cross-examination by Ms Joubert Africa denied any such remonstration or warning on the part of Miller. He said that the incident simply did not occur. His evidence throughout was that, as far as he was concerned, Miller was aware from
5 the outset that abalone was involved and that it was being masked with pilchards.

248. We have to say that Miller, whose evidence we have already said must be carefully scrutinised because of the stage
10 in the proceedings at which was tendered, was not a good witness. He came across as a forthright person and one who speaks with a measure of authority and is at pains to offer the questioner an explanation. I suppose it could be said that he talks too much and thereby exposes himself unnecessarily to
15 cross-examination. In any event there were a number of instances where he blatantly contradicted himself in the witness box as the exchange on his ignorance regarding Rapitrade's existence before this case started demonstrates.

20 249. There are also instances where the cross-examination on behalf of Miller is at odds with his evidence and that too reflects adversely on his credibility. As pointed out earlier, one such example is to be found in the cross-examination of Africa regarding the meeting at Lakeside and the subsequent
25 introduction to Chao of Africa as the so-called "girl Friday". It

was put to Africa by Ms Joubert that Miller's case was that Chao was looking for administrative assistance in his fish exporting business. In the witness box however, Miller attempted to distance himself from the fish exporting business 5 and said that he understood that Chao was looking for help in his furniture business. Why, we ask rhetorically, was it necessary to seek to avoid being implicated in anything relating to fish when that was precisely the reason that he met Chao in the first place?

10

250. In addition, Miller's assertion that he did not know what the purpose of the visit to Pitman's office was is, as we have said, hard to understand. So also was his attempt under oath to demonstrate that he had no interest after the visit in what 15 had transpired at the attorney's office. It is so out of character for Miller that we can only interpret this evidence as yet another attempt by him to distance himself from Chao's fishing business.

20 251. We are of the view that the two incidents discussed above – the discovery of the box of abalone and the conversation with Smal – each one seemingly innocuous on the face of it, fit neatly into the mosaic put up by the State. They both took place towards the end of 2004 and both events 25 establish conclusively that when Miller initiated the supply of

pilchards to Rapitrade on behalf of Pesca at Sea Freeze in early 2005, he would have been aware, firstly of the fact that Africa was involved in the illegal smuggling of abalone on behalf of Rapitrade, and secondly that pilchards might be used 5 to mask the abalone being exported.

252. We are satisfied that Miller foresaw as a real possibility, that the product being delivered by Pesca to Rapitrade was an essential part of the crimes being committed by Rapitrade, 10 Chao and Africa, to wit the illegal control and/or possession of abalone for commercial purposes. The situation neatly fits the definition of *dolus eventualis* suggested by Snyman at p178:

> "A person acts with intention in the form of *dolus eventualis* if the commission of the unlawful act or the 15 causing of the unlawful result is not his main aim, but:
>
> (a) he subjectively foresees the possibility that, in striving towards his main aim, the unlawful act may be committed or the result may be caused; and
>
> (b) he reconciles himself to this possibility."

20

253. The supply of pilchards by Pesca was Miller's main aim. This was his much needed source of income after the collapse of FTE in the form of a commission from both Zive and Pesca on the latter's 300 tons of pilchards, and commission from 25 Pesca in respect of the 800 odd tons sourced from Stowe and

elsewhere. The facts which we have found to have been established on the evidence of Smal and Miller himself demonstrate that Miller could have been in no doubt and therefore foresaw the real possibility that Africa was using Rapitrade to control abalone for commercial purposes and that the supply of pilchards from Pesca was an integral part in the illegal operation. He reconciled himself with the consequences inherent in his conduct when he took a commission on each batch of pilchards delivered to Rapitrade at Sea Freeze.

254. As far as his *actus reus* is concerned we are of the view that Miller's conduct was accessorial to the commission of the offences under Regulation 39(1)(a) by Africa, Rapitrade and Chao. Typically the role of the accomplice would be akin to the driver of the get-away car at a bank robbery – someone who actively furthers the commission of an offence by others. Snyman op *cit* at 266 offers the following definition of accomplice liability:

> "1. A person is guilty of a crime as an accomplice if, although he does not satisfy all the requirements for liability contained in the definition of the crime and although the conduct required for a conviction is not imputed to him by virtue of the principles relating to common purpose, he lawfully and intentionally engages in conduct whereby he furthers the commission of a crime by somebody else.

1. The word "furthers" in Rule 1 above includes any conduct whereby a person facilitates, assists, or encourages the commission of a crime, gives advice concerning its commission, orders its commission or makes it possible
5 for another to commit it."

255. In the result we are satisfied that the State has established the commission of at least 15 predicate offences on the part of accused number 1 under Regulation 39(1)(a) of
10 the MLRA Regs and that he is liable to be convicted on counts 15, 16, 17, 19, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31 and 32. The total weight of the abalone covered by these counts is 44 080 kilograms or 44 tons.

15 **ACCUSED NO 2 - WILLEM JACOBUS VAN RENSBURG**

256. The witnesses who referred to accused 2 (who was throughout referred to as "Willie") were Africa, Botha, Brink, AJ Theunissen and accused 4. Africa said that he got to know
20 Van Rensburg via Chao who furnished him with the former's cell phone number, ending in 5069. Africa said that he stored this number on his list of contacts on his so-called *skelm* phone (a Nokia 8800) under the name "Wayne". When regard is had to Exhibit 4.16, the spider prepared by Brink in respect
25 of the SIM card used in this phone with cell number ending

6520, it will be seen that the records reflect two communications between Africa's daughter's number (0270) and the "Wayne" number (5069) and a further 15 calls between one of Africa's other numbers (1874) and 5069.

5

257. This is perhaps an appropriate juncture to digress briefly to deal with some aspects of Africa's cell phone records and the use of his handsets. In his evidence-in-chief Africa explained that he had had a Samsung phone on contract for
10 many years and that the SIM card used on this phone ended with the number 5353. Because he had known accused 1 over the years, Africa said that he had stored his number ending 1666 on that phone under the name "Philip". When he commenced working for Chao, Africa said he was instructed to
15 use a different phone for purposes of anonymity. He accordingly acquired the Nokia referred to earlier and customarily used the SIM card ending in 6520 in it. This was a pay-as-you-go handset for which airtime had to be bought and during the course of the proceedings this phone was
20 distinguished as the "*skelm*" phone in recognition of its key role in Africa's nefarious dealings.

258. In his evidence-in-chief Africa lead the Court to believe that the Samsung and the Nokia were the only two phones that
25 he used. However during his recall after the evidence of Brink

it transpired that he also made use of cell phone handsets belonging to his wife and daughter and arguably there may have been as many as five handsets used during his employment with Chao with a number of SIM cards used
5 interchangeably. It is not clear whether each SIM was used in a different handset or simply swapped: Africa explained how Chao advised him to swap SIM cards from time to time so as to ensure his anonymity. One of those numbers was said to end in 1874, another in 0270 which was evidently his daughter's
10 phone, and yet another in 7328. Brink explained to the Court how each cell phone handset has an IMEI number which allows it to be traced with reference to that number irrespective of the cell number on the SIM card inserted in the phone and he said it is therefore possible to see what calls were made on the
15 *skelm* phone even when the SIM cards were swapped.

259. As pointed out earlier, the records from the cell phone providers include the cell phone number, the SIM card number which is not the same as the cell phone number and the IMEI
20 number relevant to any particular communication made with the handset. Accordingly, it is possible to attempt to draw inferences about the identity of the user of the handset at any given time by having regard to *inter alia* either the cell or the IMEI numbers. As alluded to earlier, the column reflecting the
25 location of the cell phone tower through which a call or SMS

message has been routed, enables the Court to draw conclusions about the geographical locality of the user of the phone at any given time.

5 260. Africa also testified that in addition to having cell phone contact with accused 2, he met him on one occasion at Chao's house in Milnerton. He described Van Rensburg as the driver of a Mercedes Benz luxury car. It later transpired after cross-examination, that Africa had not spoken to Van Rensburg on 10 that occasion but had seen him at a distance. Africa suggested that one of the phone calls referred to above was made on an occasion when a delivery of abalone at the V&A was delayed and he was advised by Chao to contact number 2.

15 261. A considerable amount of time was spent during this trial in relation to accused 2's purported denial through counsel that 5069 was his number. It was put to State witnesses that accused 2 only ever used a SIM with cell number ending 1734 and that he only used one handset (a Nokia 6100) which he 20 had dutifully handed to the police after arrest. This gallant attempt to shield accused 2 from any implication in the affairs of Chao's abalone syndicate fizzled out when he elected not to enter the witness box. Not only do we have the undisputed evidence of Africa that "Wayne" was in fact "Willie", as I shall 25 demonstrate anon the records furnished by Vodacom

demonstrate that early in 2002 the 5069 SIM card was used in the handset which number 2 admitted was his and in which he claimed the 1734 number was customarily used.

5 262. In addition we have the evidence which was the subject of the ruling on 16 February 2016 in regard to the admissibility of exhibits HHH and JJJ, in which it was demonstrated that the SIM card with cell number 5069 was at the Maseru Bridge Border Post at precisely the times that accused 2's passport 10 was presented for entry into, and exit from, Lesotho in mid-June 2006. To the extent that any ruling on the admissibility of documentary evidence such as that contained in those exhibits is provisional, we must now state that we are satisfied beyond reasonable doubt as to the integrity of Africa's 15 evidence regarding the 5069 number. That being so we ask rhetorically, why number 2's phone number was on Africa's list of contacts on his *skelm* phone, if not for purposes of contact in the course of the illegal abalone business? And why was he phoned by Africa when there was a problem with a planned 20 delivery?

263. Regrettably, the investigating team only procured a subpoena for the 5069 number and not Van Rensburg's alleged legitimate number. We therefore have a limited record of calls 25 made from 1734 and then only when that number is viewed in

the context of calls to and from other cellphone users whose records are otherwise before the Court. Nevertheless there is much to be gleaned from Brink's spider relating to 5069, (Exhibit 4.16, which covers the period 5 April 2006 to 10
5 October 2006), where, as I have already said, accused 2 is recorded as having had contact with Africa on 1874 on 15 occasions and on 0270 (Africa's daughter's phone) on two occasions. That spider also shows that 5069 allegedly had contact with accused 3, Gavin Wildschutt, on two occasions,
10 he on 8182 and on a further two occasions with Wildschutt on 9811. The spider also shows that 5069 had 150 communications with accused 4 on 8645, 46 communications with accused 5 on 7652 and 63 communications with AJ Theunissen on 8702.

15

264. The spider prepared in respect of Chao's number 1789 (Exhibit 4.14) shows 28 communications between him and accused 2 on 1734 (which is his admitted number) over the same period, with Chao also talking to Africa, (126
20 communications) and accused 3 (twice). Finally, the spider in respect of Ku (Exhibit 4.7) on 9019 shows 35 communications with number 2 on 1734, 163 with number 3 on 4596, 202 with Chao on his other number, 8839, and 52 communications with Africa on 6520.

25

265. What these various communications show (and we must emphasize that the totals given relate to calls and SMSs both ways), is that accused 2 was in regular communication with many of the role players at the heart of the Chao enterprise.
5 His failure to explain these communications on its own sends up a red flag in respect of accused 2.

266. The situation becomes all the more curious when one goes to the detailed billing for Chao on 1789 and one finds
10 that on the very day of the V&A raid (19 September 2006) he called Van Rensburg on 1734 at 07h37 while he, Chao, was in the vicinity of a tower called "Caesars" (the State suggested that this was in the vicinity of OR Tambo International Airport in Gauteng), and the parties spoke for 87 seconds. Then just 7
15 minutes later, at 07h44 Van Rensburg called Chao back and the parties spoke for a further 44 seconds. The detailed billing of Ku on 9019 shows that later that day, at 13h20, while Ku was near a tower called Broadacres in Gauteng, he was called by Van Rensburg and the parties spoke for 278 seconds - more
20 than 4 minutes.

267. If we look at the detailed billing for 5069, which is attached to Exhibit 4.16, one sees that the towers often in use include the suburbs of Clifton, Bantry Bay, Mouille Point and
25 Green Point – all along the Atlantic Seaboard of Cape Town.

That SIM card also made frequent visits to Hermanus and used towers along the usual route there. During September 2006 the SIM card was mostly in the vicinity of a tower called "Philippi Station", which is on the Cape Flats, with the odd call
5 going through the towers at Clifton and nearby Oudekraal. On the morning of the V&A raid the SIM was in the vicinity of the said Philippi Station and was in use until 11h48 that day when an outgoing call was made for 241 seconds to a number ending 0761. Thereafter the SIM card was removed from the phone
10 and all calls were automatically forwarded to voice mail.

268. As part of their subpoenaed documents, Vodacom produced a so called "Usage Profile" in respect of all handsets in which the number ending 5069 was used from 1 October
15 2003 to 23 September 2006. This shows, firstly, that the number was prepaid at all times and was not on a contract. Then it shows, for instance, that:

- On 23 July 2004, the number was used in a Nokia
20 6100 model handset with IMEI number ending 4186, for 6 communications between 17h31 and 17h37.
- On 6 August 2004, it was inserted in a different Nokia 6100 for just one call.
- Between 23 and 26 October 2004, it was inserted
25 into the same Nokia 6100 handset to make three

calls.

- Between 2 November 2004 and 11 January 2006, it was used in the same Nokia 6100 handset used on 23 July 2004 to make 89 calls.
- During part of that period, (that is 12 July 2005 to 29 June 2006), the same SIM was used in a different Nokia 6100 with IMEI number ending 0190, to make 1 874 calls, of which 15 were classified as "failed".
- Also in that period, 13 October 2005 to 29 December 2005, it was used in a Nokia 9300 to make 264 calls.
- From 12 January 2006 to 10 January 2006, it was used in yet another Nokia 6100 with IMEI number 35567300584783 to make 316 calls, of which five "failed".
- From 9 to 14 July 2006, the SIM was used in a Nokia 6030 handset to make 59 calls.
- From 26 July to 19 September 2006, it was used to make 192 calls, of which five "failed" in a Nokia 3120 handset.
- Twice (on 13 and 14 December 2006), whilst in the vicinity of the towers at Clifton and Oudekraal, it received calls from 1734; and, finally
- On 23 September 2006, at 16h49, it was inserted

into a Samsung SGH S600 handset, to make a single call. On the detailed billing, the number dialled was 100, evidently to retrieve voicemails.

5 269. What does this tell us? Firstly, that accused 2 had access to, and utilised a number of different Nokia handsets over a number of years. Secondly, that he inserted the same SIM, (with cell number 5069) randomly into various of these phones. We can only conclude, therefore, that he too is a
10 serial SIM swopper and adherent of the advice given to Chao by Africa. Why one asks, would a person go to the trouble of swopping SIMS in handsets, if one was about legitimate business? On the contrary, the practice has the hallmark of someone who is up to no good and wishes to cover his tracks.
15 But there is more to it.

270. When he handed himself over to the police on 14 November 2006, Van Rensburg did not have a cell phone in his possession and Brink was given the run around. Eventually a
20 Nokia 6100 was given to Brink the following day, whereafter bail was granted to the accused. And, that Nokia 6100 handset contained the SIM card with the cell phone number ending 1734 and which Brink then downloaded on 19 November 2006. He was led to believe by Van Rensburg that
25 this was his only phone and that 1734 was the only number he

used, hence the subsequent challenge to the Wayne number on Africa's phone.

271. Exhibit 3.39, which was generated during this download,
5 reflects the IMEI number of that Nokia 6100 as 355673005847830. Brink told the Court, (and the evidence was not challenged), that when the Vodacom computer collated the data relating to a SIM such as this, it usually dropped the last digit off the IMEI number. This means that the Nokia 6100
10 handed to the police by Van Rensburg on 14 November 2006, was the same handset in which the 5069 SIM was used between 12 January and 10 February 2006, to make the 316 calls referred to above. Accused 2 chose not to explain this anomaly. In fairness to him, he probably could not, just as he
15 could not explain the Maseru Bridge coincidence. We are of the view that this anomaly serves to confirm our finding that "Wayne" was Willie van Rensburg and as will be seen later, was known by accused 3 as "Tonywillie".

20 272. A J Theunissen identified accused 2 as a person who, accompanied by accused number 5, visited his premises one day at Brackenfell, inquiring about the manufacture of a freezer room and a blast freezer. Theunissen was unable to fix a time, but we are of the view that it may have been around
25 mid June 2006 or later. We say so, because Jaco Botha said

he made several deliveries on behalf of accused 4 to V&A via Maitland, and only later on ex Brackenfell while he worked for number 4 between February and October 2006. Theunissen explained that a blast freezer has a specialist function in
5 reducing the amount of time required to freeze product.

273. Theunissen recalled that Van Rensburg arrived driving a Mercedes Benz ML series 4x4. He said that he provided a quote to accused 5 and handed in a duplicate original thereof
10 as an exhibit. Regrettably the document is undated, but the contents speak for themselves. This was a costly piece of equipment, designed for a special function and would be ideally suited for the freezing of large quantities of abalone. When prodded under cross-examination by Mr Uijs, SC, the
15 witness said that Van Rensburg had let Liebenberg do the talking that day, and he assumed that the former was the financial backer for the deal. Theunissen disagreed with the submission put to him that it was number 2 who placed the order and that he needed the freezer at his fish factory in
20 Hermanus. Theunissen's recollection was that the freezer was to be located at his yard in Brackenfell and that in lieu of the use thereof, there would be no charge for the rental of the facility that number 4 was then using at Brackenfell.

25 274. Theunissen said that accused 5 was happy with the

quote, but when he asked for payment in advance of manufacture, things went nap. In the result, the deal did not go ahead. One can only, once again, ask rhetorically who was more likely to have been in a position to finance such a piece
5 of equipment, and who was more likely to have needed the use thereof - a man of means with an interest in the commercial fishing industry, and in particular the sale of abalone, or an self-employed chef in the catering business, as Du Toit described Liebenberg?

10

275. Theunissen also testified that accused 2 visited his business on the odd other occasion in the company of Du Toit. While this may have been at the time that he still operated out of Maitland, it was certainly during the time he had the
15 Brackenfell site. Van Rensburg did not challenge this evidence.

276. The other snippet of evidence which implicates accused 2, comes from Jaco Botha. He testified that a short while after
20 he arrived in Cape Town, and had started working for accused 4, he was taken to business premises in Montague Gardens for purposes of collecting a Kia bakkie to transport the product from Maitland to V&A. Being unfamiliar with Cape Town, he was shown the way by Michelle du Toit, who told him en route
25 that the Kia belonged to "Willie". In addition, said Botha,

accused 4 told him that number 2 was the financial backer of his processing business.

277. When Potgieter testified, he said that he had asked
5 Botha, after his arrest, to point out the address where the Kia had been collected. The premises later turned out to be those of Chao in Montague Gardens. While it was said that Van Rensburg had commercial premises in Killarney, just a short distance away, the police did not follow up on the registered
10 owner of the Kia. And so, while that may have provided direct evidence of his involvement in the predicate offences, Van Rensburg's alleged ownership of the Kia must be found to be no more than a possibility as opposed to a probability.

15 278. Captain Brink was responsible for dealing with the post-arrest procedures of accused 2 after he surrendered himself to the police on 14 November 2006. He believed it necessary to verify Van Rensburg's residential address and drove with him to Hermanus, where an unfurnished flat was allegedly pointed
20 out. At the same time Brink said that they visited the premises of a local fishing company, S&W Fishing, in which he believed number 2 had an interest. Thereafter the parties proceeded to an apartment block called Dunmore in Clifton, which is arguably one of Cape Town's most expensive suburbs
25 along the Atlantic Seaboard, where a search was conducted of

a flat in which accused 2 and his wife resided.

279. During cross-examination by Mr Uijs SC, it emerged that Brink and Van Rensburg were acquainted with each other and 5 reference was made to an unpleasant encounter at a bar in Hermanus, where the two men engaged in mutually uncomplimentary recriminations. While it is not necessary to go into the evidence of Brink in any great detail because it does not play a material part in this matter, it is clear to us 10 that he was interested in assisting in Van Rensburg's conviction and he cannot be considered to be a neutral witness in regard to accused 2.

280. What this evidence does demonstrate, however, is that 15 accused 2 was at the time involved in the fishing industry in Hermanus, where he may or may not have dealt lawfully in the commercial exploitation of abalone, that he owned or rented an apartment there, that his permanent place of residence was in an area where one would expect to encounter wealthy 20 homeowners or occupiers and that he drove a late model luxury German car. Regrettably, all these trappings of wealth remain unexplored and unexplained, because no lifestyle audit was conducted in respect of Van Rensburg.

25 281. In his evidence, accused 4 said that he and Van

Rensburg got to know each other through a business which the latter allegedly ran manufacturing security spikes for installation on perimeter walls of homes and businesses. Accused 4 told the Court that he occasionally helped with the
5 installation of number 2's wall spikes. Their acquaintance, according to Du Toit, went no further than that, and it seems they were not house friends either. In addition, during the cross-examination of Theunissen, counsel was cautious to suggest that number 2 was never at Maitland or Brackenfell in
10 the company of number 4, only number 5. But Theunissen was adamant that number 4 had been to his premises in the company of both men, albeit on separate occasions.

282. Under cross-examination by the State in relation to their
15 business liaison, Ms Van der Merwe was able to demonstrate, through the use of cell phone records, that number 4 and number 2 were in regular contact with each other. The pattern of this contact manifestly did not fit the description given by number 4 regarding limited contact in the course of their
20 alleged business relationship regarding the spikes, and it is difficult to accept this explanation.

283. A more fundamental problem in relation to Van Rensburg that arises from the evidence of accused 4, is that the fact of
25 his alleged business relationship with Van Rensburg, was

never put by Mr Uijs, SC, to Jaco Botha, someone, whom we expect might have been able to confirm the spikes story. Nor was it put to Africa, who also might just have had knowledge thereof. At the end of the day, we are left with the distinct
5 impression that the notion that Van Rensburg ran a spikes business, was just that, a story made up long after Jaco Botha had left the witness box. In those circumstances, we are of the firm belief that the only reasonable inference to be drawn from the high volume of cell phone communication between
10 accused 2 and 4, is mostly probably because he was indeed responsible for financing Du Toit's operation at Kendal Road.

284. In the circumstances, we are satisfied beyond reasonable doubt that accused 2 was part and parcel of Chao's illegal
15 enterprise, and in the absence of any explanation from Van Rensburg the evidence before us points firmly in that direction. However, we had difficulty in concluding that he can be said to have committed two predicate offences and we requested the State to address us on the point. Ms Heeramun, in reply, fairly
20 conceded that the State could not point directly thereto, but she went on to argue that Van Rensburg's criminal liability can be inferred through the application of the doctrine of common purpose.

25 285. The doctrine of common purpose is a part of our law

which is not without controversy, particularly because in the strife-torn decade of the 1980's, it was regularly used as a tool to impute guilt to participants in mob violence. The leading case then was S v Mgedezi 1989(1) SA 687 (A). The doctrine
5 received the *imprimatur* of the Constitutional Court in S v Thebus 2003(6) SA 505 (CC), where it was held that the legal principles applied in Mgedezi were not in conflict with the Constitution. Thebus involved a fatal attack by a group of residents of Ocean View on an alleged drug dealer, with whom
10 the community had had enough. In the process an innocent child bystander was shot and killed and charges of murder were brought against members of the community.

286. In the leading judgment for the minority, Moseneke, J,
15 summed up the doctrine as follows:

> "[18] The doctrine of common purpose, is a set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons, the commission of
> 20 a crime. Burchell and Milton define the doctrine of common purpose in the following terms :
> 'Where two or more people agree to commit a crime, or actively associate in a joint unlawful enterprise, each will be responsible for specific
> 25 criminal conduct committed by one of their number,

which falls within the common purpose design. Liability arises from their common purpose to commit the crime......'

[19] The liability requirements of a joint criminal
5 enterprise fall into two categories. The first arises where there is a prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. The liability arises from an active
10 association and participation in a common criminal design, with a requisite blameworthy state of mind. In the present matter, the evidence does not prove any prior pact......

[34] In our law, ordinarily, in a consequence crime, a
15 causal nexus between the conduct of an accused and the criminal consequence, is a prerequisite for criminal liability. The doctrine of common purpose dispenses with the causation requirement. Provided the accused actively associated with the
20 conduct of the perpetrators in the group that caused the death, and had the required intention in respect of the unlawful consequence, the accused would be guilty of the offence. The principal object of the doctrine of common purpose is to criminalise
25 collective criminal conduct and thus to satisfy the

social "need to control crime committed in the course of joint enterprises". The phenomenon of serious crimes committed by collective individuals acting in concert, remains a significant societal
5 scourge. In consequence crimes, such as murder, robbery, malicious damage to property and arson, it is often difficult to prove that the act of each person or a particular person in the group, contributed causally to the criminal result. Such a causal
10 prerequisite for liability would render nugatory and ineffectual the object of the criminal norm of common purpose and make prosecution of collaborative criminal enterprises intractable and ineffectual."

15

287. In this case we are not dealing with a consequential crime, but rather a series of statutory contraventions. I see no reason, however, why the doctrine of common purpose should not find application in such a situation. If one considers the
20 myriad scenarios which have confronted the courts over the years in, for example, narcotics, liquor and firearms contraventions, never has it been suggested that the doctrine of common purposes may not be relied upon.

25 288. In the context of the facts at hand, we are dealing with

the first category discussed by Moseneke, J, in relation to the doctrine of common purpose, namely a prior agreement, (express or tacit), to commit a common offence. The inquiry is whether accused 2 willingly and actively participated in the
5 unlawful enterprise conducted by accused 4 at Durbanville and the subsequent delivery of abalone to V&A. Was there a "common criminal design with the requisite blameworthy state of mind" on the part of accused 2 in relation to that enterprise.

10 289. It was open to the State to prosecute accused 2 with the more broader charges of criminal conspiracy, as one finds in S18 of the Riotous Assemblies Act 17 of 1956, or more specifically in S2(1)(g) of POCA, but it chose not to do so, preferring to indict him only under S2(1)(e) and 2(1)(f) of
15 POCA and to rely on the commission of predicate offences in relation to the former. Counsel for the defence cautioned the Court in their addresses in this matter, to be wary of placing the cart before the horse, i.e. of establishing criminal liability on the basis of participation in the illicit affairs of the
20 enterprise, rather than first establishing liability under the predicate offences. Reliance upon the doctrine of common purpose might at first blush, therefore, appear to be an endeavour to do just that.

25 290. In my view there can be no principial objection to

applying the doctrine of common purpose to establish liability under a predicate offence. One need only think of the type of gang-related activities which are routinely prosecuted under POCA, for example, murder, rape and robbery, in which it
5 could hardly be claimed that the doctrine of common purpose could not be used to establish the liability of an individual gang member in relation to crimes committed by the collective. The offences to which I have just referred are, of course, consequence crimes, but as I have already said there can be
10 no objection to apply the doctrine to statutory crimes, committed by such a collective. The court must simply be cautious that it does not circumvent proof of the predicate offences and, if it relies on common purpose to do so, that all the elements of the doctrine are found to exist.

15

291. Insofar as the potential involvement of accused 2 is concerned, he would have to have made common purpose with accused 4, Africa and Chao in the conduct of the unlawful enterprise. I shall, therefore revert to the potential liability of
20 accused 2 under the doctrine of common purpose when I deal with liability of accused 4 later.

ACCUSED 3, ADRIAAN GAVIN WILDSCHUTT

25 292. The witnesses who implicate accused 3, are Captain

Brink, Warrant Officer Potgieter, Lieutenant Colonel Potgieter, Hester Mouton, David le Roux, Salvin Africa, Adam Wildschutt, Lydia Wildschutt, Lieutenant McLean and Warrant Officer Louw. But aside from all of these, Wildschutt accepted liability
5 for two predicate offences by tendering a guilty plea in the Hermanus Regional Court in April 2006 for contravening S18(1) and Regulation 39(1)(a) in relation to the raid at Foxhole Farm. In that plea, he admitted to transporting abalone to and from Foxhole. It is not in dispute that 5 050
10 units of abalone were found during the raid on the farm and number 3's plea of guilty in respect of contravening Regulation 39(1)(a) must, therefore, be in respect of this amount.

293. While the conviction in respect of these counts would
15 otherwise be sufficient to establish proof of the predicate offences contemplated under S2(1)(e) of POCA, we will nonetheless look at the remainder of the charges under which Wildschutt has been indicted, to see what has been established for purposes of the application of POCA.

20

294. The evidence of Le Roux links Wildschutt to the collection in Stellenbosch on about 7 February 2006, of a substantial quantity of fresh abalone. It is likely that some or all of this amount, was still being processed at Foxhole at the
25 time of the raid, since Le Roux said that the day after the

delivery, he heard of the raid on the news. Le Roux further implicates Wildschutt directly in the setting up of the drying facility at Volmoed, explaining how he, Wildschutt and a Chinese man known to him only as Chris, visited the premises 5 to assess them, prior to the conclusion of the lease with the owner, Hester Mouton. Potgieter later testified that a certain Chris Zhou was arrested and pleaded guilty to charges related to the raid at Volmoed.

10 295. Mouton identified the lease referred to earlier, which was concluded by a certain Mc Donald on behalf of Kellogg's, a multi-national cereal manufacturer. She provided carbon copies of cash deposits into her bank account of the monthly rental for the cottage in which the facility was housed. The 15 cash deposit slips were all signed by a certain M Wildschutt, in one instance purportedly on behalf of Kellogg's. The earliest deposit slip identified by Mouton, related to a payment of R7 000,00 made on 29 March 2006 and, thereafter, a further two payments of R2 500,00 each. It is common cause that 20 Wildschutt's wife is known as Merilyn and in argument Mr Mellor did not seek to offer any explanation that would suggest that it was not she who deposited these amounts.

296. The evidence of Mouton also establishes the possibility 25 that a bakkie, similar to that followed by Brink from Hercules

Street to Faraday Street on 19 June 2006, was at Volmoed in around April 2006, and further, that a truck and container fitting the description of the large vehicle with the container found at the Hercules Street yard on 19 June 2006, had also 5 visited the premises at Volmoed on occasion. That vehicle, when searched by the police on the day of the raid at Hercules Street, contained paraphernalia and chemicals used in the drying of abalone, similar to that found at Volmoed.

10 297. Then there is the evidence of Adam and Lydia Wildschutt that in April 2006 their nephew, Gavin, had asked for permission to use the garage of their house at 15 Faraday Street, Belhar, to process and pack what he referred to as "fish". Lydia Wildschutt described the subsequent installation 15 of three chest freezers by accused 3 and the use of steel pans to freeze the product which was later packed into cardboard boxes. According to her, a team of around five men used to come to the house about three times a week to do the cleaning and freezing of the product.

20

298. Lydia Wildschutt described how the cardboard boxes were loaded on to the back of a bakkie and then transported away to an unknown destination. She would have us believe that she did not know from the outset what was happening in 25 her own house and claimed that a couple of weeks after her

nephew started working there, she became concerned about an unpleasant smell pervading the house and asked her husband what was going on. He told her that abalone was being cleaned and frozen. Discretion became the better part of
5 valour, it seems, since Lydia Wildschutt held her tongue.

299. Potgieter testified about the raid at both Hercules and Faraday Streets. He confirmed the *modus operandi* described by Lydia Wildschutt, and more importantly, drew the Court's
10 attention to a series of photographs taken at Faraday Street on the day of the raid. Those photographs too confirm the *modus operandi.* In one such photograph, Potgieter was able to identify a rubber stamp, which he said was similar to Exhibit 1. That exhibit was handed in to Court and identified by Jaco
15 Botha as a device which was used at Kendal Road to stamp the word "Bait" on the cardboard boxes before delivery to V&A. Potgieter's evidence suggests that the boxes of abalone packed at Faraday Street were to be similarly stamped before being removed from the premises.

20

300. We consider that there is evidential significance too in the fact that police discovered not only wet and frozen abalone at Faraday Street, but also dried abalone. There was no obvious facility at Faraday Street for the drying of the product
25 which, in the circumstances, must have been processed

elsewhere and transported to Belhar. We believe that it is reasonable to infer that such dried abalone probably came from Volmoed, given accused 3's involvement at the latter drying facility. This inference is bolstered by the fact that
5 dried abalone was found, together with wet abalone, during the raid at V&A on 19 September 2006 and by the MCM officials on 28 October 2006 in the four containers returned from Singapore. Given that the source of abalone on the pallets seized at V&A and in certain of the returned containers was
10 described as Syroun, and further that various of them bore the "Bait" stamp mark, the inference that such abalone emanated from accused 3, is reasonable in the circumstances.

301. Adam Wildschutt told the Court about his nephew,
15 Gavin's, request in February 2006 for assistance in the storing of abalone at his yard in Hercules Street. He agreed to accommodate him and they agreed on a monthly rental of R3 000,00. Adam Wildschutt said that he realised he had been duped into agreeing to help his nephew out, when the
20 operation became far bigger than that which he was originally led to believe. He said that after a while accused 3 asked whether he could use the garage at Faraday Street, and he claimed he reluctantly agreed. He said he ended up spending most of the rent on cleaning materials as "Gavin and his guys"
25 did not clean up after themselves.

302. The witness described how accused 3 brought quantities of salt and a large truck on to the yard at Hercules Street. It would seem that Adam Wildschutt was referring to Mr Chaung's Mercedes Benz truck already referred to, and which appears on photograph 30 in Exhibit C. It was parked next to a Mitsubishi truck which Adam Wildschutt said was without an engine. On another occasion, said Adam Wildschutt, accused 3 requested his uncle to convey a bakkie load of salt through to a farm near the hamlet of Stanford, which lies between Hermanus and Gansbaai, which is where accused 3 now resides. That evidence too was not challenged.

303. In argument, Mr Mellor asked the Court to disbelieve this witness and to find that the operation being conducted at his yard and his house, was, in fact, his business and not that of accused 3. The problem with the argument starts with the fact that accused 3 did not take the witness box and contest the evidence of his uncle and aunt. Argument on the probabilities in those circumstances is, therefore, problematic, because there is no countervailing version to assess for purposes of probability. Further, the evidence implicating accused 3 in relation to Hercules and Faraday Streets, is simply overwhelming, and in such circumstances the accused's failure

to take the stand is understandable. Credible evidence in rebuttal would be difficult to create.

304. We see too the reappearance of other persons involved in accused 3's set up. Some of those arrested at Foxhole, (Jerry Witbooi, Jerome Browne and Ashley Browne), were also found at Faraday and Hercules Streets and they offered guilty pleas, both in the Hermanus court and in this court before Erasmus, J. It is important to note further in this regard, that when Adam Wildschutt handed his cell phone to the police, and his list of contacts was downloaded, the names of those persons, as well as others arrested at Hercules and Faraday Streets, were found in the list of contacts on his phone with number ending 1938.

305. While there may conceivably be an innocent explanation therefor, we consider that this is a pointer to the fact that Adam Wildschutt was probably involved in the business with number 3. In this regard we recall an off-the-cuff remark made by Adam Wildschutt that at Faraday Street pilchards were being packed in the metal trays, together with the abalone. We know that this did not take place at Faraday Street, but at Foxhole, as the photographs relevant to that raid show. Nevertheless, this possibility does not detract from Gavin Wildschutt's involvement, as the principal operator of the

FPE's being conducted at Hercules and Faraday Streets.

306. At the beginning of this judgment, I set out the definition of a fish processing establishment. It is undoubtedly a wide
5 definition and includes activities such as "cleaning" and "storing" and further covers a place where fish is "salted, iced, chilled or frozen". We are satisfied that the operation at Hercules Street fits the definition of an FPE. Indeed, Mr Mellor did not present any argument to the contrary. In the
10 circumstances, we are satisfied that Gavin Wildschutt is liable for conviction on the S18(1) charges relating to the sites at both Hercules and Faraday Streets, as well as Volmoed. In addition, he admitted involvement in the FPE at Foxhole.

15 307. As indicated earlier, Africa testified that he met accused 3 on one occasion at the Waterfront, when he was introduced to him by Ku. At that stage they exchanged cell phone numbers and Africa says Wildschutt gave him his cell number. Africa said he stored this number on his *skelm* phone's list of
20 contacts, under the pseudonym "Ga". It is not clear whether in February 2006 the number given was 4596, since Africa commented that number 3 was continually swopping his SIM card and, hence, his number often changed. What is clear, however, is that when Africa's handsets were seized by the
25 police late in September 2006, 4596 was the number then

stored under the name "Ga" on the *skelm* phone.

308. Ku's cell phone records relating to his number 9019, show plenty of contact with accused 3 in August to September 5 2006, and also contact with Van Rensburg on 1734, which it seems was the only number the latter was then using.

309. Under cross-examination on behalf of accused 3, the meeting with Africa at the Waterfront was denied, as was the 10 fact that 4596 was ever his number. Accused 3 maintained, through his counsel, in cross-examination that he used no less than eight different cell phone numbers during the relevant period, as also his daughter's number on occasion. But these allegations were never substantiated through testimony from 15 him or any witness on his behalf. The immediate question that, of course, springs to mind, is why a person, who claimed to be a seller of firewood, would use so many numbers at all?

310. The police evidence was to the effect that accused 3 20 used a Samsung phone, which had been seized during the raid at Foxhole and in which the number 0364 had been used. Brink was questioned extensively by Mr Mellor in an attempt to discredit him, and much play was made regarding the fact that accused number 3 disputed that a Samsung SGH E800 25 cell phone, with IMEI number ending in 8741, was taken off

him when he was arrested by Brink at Foxhole. No mention had been made thereof in Brink's statement in the police docket for that case, nor had the phone been handed in through the SAP13 exhibit register at the Stellenbosch Police
5 Station, yet Brink steadfastly maintained that he had taken that phone from the accused and later handed it to Potgieter, (the investigating officer in the Foxhole matter as well), after he had downloaded the data on the phone on 3 April 2006.

10 311. Brink said that the download of the data off this phone on 3 April 2006, related to a SIM card in respect of a cell number ending in 0364. The list of contacts, Exhibit 3.1, contains a number of relevant names, including the name "Doepie", the nickname of Attorney Wynand du Plessis, who was called by
15 the State, Africa (stored as "shelvin") on 1874, accused 4, (who is listed as "Tony") on 8645 and accused 2, (stored as "tonywillie") on 5069.

312. The purpose of the challenge in regard to this instrument
20 seizure, was an obvious attempt to de-link it from the list of contacts recorded on Exhibit 3.1 to 3.3, which provide strong corroboration for Africa's evidence regarding the numbers stored on his *skelm* phone. We agree with counsel that there is certainly cause for concern regarding the manner in which
25 Brink allegedly handled the exhibit after its seizure, which

manifestly did not comply with police standing orders. But at the end of it all, the lie was given to the defence version when Vodacom certificates, coupled to both 0364 and 4596 were found in the house then occupied by accused 3 in Naomi
5 Street, Elsies River.

313. The evidence of Mark McLean and Wayne Louw dealt with an authorised police search at the premises at 58 Naomi Street on 28 November 2006 at around 06h00 in the presence
10 of accused 3 and his wife, Merilyn. During the search, amongst other things, a large number of unused SIM cards, still attached to their credit card sized backings, were found on the premises, as were certificates or cards relating to SIM cards which had been used. These were notarised and bagged
15 in forensic bags by the search party and duly handed in to the police at Bellville South through the SAP13 register.

314. Included in the latter were 0364 and 4596's certificates, which suggest that both SIM cards had been in that house at
20 some time or other. The Vodacom certificate in respect of 4596, for example, (Exhibit 3.71), contains a warning from the cell phone provider to the customer to "Please keep these cards in a safe place". The reason therefor is obvious. The certificate contains the PIN number for the SIM card, the cell
25 phone number and importantly, the PUK number, which is

required if the SIM card is blocked and the number is rendered temporarily unusable.

315. In the absence of an explanation from Wildschutt to the
5 contrary, it is reasonable to infer, as Africa claimed, that 4596 was a number used by accused 3 on occasion. I say on occasion, because Africa testified that Wildschutt was forever swopping SIM cards and that he would receive calls on his *skelm* phone from numbers which he did not recognise, but
10 which turned out to be from number 3. This evidence, together with the discovery of a plethora of unused SIM cards, together with the used certificates, suggests that Wildschutt was not, as Mr Mellor submitted in argument, a purveyor of not only fish products and SIM cards, but rather a serial SIM swopper. We
15 believe that it is safe to find that 4596 was one of Wildschutt's cell numbers, that Africa stored this on his *skelm* phone under "Ga" and that the two communicated with each other on this number.

20 316. The discovery of the FPE's at Volmoed, Faraday and Hercules prompts the obvious question, what became of the product? We believe that the answer to the conundrum is to be found in the evidence of Africa. He explained that prior to the delivery of a load of abalone to V&A, he would receive a
25 call from Chao, usually the day before. He would be informed

when delivery was to take place and by whom. If the delivery was made by Jaco, on behalf of accused 4, Africa was instructed to book it in at V&A under the name Rapitrade. If the delivery was made by "Gavin's guys", on behalf of number 5 3, it was to be booked in under the name Syroun. Africa testified that accused 3 was present during the first delivery, but thereafter deliveries were made by his team. This is to be expected since a seasoned abalone trader such as Gavin Wildschutt, would not take the risk of being found in 10 possession of such a quantity of the product, either en route to or at a public place such as V&A.

317. Africa said that he would usually be called by Wildschutt on the day of the delivery, or the day before, to confirm the 15 time of delivery. That evidence is not adequately sustained in respect of all deliveries by Syroun with reference to the cell phone records before August 2006. But the core data from Vodacom in relation to 4596, reflects that accused 3 was in regular contact with Ku around delivery times. We must have 20 regard to the fact that accused 3 often made use of other SIM cards and so, as Africa testified, those pre-delivery calls may have come from other numbers, which the police did not, or were not able to, trace.

25 318. In the absence of any evidence to the contrary adduced

by accused 3, we are satisfied beyond reasonable doubt, that save as set out hereunder, all batches of abalone delivered to V&A during the period February to September 2006 on behalf of Syroun, emanated from the FPE's run by him. Insofar as
5 those deliveries were made on his behalf and at his direction, the abalone was under his control for purposes of commercial exploitation. He is accordingly liable for conviction under Regulation 39(1)(a) in regard to such deliveries, shown beyond reasonable doubt, to have been made on behalf of Syroun to
10 V&A during 2006.

319. In relation to counts 33, 36, 37, 40, 44 and 45, Africa testified that the delivery of the abalone involved in those charges to V&A, was made by "Gavin's guys" on behalf of
15 Syroun. In considering the GRVs and GIVs relevant to these deliveries, we note, however, that the product was booked in by Africa on behalf of Rapitrade and when it was booked out of the cold store and transferred to the container, the GIV similarly records that the product had been held on behalf of
20 Rapitrade.

320. The invoices for these exports to Hong Kong on the other hand, reflect Syroun as the consigner of the abalone. We are concerned that the documentation does not adequately
25 corroborate Africa's evidence on the source of abalone

involved in these counts, and in fairness to accused 3, he is entitled to the benefit of the Court's doubt on those counts.

321. In summary, therefore, we are satisfied that accused 3 is
5 liable for conviction on counts 46, 47, 50, 51, 100, 102, 104, 106, 108 and 109. The total volume of abalone involved in the deliveries to V&A on behalf of Syroun, is 13 960 kilograms or 13.9 tons. The abalone found at Faraday and Hercules Streets and Volmoed, as well as Syroun's share of the abalone found
10 during the V&A raid, and that which was returned from Singapore, was not weighed, but the individual units were counted. The total thereof amounts to a staggering 171 050 units. If one were to estimate a mass of 200 grams per unit, which on the available evidence we believe is a conservative
15 figure, the weight would be of the order of 34 210 kilograms or about 34 tons.

SPLITTING OF CHARGES

20 322. During the State's replying argument, we inquired of Ms Heeramun whether there was a case for a splitting of charges at Hercules and Faraday Streets and Volmoed, in that the abalone controlled there in contravention of Regulation 39(1)(a), might have been possessed for use in the FPE's at
25 either Volmoed or Faraday Street. Ms Heeramun answered in

the negative, but the matter was not debated further.

323. Neither Mr Mellor nor Mr Uijs, SC, raised any issue around the splitting of charges in their respective arguments, 5 and in the circumstances we consider that it would not be appropriate to discuss the point further in this judgment, in light of the fact that the issue has not been properly ventilated by the parties in argument.

10

ACCUSED 4 – TONY PETER DU TOIT

324. Accused 4 is implicated by Africa, Le Roux, Jaco Botha, Percy Clack, Harold Bauchop, AJ Theunissen, Brink and 15 Lieutenant Colonel Potgieter. However, it is not necessary to go into that evidence in any great detail in light of the defence put up by Du Toit when he took the witness stand. His case is that he believed that the abalone which was processed at Kendal Road had been legitimately acquired and supplied to 20 him on the strength of certain remarks made to him by Chao. Accused 4 does not place in issue the delivery by him of various loads of abalone to Sea Freeze in 2005, nor the deliveries by Botha on his behalf to V&A in 2006.

25 325. In argument Mr Uijs, SC, stressed that there were two

legs to Du Toit's defence. The first was a defence of wrongfulness in respect whereof he accepted that the accused bore the *onus*. The second leg was that Du Toit did not have the requisite *mens rea* to commit the offences, because he

5 believed that the product had been lawfully delivered to him and that his continued possession and control thereof was lawful. Counsel observed that in regard to the second leg of the defence, the onus was on the State to establish the *mens rea* of his client. I agree.

10

326. At the outset we need to state that accused 4 was not a good witness. He is a quiet and retiring person who did not talk a lot in the witness box, but when he did so, he contradicted himself in a number of respects, and in particular

15 was often unable to offer reasonable explanations when pressed for answers. We are left with the abiding impression, further, that accused 4 did his best to protect accused 2 wherever possible. Accordingly, we approach his evidence with great caution.

20

327. The legality defence is based on the following allegations. Du Toit said that he arrived in Cape Town in 2004 from Gauteng and lived in a house in Xavier Street, Hoheizen, which is a suburb of Bellville to the north of the N1 highway.

25 He ran a second-hand furniture shop in Bellville and got to

know Richard Chao as the latter was interested in disposing of sleeper-wood furniture which he was manufacturing. Evidently the accused agreed to stock some of this furniture in his store.

5 328. The second-hand furniture store did not do well, and Du Toit was forced to close it down sometime in late 2004/2005. At that stage Chao approached him and asked him to assist with the storage of abalone at his house in Xavier Street. Du Toit told the Court that, being from Johannesburg, he did not 10 know what abalone was. This answer was probed by the State in cross-examination when it was suggested that, prior to his meeting Chao, accused 2 would have known that Michelle's erstwhile boyfriend had been caught with abalone. Nevertheless, Du Toit says he asked Chao if what he was 15 doing would be lawful, and he says that Chao told him that he had bought the abalone lawfully from the State, which disposed of seized abalone from time to time, on auction.

329. Accused 4 will have the Court believe that Chao showed 20 him a document in this regard, yet he could give no details thereof, nor did he take a copy for himself. He simply accepted the say-so of Chao that the abalone was legitimate. Already in this version one finds the seeds of doubt. Can accused 4, then a 50-year-old man, really not have known 25 what abalone was, given the extensive coverage of the

poaching thereof which one has had in the media over many, many years? Was Michelle's boyfriend, to his knowledge, caught with poached abalone, yet he knew nothing thereof? And, why did he even ask Chao if his conduct would be legal unless he had some concerns in that regard?

330. The veracity of this explanation is further brought into question when one considers the evidence of Le Roux. He explained how his initial deliveries of abalone took place at a Pick n Pay shopping centre in Boston which was located just below the N1 highway. On the first occasion he met accused 4, who explained to him how the drop was to take place. Du Toit drove the first load away and returned the bakkie later. Le Roux was not permitted to see where the abalone was being taken, and thereafter his deliveries were clouded in secrecy and subterfuge, with the deliverer being required to abandon his vehicle with the ignition keys hidden in a designated place, disappear from sight so that he could not identify the party collecting the vehicle, and then return sometime later to drive off with the vehicle that had been relieved of its load. On the last occasion, he said, he was instructed by accused 4 to follow him to his house where the bakkie was offloaded.

331. Du Toit testified that Chao provided three deep-freezers

in which the product was to be frozen. Initially, we understood accused 4 to say that he was asked only to store the abalone, but his evidence moved swiftly towards a situation where he explained that he was required to clean the abalone and place
5 it in steel pans before freezing it. The frozen abalone was placed in 5 and 10kg boxes and driven through by him to Sea Freeze, at least from the beginning of 2005. Du Toit never really explained how it came about that the storage facility morphed into a fully functional FPE.

10

332. Du Toit said that during 2005 his daughter, Michelle, ran into domestic problems and relocated to Cape Town from Johannesburg. At the same time his uncle, Oom Des, who then resided in Mpumalanga, moved down to Cape Town and
15 the Kendal Road house was rented to accommodate them. Initially, accused 4 said he rented the house, but almost immediately changed his evidence to suggest that the lease was taken in the names of either Michelle or Oom Des. Du Toit went on to describe how the Hoheizen production facility
20 was relocated to Kendal Road. He did not explain to the Court the rationale for this move, but went on to explain how use was then made of a mobile freezer mounted on a trailer to freeze the product.

25 333. Du Toit confirmed that the drop-off point for abalone

moved from Boston to a spot near the public rose garden in Durbanville. The same dead-drop procedure was employed. He confirmed, too, that the frozen cartons were delivered to the Maitland premises belonging to Theunissen, and then
5 taken through to V&A using a Kia bakkie provided by Chao. Accused 4 says that he was introduced to Africa by Chao at his house on Woodbridge Island and was told that Africa would thereafter attend to the deliveries of abalone to V&A. He suggested to the Court that he had no knowledge that the
10 cartons were stamped with the word "Bait", nor did he know that quantities of pilchards were being used to mask the product when it was palletised at V&A.

334. We have difficulty in accepting this explanation. He was,
15 after all, in charge of the FPE at Kendal Road where the "Bait" stamp, Exhibit 1, which was handed to the police by Botha, was found. Further, it is inconceivable that Botha would have been party to the concealment of the product through the use of the bait stamp and the masking of the pilchards, and yet not
20 have disclosed or discussed this with Du Toit. We believe Botha's evidence sufficiently implicates number 4 in these acts of concealment.

335. Regarding his cell phone number, accused 4 consented
25 to the handing in of a document containing admissions made in

terms of section 220 of the CPA that he used the numbers 3601 and 8645 at all material times. He also admitted the contents of the data files supplied by MTN in respect of both numbers in that document. These admissions were made by
5 his counsel at a time when accused 4 was not in court, having been excused from attendance to attend to a bereavement out of town. Mr Uijs SC, assured the Court that he had discussed the matter with his client, that the admissions were in order, and that accused 4 would formally sign the list of admissions
10 on his return. In the result, however, the issue fell through the cracks and the document was never signed. The State, nevertheless, proceeded on the basis that the admissions stood and were binding on accused 4. Significantly, accused 2 and 5, who along with the other accused signed the same
15 document, admitted that both numbers were used by Du Toit.

336. Under a thorough and probing cross-examination by Ms Heeramun, Du Toit claimed at one stage that he had never used 8645. When it was pointed out that he had made the
20 section 220 admission, the witness fell about while Mr Uijs SC, manfully sought to take the blame on behalf of his client. But there was never a formal application by number 4 to withdraw the admission and as matters stand today he is bound thereby.

25 337. In any event, we believe that the admission was quite

correctly made if regard be had to the cross-examination of this witness. Ms Heeramun took Du Toit through the cell phone records of 3601 and 8645 and demonstrated, with reference to cell phone towers, how the two numbers obviously
5 travelled together in the same vehicle on occasion. One saw how calls were made on first the one number and then the other, the calls being routed through the same towers along the way. The inference was irresistible that the accused was using two phones, alternately, at the same time.

10

338. Du Toit was unable to provide either a satisfactory or convincing answer for this coincidence. But then, at another stage, he seemed to concede that he had used 8645. The reason for this flip-flop in the witness box was obvious:
15 Brink's spider in Exhibit 4.16 showed a high incidence of communications between 8645 and 5069 – 150, to be precise, from 5 April to 10 October 2006, and Du Toit was desperate to put distance between himself and accused 2. But, when pressed for an explanation regarding the reason that he would
20 have had so many communications with number 2, Du Toit sought to fall back on the spike story, which earlier had seemed to require far less contact with Van Rensburg than he would later have us believe. It was during this passage of the evidence that we lost all confidence in the credibility of Du
25 Toit's evidence.

339. The question that arises here is why it was necessary for accused 4 to operate two cell phone numbers. We consider that his conduct is no different to so many of the players in
5 this piece where the use of legitimate and *skelm* phones was part of the *modus operandi*.

340. Accused 4 made his last call on 8645 at 12h09 on 23 September 2006, just four days after the V&A raid. It is
10 reasonable to infer that he was concerned about the further use of this number, since he thereafter made exclusive use of 3601. A further troubling issue is the fact that in the early evening of 6 October 2006, the very day of the Kendal Road raid, accused 4's phone, using 3601, moved from the Bellville
15 area to the Strand area where it remained overnight in the vicinity of towers called "Onverwacht" and "Strand Fire Station". Du Toit told the Court that he may have visited his brother in the Strand, but he could not recall why.

20 341. It is not unreasonable to infer that at that stage accused 4 was in contact with accused 5, who resided nearby in Somerset West. Also, at the time of the V&A raid, said Jaco Botha, he was on holiday in Mossel Bay, and received a call from accused 4 to lie low for a while and delay his return to
25 Cape Town. Clearly, Du Toit was worried about the continued

safety of those involved in the Kendal operation as a result of the V&A raid. But why so, we ask, if it was legitimate?

342. Ultimately the lie is given to Du Toit's feigned innocence
5 on the day of the raid at Brackenfell. Theunissen testified that he was not on the premises that day but was visiting someone in Still Bay with his secretary, allegedly for work purposes. He testified that he received several frantic phone calls from accused 4 and 5 claiming that there was an impending police
10 raid at Brackenfell, and asking him urgently to release their product which had been stored there.

343. Theunissen said that accused 5 was in arrears with the rental for the freezer room, and that he thought that this was a
15 ploy to enable them to escape settling their debt. He accordingly refused to cooperate, and ignored the request. Even when Potgieter contacted him regarding accused 4's stash he thought it was still a game, but was eventually brought to his senses when he was told that armed police had
20 arrived at Brackenfell. It once again begs the question why, if the Kendal Road operation was legal, accused 4 and 5 were so eager to recover the abalone which had been stored at Brackenfell?

25 344. In relation to the suggestion that Chao was handling

legitimate abalone which he had bought on a State auction, we have the evidence of McKenzie that no permit was ever issued to Chao for the period in question. In fact, no such permits had been issued since 2002, and it follows that neither Chao
5 nor Du Toit could have possessed any abalone lawfully during the period 2005 to 2006. We take note of the evidence that the regulation of seized abalone was in a state of flux at the time, but the fact remains that accused 4 was unable to produce any documentation to substantiate his claim of
10 legality.

345. In the indictment the State relies on the application of the provisions of section 250 of the CPA in relation to all of the accused. That section, generally, places the *onus* on an
15 accused person to establish the authority required, *inter alia,* to conduct a business or possess a particular item when he is charged with an offence that requires statutory permission. In the context of this case it would require each of the accused charged under s18(1) of the MLRA to produce a valid permit
20 entitling him to operate same. The same applies in respect of the accused who are charged with the possession of abalone under Regulation 39(1)(a).

346. The purpose of the section is to lighten the burden of the
25 prosecution in not having to prove a negative. However, once

such a certificate is produced, the onus remains on the State to prove the contravention of the offence by showing that the alleged criminal conduct was not covered by the permit. (See S v Auby 1987(4) SA 535 (N) at 542E-543B.) In this regard, 5 we are satisfied that Du Toit failed to discharge the *onus* which he bore to prove that he was the holder of the required permits.

347. In summary then in regard to accused 4, we are of the 10 view, firstly, that he has failed to discharge the *onus* of establishing that his conduct was lawful, and we are further satisfied beyond reasonable doubt that the State has established his *mens rea* in relation to all of the charges that he still faces. He is accordingly liable to be convicted on the 15 FPE charge (Count 114) as well as contravening Regulation 39(1)(a) on each occasion that abalone was delivered on behalf of Rapitrade to Sea Freeze and V&A. The counts involved here are 14, 15, 16, 17, 19, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 38, 39, 41, 42, 43, 48, 105, 107, 20 115 and 116. The mass of the abalone involved in these deliveries amounts to 71 500 kilograms or 71,5 tons. As with accused 3, the abalone found at Kendal Road, Brackenfell and V&A, and that returned from Singapore, was not weighed, but found to consist of 24 831 units. At 200 grams per unit, the 25 weight would be of the order of 4 966 kilograms or about 4.9

tons.

ACCUSED 5 – JOHANNES EMIL LIEBENBERG

5 348. The State witnesses who implicate accused 5 are Botha, Theunissen and Brink, and he was also referred to by accused 4 in his testimony.

349. As we have said earlier, accused 5 exercised his right to
10 remain silent. We know little of his private life other than that he is a chef by profession, who currently works on oil rigs around the world. During the trial the Court was told that he was first working off the coast of Chile, and it later appeared that he was on a North Sea rig as well. Theunissen told the
15 Court that accused 5 accompanied Du Toit on visits by the latter to both Maitland and Brackenfell, and as we observed earlier he also accompanied Van Rensburg to Brackenfell when enquiries were made about the manufacture of a stand-alone freezer unit.

20

350. Jaco Botha told the Court that he ran into Liebenberg at Brackenfell from time to time and found that he was also storing abalone which was required to be transported through to V&A. This abalone was initially stored in polystyrene boxes
25 with lids (as appears from Exhibit J) and packed into 10kg

cardboard boxes before removal to V&A. Botha said that after the V&A raid (and before the Kendal Road raid) Liebenberg arrived at Kendal Road with a bakkie, hooked up the freezer trailer and moved it elsewhere. This evidence was not
5 challenged. It is not clear on whose instructions Liebenberg acted, but it is safe to infer that this came on the instructions of Du Toit, who was in charge of operations at Kendal Road, and after Du Toit had spent the night of the 19th September in the Strand.

10

351. The unchallenged evidence of Theunissen suggests that there was a fairly close working relationship between accused 2 and 5. And, as Mr Uijs SC, suggested to him in cross-examination in relation to the person who was interested in
15 acquiring the freezer unit, it is probable that accused 2 stood in a position of some authority over accused number 5. By this we intend to suggest that it is probable that accused number 5 would defer to accused number 2, who, in any event, seems to us to be a little older than him.

20

352. The bulk of the evidence against accused 5 is to be found in the cell phone evidence. Liebenberg also used at least two cell numbers: 7652 and 1361. That demonstrates ample communication between him, Van Rensburg and Du Toit,
25 and many calls to Theunissen. Importantly, we consider, is the

fact that on 7652 Liebenberg had 49 communications with the "Wayne" number (5069), and 91 communications with Van Rensburg on 1734. And, in the context of those many communications, we wonder why accused 5 was referred to by
5 various persons on their lists of contacts as "Koos Fish" rather than, for example, "Koos Caterer" or "Koos Kok"?

353. Be that as it may, the evidence establishes that accused 5 delivered quantities of abalone to Brackenfell shortly before
10 the raid and, as pointed out above in relation to accused 4, he was eager to retrieve same from the freezer facility shortly before the police raid there. His demands that Theunissen release the abalone to him, are capable of only one inference: that he exercised control over the abalone, and he is therefore
15 liable for conviction for contravening Regulation 39(1)(a) on Count 116 in relation to 1 969 units of frozen abalone. This is the same number of units included in the number found to have been controlled by accused 4 at Brackenfell. Accused 5 is therefore directly implicated in one predicate offence.

20

354. However, I am of the view that the matter does not end there. Earlier I referred to the doctrine of common purpose, and it is appropriate at this stage to consider whether the State has established any predicate offences against accused
25 2 and 5 on the basis of a common purpose to commercially

exploit abalone with accused 4.

APPLYING THE DOCTRINE OF COMMON PURPOSE TO ACCUSED 2, 4 AND 5

5

355. In dealing with accused 4 we have made findings which establish the following pattern of criminal conduct on his part. Firstly, Chao facilitated the provision of fresh, mostly shucked abalone to Du Toit, the delivery whereof took place in
10 circumstances of secrecy. Secondly, that abalone was processed, frozen and boxed at Kendal Road under the ultimate supervision of accused 4, whereafter it was taken to Theunissen's cold storage facility (whether at Maitland or Brackenfell) for storage prior to delivery to V&A. That delivery
15 was undertaken by Botha, sometimes on his own and sometimes with the assistance of one of the Du Toit siblings. In this phase of the operation Botha made use of a Kia LDV, probably under the control of Chao.

20 356. Thirdly, at V&A, Africa attended to the paperwork and other administrative duties required to place the frozen product in a new storage facility, and then later to pack it into a container for purposes of export. Chao assumed responsibility for the expenses incurred by Africa, as also the costs relating
25 to V&A and transhipment overseas.

357. We know from Botha's evidence that he and the others employed at Kendal Road were all paid handsomely for their work. He said that, much like the members of a collective,
5 each participant in the operation received the same amount of money every month. He said he was paid by accused 4 and told that the total proceeds for the month were divided up equally by Du Toit who, himself, allegedly took the same amount for himself. According to Theunissen, accused 4 was
10 regarded by him as the person responsible for the payment of the storage fees at his facility. What we do not know, is where the money for all of these payments by Du Toit came from. At first blush it would seem that Chao was the most likely source of finance.

15

358. The State urged us to have regard to cell phone communications between the principal role players around the time of deliveries by Rapitrade to V&A. The dates of deliveries can be established from the GRVs issued by V&A in respect of
20 product stored on behalf of Rapitrade. In most instances the charges relating to Rapitrade involved more than one delivery and hence more than one GRV. It was suggested by Ms Heeramun that round about the time of each delivery, i.e. a day or two before or after:

25

1 Chao could be seen communicating with accused 1 and 2 and Africa;

2 Du Toit routinely communicated with accused 2, Africa and Theunissen;

5 3 Botha could be seen communicating with accused 4 and Africa; and

4 Van Rensburg could be seen communicating with Africa, Du Toit and Theunissen.

10 359. Having considered the source documentation in Files 4 and 5 (as individually flagged by the State), we make the following observations in relation to just two of the counts against these accused:

15 A. <u>Count 41</u>

1. On 15 and 25 May 2006 there were two deliveries of abalone to V&A at 10h58 and 10h07, respectively. The GRVs relevant to these
20 deliveries are Exhibits 2.151a and 2.151b.

2. The cell phone records relevant to the days around the first of these dates show the following pattern:

25

a. On 13 May 2006 Miller calls Chao twice: at 12h47 and 13h54;

b. On 14 May 2006 Africa (on 1874) calls Du Toit at 19h47, and Pienaar at 19h50;

5 c. On 15 May 2006 Du Toit calls Theunissen at 08h50;

d. Africa calls Pienaar at 10h50;

e. While Van Rensburg (on 5069) calls Du Toit three times at 08h42, 09h55 and

10 11h11, and in between Van Rensburg (then on 1734) also calls Chao at 10h54;

f. Shortly thereafter, at 11h08, Miller calls Chao;

g. And then at 12h24 Africa calls Chao;

15 h. In the meantime, also on the 15th, Africa calls Botha at 10h45 and 10h48, while

i. Du Toit calls Botha at 10h37.

3. For the delivery to V&A on the 25th, the following

20 calls are noted:

a. On 24 May 2006 Van Rensburg (on 5069) calls Du Toit (8645) at 11h03;

b. On 25 May 2006 Africa (on 5353) calls

25 Pienaar at 07h26, and later again at 09h25,

while

c. Van Rensburg (on 5069) calls Theunissen at 08h51; and

d. Africa (on 0270) calls Van Rensburg (on
5 5069) at 08h54; and

e. Then Du Toit calls Botha at 09h01, and Africa (on 1874) calls Botha twice, at 09h32 and 09h48;

f. On 26 May 2006 Miller phones Pienaar at
10 08h21.

B. <u>Count 42</u>

1. There are two GRVs relevant to this count
15 relating to deliveries on 5 and 8 June 2006. (Exhibits 2.156a and 2.156b.)

2. For the delivery on 5 June (which occurred at 13h16) the following calls are relevant:

20

a. On 4 June 2006 Pienaar calls Africa at 14h09;

b. On 5 June Du Toit calls Botha five times: 06h21, 09h31, 10h43, 14h32 and 15h32;

25 c. Van Rensburg (on 5069) calls Africa (1874)

at 09h48 and 13h32, Du Toit (on 8645) at 09h49, Chao at 10h17, and Theunissen at 11h14 after Theunissen had called him earlier at 10h19;

5 d. Chao calls Africa at 11h10; and

e. Africa (on 1874) calls Du Toit (8645) at 10h53 and 12h48, and Botha at 12h49;

f. On 6 June 2006 Theunissen calls Du Toit at 11h29; and

10 g. Africa calls Pienaar at 11h35;

h. While Van Rensburg (1734) calls Chao (1789) at 09h53; and

i. Miller calls Chao at 13h08.

15 3. For the delivery on 8 June 2006 the following calls are relevant:

a. On 7 June Africa (5353) calls Pienaar at 11h53 and 14h46; and

20 b. He also phones Du Toit twice, at 09h28 and 13h40, while

c. Africa (1874) calls Van Rensburg (5069) at 17h59, who immediately calls (on 5069) Du Toit (on 8645) at 18h08.

25 d. At the same time Chao (on 1789) calls Van

Rensburg (1734) at 17h59.

e. On 8 June there is a host of calls with Africa (on 1874) calling Du Toit at 09h28, 11h41, 12h19 and 12h29.

5 f. Also Africa (on 1874) called Van Rensburg (5069) at 10h32 and Pienaar at 13h06, after Pienaar had called him at 12h03; and

g. Van Rensburg (5069) called Du Toit (8645) at 13h02, 15h08 and 19h04.

10 h. Lastly, on the 8th, Du Toit called Botha at 09h15, 11h42, 11h44, 12h08, 12h19, 12h28, 14h40, 15h09 and 15h17, Theunissen at 12h05, who had earlier called Botha at 10h42.

15

360. Based on this analysis, we see some very interesting patterns. Van Rensburg usually uses his contract phone (1734) to call Chao, while he uses 5069 to call Africa (on 1874) and Du Toit (on 8645) – in effect, three *skelm* phones 20 talking to each other. Further, we note regular contact between Van Rensburg, Africa, Du Toit, Botha, Theunissen and Chao in the immediate proximity of deliveries to V&A on behalf of Rapitrade. We know from the evidence of Africa, Du Toit and Botha that such deliveries related exclusively to 25 abalone, and that Chao was the ultimate beneficiary of these

deliveries. And, having regard to accused 4's evidence, it is fair to conclude also that Chao participated, whether directly or indirectly, in the supply of the product to Du Toit for processing.

5

361. We have already commented on the fact that accused 2 seemed to enjoy a fairly comfortable lifestyle. We know, too, from the cross-examination on behalf of Van Rensburg, that he claimed to be involved in the local fishing industry in
10 Hermanus, and that he also claimed to trade lawfully in abalone on occasion. And a month or two before the raid at Brackenfell, accused 2 had made enquiries about the purchase of a freezer unit which, while it may be said to have been suitable for fish products generally, would have been ideal for
15 the blast freezing of abalone. The evidence further suggests that he was amenable to paying in excess of R50 000 for that equipment.

362. We have already rejected accused 4's suggestion that his
20 extensive communications with number 2 related to the purchase and supply of security spikes as being not reasonably possibly true in the circumstances, and we note that Van Rensburg did not take the witness stand and support these claims by Du Toit, nor did accused 2 endeavour to
25 explain the reason for the many calls made between him and

the various persons referred to above – most importantly Africa, whom he (number 2) ostensibly had no reason to call. While the records show that he was in the thick of it all, Van Rensburg sought at all costs to distance himself from the use
5 of the number ending 5069. We have found that denial to be untenable.

363. There is, in our view, no explanation for these calls in circumstances where such an explanation is reasonably
10 expected. For instance, aside from calls to and/or from Chao, Du Toit, Liebenberg and Theunissen, what reason did Van Rensburg have to speak to Africa or accused 3? And if those communications were for a legitimate purpose, why did Van Rensburg not take the Court into his confidence?

15

364. In the result we are driven to the conclusion that the only reasonable inference to be drawn from all of the prevailing facts and circumstances is that the communications which Van Rensburg had with these key players in the piece at the times
20 of deliveries must have related to abalone, and in particular to accused 4's processing facility at Kendal Road.

365. There is, however, an important aspect of Botha's evidence which is relevant here, too. In examination in chief
25 Botha was asked about the involvement of accused 2 in

relation to Du Toit's operation at Kendal Road. The following appears at page 578 of the transcript, where the witness was being led by Ms Greyling in relation to the acquisition of metal pans, cleaning materials and packing boxes used at Kendal
5 Road:

> *"Het u ooit geweet wie die geld verskaf het om al hierdie goed te koop? --- Ek het nie geweet nie, maar ek het gehoor daarvan, ja.*
>
> 10 *Wie het vir u gesê? --- Die eerste een wat my vertel het, was Michelle, en toe oom Tony.*
>
> *Nou vertel vir ons wat oom Tony vir u vertel het? ---* ***Dat die geld van Willie kom."*** (Emphasis added.)

15 366. That evidence was never challenged by Mr Uijs SC, during the cross-examination of Botha, and given that he represented both accused 2 and 4, he would have been in a position to take instructions from both men in relation to the veracity of this very material piece of evidence. The State was
20 therefore entitled to accept that this point was not in issue, and it did not need to adduce any further evidence to establish that accused 2 was the financier. As we have said, Du Toit's claim that he knew nothing of accused 2, other than in the context of the supply of spikes, is not worthy of serious
25 consideration and falls to be rejected as false.

367. Snyman, at 256 *et seq*, has a detailed discussion of the doctrine of common purpose. While noting that the doctrine has not been limited to consequence crimes (the learned
5 author cites cases involving the unlawful possession of firearms), he explains, with reference to a consequence crime such as murder, that the doctrine of common purpose has been accepted and regularly employed in our law to ease the burden of proof on the State in criminal matters.

10

> *"In order inter alia to overcome difficulties relating to causation as explained.....above, the courts apply a special doctrine, called the common purpose doctrine, to facilitate the conviction for murder of each separate*
> 15 *member of the group. The essence of the doctrine is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others.*
> 20 *The doctrine is couched in general terms and therefore not confined to one type of crime only. However, the best-known application of the doctrine – at least in our reported case law – is to be found within the context of the crime of murder. The discussion of the doctrine*
> 25 *which follows, will, for the sake of simplicity, therefore be*

limited to its application to the crime of murder.

The crucial requirement is that the persons must all have the intention to murder and to assist one another in committing the murder. Once that is proved, the act of X,

5 *who actually shot and killed Y, is imputed to Z, who was a party to the common purpose and actively associated himself with its execution, even though a causal relationship between his (Z's) act and Y's death cannot readily be proved. X's act is then regarded as also that*

10 *of Z.*

It is not unjust to impute X's act which caused the death, to Z. By engaging in conduct in which he cooperates with X's criminal act, Z forfeits his right to claim that the law should not impute to him another's unlawful act. He

15 *signifies through his conduct that the other person's (i.e. X's) act is also his.*

The basis of the doctrine used to be the idea that each member of the plot or conspiracy gave the other an implied mandate to execute the unlawful criminal act, and

20 *accordingly the liability of those participants in the common purpose who did not inflict the fatal blow depended on the question of whether the unlawful criminal result fell within the mandate."*

25 368. Applying that analogy to the present case, we find the

following scenario. Accused 4 is actively involved in the serial contravention of Regulation 39(1)(a) by unlawfully possessing or controlling abalone for commercial purposes, and he does so without the requisite permit. His control runs from the time 5 of acquisition of the abalone through the processing thereof to the delivery of boxes of frozen abalone to V&A. That is akin to *"X's criminal act"* described by Professor Snyman above. Accused 2's cooperation in those criminal acts is to be inferred from his communication with the main role players (Du Toit, 10 Chao, Africa and Botha) at the critical time of delivery of the product to V&A. And so, accused 4's criminality is imputed to accused 2 through the doctrine of common purpose.

369. Further, Botha's evidence provides the obvious reason 15 for the frequency of communication between accused 4 and the main actors involved in the enterprise, and it is reasonable to conclude, in the circumstances, that Van Rensburg had a common purpose with accused 4 in relation to the running of the FPE at Kendal Road in furtherance of the enterprise's 20 objective, which was the commercial exploitation of abalone.

370. The frequency of calls around the time of Rapitrade deliveries to V&A in relation to Counts 41 and 42, in our view, certainly brings accused 2 within the purview of the 25 contravention of Regulation 39(1)(a) through the application of

the doctrine of common purpose, but his criminal liability is not limited to just those two counts which we have examined in detail. In light of a similar pattern of conduct in relation to the other deliveries on behalf of Rapitrade to V&A, Van Rensburg 5 is further implicated in the counts relevant to those deliveries through the application of the doctrine of common purpose. Similarly, his financial support for accused 4's operation at Kendal Road renders him liable, through the doctrine of common purpose, for conviction in regard to Count 114, that is 10 the unlawful operation of the FPE at those premises.

371. As regards accused 5's involvement in this common purpose, there is a high incidence of calls between him and Theunissen in September 2006. We know, too, from the 15 evidence of Botha and Theunissen that this coincides with the time during which accused number 5 was regularly seen at Brackenfell delivering abalone. But Liebenberg's phone records do not show any particular pattern, other than a reasonable number of calls to Van Rensburg and a few to Du 20 Toit.

372. Also, we have observed from the cell phone towers that accused number 5 was often in Gauteng and in other parts of the Southern Cape Peninsula, such as Grassy Park and 25 Plumstead. These are not areas often frequented by Van

Rensburg or Du Toit if one has regard to the towers through which their cell phone numbers were routed. There is a high level of suspicion about just what accused 5 was doing in the operation, but it seems to us that he was more aligned to
5 accused 2 than to accused 4, as the freezer enquiries from Theunissen suggest. Also, he was a regular deliverer at Brackenfell in September 2006, but not on behalf of Du Toit. This tells us that accused number 5's abalone came from another processing enterprise.

10

373. While it is obvious that he was delivering abalone that was ultimately being exported by Rapitrade, what we do not know, is exactly when accused 5 began participating in the keeping of abalone for commercial purposes on behalf of that
15 entity. We cannot say, as we can in the case of number 2, that Liebenberg was part of the scheme from the outset. If he is to be drawn in through the doctrine of common purpose, he is more likely to resort under the "joining in" category of participants contemplated in Mgedezi.

20

374. That situation brings a fresh inquiry of its own. Has the State established the *mens rea* of accused 5 in relation to number 4's activities? Did he know that the abalone he was storing was for the operation being run by Du Toit (and by
25 implication Chao), and has the State shown that he knew the

extent of that operation? We believe that it has failed to do so. In this regard there was evidence which it might have adduced from Africa, Botha and Theunissen in relation to the cell phone records, which it failed to do. In the result, while 5 the case for common purpose might have been established against Liebenberg if this were a civil matter, we are not satisfied that this has been shown beyond reasonable doubt.

ACCUSED 6 – RODNEY ONKRUID

10

375. The State witnesses who implicate accused 6 are Zolile Machaba, Adam Wildschutt, Africa and Inspector Carstens, who took his warning statement, Exhibit PP. There are no cell phone records in respect of Onkruid.

15

376. Machaba, then a police officer stationed at Bellville South, testified that he participated in the raid at Hercules Street and that he arrested several persons there, one of whom was Onkruid. However, Machaba did not say where on 20 the yard he apprehended accused 6. He accordingly did not link Onkruid directly to either the fresh abalone lying under the lean-to or in the freezers, or any of the abalone-processing paraphernalia lying around on the yard.

25 377. We have reviewed photographs 27 to 48 in Exhibit C and

can see from them that it is a sizable, ramshackle yard filled with a variety of items from rusty, old lorries and piles of firewood to bags of salt and abalone in deep-freezers. In the circumstances, it is important to know exactly where accused 6 5 was apprehended to establish whether it can be said beyond reasonable doubt that he was in possession of abalone, or participating in the activities of the FPE that was being conducted there. The evidence of the arresting officer does not assist us in any way in resolving this issue.

10

378. As I have said earlier, Adam Wildschutt testified that on one occasion accused 3 asked him to deliver some salt to a farm near Stanford. He was accompanied on this trip by accused 6, who presumably helped offload the salt. That 15 evidence was not challenged.

379. Africa told the Court that he met accused 6 at an engineering works belonging to Johan Kloosman in Maitland when he went to collect a batch of metal trays that were used 20 to freeze the abalone. Africa also told the Court that he saw accused 6 at V&A on one occasion when a vehicle belonging to number 3 was being offloaded with cargo for Syroun. From this he drew the conclusion that Onkruid was one of "Gavin's guys". Mr Banderker exposed some doubt regarding the 25 alleged time of this delivery when he demonstrated to Africa in

cross-examination that accused 6 was in custody at the time, having been arrested at Hercules Street.

380. We are satisfied that there is sufficient evidence to link
5 accused 6 to accused 3, and that he probably was one of "Gavin's guys". However, that finding is not sufficient to link accused 6 to the abalone found at Hercules Street: his mere membership of that number is not sufficient to attract criminal liability for possession of abalone in the circumstances.

10

381. In his witness statement taken by Inspector Carstens, Onkruid claimed that he had visited the yard that day to see one Derek Wildschutt (apparently a relative of number 3 and one of those also arrested at Hercules Street) to collect wood
15 from him, and that he was not near the abalone when arrested, but sitting near a fire. It was June, it was probably cold, and on the strength of the facts to hand we cannot say that that explanation falls to be rejected as not being reasonably possibly true in the circumstances. It follows that the State
20 has failed to establish the commission of any predicate offence on the part of accused 6.

ACCUSED 8 – DESMOND DAVID PIENAAR

25 382. The witnesses who refer to Pienaar are Africa, Potgieter

and Miller, while the accused testified in his own defence. As we have already said, it is common cause that in 2005 to 2006 Pienaar was employed at V&A as a cold store supervisor. His immediate superior was accused 9, Gregory Abrahams, who 5 was the manager of the cold store. Pienaar's work embraced a number of functions, but for the purposes of this case it will suffice to refer to just the following.

383. All products which were brought in for storage at V&A 10 passed through the supervision of accused 8. He was responsible for booking the product in and issuing a GRV and seeing to it that the product was removed from the loading bay and safely stored at its designated place in the cold room. Like Africa, Pienaar had worked in the industry for many years, 15 and both were in agreement with the standard operating practices applicable at V&A in 2006. So, for instance, all products had to be frozen in advance to a temperature not less than minus 12 degrees Celsius, as we recall. If it was warmer than that, it would be turned away or sent to a blast freezer, 20 which would attract an additional cost for the client.

384. Pienaar explains that V&A made use of a computerised storage system which automatically allocated a predetermined place in the cold room where the product was to be kept. This 25 location was not fixed by human hand, and once the computer

had allocated a space the product (which was required to be palletised and covered in plastic wrap) would be taken there by forklift. When the product was required to be removed from the cold room, it was easily located through the computer
5 system and was retrieved by forklift before being loaded into a container or transported elsewhere.

385. Africa testified that when he became involved with Chao's business he was told that accused 8 and 9 were
10 already "on board" or in the know, as it were. He was told by Chao that their function was to ensure "safe passage" while the product was in the warehouse. For this, Chao allegedly told Africa, they were to be paid a fixed amount per container. Africa said that Miller, and later he, attended to these
15 payments, which were of the order of R10 000 per person per container. Pienaar disputed such payments, and Abrahams's case, through the cross-examination by Mr Fransch, was that he did, too. However, both men admitted receiving money from Africa for so-called "spotter's fees".

20

386. Pienaar claimed that due to the computerised nature of the storage system, he did not have effective control of the abalone once it was stored in the cold room. He suggested that the fact that he did not allocate the exact place where the
25 abalone was to be stored, implied that he could not control its

location.

387. We think that that argument misses the point. The supervisor had access to the computerised system at all
5 material times. By feeding in a customer name or a location code and pressing a button the cold storage supervisor could immediately have access to the contraband product. And, if it ever became necessary to preclude the product from being detected by either a superior at V&A or the law enforcement
10 authorities, the product could be shielded or moved by him to another place in the cold store.

388. Importantly, too, if the supervisor was aware of the illegal nature of the contents of a pallet stored in the cold
15 room, he was no doubt duty-bound to inform the owners of the business (or at least his manager) thereof, lest the business be held accountable for illegal possession. By agreeing to maintain his silence in this regard for a fee, the supervisor most certainly guaranteed "safe passage" of the abalone
20 through the refrigeration process. In the circumstances, we are satisfied that accused 8 exercised the requisite degree of *"keeping or controlling"* as contemplated in Regulation 39(1)(a), and that the State has established his *actus reus* in that regard.

25

389. The question that then follows, is whether the State has succeeded in establishing the requisite *mens rea* (or criminal intent) on the part of Pienaar. Central to this inquiry is whether the State has proved beyond reasonable doubt
5 whether accused 8 had knowledge of the content of the cartons stored on behalf of Rapitrade and Syroun. There are various considerations at play here *viz* whether Africa is to be believed when he says that Pienaar was in the know from the outset; whether he is further to be believed regarding the
10 payment of commission (as opposed to spotter's fees) to Pienaar, and whether the meeting with Africa and Chao at Grand West Casino went as Africa claimed or as Pienaar said it did.

15 390. According to Africa, Miller and Pienaar, the payment of a spotter's fee is commonplace in the wholesale fish market. It is fundamentally based on knowledge of what stock is available on the one hand and who is looking to buy on the other hand. In that situation the "spotter" is paid a small
20 commission by either the seller or the purchaser, (and if he is lucky, by both), for bringing the seller and the purchaser together.

391. Pienaar explained that this practice, while rife, is not one
25 which his employer would have sanctioned, and he insinuated

that his erstwhile boss, Mr Fernandes, would not have taken kindly to discovering that he was involved in the practice. For this reason, said Pienaar (and Africa confirmed), payments were customarily made in cash placed in plain envelopes and delivered outside of the workplace, usually at his or Africa's home.

392. Pienaar said that he and Miller were old acquaintances. Indeed, through another strange twist of fate, Pienaar said, he got to know Brink and Smal when he, too, was put through his paces by Miller at the False Bay Diving School. Be that as it may, Pienaar said that when Miller became involved with Rapitrade in about 2003, he was paid spotter's fees by Miller from time to time. That was not only in relation to pilchards, but also ribbon fish and jacopever. Accused 8 said that these payments by Miller came to an end when FTE went out of business, but, he added, in 2005 and 2006 Africa continued to pay him spotting fees when he ran short of pilchards.

393. Initially, Pienaar spoke of Africa with a degree of admiration. He described his own personal life, growing up in the rough, working-class neighbourhood of Manenberg on the Cape Flats and his eventual ability to hold down a good job in a tough industry, dominated by white men, much like that of Africa. Pienaar said he was most impressed when he saw that

Africa was in charge of his own company and that he treated those who assisted him at the cold store most benevolently. However, said Pienaar, having heard Africa's evidence and the profound untruths about which he testified, he had lost all
5 respect for the man he castigated as a shameless liar.

394. It is necessary to comment briefly on accused 8 as a witness. He came across as a well-spoken, confident person who was proud of what he had achieved (and, we would say,
10 rightfully so), and devastated by the consequences of being implicated in this matter. He said that it had cost him dearly. Among the many witnesses that we heard in this case, Desmond Pienaar stands out as one of the best. In his evidence he compared the Africa that he knew with the Africa
15 that he saw in the witness box, and spoke of "chalk and cheese". We would say the same about Pienaar when compared to Africa as a witness. He gave evidence in a clear and forthright manner, and we are not aware of any material contradictions, whether internal or external, in his evidence.

20

395. Pienaar said that he had no knowledge of a box of abalone bursting open at V&A in late 2004 which led to the move to Sea Freeze. Africa's version on that score was in any event garbled and hard to follow, and we are unable to reject
25 Pienaar's version on this aspect as not being reasonably true

in the circumstances.

396. Africa testified that on one occasion at V&A a box was delivered (we think it was on behalf of Syroun) which
5 contained partly frozen contents and from which slime was allegedly leaking. He said that the employees at V&A refused to accept it as it was not properly frozen, and so he called Chao to inform him thereof. Africa said that Chao told him to speak to Pienaar and that the latter would make a plan, which
10 he did.

397. Pienaar denied the incident and, in any event, pointed out that not only did company policy prohibit the receipt of such product, but that it would have to have been placed in a
15 blast freezer to bring the temperature down to the requisite level. This did not happen. Once again, in the absence of any evidence to support Africa's claim (for instance an erstwhile employee at V&A who had first-hand knowledge of the incident), we are not prepared to find that Pienaar is to be
20 disbelieved on this point.

398. In relation to the payment of spotter's fees in 2006, there is no dispute between Africa and Pienaar as to the exchange of money. While Africa claims that the payments were made
25 pursuant to Chao's instruction to keep those responsible for

"safe passage" on their side, we cannot ignore the fact that Africa was struggling to find supplies of pilchards in 2006 and would most certainly have benefited from the assistance of a spotter. There is accordingly nothing inherently improbable in 5 Pienaar's version on this score.

399. Africa testified that a month or two before the V&A raid he, Pienaar and Chao dined together at a fish restaurant at the Grand West Casino. He said that at the meeting Pienaar 10 cautioned Chao to slow down his supplies of abalone and went on to point out that Pienaar had said that there was a shortage of 10kg packs of pilchards in the industry, that 5kg boxes were being used, and that people were suspicious of the fact that Rapitrade and Syroun had managed to access 10kg boxes of 15 "Bait".

400. Pienaar's version of that meeting is that Africa had picked him up at his home in Kenilworth and driven through to the casino for a meal. While there, he said, Chao pitched up 20 unexpectedly and joined them. Nothing of any great moment was discussed, said Pienaar. While it is true that some of the photographs taken during the V&A raid show the presence of 5kg boxes of pilchards covering the boxes of "Bait", Pienaar testified that there was no shortage in the marketplace at that 25 time, thereby implying that the use of 5kg boxes was purely

fortuitous.

401. The State did not seek to lead evidence in rebuttal as to the state of the market then. Further, we believe that this is 5 one of those instances where the evidence of Chao may have led to the Court taking a different view on the evidence. In the circumstances, we are unable to reject Pienaar's version on this issue as not being reasonably possibly true.

10 402. There is, however, one aspect of Pienaar's evidence which causes us concern. He told the Court that at the time he had two cell phone numbers (8920 and 9138) which were used interchangeably. In some circumstances, he said, one phone's battery might run flat, and then he would put it on charge while 15 using the other phone. Pienaar said that one phone belonged to V&A and the other was his, and that in respect of the latter he was compensated by his employer for his work-related calls.

20 403. In a thorough and probing cross-examination Ms Van der Merwe showed a high frequency of calls between Africa and Pienaar in the six-month period prior to the V&A raid. These calls appeared to be, on average, at the rate of two to three per week, and often coincided with deliveries of abalone by 25 either Rapitrade or Syroun. Significantly, one sees no

communications between Chao and Pienaar, but there are a few calls between him and Miller. We can find nothing untoward in either the frequency of the calls or the parties to whom Pienaar spoke. After all, he would have had to speak to
5 Africa in relation to deliveries to V&A.

404. Ms Van der Merwe concentrated on a number of calls made immediately after the raid, which are usefully depicted in linear form in Exhibit 4.2 which was drawn up by Brink. This
10 document shows, at around 06h50 of the morning of the raid, a call from accused 9 to number 8 and thereafter a call by number 8 to number 1. Miller can then be seen communicating with Chao on two occasions in short succession. Later in the morning and early afternoon of 19 September Chao called
15 Pienaar on a couple of occasions, some of these calls being of several minutes' duration, and there were a number of calls from Africa to Pienaar that day, some of them well into the night.

20 405. When pressed for an explanation in the witness box by the prosecutor, accused 8 explained that he had been contacted at home by accused 9 and told that abalone had been found amongst Africa's products. Pienaar was requested to come to work immediately, and he said that while he was on
25 his way he received a further call from Abrahams who told him

that Africa (of whom Abrahams was said to have been suspicious and uncomplimentary) had asked him to call Miller and tell him what had happened.

5 406. Pienaar said that he did so as a favour to two old friends in the industry. The question that immediately springs to mind is why Africa would want to inform Miller of the situation if Miller was not involved in any way. But that conundrum need not be resolved now. If the purpose was ultimately to inform 10 Chao, one would have expected that if Pienaar had been in cahoots with him, he would have called Chao immediately himself. He did not do so, and his explanation for calling Miller cannot be faulted.

15 407. The calls from Chao to Pienaar later during the day were all incoming calls, one such call being of about seven minutes. Pienaar said that initially Chao was looking for Africa and asked to speak to him. He told Chao that Africa was busy with the police, but Chao was persistent and called again not long 20 thereafter, wanting to know what was going on. Pienaar says he explained to Chao that abalone had been found amongst Africa's products in the cold store and that the police were busy investigating. Pienaar's ability to properly explain these communications with Chao was rightfully criticised by the 25 State.

408. In argument Mr Fransch pointed out that most of the calls were in one direction – from Chao to Pienaar – and he suggested that this was consistent with Pienaar's version and not consistent with the version of one who would have been expected to call his boss the moment trouble ensued, thus dispelling the notion of "safe passage". In addition counsel pointed to Pienaar's evidence that Chao spoke with a heavy Chinese accent which was difficult to follow on occasion, that he may have had to repeat himself to be understood, and that Pienaar was taking calls while he was on the factory floor, and that this may also have accounted for the protraction of such calls.

409. Then the State tackled Pienaar on a number of calls between him and Africa on 21 and 22 September 2006. This is after Africa had been released from custody and granted bail on the basis that he would be assisting the police as a possible section 204 witness, and immediately prior to Pienaar's arrest on the afternoon of Friday, the 22nd. Those calls were long, in both directions, and in some instances late at night.

410. Pienaar was persistently unable to give any explanation as to what the topic of conversation may have been, claiming

that it happened long ago and that his memory had left him in the lurch. Of course, that is a fair answer, but surely he must have had some recollection of what the topic of discussion was. After all, the earlier rationale for their communications
5 (arranging deliveries of abalone or the packing of containers) fell away with the raid on the 19th September. We regret to say that during that part of his cross-examination Pienaar was far less convincing than before.

10 411. When we evaluate accused 8's evidence we must approach it on the basis of the *dictum* of Watermeyer, AJA, in R v Difford 1937 AD 370 at 373:

> *"It is equally clear that no onus rests on the accused to convince the Court of the truth of any explanation he*
> 15 *gives. If he gives an explanation, even if that explanation be improbable, the Court is not entitled to convict unless it is satisfied not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his*
> 20 *explanation being true, then he is entitled to his acquittal."*

412. When reviewing the evidence of accused 8 in the context of all the other evidence before the Court, we are bound to say
25 that we cannot hold that his version is false beyond any

reasonable doubt. The latter part of his testimony under cross-examination certainly has blemishes, but the suspicions which these engender, are not sufficient to persuade us that the *mens reas* of Desmond Pienaar has been established
5 beyond reasonable doubt. In the circumstances, we cannot find that the State has proven any predicate offences against accused 8.

ACCUSED 9 – GREGORY ABRAHAMS

10

413. The evidence which implicates accused 9 is limited, Africa being the only witness who referred to him, and then only in respect of the receipt of commissions from Chao for guaranteeing "safe passage" of the abalone through V&A. In
15 considering the veracity of those allegations we are obliged to bear in mind that Abrahams did not enter the witness box and take the Court into his confidence. Those allegations are therefore unchallenged by accused 9.

20 414. We have the evidence of accused 8 as to the basis of payments made to him on behalf of Chao. We know, too, from Pienaar's unchallenged evidence that Abrahams functioned at a different level at the V&A cold storage business – both departmentally in the company, and physically on the
25 premises. Abrahams was the manager of the three supervisors

(which included Pienaar) who were on the factory floor, while he occupied an office on the upper level of the building. On a day-to-day basis he had far less to do with the public delivering and collecting product than number 8 and the lower-
5 level employees.

415. In cross-examination Pienaar said that he did not know for a fact whether Abrahams ever received spotter's fees, although he suspected that he might have. Assuming that this
10 was so, we have found that number 8's evidence on the *causa* for the receipt of money emanating from Chao could not be rejected as false. We are bound to apply this reasoning to accused 9, even though he has not testified, on the basis that it is not likely that money would have been advanced to
15 Abrahams on any ground different to that on which it was to Pienaar. We are not prepared to accept the uncorroborated evidence of Africa on this point.

416. In the result we are unable to find beyond reasonable
20 doubt that the State has established that accused 9 has committed any predicate offence.

THE IMPLICATIONS OF THE FINDINGS ON THE PREDICATE OFFENCES IN THE APPLICATION OF POCA

25

417. We now turn to the POCA charges. As we demonstrated at the outset, once the State has conclusively established the commission of two or more predicate offences on the part of an accused it is entitled to ask the Court to find that such
5 accused has participated in a pattern of racketeering activity in the enterprise. To repeat the *dictum* in De Vries in the SCA:

> *"In order to secure a conviction under s2(1)(e) of POCA the State must do more than merely prove the underlying*
> 10 *predicate offences. It must also demonstrate the accused's association with an enterprise and a participatory link between the accused and the enterprise's affairs by way of a pattern of racketeering activity."*

15

Once again, we will deal with the accused individually as we apply the provisions of POCA, and in particular s2(1)(e) thereof.

20 **ACCUSED 1**

418. In our finding in respect of the predicate offences we held that accused 1 is liable for conviction as an accomplice for the contravention of Regulation 39(1)(a). Our finding in
25 that regard covers the period in 2005 when pilchards were

supplied to Rapitrade by Pesca at Sea Freeze. As stated earlier, we are satisfied that Miller knew of the existence of the unlawful enterprise being conducted by Chao, and willingly participated therein during 2005.

5

419. What of 2006? The cell phone records show that Miller was in regular communication with, *inter alia*, Africa and Chao during 2006. At that stage, said Miller, he had embarked upon a new venture: the installation of a fish-processing facility at
10 Humansdorp in the Eastern Cape. This, he said, necessitated him travelling to the Eastern Cape regularly during that period.

420. When asked to explain the necessity for these communications with Chao (who would have had no interest in
15 the Humansdorp project), Miller suggested that he and Chao had other ongoing business interests, *inter alia* the marketing of electric scooters and electric pumps for water features. The first time the Court heard of these was when Miller testified. No mention had been made thereof in the cross-examination of
20 any witnesses who may have been able to comment about the veracity of the allegations, for example Africa, who seemed to be in the know about most things.

421. We are of the view that this explanation must be viewed
25 with circumspection, because the very reason that Miller

applied to reopen his case was to seek to offer an innocent explanation for his cell phone communications which the State had heavily criticised in its initial argument.

5 422. In relation to the number of calls made between Miller on 1666 and Africa during 2006, Miller was in a bit of a spot. It was common cause that he had stopped supplying pilchards to Africa at the end of 2005 when, according to Africa, Chao had worked Miller out of the business, claiming that he was 10 dissatisfied with the quality of the pilchards supplied. On the face of it, therefore, there was no reason for the two old acquaintances to be talking to each other any longer.

423. However, Miller said that he knew that Africa was still 15 working for Chao in 2006, and that he received calls from Africa from time to time, asking for advice regarding the availability of pilchards and quizzing him on the price thereof. Miller admits that he furnished such information, claiming that he was still in the know in the pilchard market.

20

424. I consider that the mere furnishing of such advice to Africa would have been to the benefit of the enterprise, generally, in that it facilitated the provision of pilchards used to mask the export of the abalone. In this activity then we see 25 Miller participating indirectly in the affairs of the enterprise

through a pattern of racketeering activity in 2006 as contemplated in s2(1)(e) of POCA.

425. But this is not all. Miller told the Court that after the
5 collapse of FTE there were several debts outstanding to unpaid creditors who had supplied him with pilchards. One of these was a company in Kommetjie called Komicx. He said that he repaid that entire liability over the years as he wished to preserve his good name in the marketplace. He did this by
10 passing on orders to Komicx in respect whereof he would ordinarily be entitled to a commission, and then forfeiting the commission in favour of Komicx in settlement of the debt.

426. One sees on some of the GIVs relating to exports
15 processed by Africa the provision of pilchards by Komicx. In the circumstances it is not unreasonable to conclude that Miller may have had a hand in sourcing these supplies. On other GIVs we see pilchards supplied by "P Miller". Accused 1 readily agreed in the witness box that this could only have
20 been a reference to him. But, he said, it wasn't he who had supplied the pilchards.

427. Miller explained, and accused 8, Desmond Pienaar, confirmed that for purposes of traceability in the cold chain
25 process a product is always booked in under a designated

name (and the client could choose any name, as we see with Africa nominating Rapitrade, Syroun or Cross Berth, as the batch name), and once so booked in it remained classified under that name forever. So, for example, if Bongolethu
5 Fishing had stored 20 tons of pilchards at V&A and Africa had bought 10 tons thereof to have a ready supply for masking purposes, the batch name would always be referred to in documentation as "Bongolethu", even though it then belonged to Rapitrade.
10

428. So, we ask, what was the source of the "P Miller" batches used by Africa in 2006? Miller denied any knowledge thereof and said that this must have been a batch of pilchards stored by someone else under his name. The explanation is difficult
15 to follow, but what is certain is that when those batches arrived at the cold store someone chose to associate them with Phillip Miller. Why his name if he had no interest in them? We believe that this evidence, too, demonstrates that Miller was still involved with the enterprise in 2006 even though, as Africa
20 claimed, Miller did not supply pilchards to him.

429. The participation of Miller becomes all the more clear on the day of the V&A raid. Exhibit 4.2 shows that, most likely at the request of Abrahams, Pienaar called Miller at 06h51 and
25 the two spoke for 82 seconds. About 20 minutes later Miller

called Chao (on 1789) and they spoke for more than two minutes. Why? Who asked him to do so? Or was it of his own initiative, and, if so, why?

5 430. Then, almost immediately thereafter, Abrahams called Miller and they spoke for 97 seconds. Why would Abrahams be seeking out Miller? And, if not on his own initiative, who was it that asked him to call Miller? Perhaps Africa? And if it was Africa, why would he have wanted a message to be
10 conveyed to Miller?

431. An hour later Miller called Chao again, at 08h16 and 08h32. Why? Surely, they were not talking about electric scooters when all hell had broken loose at V&A? And why did
15 Miller call Abrahams later that morning at 10h13 and speak for only 21 seconds?

432. Miller claimed that he was asked by Pienaar, during the call at 06h51, to call Chao on behalf of Africa to inform him of
20 the fact that abalone had been found amongst Africa's products. Miller said he obliged because he knew them both, although Pienaar denies that that was what he conveyed to Miller. Assuming Miller's version to be correct, why the follow-up calls to Chao and Abrahams?

25

433. We believe that the answers to these questions are not hard to find. Miller and Chao went back a long way. Miller introduced Chao to Africa in 2002 when Africa was down and out, and Chao needed someone, not in the furniture business,
5 but to do the paperwork for his fish exports, the so-called "Girl Friday". Further, it was Miller who knowingly took Africa to Pitman to sign the documents to set up the companies through which, at least from early 2003, abalone was exported. And, after the collapse of FTE, Miller was financially embarrassed
10 and did what he knew best: the supply of pilchards – this time with the assistance of Pesca. And at that stage, on his own version, he knew that the pilchards were being used to mask the abalone.

15 434. In 2006 Miller continued to provide the enterprise with, at the very least, advice, if not the sourcing of pilchards themselves. And when the edifice came crashing down on 19 September 2006 he was around, speaking to the man behind it all. We are satisfied that accused 1 was an active and
20 knowing participant in a pattern of racketeering in an unlawful enterprise over a protracted period, and is therefore liable for conviction under s2(1)(e) of POCA.

ACCUSED 2

25

435. We have found that accused 2 was a co-perpetrator in the unlawful enterprise in light of the fact that he made common purpose with accused 4 in relation to the control of abalone when it was delivered to V&A, and there is the
5 important aspect of Botha's evidence regarding where the money came from.

436. Further, if regard be had to the cell phone records produced by MTN (File 5) in relation to accused 4's number
10 ending in 8645, and in particular at pages 1 to 51 thereof (which relate to the period September 2005 to January 2006), one finds frequent communications between Du Toit and Van Rensburg. Given that Du Toit admitted that he frequently delivered abalone to Sea Freeze during that period, it is
15 possible to infer that these communications might have been in relation to Du Toit's abalone-processing- and delivery operation.

437. As we have said, this pattern of communication repeats
20 itself throughout 2006, and the evidence is not limited to the extracts which we have given in relation to Counts 41 and 42 above. For the sake of convenience and to not necessarily overburden an already long judgment with further minutiae, we will not recite those communications in detail. Suffice it to say
25 that the cell phone records for 2006 sustain this pattern of

communication. However, the records for 2005 are more limited and less reliable, and we are therefore not prepared to find beyond reasonable doubt that the common purpose between accused 2 and 4 which we find in 2006, goes as far
5 back as 2005.

438. We mentioned earlier that Van Rensburg's number ending in 5069 was regularly seen moving about in the vicinity of cell phone towers located along the Atlantic Seaboard, as
10 also in the vicinity of Hermanus and places en route thereto. With effect from 28 July 2006 we note that 5069 seems to have been mostly in the vicinity of the tower described as "Philippi Station" on the Cape Flats. That number occasionally moved into Clifton, Oudekraal and the Cape Town City Centre, but it
15 was also seen in the Eastern Cape around towers described as "Katberg" and "Fort Beaufort".

439. We infer from this movement that accused 2 did not use 5069 in his handset during that period. It is probable that he
20 gave the 5069 SIM to somebody else to use in another phone, since Exhibit 4.16A (the "User Profile" referred to earlier) tells us that 5069 was in a Nokia 3120 from 26 July to 19 September 2006, and the IMEI number of that Nokia 3120 corresponds with the IMEI number of the phone in use in the
25 vicinity of Philippi Station and the other towers referred to.

440. Nevertheless, there is a very interesting development on 19 September 2006, the day of the V&A raid. The last call made on 5069 was an outgoing call at 11h48 on that day to a
5 number reflected as 084 432 0761, a number not identified to us. Thereafter the phone appears to have been switched off, as the records reflect that all calls were forwarded to voicemail. This suggests that Van Rensburg must have been in touch with the user of the phone and directed that it be
10 deactivated so as to preserve anonymity.

441. Also on 19 September 2006 Van Rensburg was in contact with Ku and Chao. Exhibit 4.2 shows that at 07h37, not long after he had spoken to Miller and Abrahams, Chao (on 1789)
15 called Van Rensburg (on 1734) and spoke for 87 seconds. This call cannot be denied, because Van Rensburg admits using 1734. Immediately thereafter Van Rensburg called Chao back, both on the same numbers, and they spoke for 44 seconds. These calls, at a critical stage in the history of this
20 matter and on a number which Van Rensburg admitted was his, called for an explanation by accused 2. In the absence of any such explanation the only reasonable inference that we can draw, is that Chao and Van Rensburg must have been communicating about the raid at V&A. This places accused 2
25 at the nerve centre of the unlawful enterprise at a time when

its affairs were under attack and when contingency plans needed to be made.

442. We can come to no other reasonable inference, having
5 regard to all the circumstances relevant to Van Rensburg, that he was intimately involved in the affairs of the enterprise. After all, the unchallenged evidence of Botha was that the money for the Kendal Road FPE came from accused 2. This was used, as Botha demonstrated, to pay the overheads of the
10 operation there, including packaging and staff remuneration. We are satisfied that accused 2's overall pattern of behaviour fits neatly into the mosaic, and that he, too, is liable for conviction under s2(1)(e) of POCA.

15 **ACCUSED 3**

443. As we have said, Africa was introduced to Gavin Wildschutt by Ku. There is sufficient evidence before us to demonstrate that Rapitrade's supply line was the joint work of
20 Van Rensburg and Du Toit, together with their respective lackeys in the form of Botha, Clack, Beauchop *et al.* The State has asked us to find that Syroun's supply line was the joint work of Ku, accused 3 and "Gavin's guys".

25 444. The absence of Ku from these proceedings has meant

that there has not been any particular focus on his activities. That notwithstanding, we are satisfied that the evidence places him firmly in the enterprise, too. If regard be had to the spider relating to Ku's number ending in 9019 (Exhibit 4.7) which
5 covers the period 1 April to 10 October 2006, we see that he had in excess of 200 communications with Chao on 8839; at least 35 communications with Van Rensburg on his legitimate phone, 1734; at least 52 communications with Africa on 6520, and more than 160 communications with accused 3 on 4596.
10 The spider also reflects in excess of 100 communications with a number ending 4429, which is described on the spider as "Jerry Driver", and was said to be accused 7, Stanley Dlamini.

445. Exhibit 4.7 confirms Africa's testimony that he was in
15 regular communication with Ku, and when an exercise is conducted like that which we performed in relation to Counts 41 and 42, a similar pattern of communications between the major role players around the time of deliveries to V&A on behalf of Syroun emerges.

20

446. When we look at the call data for 9019 we see, for example, that accused 3 (on 4596) was often in touch with Ku, who seems to have been more in Gauteng than the Cape Peninsula if regard is had to the cell phone towers through
25 which his phone was routed. That having been said, Ku's

number was also in and around the towers near Hermanus and Gansbaai in late July and early August 2006, when he can be seen in contact with both accused 2 (on 1734), number 3 (on 4596), Chao (on 8839) and Africa (on 6520), and those calls
5 coincide with deliveries by Syroun to V&A around those times.

447. We will not overburden an already longer judgment with further detail in this regard. Suffice it to say that we have satisfied ourselves that the details in the Vodacom records
10 sufficiently corroborate Africa's evidence regarding Ku's involvement in the business of Syroun and Ku's links to accused 3 and Chao.

448. As said earlier, we note that Ku's communications with
15 Van Rensburg were on 1734 – the number which he admits was his. Those communications are therefore not in issue. What was Ku talking to number 2 about, and once again, we ask, why did Van Rensburg not take the Court into his confidence in that regard? Importantly, in the absence of Ku's
20 further involvement in this trial (and the fact that he skipped bail creates negative inferences of its own), Van Rensburg's innocent explanation of such contact with Ku would have most likely gone unchallenged.

25 449. Finally, Exhibit 4.2 contains critical information

suggesting Ku's links with the hierarchy of the enterprise. Firstly, we note that Ku communicates with Chao on his 8839 number, while all the other role players, including number 2 (on his admitted number, 1734), call Chao on 1789. Was 8839
5 then possibly Chao's *skelm* phone, we ask?

450. In any event, the first call from Chao to Ku is at 07h13, just three minutes after Miller had called Chao (on 1789) and spoken for a little over two minutes. Thereafter, Chao and Van
10 Rensburg speak twice, at 07h37 and 07h44, before Chao calls Ku again at 08h23, when they speak for nearly four minutes. At 13h20 Van Rensburg calls Ku and they speak for almost five minutes. In the 25-hour period that follows, from 15h05 on 19 September, Chao and Ku speak no less than 15 times, with the
15 call durations ranging from two seconds to three minutes. And from 11h24 on 19 September 2006 to 14h28 on the 20th, Ku speaks to Wynand du Plessis, the enterprise's attorney, on five occasions. One can clearly see that, as the fortress is under siege, central command springs into action, and Ku is very
20 much part of the action.

451. We believe that the State has more than adequately demonstrated Ku's involvement in the enterprise, and that his supply line was through Syroun, ably assisted by the
25 production and logistical services of accused 3. We consider

that it is reasonable to infer that the abalone emanating from Foxhole, Volmoed, Hercules and Faraday Street found its way to Syroun, and no other enterprise.

5 452. In the circumstances we are satisfied beyond reasonable doubt that Gavin Wildschutt, too, was directly involved in the affairs of the enterprise from at least February to September 2006 through a pattern of racketeering activity, and that he is liable for conviction under s2(1)(e) of POCA.

10

ACCUSED 4

453. The involvement of accused 4 in the affairs of the enterprise presents little difficulty once the defences of

15 lawfulness and the absence of *mens rea* have been disposed of. Du Toit testified that his supply of abalone emanated from Chao and was delivered to Sea Freeze and later V&A on the instruction of Chao. While he said that Chao paid him a rate per kilo for the processing work, we know, too, from the

20 unchallenged evidence of Botha that Van Rensburg provided financial support to Du Toit as well.

454. We are therefore satisfied beyond reasonable doubt that accused 4 participated directly in the affairs of the enterprise

25 from early 2005 through to September 2006 through a pattern

of racketeering activity, and is therefore liable for conviction under s2(1)(e) of POCA.

ACCUSED 5

5

455. We have found that the State only proved a single predicate offence against accused 5 *viz* the possession of 1 969 units of frozen abalone at Brackenfell. Although the barometer of suspicion in relation to Liebenberg's involvement 10 in number 4's criminal conduct through common purpose runs high, we have been unable to find this beyond reasonable doubt. In the circumstances, accused 5 is not liable for conviction under s2(1)(e) of POCA.

15 **ACCUSED 6, 8 AND 9**

456. In light of our finding that the State has failed to establish the commission of any predicate offences on the part of these accused, they are not liable for conviction under 20 s2(1)(e) of POCA.

THE VERDICT

We have reached our verdict, and that verdict is a unanimous 25 one. It is the following:

1. **ALL OF THE ACCUSED ARE ACQUITTED ON ALL THE FRAUD CHARGES THAT THEY FACE.**

5 2. **ACCUSED 1: PHILLIP JAMES MILLER**

COUNT 2

(Contravening section 2(1)(e) of the Prevention of Organised Crime Act 121 of 1998, POCA)

10

GUILTY AS CHARGED

COUNTS 15, 16, 17, 19, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31 and 32

15 (Contravening Regulation 39(1)(a) of the regulations as promulgated under Government Gazette Notice R1111 and published in Government Gazette 19205 of 2 September 1998 – the MLRA Regs)

20 **GUILTY AS CHARGED**

On all the remaining charges which accused 1 still faces.

25 **NOT GUILTY AND DISCHARGED**

3. **ACCUSED 2: WILLEM JACOBUS VAN RENSBURG**

COUNT 2

5 (Contravening section 2(1)(e) of POCA)

GUILTY AS CHARGED

Counts 34, 35, 38, 39, 41, 42, 43, 48, 105, 107 and 115

10 (Contravening Regulation 39(1)(a) of the MLRA Regs)

GUILTY AS CHARGED

COUNT 114

15 (Contravening section 18(1) of the Marine Living Resources Act 18 of 1998, the MLRA)

GUILTY AS CHARGED

20 **On all the remaining charges which accused 2 still faces**

NOT GUILTY AND DISCHARGED

25 4. **ACCUSED 3: ADRIAAN GAVIN WILDSCHUT**

COUNT 2

(Contravening section 2(1)(e) of POCA)

5 **GUILTY AS CHARGED**

COUNTS 3 AND 4

We take note of the fact that these counts have already
10 been established in terms of accused 3's guilty plea in terms of section 105A of the Criminal Procedure Act in April 2006, and that they are before us only as acts of racketeering.

15 **COUNTS 46, 47, 50, 51, 100, 102, 104, 106, 108 and 109**

(Contravening Regulation 39(1)(a) of the MLRA Regs)

GUILTY AS CHARGED

20 **COUNTS 99, 101 and 103**

(Contravening section 18(1) of the MLRA)

GUILTY AS CHARGED

25 **On all the remaining charges which accused 3 still**

faces

NOT GUILTY AND DISCHARGED

5 5. **ACCUSED 4: TONY PETER DU TOIT**

COUNT 2

(Contravening section 2(1)(e) of POCA)

10 **GUILTY AS CHARGED**

COUNTS 14, 15, 16, 17, 19, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 38, 39, 41, 42, 43, 48, 105, 107, 115 and 116

15 (Contravening Regulation 39(1)(a) of the MLRA Regs)

GUILTY AS CHARGED

COUNT 114

20 (Contravening section 18(1) of the MLRA)

GUILTY AS CHARGED

On all the remaining charges which accused 4 still

25 **faces**

NOT GUILTY AND DISCHARGED

6. **ACCUSED 5: JOHANNES EMIL LIEBENBERG**

5

COUNT 116

(Contravening Regulation 39(1)(a) of the MLRA Regs)

GUILTY AS CHARGED

10

On all the other counts which accused 5 still faces

NOT GUILTY AND DISCHARGED

15 7. **ACCUSED 6: RODNEY ONKRUID**

NOT GUILTY AND DISCHARGED ON ALL COUNTS

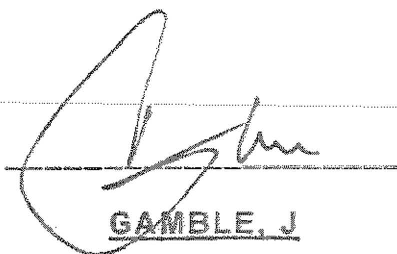
8. **ACCUSED 8: DESMOND PIENAAR**

20

NOT GUILTY AND DISCHARGED ON ALL COUNTS

9. **ACCUSED 9: GREGORY ABRAHAMS**

25 **NOT GUILTY AND DISCHARGED ON ALL COUNTS**



GAMBLE, J