater level of disclosure to the authorities.

204. Mr Beukes agreed with defence counsel that there were no customs or excise duties payable on exports out of South
15 Africa. The purpose of the F178 procedure appears to us to have been to trigger a situation whereby the Reserve Bank was alerted to the necessity to monitor amounts which were required to be repatriated for the benefit of local exporters. Ultimately, the benefit to the fiscus would have been income
20 tax potentially payable to the State by such exporting entities. The prejudice occasioned by the failure to trigger that process would have been to the Reserve Bank in not being able to monitor the repatriation of monies which would otherwise have had to be paid into a South African bank account. And, I
25 suppose, it, could be said that ultimately the revenue might be

prejudiced by the failure to pay income tax where same was due to it.

205. Our law is clear concerning the necessity for precision in
5 the drafting of the indictment in a complex case such as the fraud alleged here. The State is obliged to produce proof, not that the accused have committed fraud, but that they have committed fraud in the manner alleged in the indictment. See in this regard S v Heller and Another 1964(1) SA 524 (T) at
10 535H where the learned judge of appeal noted that the question was whether the State had:

> "...adduced *prima facie* proof not merely that the accused have committed fraud but have committed it in the manner alleged in the indictment, because precision in
15 pleading and charging fraud is generally, and *a fortiori* in a case of this complexity and magnitude, essential."

206. In our view the State's case on the fraud charges is fundamentally flawed in three respects:

20 1. It has failed to make the correct allegations in the indictment as to the nature of the representations which were potentially misleading and which caused, or were likely to cause, prejudice.
2. It has failed to correctly identify the party (or
25 parties) prejudiced or potentially prejudiced by the

misrepresentation.

3. The evidence tendered by the State does not sustain the allegations in the indictment, inadequate as it maybe, that Beukes on behalf of 5 the Department of Customs and Excise and/or the South African Revenue Services suffered any prejudice or potential prejudice as a consequence of the misrepresentations.

In light of these findings it is not necessary to go into the 10 potential contravention of any of the fraud charges by the individual accused.

CONTRAVENTION OF THE PREDICATE OFFENCES

15 207. We will now proceed to discuss each of the accused's potential involvement in the predicate offences under the MLRA and/or the MLRA Regs. In that context it is necessary to briefly say something about the credibility and reliability of the witnesses. Everyone who testified in this case was asked 20 to recall events going back eight to ten years or even more. No doubt the State witnesses were able to refresh their memories through perusal of their witness statements taken by the police. However, these are notoriously inaccurate and unreliable (R v Gumede 1949(3) SA 749 (A) at 757). In our 25 view, the necessary leeway must be allowed for lapses of

memory and deviation from earlier statements when reviewing the evidence.

208. An overall analysis of the evidence is somewhat hamstrung by the absence of two of the key role-players in this matter – Chao and Ku. There can be little doubt that had they been present and represented in these proceedings cross-examination on their behalf, and their own testimony, might have revealed a different take on matters.

209. Generally we are satisfied with the quality of the evidence presented. What concerns us is not the veracity of any of the witnesses but their reliability. That having been said, we are cautious about the credibility of only a few of the witnesses. We have already mentioned Salvin Africa and must add to that list the names of AJ Theunissen, Adam Wildschutt, Melville Meihuizen and Captain Brink.

- Theunissen may have been hamstrung by the fact that he was not offered S204 protection and so answers which may have been potentially self-incriminatory might be compromised.
- Adam Wildschutt was bombastic and aggressive towards defence counsel, yet when he addressed the State and the Court he was more than civil enough. This may be a sign of defensiveness on his part.

- Melville Meihuizen was less than satisfactory as a witness. We have some reservations about his proclaimed ignorance of the contents of the containers that he shipped out on behalf of Rapitrade and Syroun.
5 In addition, he demonstrated a tendency for collaboration in illicit dealings when he cooperated with Africa in the rendering of inflated invoices to Chao to enable Africa to skim some additional commission off his boss. Perhaps he too would have benefited from a warning under S204.
10 • Brink demonstrated a tendency to cut corners and bend the rules of standard police procedure and as we shall show later he may have had exhibited bias towards certain of the accused.

15 210. Mr Mellor suggested that we should have concerns about the evidence of David le Roux as he was once a policeman in the apartheid era Security Branch. The submission is without merit: a person's erstwhile odious employment status is no basis per se for disbelieving him. The hangman's evidence is
20 as potentially as credible as the priest's. As it was we observed Le Roux as a cautious, somewhat nervous, witness who was fully alive to the dangers of testifying in this matter. Lydia Wildschutt, too, was somewhat timid and reluctant as could be expected of someone called upon to testify against a
25 family member with a self-confessed history of direct

involvement in the abalone trade.

211. Also, we are alive to the fact that lay witnesses may have been reluctant to testify in a matter such as this, given the perception of the ruthlessness of the notorious Chinese Triad gangs who involve themselves in all manner of illegal smuggling activities. Indeed accused 1 alluded to this in his evidence when he related an anecdotal story about the death of someone who had crossed such a gang in Cape Town and had been found dead in the Liesbeeck River. We do not wish to be misunderstood on this score. We are not saying that there were any such threats to witnesses, perhaps just a perception on their parts.

ACCUSED NO 1 - PHILLIP JAMES MILLER

212. The State witnesses who gave evidence regarding accused 1 were Salvin Africa, Colin du Plessis, Barend Smal aka Bennie and Captain Brink. Miller was also referred to by accused 8, Desmond Pienaar, when he testified in his defence.

213. As pointed out earlier on in this judgment, Miller initially elected to close his case without tendering any evidence in his defence. However, after hearing the argument presented by the State during February 2017 in relation to his alleged

involvement in this matter, he had a change of heart and successfully applied for the reopening of his case. In the amplified affidavit in support of the application to re-open, Miller explained that after he had heard the State's argument
5 in relation to his cell phone communications during 2006, he was of the view that the prosecution had got the wrong end of the stick and had drawn the incorrect inferences from those communications. Clearly then what the accused sought to do was to set the record straight and to place before the Court the
10 facts as he believed them to be. In addition to testifying personally, Miller called Cyril Akers, the manager of Sea Freeze in Hout Bay, who had previously been on the list of State witnesses and was made available to the defence at the close of the State case.

15

214. We are of the view that Miller's evidence must be carefully scrutinised given that he decided to testify at a time when the proverbial shoe was pinching and in circumstances where he was clearly endeavouring to remove the source of his
20 discomfort, so to speak. See S v Felthun 1999(1) SACR 481 (SCA) at 487a-b. And when we evaluate the evidence presented on behalf of accused 1 we must have particular regard to his case as put up by counsel in the cross-examination of the State witnesses, and when he took the
25 witness stand any potential deviation in evidence from the

earlier instructions which he would have given to his counsel for purposes of cross-examination.

215. The testimony of Du Plessis, Smal, Brink and Pienaar
5 was not challenged by Miller but that of Africa was, and so it makes sense to commence with that testimony, much of which has already been set out in the overview of this witness's evidence. Miller confirmed in his evidence in chief the manner in which he had got to know Africa over the years in his
10 capacity as a former cold store manager at Commercial Cold Storage. It was clear that they had had an amiable working relationship previously and that Miller was initially well-disposed to Africa. Miller knew that Africa had left Commercial under a cloud and was aware that he was in straitened times.
15 He described how Africa arrived unannounced at Lakeside one Saturday where he was coordinating a gathering of the local naval cadets and confirmed that he knew that Africa was unemployed, was desperate for money and was literally prepared to do anything to put food on the table. Miller said
20 he told Africa that there was a possibility that he may be able to find employment and said that he would revert to him.

216. A week or two later Miller contacted Africa again and informed him of the prospect of employment, so it later turned
25 out, with Chao. A meeting took place at Miller's office which

was located in a converted double garage at his erstwhile home in Tokai. Miller introduced Africa to Chao and says that he left the two of them to discuss things on their own while he went about his business. He clearly wished to convey to the
5 court that he did not participate in those discussions at all. Nevertheless, he told the court in his evidence in chief that Chao required an administrative assistant, (Miller called the position "a girl Friday") to assist with the processing of documentation at his factory in Montague Gardens, which was
10 then still involved in the manufacture of furniture from railway sleepers.

217. In this evidence we see a deviation from the cross-examination of Africa by Ms Joubert where it was put on more
15 than one occasion that Miller knew that Chao was looking for assistance in his fish exporting business. In fact, it was put to Africa that Miller had suggested to him before the Tokai meeting on what basis he might offer to be remunerated for his services – a fixed salary of R3 000 per month and an
20 additional amount per container. We shall revert to the materiality of this digression later.

218. It is not clear as to when exactly Africa commenced employment with Chao but it is safe to assume that it was
25 sometime during the first half of 2002 probably around Easter.

What is not clear either is how, on Miller's version, Africa came to be saddled with the administrative side of Chao's fish exporting business, after initially having been engaged to help out with the furniture business. In any event, Miller testified
5 that he helped Africa purchase the basic office equipment, computer, printer and a fax machine, necessary to do the work which Chao required of him. He said that at the request of Chao he took Africa to a branch of Cash Converters and paid for the goods on behalf of Chao.

10

219. It seems that a couple of months after he started working for Chao, Africa stopped working at the premises in Montague Gardens and commenced working from his home in Heathfield. As we said earlier, the event which lead to Africa discovering
15 about the true nature of the cargo was the remark by someone at Sea Freeze – most likely Akers – about the unsatisfactory packaging of a quantity of fish which he, Africa, believed to be jacopever. He went on to say that when he was told by Chao that his work would involve overseeing the necessary
20 documentation required for the purposes of the export of abalone, he immediately decided to work from home. Presumably he wished to physically distance himself from Chao in the event of police activity.

25 220. In any event and as we have said earlier, in June 2002

Chao indicated that he wanted to house his fish exporting business in a separate corporate vehicle. To this end Africa was taken to the offices of a firm of attorneys in Rondebosch, Spencer Pitman Incorporated, where Mr Adam Pitman 5 presented the paperwork for the necessary establishment of the first of two Pty Limited companies set up by Chao. Africa was reflected in the necessary documentation lodged with the Registrar of Companies as the sole shareholder and director of Tresso Trading 588 (Pty) Ltd. It is clear that this was a 10 nominee position only as Africa had neither the capital nor the expertise to set up or run such a company. The documents relevant to the registration of Tresso 588 record an attendance with Mr Pitman on 26 June 2006.

15 221. Early in 2003 Africa paid a further visit to Mr Pitman's offices when a second company, Rapitrade 109 (Pty) Ltd, was set up by Chao in similar circumstances. For the sake of completeness we should point out that a name change was subsequently effected to Tresso 588 - it then became known 20 as Syroun (Pty) Ltd - but the ownership and control remained unaffected with Africa nominally in charge. While there is no documentation to formally record this name change, the probabilities suggest that this occurred in 2005 because the name Syroun is not to be found in any documentation before 25 the court before early 2006. Syroun was used by Africa in May

and August 2005 to export abalone from V&A for Mohamed.

222. In regard to the initial meeting at Mr Pitman's office in June 2002, Africa said that he was contacted by Miller and told
5 that it was necessary for him to visit the offices to sign documents for a company which Chao was setting up in his, Africa's name. This fact was disputed by Miller in evidence claiming that he was contacted by Chao one day and asked to do him a favour by transporting Africa through to Rondebosch
10 as Africa did not know where to go. Miller says that he obliged by simply doing a business associate a favour and made no further enquiries as to the purpose of the visit.

223. During cross-examination on this point Africa was
15 adamant that it was Miller who told him what the purpose of the visit was, the clear import of his evidence being that Miller was in the know from the very start of the establishment of Tresso 588. Yet when cross-examined by the State on this point Miller was all but convincing. He attempted to persuade
20 the court that he had no knowledge whatsoever as to the purpose of the visit and, further that he made no enquiries of either Chao or Africa as to that purpose, either before or after the visit.

25 224. We consider Miller's explanation on this point

unconvincing. He is simply not the sort of person who would have gone about such a menial chore without knowing what it was about, or at the very least, by making enquiries of Africa after the event. He knew Africa's dire personal circumstances and in particular he knew that Africa had no prior experience in the running of a company. In the witness box we saw in Miller a forthright person prone to curiosity, as we will show later. He is one who is not shy to express himself assertively, if necessary with a little exaggeration; a person of whom it may be said “he calls a spade a spade”.

225. In those circumstances we consider that basic human behaviour and in particular Miller's own curiosity would have led to him conducting himself as Africa testified. Moreover, when we bear in mind that Africa conceded under cross-examination that it was possible that Miller did not know at that time that Chao's fish exporting business involved dealing in illegal abalone, Miller's denial in the witness box of the reason for the visit to Pitman's offices becomes a curiosity of its own to which we shall revert later.

226. Miller testified that he was well known in the commercial fishing fraternity in Cape Town, particularly for his ability to source pilchards for use on tuna fishing vessels. He claimed to be known as the local "Pilchard King", but it was apparent

from his evidence that he traded in various other varieties too. Miller too, like Africa, has a nose for a deal and if there was money to be made, for example by taking a modest commission from both supplier and purchaser, he would do so.

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227. In 2004 FTE ran into cash flow problems when a purchaser failed to pay for a consignment of fish destined for Angola. The result was that Miller's company was liquidated, it would seem sometime around October of that year. Miller's 10 personal solvency was not directly affected by the collapse of FTE and there were no suretyships that were called up. But, of course, it resulted in his source of personal income being depleted. Miller described this time as the worst years in his life but he continued to put deals together, buying and selling 15 fish as a sole proprietor.

228. Miller explained that early in 2005 he entered into what can conveniently be termed a joint venture with two other participants in the local fishing trade in Hout Bay, namely 20 Colin du Plessis, who testified for the State, and his business partner, a certain Steve Meyer. Du Plessis and Meyer had also run into some problems in an earlier venture of theirs and started a business known as "Pesca Atlantico" which they operated out of a part of the premises of Sea Freeze in Hout 25 Bay harbour. Their interest at that stage had been the export

of hake to Spain. Acting on the initiative of Miller they were persuaded to go into pilchards and to this end Pesca rented a small office at Sea Freeze and stored their fish in the freezer rooms at Sea Freeze. Miller was paid an agreed commission 5 by Pesca on the sale of such fish to his clients.

229. Du Plessis, who confirmed that the timeframe was end 2004 into 2005 explained to the court that with the assistance of accused number 1, Pesca brought in large quantities of 10 inferior grade pilchards which were offloaded on the quayside at Hout Bay by local vessels and then packed and frozen in galvanised steel trays of either 5 or 10 kg size. The frozen product, called a "jumble pack" after the contents of the pans, neatly filled the cardboard boxes into which they were packed 15 after freezing and removal from the pans. The packing of the trays was done by casual staff at Sea Freeze who were shown by Miller how the packing should be done.

230. Du Plessis said that Miller introduced a client of his 20 called Rapitrade to Pesca and that he thus got to know Salvin Africa. Africa would oversee the packing of containers of fish at Sea Freeze and Pesca would provide as many cartons of jumble pack (which was referred to in the documentation by the acronym "JP") as Africa had previously ordered. Du 25 Plessis confirmed that quantities of other product which it

seems he believed was fish also contained in 10 kg cardboard boxes, were delivered to Sea Freeze by the bakkie load, the vehicles invariably driven by a white male. These boxes were stored at Sea Freeze until the time came for a container to be 5 loaded, at which stage the cartons would be retrieved from the cold store rooms. We know now that the delivery man was accused 4 and that the product was in fact abalone.

231. Miller told the court how the local pilchard industry 10 operated through the issue of State controlled quotas. He explained that there were two big commercial operations in Hout Bay which fished for pelagic fish with such quotas. The one was a certain Mike Stowe, the owner of several vessels who is known to many in the court room as a former 15 prosecutor, and the other was Bernard Zive of Snoek Wholesalers. Stowe's quota in 2005 was said to be of the order of 800 tons and Zive's around 300 tons.

232. Miller explained that he negotiated a deal with Zive to 20 purchase his entire quota which he then on-sold to Pesca. In that way, Miller did not need to put up any capital but took a commission from both Zive and Pesca. As Zive offloaded his fish in Hout Bay, it was booked in to Sea Freeze where the fish was packed in 5 or 10 kg boxes as already described and then 25 stored in the cold rooms. As Pesca found buyers for the

pilchards, these boxes were withdrawn from the freezers and collected by the purchasers.

233. Miller said that the best quality pilchards were caught
5 during the colder months of the year and that Zive fished out his quota by about August of that year. Some of Stowe's quota was taken by Du Plessis and Meyer and the proceeds of these quotas then established the basis for Pesca's source of supply. Du Plessis said that he only learned of the illegal
10 export of abalone when he read about the raid at V&A in September 2006 in the newspaper.

234. If one has regard to the various GRV's and GIV's issued by Sea Freeze in 2005 in respect of product stored on behalf
15 of Rapitrade, a very clear pattern emerges. The pilchards which were used to mask the abalone were invariably referred to in the documentation through their source – Pesca – and the abalone mostly as Rapitrade. We have tallied up the number of cartons of pilchards recorded as being ex Pesca in exhibits
20 2.27e, 2.27k, 2.32, 2.37 and 2.42 and have calculated the total to be 2997. If this figure is multiplied by 10, being the kilogram weight per box, a total of 29 970 kilograms is arrived as having been supplied to Africa by Pesca during the period June 2005 to August 2005. This is roughly the equivalent of
25 300 tons of pilchards and that figure ties in almost exactly with

the Zive quota which Miller says he contributed to the joint venture.

235. In the result we are satisfied beyond reasonable doubt
5 that accused 1 was instrumental in facilitating the supply of 300 tons of jumble pack pilchards to Rapitrade during 2005. We are satisfied too through the evidence of Africa and accused 4, Tony du Toit, that those Pesca jumble packs were loaded into containers which contained varying quantities of
10 frozen abalone and were used to mask the abalone to avoid detection by the authorities.

236. The question which then must be asked is whether the State has established Miller's *mens rea* in respect of the
15 counts with which he is charged specifically with reference to containers packed at Sea Freeze. That question is answered by posing the following further question: Did Phillip Miller know that there was abalone in the containers which were packed by Africa at Sea Freeze and did he realise that the
20 pilchards which he was supplying via Pesca were being used to mask that abalone? Alternatively, can it reasonably be inferred from all the relevant evidence that Miller had the subjective foresight, when providing pilchards to Rapitrade at Sea Freeze, that an unlawful act may have been committed by
25 Rapitrade, or that an unlawful result may have been caused,

and that he reconciled himself with that possibility.

237. There are 2 pieces of evidence which are relevant to this enquiry. The first is that of Barend Petrus Smal aka Bennie. 5 Smal is a sea fisheries inspector with MCM and has been for many years. It later transpired through the evidence of Miller that he had run a scuba diving academy which was fortuitously attended by *inter alia* Smal and Brink. Smal testified that in the 1990's he was stationed in Hout Bay and had got to know 10 Miller. He said that in 2004 while he was stationed at the MCM offices in Sea Point, he had returned to Hout Bay one evening to enjoy a drink at the local yacht club. There he encountered accused 1 and the two of them struck up a conversation as old friends do.

15

238. Smal said that Miller confided in him that he had been approached by a Chinese man who was involved in the export of abalone and who had asked him, Miller, to assist with the packing of abalone in amongst pilchards which would be used 20 as a decoy. Miller told Smal that he would alert him if the Chinese man contacted him again. Smal said that he reported the conversation to his senior, Keith Thompson, but that nothing further transpired and that he had not heard again from Miller. Smal was clear that the conversation took place 25 towards the end of 2004 and was able to fix it in time. He said

that in November 2004 he had been transferred to a specialised unit dedicated to the prevention of abalone poaching and that the discussion had taken place after that.

5 239. The cross-examination of this witness by Ms Joubert was short and to the point. Importantly, she indicated that accused 1 did not dispute the conversation with Smal and went on to add that Miller would say that he had no recollection thereof - "Hy onthou dit nie maar ontken dit ook nie." (Transcript page 10 2186 line14). In terms of the approach in SARFU the State was entitled to regard this point as not in issue.

240. Later in the witness box Miller tried to recant on this concession by his counsel by suggesting firstly that although 15 he could not recall the discussion, he simply believed that it was inconceivable that he could have said so. And when taxed on his attitude now by Ms van der Merwe under cross-examination he went so far as to suggest that perhaps Smal had an axe to grind as he, Miller, had failed him during his 20 scuba diving test.

241. In argument Ms Joubert speculated that on the probabilities the conversation must have been in late 2005 and not 2004 and that Smal was therefore patently out with the 25 dates. In light of the concession in the cross-examination of

Smal it is not open to counsel to argue the contrary. In her reply Ms Heeramun for the prosecution, countered that had the challenge been properly laid down in terms of SARFU the State might have considered calling Thompson to rebut the
5 suggestion of a recent fabrication. We are under no misapprehension in relation to this point. We are satisfied that there was such a conversation and that it took place towards the end of 2004.

10 242. The second piece of evidence comes from the mouth of the accused himself. In his evidence-in-chief given in February 2017 he explained that towards the end of 2004 he was at Sea Freeze discussing the setting up of the Pesca joint venture with du Plessis. From the office where they were
15 talking Miller says he saw an unmarked bakkie driven by white male offloading 10kg cardboard boxes which were being taken to the cold store. Miller said that he observed that the product was not refrigerated on the bakkie which had neither a canopy nor a refrigeration unit on the back. He found this strange as
20 he would have expected frozen produce to have been delivered in a refrigerated vehicle of sorts. There can be little doubt now that Miller was witnessing one of accused 4's deliveries of abalone to Sea Freeze.

25 243. Miller says that curiosity got the better of him and he

later wandered over to where the boxes were standing on the platform in the cold store. He looked at a label attached to the batch of boxes and saw the name of Rapitrade as the client on whose behalf the product was being stored. He then prised
5 open a flap on one of the boxes to have a peek inside and to his horror, (he now says), discovered that the product was abalone. He testified that he thereafter contacted Africa telephonically and read him the riot act regarding the dangers of illegal abalone smuggling. Miller testified that Africa
10 assured him that he was only busy with a small deal of his own on the side.

244. In her continuation of the cross-examination of Africa on 2 February 2015, (after the matter had stood down in October
15 2014 to accommodate the withdrawal of Mr Theunissen), Ms Joubert dealt with this incident and put her client's version of events to Africa. That version was largely in accordance with Miller's subsequent evidence-in-chief. However, there is one fundamental difference between the cross-examination of
20 Africa and the evidence-in-chief of the accused.

245. Ms Joubert put it to Africa that her instructions were that the discovery of the abalone occurred towards the end of 2005 and that that fact was the immediate cause of his decision to
25 stop supplying Rapitrade further with pilchards. Miller on the

other hand testified-in-chief that the incident occurred when he and Du Plessis were discussing establishing their joint venture and he did not seek to use it as a justification for the termination of his relationship with Rapitrade. As a matter of
5 fact those discussions with du Plessis could only have taken place late in 2004 after the collapse of FTE and when Miller was looking around for alternative sources of income.

246. Under probing cross-examination by Ms van der Merwe,
10 Miller made a meal of explaining the alleged discovery of the abalone. At one stage he made the startling claim that he had first heard about Rapitrade in court during the course of these proceedings. That suggestion was manifestly false for two reasons. Firstly, Du Plessis had earlier testified that Miller
15 had introduced Rapitrade, then an existing client of his, to Pesca as a client in 2005 and that Pesca thereafter regularly sold pilchards to Rapitrade. That allegation was not challenged by Miller during the cross-examination of Du Plessis. Secondly, Miller testified that it was the discovery of
20 Rapitrade's name on the box of abalone into which he had peeked that caused him concern and led to the call to Africa. He knew that Africa represented Rapitrade and it was for that reason that he said he confronted Africa and warned him off.

25 247. For the sake of completeness we should add that under