IN THE KWAZULU-NATAL HIGH COURT, PIETERMARTIZBURG

REPUBLIC OF SOUTH AFRICA

Case no: 8006/12

In the matter between:

GASTON SAVOI **First Applicant**

INTAKA HOLINGS (PTY) LIMITED **Second Applicant**

FERNANDO PRADERI **Third Applicant**

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **First Respondent**

THE MINISTER OF JUSTICE AND CONSITUTIONAL DEVELOPMENT Second Respondent

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JUDGMENT

MADONDO J:

Introduction

[1] The applicants seek an order declaring the definitions of "pattern of racketeering activity" and "enterprise" in section 1 and Chapter 2 of the Prevention of Organised Crime Act 21 of 1998(POCA) unconstitutional and invalid on the grounds that :

(a) The definition of "pattern of racketeering activity" in section 1 is unconstitutional and void for vagueness.

(b) In addition, the definition of "enterprise" in section 1 of POCA is overbroad and unconstitutional.

(c) Consequently, the following sections of POCA, which are predicated on the definitions of "pattern of racketeering activity" and "enterprise", are unconstitutional, invalid and void for vagueness:

i. section 2(1)(a);
ii. section 2(1)(b);
iii. section 2(1)(c);
iv. section 2(1)(d);
v. section 2(1)(e);
vi. section 2(1)(f);
vii. section 2(1)(g).

(d) Chapter 2 of POCA is unconstitutional in its entirety because it operates retrospectively in violation of section 35(3) (1) of the Constitution and the Rule of Law.

(e) Section 2(2) of POCA is unconstitutional and invalid because it violates the fair trial rights of an accused in section 35 of the Constitution.

Parties

[2] The first applicant is the chairman of the various companies in the Intaka Group of Companies ("the Intaka Group"), consisting of inter alia Intaka Manage (Pty) Limited and Intaka Holdings (Pty) Limited.

[3] The second applicant is Intaka Holdings (Pty) Limited, a company with limited liability duly incorporated and registered in terms of the Company Laws of the Republic of South Africa, with its registered address at 4 Bell Crescent, Westlake Business Park, Tokai. It was previously known as Intaka Investments (Pty) Limited. The company is indicted in the KZN Criminal matter in terms of section 332 of Act 51 of 1977, and in such matter is represented by the first applicant.

[4] The third applicant is Fernando Praderi, an adult Uruguayan male residing at 42 Blue Crane Way, Tokai, Cape Town. The third applicant is an employee of Intaka Group and is indicted as an accused in the KZN Criminal matter.

[5] The first respondent is the National Director of Public Prosecutions (NDPP) acting in his official capacity and having the office at the National Prosecuting Authority, VTMBuilding, 123 Westlake Avenue, Corner of Hartley Avenue and WeavingPark, Silverton, Pretoria. The first respondent is the head of the prosecuting authority in terms of section 179(1)(a) of the Constitution.

[6] The second respondent is the Minister of Justice and Constitutional Development, cited herein in his official capacity in terms of Rule 10A of the Rules of Court and having interest in the Constitutional impugnment of criminalising legislation.

Factual Background

[7] All three applicants are charged with racketeering, fraud, corruption, money laundering and infringement of Public Management Act before various courts in the country including KwaZulu-Natal. In KwaZulu-Natal High Court, 54 charges have been preferred against the applicants and other co-accused.

[8] The charges relate to the provisions of Water Purification Plant and/or Gas Generating systems and/or Dialysis Machines by the second applicant to various provincial departments in KwaZulu-Natal and the Northern Cape Province as well as to two municipalities in the Northern Cape Province. However, the application for a declaratory

order in respect of the unconstitutionality, that is, if it is ultimately confirmed by the Constitutional Court under section 172(2) of the Constitution would also be binding on all other courts.

[9] The state alleges that senior officials within the provincial government of KwaZulu-Natal together with the first applicant and the third applicant engaged with one another so as to secure contracts for the second applicant in respect of the provisions of water purification and oxygen plants for use by the provincial administration in municipalities (in respect of the water purification plants) and in Provincial Hospitals (in respect of both water purification plants and oxygen plants).

[10] It is alleged that the first and second applicants conspired in different ways with highly placed officials within provincial administration, so to secure contracts by unlawful means for the provision of water purification and oxygen plants. The corruption of public officials to secure valuable contracts at the instance of persons who do so for their own enrichment is allegedly part of a wide spread pattern of corrupt activity that threatens vital interests of the State and public good that it serves. Unlawful procurement and the corruption of the public officials give rise to wasteful public expenditure, the misallocation of scarce goods and the compromising of government's ability to serve the public good. Water purification plants are procured to provide essential services to the very poorest in the Province. So too, water purification plants and oxygen plants are vital equipment for hospitals that serve the most needy in the society. Public officials and profiteering individuals such as the applicants who came together to compromise the procurement of vital goods for their self-enrichment at the cost of public good do grave harm.

[11] However, on 14 September 2012 the first respondent decided to withdraw the original indictments against some of the accused and prepared new indictments in respect of the applicants and their co-accused. There are substantive differences between the original and new indictments. The new indictment refers only to 11 accused as opposed to 23 accused charged under the original indictment, and the new indictment contains on only 17 counts as opposed to 54 counts in the original indictment.

[12] According to the respondents the dropping of charges against some of the accused came as a result of the prosecutorial assessment of the evidence available to it. This was a simple exercise of the prosecutorial authority and does not, in anyway, affect the legislation under which they are charged. The new indictment simply flows from the first respondent's assessment of the strength of the evidence currently available to the prosecution against each and every accused. However, nothing turns on the withdrawal of the original indictment.

Applicants`standing to challenge constitutional validity of impugned provisions of POCA

[13] It is the contention of the respondents that the challenge by the applicants is abstract and premature in that it does not say that the provisions of POCA are vague and overbroad when seen in the light of the specific allegations made against the applicants in the indictments. On this ground alone the respondents submit that this application should be dismissed.

[14] The applicants admit that it is not the manner the law has been applied which is being challenged but rather the alleged vagueness and over breadth of the impugned provisions of POCA which allow for constitutional and arbitrary application. They allege that

the unconstitutional vagueness of POCA serves as an arbitrary penalty enhancer and prosecutorial bargaining tool. In the argument of the applicants the arbitrary nature of POCA is susceptible to manipulation. However, on the whole, it is common case between the parties that the challenges by the applicants are not predicated on the application of POCA or the conduct of the respondents.

[15] The respondents submit that this Court should not entertain the applicants` challenges because they are premature, abstract in nature and without merit. In the submission of the respondents the applicants have failed to link the challenges they bring to the indictment serving against them, and nor has any effort been made to adduce evidence under authority of section 2(2) of POCA. The applicants' challenges are pre-emptive and in advance of the leading of any evidence in the criminal trial. In support of their submission the applicants rely on the case of *Director of Public Prosecutions, Transvaal V Minister of Justice and Constitutional Development 2009(2) SA 130(CC)* where Ngcobo and Skweyiya JJ affirmed the importance of resolving constitutional issues in circumstances where the issue is a live one and it requires resolution on the facts of the case.

[16] In *United States v National Dairy Products Corp, 372 U.S 29, 33 (1963*) the court discouraged evaluating the constitutionality and validity of the statute in abstract and held that:

> "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases…. [A] limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were… presented, we might add that application of this rule frees the court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statues in areas where their constitutional application might be cloudy."

In *Robinson v United States, 3 24U.S 282(1945),* it was held that in determining the constitutionality and validity of a particular statute, a statute must of necessity be examined in the light of the conduct complained of.

[17] In the argument of the applicants they (the applicants) are charged in the pending criminal trial with offences involving contraventions of the impugned provisions of POCA, and such contraventions are dependent on the impugned definitions of the Act. They are faced with charges which can give rise to those procedures being invoked against them. They are at risk of those procedures being employed against them; and if convicted they may face consequences including life imprisonment of a fine of R1 billion. In the premises, the applicants submit that their rights are therefore threatened.

[18] In Mr Marcus' submission the applicants are in jeopardy of being forced to face a trial based on charges which cannot survive constitutional scrutiny. The outcome of the application will have a practical effect on the proceedings of the criminal trial against the applicants set down in May 2013. Under section 85 of the Criminal Procedure Act, 51 of 1977 an accused may, before pleading to the charge under section 106 object to the charge on the ground –

> "(a) That the charge does not comply with the provisions of the Act relating to the essentials of a charge;
>
> (b) … ;
>
> (c) That the charge does not disclose an offence;
> (d) … ;
>
> (e) …."

[19] In theargument of MrMarcus the applicants are entitled to challenge the constitutionality of the sections on which prosecution is based. The applicants, therefore,

have a real and not a hypothetical interest in the decision. In support of his argument Mr Marcus relies on *Ferreira v Levin 1996(1) SA 984(CC) at p1006 para 26, where* the following was said:

> "…. The Constitutional Court, or any other competent court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of the law. The consequence of such a (subjective) approach would be to recognise that validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach."

At para 97, the court held that the issue of whether a law is invalid or not does not depend on whether, at the moment when the issue is being considered a particular person's rights are threatened or infringed by offending law or not.

[20] In *DPP v Minister of Justice and Constitutional Development 2009(2) SACR 130(CC) at 204 para 225,* it was held that in a constitutional order it is appropriate for litigants to launch facial challenges to the constitutionality of legislation, and for courts to hear such challenges where it is in the interest of Justice.

[21] In *TecklaNadjilaLameck and Another v The President of the Republic of Namibia and others [2012] NAHC 31*, it was held that broad approach to standing should be adopted in constitutional challenges. The applicants are currently charged with various criminal offences which include contraventions of impugned provisions of POCA. In my view, the applicants are entitled to challenge the constitutional validity of the provisions of POCA under which they are currently charged. The said provisions are pertinent to the impending criminal trial proceedings against them. Accordingly, it follows that the applicants have a cause for concern or fear that their fundamental rights to fair trial may be infringed or threatened, presumably, by the unlawful conduct of the first respondent. They are,

therefore, entitled to claim enforcement and protection of their fundamental rights. See *Uffindell t/a Aloe Hunting Safaris v Government of Namibia and Others (P) A 141- 2000 [2009] NAMC 51 (20 April 2009) p19 para 19.*

Definitional Challenge to "Pattern of Racketeering Activity" and "Enterprise"

[22] The applicants challenge the definitions of the concepts of "pattern of racketeering activity" and "enterprise" as defined in section 1 of POCA on the basis, mainly, that the definition of "pattern of racketeering activity "is vague and therefore void for vagueness and, that the definition of "enterprise" is overbroad, and as a consequence both definitions are in breach of the principle of legality and hence unconstitutional. . In support of their challenge the applicants have referred me to *H.J Inc. v North-western Bell Tel Co 49 U.S 229 (1989) where* Justice Scalia noted in his concurrence that courts have been unable to define "pattern" with any meaningful degree of clarity, leading to speculate that RICO would be vulnerable to a vagueness challenge. *See also Cianci v Superior Court 710P.2d 375, 376-77(Cal. 1985).*It is alsothesubmission of the applicants that the provisions of POCA relating to racketeering are similarly vague and unconstitutional, and in violation of the rule of law, in that they depend on a definition of "pattern of racketeering activity" which is impermissibly vague

[23] The definitional challenge by the applicants involves two considerations: first, whether the definition of "pattern of racketeering activity" is vague and void for vagueness, and second, whether the definitions of the concepts of "pattern of racketeering activity "and "enterprise'' are overbroad. In terms of section 1 of POCA a "pattern of racketeering activity'':

> "means the planned, on-going, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1."

The definition of a "pattern of racketeering activity" is one of the most important concepts under POCA because it defines a key element of each substantive racketeering offence.

[24] However, statutory definitions in the POCA andthe corresponding American legislation Racketeer Corrupt Organizations Act (RICO) of 1970 are not precisely the same. Section 1961(5) ofRICO provides that a pattern of racketeering activity:

> "requires at least two acts of racketeering activity, one of which occurred after the effective date of this Chapter [October 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering"

[25] Section 1 of POCA provides that "Enterprise":

> "'includes any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity."
>
> Section 1961(4) of RICOuses the same language as POCA for the definition of "enterprise".

[26] The Shorter Oxford English Dictionary (Volume1) at P 1046 (1972) defines the word "include" to mean:

> "contain, comprise, embrace: a. as a member of an aggregate, or a constituent part of a whole, b.as a subordinate element, corollary, or secondary feature."

Pursuant to United States case law in definitional provisions of statutes and other writings, the word "include" is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration. See *American Surety Co. v Marotta, 287 US 513, 517 (1983); United States v New York Tel.Co. 434 U.S. 159, 69 (1977).*When POCA is read as whole, it is apparent that the verb "includes" should be

interpreted in that manner and the list that follows should be treated as illustrative rather than exclusive.

[27] The "enterprise" is not the "pattern of racketeering activity", but an entity separate and apart from the pattern of activity in which it engages. An enterprise is chiefly distinguished from the pattern of racketeering activity by the fact that it possesses some goal or purpose more pervasive and more enduring than usual gratification that can accrue from the successful completion of each particular criminal act.

[28] In the contention of the applicants a "pattern of racketeering activity" as defined in section 1 of POCA is unintelligible, vague and meaningless, it is unclear at what point it can be said that there is a "pattern of racketeering and the definition is vague; it is unclear who may be charged with racketeering under POCA, and it is not objectively ascertainable at what point a racketeering offence is committed. In support of their contention the applicants rely on the judgment of Justice Scalia in the case of *H J Inc. v North Western Bell Telephone Co. 492 U.S 229* where the learned Judge indicated strongly in his concurring judgment that the definition of "pattern of racketeering activity" in RICO was illusive and uninformative. He had also similar difficulties with the element of "continuity" the state must prove under the "pattern of racketeering activity" definition.

VOID FOR VAGUENESS

[29] Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. *See United States v Harris, 347 U.S 612, 617 (1954)*. The doctrine of vagueness is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion. *SeeChavunduka v Minister of Home Affairs, Zimbabwe 2000(4) SA*

1(ZSC) at 10C-D. The void- for- vagueness doctrine reflects the principle that a statute which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

[30] In *Connally v General Construction Co. 269 U.S 385,391 (1926*) the US Supreme Court held:

> "The terms of a penal statute creating new offence must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognised requirement consonant alike with ordinary notions of fairplay and the settled rules of law and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process."

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *See Grayned case 408 U.S 104(1972) at 108-109.*

[31] The elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. See *Landgraf v U.S I film Products et al 511 US 244 (1994) at 265.*Legislation must be drafted in such a way that the readers know what the law expects of them. Legal certainty and comprehensibility are not mutually exclusive. The law cannot fulfil its role to regulate and to order if it cannot be understood. The law must, therefore, be sufficiently clear, accessible and precise that those who are affected by it can ascertain the extent of their rights and obligations. *See Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC) para 47.*

[32] In *President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC) at para 12* Mokgoro J said:

> "…. The need for accessibility, precision and general application flow from the concept of the rules of law. A person should be able to know of the law, and be able to conform his or her conduct of the law. Further, laws should apply generally, rather than targeting specific individuals."

Similarly, it is difficult or even impossible for a person to know in advance precisely what kind of conduct is punishable if the definitions of crimes are vague or their content is problematic. There is a connection between the principle of legality and a democratic form of government.

[33] The concepts; "ongoing, continuous or repeated "simply capture different ways in which participation is not once off criminality with respect to the predicate offences. Ongoing acts must constitute ongoing unlawful activities whose scope and persistence pose a special threat to social well-being. *See International Data Bank, Ltd Zepkin, 812 F2d 155 (4th Cir.1987).*

[34] Continuity, in turn, refers either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. In order to satisfy the element of continuity it must be shown that the past act constitutes a threat of continuing racketeering activity. The threat of continuity is sufficiently established where the predicates can be attributed to an accused operating as part of a long-term association that exists for criminal purposes.

[35] The word “repeated “means a repetition of a particular conduct, and for present conduct to be said it is repeated it must bear some resemblance to the past conduct. In the US it has been held “a criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims or methods or commission or otherwise are interrelated by distinguishing characteristics, and are not isolated events.” *See H.J Inc. V Northwestern Bell Telephone Co.; United States v Stofsky 415 US 566 (1974).*However, to constitute a pattern, it is not necessary that the alleged racketeering acts be similar or related directly to each other, rather a pattern may consist of diversified racketeering acts provided that they are related to the alleged enterprise. *See United States v Eufrosio, 935 F, 3d 533 (3dCir. 1991); H.J. Inc. 492U.S 247*.

[36] In describing a “pattern” the US Supreme Court s In H.J Inc., 492 U.S. 238-39 stated the following:

> “A pattern is an “arrangement” or order of things or activity …. It is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them “ordered “or arranged …”

[37] In the argument of the applicants the principle of legality is one of the constitutional controls through which the exercise of public power is contained. Therefore, in their submission the statutory text must be clear to potential wrongdoers what conduct is proscribed by the specific legislation as well as to enforcement agencies and officials. In essence, it is the contention of the applicants that the principle of legality demands that when legislation is construed, using the usual canons of construction with no bias towards benevolence, it must indicate with reasonable certainty to those who are bound by it which

act is enjoined or prohibited. If it does, it is constitutionally acceptable; if it does not, it is constitutionally offensive. In their submission the impugned provisions of POCA are in breach of the principle of legality by reason of their vagueness.

[38] Statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offences fall within their language. S*ee Jordan v De George, U.S 223, 231 (1951) and United States v Petrillo, 332 U.S.I. 331 U.S 7 (1997).* The vagueness doctrine enquiry in US law is twofold: Firstly, the court looks at the challenged law in order to determine whether adequate notice of the prohibited conduct is provided. Secondly, the court analyses the law to see if creates a potential for arbitrary law enforcement. If the formulation of a crime is unclear or vague, it is difficult for the subject to understand exactly what is expected of him. According to *CR Snyman: Criminal Law 4th Edition atP 46* an excessively widely formulated criminal provision violates the principle of legality because such provision can serve as a smokescreen behind which it wishes to proscribe but, which, for tactical reasons, it does not wish to name expressly.

[39] Living under a rule of law entails various suppositions , one of which is that "all persons are entitled to be informed as to what the state commands or forbids" *See Papachuston v City of Jacksonville 405 US 156 (1972) ; Lanzetta v New Jersey 306 US 451, 453 (1939).* The statute is not impermissibly vague if the citizens who desire to obey it will have no difficulty in understanding it. *See Colten v Kentucky 407 U.S 110-111 (1972). In United States v Stofsky 415 US,* the supreme Courtin deciding whether 18 USC 1962(C) gave an accused adequate warning that the commission of more than one such criminal act under circumstances constituted an additional separate crime for which there was separate

penalty, it held that if the elements of the predicate offences were well-defined and established it would be futile for a person to argue that he had no warning or knowledge that his commission of such acts would violate the law.

[40] A "pattern of racketeering activity" requires at least two acts of racketeering activity (any of the offences referred to in Schedule 1), of which one occurred after the effective date of POCA and the last offence occurred within ten (10) years (excluding any period of imprisonment) after the commission of a prior such offence referred to in Schedule 1. The statutory definition of a "pattern" has thereby set forth two technical requirements regarding the time when the predicate acts were committed. The last act must have been committed within ten years of prior act, excluding any period of imprisonment. This means that the last racketeering act must have occurred within ten years after commission of a prior racketeering act and that is essential to establish the requisite two acts. See United States v Pungitore , 910 F,2d 1084,1129 and n 63 (3d Cir. 1990)

[41] POCA is of general application in that everyone who has engaged in the prohibited act involving one of the offences referred to in Schedule 1 of the Act before the effective date of the legislation is on prior notice that only one more act may trigger an offence of racketeering, which carries a severe penalty. Therefore, an accused is given a fair warning that the subsequent act will combine with prior racketeering activity act to produce the racketeering pattern activity against which the definition section is directed. The second act creates a separate offence based on the commission of predicate act. In the premises, upon proper construction the definition of "pattern of racketeering activity" in section 1 of POCA is not vague, but clear and precise, instead. It adequately warns an accused that an on-going

and continuous or repeated commission of more than one criminal act listed in Schedule 1 will expose him to conviction on a charge of a more serious offence of racketeering.

Overbreadth

[42] Over breadth refers to a principle that "governmental purpose to control or prevent activities constitutionally subject to State regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of constitutionally protected freedom". Over breadth requires that the means used to achieve a State object is too sweeping to attain the object and thereby infringe some protected right. See *ReitzerPharmaticals (Pty) Ltd v Registrar of Medicines 1998(4) SA 660(T) at 670; NAACP v Alabama Ex rel. Flowers U.S 307- 08(1964)*

[43] The enquiry into the issue whether the definitions of the concepts of "pattern of racketeering activity "and "enterprise'' are overbroad is twofold: first, is to ascertain the aim and object of POCA, and second, to determine whether in their application the impugned provisions infringe the constitutionally protected fundamental rights and values.

(a) Object of POCA

[44] In terms of the purpose – orientated approach, the purpose of the legislature is the prevailing factor in interpretation. The context of the legislature as well as social and political policy directions is taken into account to establish the purpose of the legislation. The object of POCA is stated in it as follows:

> "To introduce measures to combat organised crime, money laundering and criminal gang activities; to provide for the prohibition of money laundering and for an obligation to report certain information, to criminalise certain activities associated with gangs; to provide for the recovery of the proceeds of unlawful activity; for the civil forfeiture of criminal property that has been used to commit an offence; property that is the proceeds of unlawful activity or property that is owned or controlled by, or on behalf of, an entity involved in terrorist and

> related activities; to provide for the establishment of a Criminal assets recovery account; to amend the Drugs and Drug Trafficking Act, 1992, to amend the International Co-Operation in Criminal Matters Act, 1996; to repeal the Proceeds of Crime Act, 1996; to incorporate the provisions contained in the Proceeds of Crime Act, 1996; and to provide for matters connected therewith."

[45] In *Heydon's case [1584] EWHC EXCH J 36 76 ER637*, it was resolved that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) three things are to be discerned and considered:

(i) what was the common law before the making of the Act?
(ii) what was the mischief and defect for which the common law did not provide?;
(iii) what remedy the parliament had resolved and appointed to cure the disease of the common wealth?

[46] Prior to the enactment of POCA the government considered the common law of conspiracy and common purpose to be inadequate to deal with the sophisticated methods used by modern crime syndicates, organised crime in particular, organised crime has a number of features that make successful prosecutions difficult at common law. Those who orchestrate organised crime as the heads of crime syndicates use sophisticated methods to hide their involvement in the criminal conduct of subordinates and take elaborate measures to disguise the proceeds derived from their crime. It is the nature of the organised crime that those who are responsible for planning and orchestrating criminal activities are not the persons who carry out the activities. One of the intractable features of organised crime is that it utilises modern business organization methods so to make it very difficult to trace those who are in leadership positions and ultimately benefit from the greater part of the spoils of crime.

[47] Organised crime has developed complex organizational structures, with many layers and structures that conceal ultimate control and which makes it difficult to trace those who

benefit from the proceeds of crime. Organised crime also utilizes seemingly lawful activities and enterprises both to carry out criminal activity and also to launder the proceeds of crime. The United States of America had also a similar experience and the legislative response to the scourge of organised crime was the enactment of (RICO) in 1970. The Act is aimed at preventing racketeers from investing or reinvesting in wholly illegal enterprises and from acquiring through a pattern of racketeering activity in wholly illegitimate enterprises such as illegal gambling business or loan sharking.

[48] The statement of findings that prefaced the Organised Crime Control Act of 1970 (OCCA) in US reveals that:

> "The Congress finds that (1) organised crime in the United states is highly sophisticated diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and illegal use of force, fraud, and corruption; (2)organized crime derives a major portion of its power through money obtained from such illegal endeavours as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs and other forms of social exploitation; (3) thus money and power are increasingly used to infiltrate and corrupt legitimate business and labour unions and to subvert and corrupt our democratic processes; (4)organised crime activities in the United states weaken the stability of the nation's economic system, harm innocent investors and competing organisations, interfere with free competition seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the nation and its citizens, and (5) organised crime continues … to grow because of defects in the evidence gathering process of the law inhibiting the development of the illegally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organised crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact."

[49] In the light of the above findings, it was the declared purpose of the Congress to seek the eradication of organised crime in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organised crime. *See Turkette case, p923.* It is the contention of the respondents in the present case that without the legislation that is conceptually adapted to these sophisticated

structures, the undertaking of criminal prosecutions that have a prospect of reaching those who control organised crime will remain illusory.

[50] It is evident from the above that common law remedies could not resolve the increased problems of organised crime and POCA seeks to provide enhanced sanctions and drastic remedies to assist the State to combat intolerable situation of a large increase in organised crime. The main objective of the POCA is to prevent criminals from benefiting from the proceeds of crime and to discourage the use of property for criminal purposes. This also appears more fully in the affidavit of Ebrahim Ahmed Kadwa, a Brigadier in the South African Police Service attached to the Organised Crime Investigations Component of the Directorate of Priority Crime Investigation, that the world has seen the proliferation of organised crime. Organised Crime groups are constantly expanding and diversifying their operations into new markets. It has internationally been identified as a security threat. According to Kadwa's investigations, even in our country, organised crime groups are described as being dynamic and adapting to the circumstances in order to maximise their profits and minimise their risks. Managers of criminal enterprises normally give orders and directions in the commission of criminal activities. However, they are not actually involved in the commission of crime. Corruption is the strongest weapon in the hands of organised crime groups in the furtherance of their criminal ventures. It is essentially about corrupting the powerful and terrorising the innocent. It is through the complicity of corrupt officials the organised crime groups are able to successfully smuggle contraband, secure government contracts, and they intimidate, threaten and assassinate witnesses.

(b) Interpretation of POCA legislation

[51] The concept of "racketeering" as a tool to fight crime originated from United States in 1970 with the enactment of RICO. The concept was then adopted by South Africa in 1998 with the enactment of POCA. The Supreme Court of Appeal in *De Vries and another v S [2012] 1 All SA 13(SCA) at 42-3* acknowledged that POCA was modelled on RICO and held that as a result of similarities between the two statutes the jurisprudence of the United States is of "considerable assistance" in developing case law in POCA matters.

[52] The fundamental principle in statutory interpretation is that the purpose of the legislation must be determined in the light of the spirit, purpose and objects of the Bill of Rights in the Constitution. Where the law is clear and unambiguous, and in keeping with the spirit of the Bill of Rights, the court must give effect to its meaning.See *section 39(2) of the Constitution of the Republic of South Africa Act, 108 of 1996 (the Constitution),* which provides:

> "When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[53] The most important principle is to determine and apply the purpose of the legislation in the light of the Bill of Rights. The ordinary meaning must be attached to the words. *See Union Government v Meck 1917 AD 419. In Volschenk v Volschenk 1946 TPD486*, it was decided that the most important rule of interpretation was to give words their ordinary, literal meaning*. In Association of Amusement and Novelty Machine Operators v Minister of Justice 1980(2) SA 636(A)* the Court held that this means colloquial speech. A meaning must be assigned to every word. See *Keyter v Minister of Agriculture 1908 NLR 522.*

[54] In *S v Lawrence; S v Negal; S v Solberg 1997(4) SA 1176(CC) at p1198 para 52*Chaskalson P said:

> "The purpose of particular legislative provisions has ordinarily to be established from their context, which would include the language of the statute and its background…"

The intention of the legislation must essentially be gathered from the language used. In *Greenshields v Willemburg (1908) 25SC, 568,* it was held that a court should not extend the meaning of the legislation beyond that of the words used. The court should give effect, to what the legislature has said, and not try to cover eventualities that the legislature has, for whatever reason omitted to cover. See also *R v Kirk 1914 CPD 564 at 567*.

[55] In *Dadoo Ltd and others v Krugersdorp Municipal Council 1920 AD 530*, the Appellant Division acknowledged that there was a *casus omissus*(an omission) but refused to add the omission, to give effect to the law makers obvious intentions, more recently, in *Stafford v Special Investigating Unit [1998] 4 All SA 543(E) 553b-c,* the court held:

> "Acourt cannot act upon mere conjecture and speculate as to whether or not the legislature might have overlooked something, it cannot supplement a statute by providing what it surmises the legislature omitted. The court therefore must give effect to what the act says and not what it thinks it ought to have said…"

[56] The court has to measure the legislation against the provisions of the constitution and decide whether or not the legislation is valid. The spirit and purport of the fundamental rights have to be taken into account during the interpretation of statutes. The difference between constitutional and "ordinary" interpretation was explained by Froneman J in *Matiso v Commanding Officer, Port Elizabeth Prison 1994(4) SA 592(SE) at 597 G-H* as follows:

> "The interpretation of the constitution will be directed at ascertaining the foundational values inherent in the constitution, whilst the interpretation of the particular legislation will be directed at ascertaining whether the legislation is capable of an interpretation which conforms to the fundamental values or principles of the constitution."

[57] In *Nortjie v Attorney-General of the Cape 1995(2) SA 460(C) 471 B-D*the following was said about the supremacy of the Constitution:

> "A supreme constitution is not a finely tuned statute designed ad hoc to deal with one particular subject, or to amend or repeal another specifically named statute or a specifically identified rule of the common law. It is *sui generis*. It provides, in the main, a set of societal values to which other statutes and rules of the common law must conform and with which government, and its agencies must comply, in carrying out other functions. It is short on specifics and long on generalisation."

[58] In *Zondi v MEC for Traditional and Local Government Affairs and others 2005(3) SA 589 (CC) at 619 para 90* Ngcobo J said:

> "…. The purpose and effect of a statute are relevant in determining its constitutionality ….If a statute has a purpose that violates the constitution; it must be held to be invalid regardless of its actual effects. The effect of legislation is relevant to show that although the statute is facially neutral its effect is unconstitutional. This will be the case where, for example, the legislation has a discriminatory impact on a particular racial group.

In interpreting the legislation in question the principles of international human rights law and foreign law must be applied, but with due regard for the South African Context. *See S v Zuma 1995(2) SA 642(CC) 651J-I, Nortje v Attorney-General, Cape 471B-C; S v Mankwenyane 19956(3) SA 391(CC) 406E-407C; Du Plessis v De Clerk 1996(5) DCLR 658(CC) para 123.*

[59] The applicants contend that the definition of "pattern of racketeering" includes offences which could not ever have been intended to be "racketeering" and imposes severe punishments thereon. Mr Kemp also for the applicants has argued that under racketeering charges the accused have to submit to an ordeal by lengthy trial where their involvement may only be peripheral when they could, but for the racketeering provisions, have resorted to misjoinder proceedings as of right. Multiplicity of charges may lengthen the trial with prejudice to the accused.

[60] It is the very nature of organised crime that those who are responsible for planning and orchestrating criminal activities are not persons who carry out the activities and it is very difficult to trace those who are in leadership positions and ultimately benefit from the greater part of the spoils of crime. It is also a feature of organised crime that its organizational reach is wide and tentacles of the organization stretch into many areas of commercial and governmental activity. The concept of "pattern of racketeering activity" seeks to prohibit connections between conducts that might otherwise seem disparate but are in fact connected through the orchestrated activities of an organised criminal organization.

[61] It is undeniable fact that prior to the promulgation of POCA the principles of common law could not deal effectively with organised crime in the form of corruption, money laundering and racketeering due to the fact that common law was limited in scope and impact and consequently difficulties in detection and successful prosecution of organised crime were encountered. S*ee National Director of Public Prosecutions v Van Staden and others 2007(1) 32 SACR 338(SCA) at para 7; Heyden's case, supra*

[62] In the submission of the applicants the effective scope of the term "racketeering activity" is broad in that it includes not only the actions of mobsters but also the conduct of "legitimate" businessmen who engage in "garden variety" commercial fraud. A pattern of racketeering activity" is intended to encompass the activities of organised crime families associated with organised crime. *See United States v Pungitore 910 F 2d 1084, 1104 (3rd Cir1990)*.The concept of a pattern of racketeering activity is thus tailored to meet the way in which the organised crime manifests itself. The purpose is to protect the public by

preventing, restricting or disrupting involvement by the person concerned. Should the statute simply target only those who have committed specific offences the State would fail to reach such activity which is ultimately the outcome of those who control large criminal syndicates that work in different areas of economic activity, utilizing different agents and organizations and thereby commit various offences, overtime, in complex combinations.

[63] However, POCA should be limited to organised crime. In *National Director of Public Prosecutions v Van Staden and others 2007(1) SACR 338 (SCA) para7,* Nugent J said the following:

> "I have already observed that organised crime is but one of the targets of the Act …. Incursions upon conventional liberties that are justified by the particular difficulties encountered in the detection and successful prosecution of organised crime are not similarly justified in cases of ordinary crime that do not present those difficulties …"

[64] It is the contention of the applicants that Schedule 1 of POCA contains a laundry list of crimes which may constitute the predicate acts on which a racketeering charge is based, as follows:

1. murder;
2 rape;
3. kidnapping;
4. arson;
5. public violence;
6. robbery;
7. assault with intent to do grievous bodily harm;
8. indecent assault;
9 the statutory offence of –
   (a) unlawful carnal intercourse with a girl under a specified age;
   (b) committing an immoral or indecent act with a girl or a boy under a specified age;
   (c) soliciting or enticing such girl or boy to the commission of carnal or indecent act;
10. any offence under any legislation dealing with gambling; gaming or lotteries;
11. contravention of section 20(1) of the Sexual Offences Act, 1957 (Act 23of 1957);
12. any offence contemplated in Part 1 to 4 or section 17, 18, 20 or 21 of chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004;

13. extortion;
14. child stealing;
15. breaking or entering any premises whether under the common law or a statutory provision, with intent to commit an offence;
16. malicious injury to property;
17. theft, whether under the common law or a statutory provision,;
18. any offence under section 36 or 37 of the General Law Amendment Act 1955 (Act 62 of 1955);
19 fraud;
20. forgery or uttering a forged document knowing it to have been forged;
21. offences relating to the coinage;
22. any offence referred to in section 13 of the Drugs and Drug Trafficking Act. 1992 (Act 140 of 1992);
23. any offence relating to the dealing in or smuggling of ammunition, firearms; explosives or armament and the unlawful possession of such firearms, explosives or armament;
24. any offence in contravention of section 36 of the Arms and Ammunition Act, 1969(Act 75 of 1969);
25. dealing in, being in possession of or conveying endangered, scarce and protected game or plants or parts or remains thereof in contravention of a statutory or provincial ordinance;
26. any offence relating to exchange control;
27. any offence under any law relating to the illicit dealing in or possession of precious metals or precious stones;
28. any offence contemplated in section 1(1) and 1A (1) of the Intimidation Act, 1982(Act 72 of 1982);
29. defeating or obstructing the course of justice;
30. perjury;
31. subornation of perjury;
32. any offence referred to in Chapter 3 or 4 of this Act;
33. any specified offence as defined in the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (in term 32A inserted by 527(1) of act 33 of 2004);
34. any offence the punishment wherefore may be a period of imprisonment exceeding one year without the option of a fine;
35. any conspiracy; incitement or attempt to commit any offence referred to in this Schedule.

[65] A clear and precise enactment may nevertheless be "overbroad" if in its reach it prohibits constitutional protected conduct. See *Grayned v City of Pock Ford 408 U.S 115 (1972).* The question then arises whether under POCA the definition of "pattern of racketeering activity" sweeps within its prohibitions what may not be punished under the constitution. It has been argued on behalf of the applicants that "pattern" applies to a discrete set of criminal acts. The rule is that the provisions which create crimes or describe

criminal conducts should be interpreted strictly rather than broadly. See *C R Snyman: Criminal Law 4th Ed at p40.*The word "pattern" should be construed as requiring more than accidental or unrelated instances of prescribed behaviour. Under section 3575(e) of the Organized Crime Control Act(OCCA) of 1970:

> "… Criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."

[66] The court has construed the word "pattern" as including a requirement that the racketeering acts must have been connected with each other by some common scheme, plan or notice so as to constitute a pattern and not simply a series of disconnected acts. *See United States v Petrillo 332 U.S 1,8,67 SCT; 1538, 154, 2 91L Ed 1877, 1883 (1947*). However, under American case law every court of appeal that has decided the issue has held that racketeering acts need not be similar, or directly related to each other; rather, it is sufficient that the racketeering acts are related in some way to the affairs of the charged enterprise. But, each element of each predicate offence must be proved beyond a reasonable doubt. *See also United States v Stofsky 409F. Sup 609,617(U.D, N, Y 1973).*

[67] Under OCCA "racketeering activity" means "any act or threat involving" state law crimes, any "act" indictable under specified federal statues, and certain federal "offences". *See section 196(1*).A "pattern" requires "at least two acts of racketeering activity" within a 10 year period. The predicate Act must be shown to form part of the operation or activities of the gang. In *Evassen v S [2009] 1 All SA 32(SCA) at p 35 para* 9 the court held:

> "The participation must be by way of on-going, continuous or repeated participation or involvement. The use of 'participation' widens the ambit of the definition. So does the use of the words 'on going continuous or repeated'. 'On going' conveys the idea of 'not as yet complete', 'continuous' (as opposed to continual) means uninterrupted in time or sequence. 'Repeated' means recurring."

[68] Continuity requires long–term criminal activity. The predicate acts must be part of a prolonged criminal endeavour. See *Menasco Inc. v Wasserman 886F 2d 681, 683 (4th Cir. 1989)*. However, courts have frequently found sufficient continuity where even, a few, short-lived racketeering acts were committed in furtherance of the affairs of a criminal enterprise that existed for a considerable period of time. *See H.J inc., 492 U.S. at 240-243*. The word "pattern", therefore, should be construed as requiring more than accidental or unrelated instances of prescribed behaviour. But the acts are limited to those predicate acts explicitly set forth in Schedule 1 of POCA.

[69] In NAACP case, supra, 377 U.S 307 the following was said:

> "The power to regulate must be so exercised as not, in attaining a permissible and, unduly infringe the protected freedom. *Count well v Connecticut, 310 U.S. 304*.
> … Even though the governmental purpose be legitimate and substantial. That purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

[70] In order to achieve the object of POCA, namely, to prevent, arrest and totally root out organised crime the definition of "pattern of racketeering activity" must liberally be construed so to create a wider and all-embracing offence than the common law offence. *See S v Xaba and another 1996(2) SACR 259(N). See also Scagel and others v Attorney – General Western Cape 1997(2) SA 368(CC) at 374E-G.* However, such interpretation should be limited to organised crimes.

[71] This Court has to determine whether or not any right has been infringed or unjustifiably swept within the prohibitions of "pattern of racketeering activity". See *Christiaan Education South Africa v Minister of Education 2000(4) SA 757(CC)*. Upon proper

construction, in its general application, the definition of ‘’pattern of racketeering activity’’ is not overbroad. In the present case, in the absence of the reality of the conduct alleged to have interfered with the constitutionally entrenched rights to fair trial or freedoms of the applicants, it is difficult and even impossible to determine whether or not the definition of “pattern of racketeering activity” sweeps within its prohibitions what may not be punished under the constitution. *See Perna V Italy (App no.48898/99)2003 (ECR) 6 May 2003 p15; Grayned case, supra, 408 U.S. 115*

[72] It is the contention of the applicants,firstly,that the definition of enterprise is “exceptionally broad” and includes an enterprise that is lawful, formal or informal and, secondly , that the definition of “enterprise” covers a single person as well as every other connections between persons either known to the law or existing in fact. In the argument of the applicants the requirement that the accused “participated in the conduct directly or indirectly of the enterprises affairs” in the light of the definition of “enterprise” is overbroad, vague and in effect meaningless, as to be unworkable. The word “enterprise” simply defines as offence where any person, whilst managing or employed or associated with any enterprise, conducts or participates in the conduct directly or indirectly, of such enterprise’s affairs through a pattern of racketeering activity. According to the applicants the enterprise must be one that is either managed by a person or employed by it.

[73] In *United States v Turkette 452 U.S 575(1981)* the United States Supreme Court squarely held that the term “enterprise” encompasses both legitimate and illegitimate enterprises. Enterprise has an on-going organization, formal or informal i.e. various

associates of the enterprise must function as a continuing unit. It has a hierarchical or consensual structure within the group for making decisions, and it has mechanism for controlling and directing the affairs of group on an on-going basis. See *United States v Riccobene; 709F, 2d214, 223-224 (3d Cir) (1083).* Enterprise could be a group of person associated together for a common purpose of engaging in criminal cause of conduct.

[74] With regard to the contention of the applicants that the definition of "enterprise" is so broad as to cover a single person as well as every other connection between persons either known to the law or existing in fact. POCA's proscriptions are directed against the conduct not connection. It is applicable to a person or to a group of persons whose sole purpose is to engage in illegal activities. See also *United States v Martino 648F. 2d 376, 381(5th Cir. 1981).*An accused person need not be among the enterprise`s ''control group'' to be liable for a substantive POCA violation.But, an accused must have intention to perform acts that are related to, and foster the operation or management of the enterprise*. See United States v Pasada- Rios, 158,F, 3d 832,857 (5th Cir.1998); United States v Darden ,70F.3d 1507,1542-43(8th Cir.1995).* The word "conducts" simply means the performance of activities necessary or helpful to the operation of the enterprise. See *United States v Tucker, 638 F 2d 1292 (5th Cir. 1981)*

[75] Both RICO and POCA require that the affairs of the enterprise be conducted through a "pattern of racketeering activity." In United States v Starrett, 55 F.3d 1525, 1542-43(11thCir. 1995), the court found two components to this requirement. First, the accused person's predicate acts must be related to the enterprise charged (the relationship requirement).Second, the predicate acts taken all together must form a pattern. The State may establish the relationship requirement by showing that the racketeering activity

affected the “every day operations of the enterprise.” The relationship requirement may also be demonstrated by “proof that the facilities and services of the enterprise were regularly and repeatedly utilised to make possible the racketeering activity.

[76] Where the enterprise is commercial, courts in the United States have consistently construed “enterprise” broadly in the light of the Congress’ mandate that the provisions of Title 1X of the Act “shall be liberally construed to effectuate its remedial purpose.”
See *United States v Altex 542F.2d 104, 106 (2d Cir. 1976); United States’ v Huber 603F 2d 387, 393 (2d Cir. 1979)*.The rationale for liberal interpretation where the enterprise is commercial was that the Congress was concerned about the impact on the American economy of the infiltration of organised crime into interstate commerce. All lawful infiltration, regardless of form, should be eradicated. To view “enterprise” as excluding groups of corporations would make it too easy to avoid RICO, forfeiture sanction; one could simply transfer assets from the corporation whose affairs had been conducted through a pattern of racketeering activity to another corporation whose affairs had up to that point not been so conducted. *See United States v Huber case.*

[77] It is apparent from the above that the Congress focused on some of the kinds of activities by which individuals and associations engaged in organized crime maintained their income or influence. Section 1962 of RICO (18 U.S s 1962) makes such activities unlawful no matter who engages therein. *See also United States v Campanale 518F. 2d 352, 364 (9th Cir.1975)*. In *Papa Christou v City of Jacksonville 405 U.S 156, 162 (1972*) the court held that in the field of regulatory statutes governing business activities, where the acts limited are in a narrow category, greater leeway is allowed where the Congressional purpose is to

eradicate criminal means of acquiring, maintaining and conducting any enterprise affecting commerce.

[78] The perversion of legitimate business may take many forms. The goals of the enterprise may themselves be perverted, or the legitimate enterprise may be continued as a front for unrelated criminal activity or the criminal activity may be pursued by some persons in direct conflict with the legitimate goals, pursued by others or the criminal activity may indeed, be utilized to further otherwise legitimate goals. The term "enterprise" is defined in 18 U.S.C 1961(4)to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. The term "enterprise" as used in RICO encompasses both legitimate and illegitimate enterprises. See*also United States v Turkette; 452 U.S 576, 580 – 582.*

[79] In order to secure a conviction under RICO, the State must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity": The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute, 18 U.S.C 1961(1) (1976); Supp 111. The former is proved by evidence of an on-going organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts or racketeering committed by the participants in the enterprise while the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity", it is an entity separate and apart from the pattern of

activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the State.

[80] POCA extends the scope of the meaning of the concepts of "pattern of racketeering activity" and "enterprise" in order to promote adequate protection to the victims of organised crime. However, such wider ambit should be restricted to acts referred to in Schedule 1 of POCA and organised crime activities. The facts of this case do not show that the definitions of "pattern of racketeering activity" and "enterprise" have been applied to such an extent that they sweep everything broadly within their prohibition so to invade constitutionally protected rights. The purpose of defining the concepts of "pattern of racketeering activity" and "enterprise" is to protect the public by preventing, restricting or disrupting involvement by the person concerned, and by facilitating proof of the committed organised crime. A single enterprise may engage in a pattern of racketeering and invests the fruits in itself.

[81] In the premises, I agree with Mr Unterhalter for the respondents that it is the diversity of criminal activities, situated in complex organizational structures, occurring overtime where the lines of authority are deliberately obscured, that renders legislation such as POCA a necessity. In order to discourage people engaged in these activities and ultimately to prevent, arrest and root out the scourge of corruption, racketeering, money laundering and fraud detection, swift prosecution and conviction of those involved in such activities under POCA is for the State a solution. The Legislature has extended the scope of POCA in order to ensure and promote adequate protection of the victims of organised crime.

Section 2(1)(a) – 2(1)(g) of POCA

[82] The applicants contend that since section 2 (1) of POCA is premised entirely on the concepts of "pattern of racketeering activity" and "enterprise" is also unconstitutional, invalid and void for vagueness. In *Affordable Medicines Trust and others v Minister of Health 2006(3) SA 297 (CC) at paras 108 -109*Ngcobo J said:

> "The doctrine of vagueness is founded on the rule of law, which, as pointed out, is a foundational value of our constitutional democracy. It requires that the law must be written in clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they must regulate their conduct accordingly. The doctrine of vagueness must recognise the role of government to further legitimate social and economic objectives …, the Court may first construe the regulation applying the normal rules of construction including those required by constitutional adjudication. The ultimate question is whether, so construed, the regulation indicates with reasonable certainty to those who are bound by it what is required of them. "

*See also R v Jopp 1949 (4) SA 11 (N) at 13-14; S v Galguts Garage 1968(4) SA 725(T) at 729H.*Where a statue is broadly worded, it is not reasonably clear what conduct is prohibited, could be impugned by a court of law on the basis that it does not satisfy the requirements of the limitations clause (s 36). *See Burchell, South African Criminal Law and Procedure: General Principles of Criminal Law Vol.1 at p 29.*

[83] Section 2(1) (a) – 2(1) (g) of POCA dealing with offences relating to racketeering activities provides as follows:

> "2 Offences
>
> (1) Any person who-
>
> (a) (i) receives or retains any property derived, directly or indirectly, from a pattern of racketeering; and
>
> (ii) knows or ought reasonably to have known that such property is so derived; and
>
> (iii) uses or invests, directly or indirectly, and part of such property in acquisition of any interest in, or the establishment or operation or activities of, any enterprise;

(b) (i) receives or retains any property; directly or indirectly, on behalf of any enterprise; and

(ii) knows or ought reasonably to have known that such property derived or is derived from or through a pattern of racketeering activity;

(c) (i) uses or invests any property, directly or indirectly, on behalf of any enterprise or in acquisition of any interest in, or the establishment or operation or activities of any enterprise; and

(ii) knows or ought reasonably to have known that such property derived or is derived from or through a pattern of racketeering activity;

(d) Acquires or maintains, directly or indirectly, any interest in or control of any enterprise through a pattern of racketeering activity;

(e) Whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprises' affairs through a pattern of racketeering activity;

(f) Manages the operation or activities of an enterprise or activities of an enterprise and who knows or ought reasonably to have known that any ay person, whilst employed by or associated with that enterprise, conducts or participates in the conduct directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity;
or

(g) Conspires or attempts to violate any of the provisions of paragraphs (a),(b),(c),(d), (e) or (f), within the Republic or elsewhere, shall be guilty of an offence."

[84] Section 2(1)(a)- 2(1)(d) involves actions with proceeds from Racketeering activity or infiltration of existing businesses by means of racketeering activity. In so far as the ''participation'' is concerned, RICO and POCA differ to some degree on the type of relationship that may exist between the accused and the enterprise and between the accused and pattern of racketeering activity. However, such difference in statutes is lessened by American case law interpretation of the RICO statute. Section 1962(c) of RICO defines the relationship between the accused and the enterprise as one of '' employed by or associated with'' and defines the relationship between the accused and the pattern of

racketeering activity as conducting or participating in the enterprise's affairs ''through a pattern of racketeering. Whereas POCA provides for broader liability.

[85] However, section 2(1)(e) is similar to RICO section 1962(c) in that it provides that the relationship between the enterprise and the accused may be one of three types : (1) employed by; (2) associated with, or managing. Section 2(1)(e) provides that the relationship between the accused and the pattern of racketeering as conducting or participating in the enterprise's affairs ''through a pattern of racketeering activity.'' Section 2(1)(f) extends liability to an accused who is a manager and who knows ,or should have known , that the pattern of racketeering took place or is taking place, but in the latter instance , there is no requirement that the accused participated , directly or indirectly in any of the acts of racketeering.

[86] In the argument of the applicants section 2(1) (f) of POCA covers any person who manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, while employed by or associated with that enterprise, participates in a pattern of racketeering. It is therefore the contention of the applicants that there is no implied crime of racketeering under RICO on the said basis, and that actual participation in the acts of racketeering is required. Further, that the standard of proof is lowered to such an extent that persons who were negligently engaged in racketeering may be held liable through the presumption of constructive knowledge.

[87] For an accused to be convicted of racketeering he must have actually committed an offence of racketeering or participated therein. A person well knowing that a particular act is associated with racketeering and continues to deal with the enterprise in question, he

thereby encourages, aids and abets the commission of racketeering and renders himself liable.

[88] The commission of the offence of racketeering requires conscious and deliberate intention. A voluntary act and *dolus*, however, are two discreet requirements for a conviction. The accused must have the requisite intent to commit racketeering. Intent in the form of *doluseventualis* or legal intent is also at some time required to commit racketeering. The test for *doluseventualis* form is twofold:

(a) did the accused subjectively foresee the possibility of his conduct constituting an offence of racketeering?

(b) did he reconcile himself with that possibility?

See also *S v De Oliveira 1993(2) SACR 59(A) 65 i-j.* Sometimes the element in (b) is described as "recklessness" as to whether or not he has subjectively foreseen the possibility ensuing. *See S v Gwahla 1967(4) SA 566(A) at 570.*

[89] A person who has committed an act capable of encouraging, aiding and abetting the commission of racketeering, it must be proved that he had the necessary intention to encourage, aid and abet the performance of an act which would amount to the commission of racketeering. *See also section 45 and 47(2) of the United Kingdom Serious Crime Act 2007.* He must have known that the act would encourage or assist the commission of racketeering and was reckless as to whether or not such eventuality occurred. What is then required to be proved is recklessness. In terms of section 45(b) (i) (ii) of Serious Crime Act of United Kingdom a person commits an offence if he believes that the offence will be committed, and that his act will encourage or assist its commission.

[90] However, a person cannot be convicted on the ground that the circumstances were foreseeable consequences of his conduct. The requirement that the accused ought reasonably to have known that his conduct would constitute an offence of racketeering calls for the application of an objective test in determining whether or not the accused "ought reasonably to have known"; because the fictitious reasonable person would have known that his conduct constituted racketeering activity. However, such a conclusion would constitute negligence and not *dolus* in any form. *See also Jacob Humphreys v The State (424.12) [2013] ZA SCA 20 (22 March 2013) para 13.* This renders the accused exposed to conviction for an offence he had not committed. In the circumstances, the possibility of punishing an unintended, insensible or unconscious conduct cannot be excluded, and that would in the decision in Humphreys` case, supra, conflate different tests for *dolus* and negligence.

[91] The same can be said for deductive reasoning on the ground that the process of inferential reasoning also starts from the premise that, in accordance with common human experience the possibility of the consequences ensuing would have been obvious to any person of normal intelligence. There is no certainty as to whether actual or constructive knowledge is a requirement for the contravention of section 2 (1) (a) – 2(1) (g) of POCA.Such a confusion has the effect of rendering the provisions of section 2(1)(a)(ii), (b)(ii), (c)(ii) and (f) vague and unintelligible, and as a consequence such provisions are unconstitutional and, therefore, invalid to the extent only of the words "ought reasonably to have known" in each paragraph referred to above.

Chapter 2 of POCA – Retrospectivity

[92] It is the contention of the applicants that Chapter 2 of POCA is unconstitutional in its entirety because it operates retrospectively in violation of section 35(3) (l) of the Constitution and the Rule of Law. According to the applicants Chapter 2 is a retrospective measure in that the new offence of racketeering which did not exist prior to the commencement of POCA applies to activities which were conducted or committed before POCA came into effect, and upon which POCA is parasitic. This is notwithstanding that the first two offences could never have constituted racketeering when they were committed and the last offence, committed after the commencement of POCA, could never in and itself constitute racketeering without more.

[93] In the premises, Mr Marcus for the applicants have argued that the retrospective operation of the "pattern of racketeering activity" renders its definition unconstitutional and invalid on the ground of the rule of law, and also section 35(3)(l). All sections which rely on this definition are similarly rendered unconstitutional and invalid. The act or omission referred to must constitute an offence. However, no reference is made to acts or commissions that constitute an element of an offence. Lastly, the provision is concerned with the acts or omissions that did not constitute an offence at the time such act was committed or omitted.

[94] Mr Unterhalter for the respondents has argued that any element of the offence that is used to constitute the offence of a pattern of racketeering that derives from the conduct pre-dating POCA is a warranted inclusion in the definition, given the nature of organised crime and the importance of showing how such conduct is manifested through complex organisational forms overtime. He went on to argue that if this Court finds that there has been a breach of the principle of retroactivity of the legislation, such breach is justified on

the basis that the use of POCA of past predicate offences is to establish an element of wrong doing in the past for the purposes of prosecuting the prospective conduct of organised crime in dealing with the fruits of those predicate offences. To prevent the legislature from doing so would significantly curtail the efficacy of POCA because it would mean that the stream of benefits that accrue to organised crime from past wrongdoing and are being utilized after the introduction of POCA by organised criminals would be beyond remit of criminal prosecution.

[95] A retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statue was enacted. *See Benner v Canada (Secretary of state)(1997) 42 CRR (29) 1 (SCC); Elmer A Drieger, (1978) 56 Canadian Bar Review 267 at 268-9; see also Bareki NO and another v Glen Cor 2006(1) SA 432 (T) as per de Villiers J; Adampol (Pty) Ltd v Administrator, Transvaal 1989(3) SA Joubert and HoexterJJA,* A retroactive statute is one that operates as of a time prior to its enactment, retroactive statute operates for the future only. A statute is said to be retrospective if it creates a legal consequence for a conduct only after that conduct has occurred. *See National Director of Public Prosecutions v Basson 2002(2) All SA 255(SCA) para 11-12.*

[96] *In Polyukhovich v The Common Wealth of Australia and anther (1991), 172CLR 501F. C. 91/026*, Ivan Polyukpvich was charged with war crimes in respects of acts allegedly committed by him during World War II. He initiated a challenge to the constitutional validity of the War Crimes Act, on the basis that the Act:

(i) purported to operate retrospectively; and

(ii) granted jurisdiction over individuals for alleged crimes which had no connection with Australia.

The court held that the Act was not retrospective in operation because it only criminalized acts which were war crimes under international law as well as "ordinary" crimes under Australian law at the time were committed.

[97] In Polyukhovich case, Brennan J emphasised that:

> "International law not only refuses to countenance retrospective provisions in international criminal law, it condemns as offensive to human rights retrospective municipal criminal law imposing a punishment for crime unless the crime was a crime under international law at the time when the relevant act was done."

Blackstone in his commentaries 17th ed. (1830) vol1, p 46 with reference to law making post conduct a crime and inflicting punishment on the person committed it said:

> "Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilty by a subsequent law: he had therefore no cause to abstain from it, and all punishment for not abstaining must of consequence be cruel and unjust."

[98] In *Cummings v The State of Missouri (1866) 71 US 277*, it was held that on *ex post facto* law is a retrospective law which makes past conduct a criminal offence. In *Calder v Bull (1799) 3 US 385, at 390* Chase J said:

> "An ex post facto law includes: 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime or makes it greater than it was, when committed."

[99] A statutory provision declaring past conduct to have been a criminal offence constitutes a usurpation of judicial power in that, once it is established that the accused has committed the past act, the question whether the act constituted a criminal contravention is made simply irrelevant. To that extent the court determination of criminal guilt is ousted

by legislative decree. The point can be illustrated by dividing the legislation into its essential components. One component of such legislation is the requirement that there be a "trial" in the courts, in which judicial process must be observed, to determine whether it is established beyond reasonable doubt that a particular person knowingly engaged in the designated conduct. The second component is the enactment that , if it be established that the particular person did in fact engage in that past conduct which was not criminal when done he is guilty of a punishable crime. The second component of the legislation invades the heart of the exclusively judicial function of determining criminal guilt that is to say, of determining whether past conduct, constituted a criminal contravention of the law. The court's participation in that process, would also be inconsistent with the doctrine of separation of powers in that it would represent an abdication of the judicial function of determining in a criminal trail whether past conduct has contravened the law in favour of the legislature's decree that a past war criminal act is to be punished as a crime. See *Polyukhovich case, supra, at PP 101-102; Victoria v Australian Building Construction Employees' and Builders Labours' Federation (1982) 152 CLR25, at p107.*

[100] Where an *ex post facto l*aw penalizes a past activity by means of a generally applicable rule rather than specifying the persons to be subjected to the penalty, a court is still left to determine whether an individual is guilty of having engaged in a prohibited activity. Where it is apparent that the legislature intended the conviction of specific persons for conduct engaged in the past, the law may do that by penalizing specific persons by name or by means of specific characteristics, which in the circumstances identify particular person, a court in applying such law is in effect confined in its inquiry to the issue of whether or not an accused is one of the persons identified by the law. If he is, his guilt follows. The proper judicial inquiry as to whether an accused has been guilty of prohibited

conduct has thus been usurped by the legislature. In *United states v Brown (1965) 381, 450 U.S*, the Supreme Court struck down as amounting to a bill of attainder an act which made it a crime for a member of the communist party to serve as an officer (except in clinical or custodial positions) or as an employee of labour organization.

[101] In international law the principle of non- retroactivity is enshrined in article 15(1) of the International Covenant on Civil and political Rights, (1966), which reads, inter alia:

> "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."

See also Act 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); Art.11(2) of the Universal declaration of Human Rights, (1948); Art.9 of the American Convention on Human Rights,(1969) and Art.7 of the African Charter on Human and Peoples' Rights (1981).

[102] In Calder v Bull (1798) 2 U.S 385 at 388 Chase J said:

> "no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit."

All these general objections to retroactively applied criminal liability have their source in a fundamental notion of justice and fairness. They refer to the desire that individuals are reasonably free to maintain control of their lives by choosing to avoid conduct which will attract criminal sanction; a choice made impossible if conduct is assessed by rules made in future.

[103] It follows that the creation of a crime with retrospective effect (that is *ex post facto* creation of a crime) is in breach of the principle of legality; this means that any provision by

any legislative body which creates a crime with retrospective effect is null and void. The principle of legality (*nullumcrimen sine lege* (no crime without Law) can be described as a mechanism to ensure that the state, its organs, and its officials do not consider themselves to be above the law in the exercise of their functions but remain subject to it. In the field of common law the principle fulfils the important task of preventing the arbitrary punishment of people by state officials, and of ensuring that the determination of criminal liability and the passing of sentence correspond with clear and existing rules of law. *See C R Snyman: Criminal Law at p39.*

[104] The principle of legality is incorporated in section 35(3) (l) and (n) of the Constitution. This means that every provision in a statute or common law which is in conflict with the Bill of Rights may be declared null and void by a court. Section 35(3) of the Constitution provides that every accused person has a right to a fair trial, and paragraph (l) of this sub-section provides that this right to a fair trial includes the right "not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted." In terms of paragraph (n) a right to a fair trial includes the right "to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing." A court may not find a person guilty of an act or omission that was not an offence at the time it was committed or omitted. It, therefore, follows that a court does not have the power to create a crime. If there is an omission in law, in terms of the *casus omissus* rule the courts may not supply an omission in law, as this is the function of the legislature. *Casus omissus* is derived from the principle *iudicis est ius dicere sed non dare* (the function of the court is to interpret law and not to make it) *See Exparte Slater v Walker Securities (SA) Ltd 1974 (4) SA 657(W).*

[105] The upholding of the sacrosanctity of the rule of law as one of the foundational principles of our Constitution is paramount to success of any nation on earth. *See Veldman v Director of Public Prosecutions, WLD 2006(2) SACR 319(CC).* The rule of law is the absolute supremacy or predominance of regular law as opposed to the exercise of the arbitrary power by government. Secondly, the rule means equality before the law or the subjection of all classes to the ordinary courts. In essence the doctrine of the rule of law amounts to that nobody maybe deprived of rights and freedom through the arbitrary exercise of wide discretionary powers by the executive, and that nobody is above the jurisdiction of the ordinary courts. See *Dicey: An Introduction to the Study of the Constitution.*

[106] Not every situation involving events which took place before the Act came into operation necessarily involves a retrospective application of the Act. A statute is said to be retrospective if it creates a legal consequence for a conduct only after the conduct has occurred. *See National Director of Public Prosecutions v Basson 2002(2) All SA 255(SCA) paras 11-12.* The enactment would be given retrospective effect if it attaches a new duty, penalty or disability to an event that took place before the enactment. *See Benner v Canada (Secretary of State) (1997) 42 CRR (29, 39) 1 (SCC).*

[107] "Every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches disability, in respect to transactions or considerations already post, must be deemed retrospective …." *Calder v Bull; 3 Dalli, 386)1798) Dash v Van Kleek, 7 Johns, 477 (NC.Y 1811).*

[108] The court must, first, ask itself whether the new provision attaches new legal consequences to events completed before its enactment. *See Land Graf v US 1 Film Products, 511 U.S 244 (1994).* The statutory definition of a "pattern" sets forth technical requirements regarding the time when the predicate acts were committed. A "pattern of racketeering activity" requires at least two acts of racketeering activity, one which occurred after the effective date of POCA and the last of which occurred within ten (10) years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity. In orderto avoid a *post facto* principle POCA provides that the last act must have been committed within ten years of prior act. The requirement that one act of racketeering be committed after effective date of POCA eliminates any *expost facto* problems , even if some acts of racketeering occurred before the effective date. *See United States v Pungitore, 910F2d 1084, 1129*

[109] Upon proper construction the primary purpose of Chapter 2 of POCA is not punitive in that it does not attract liability to conviction for the past acts, but it merely refers to the past conducts as the predicates of racketeering activity. In essence, Chapter 2 only punishes the current conduct of racketeering charged and in so doing it incorporates the past conducts by reference into the current offence of racketeering charged, as its elements. The racketeering offence involves elements that must be proved for a conviction for commission of an offence that are part of the pattern of racketeering activity. *See United States v Crosby, 20F, 3r 480, 484 (D.C Cir.1994* In order to prove a pattern of racketeering activity a prosecutor must show at least two racketeering predicate acts that are related and amount to or threaten the likelihood of continued criminal activity.That is established, the court has on evidence to determine whether or not such past acts constitute a pattern of racketeering activity. *See United States v 67 Crosby, 20F, 3r 480, 484 (D. C. Cir. 1994*; *United States v*

*Morgan 139 F, 3d 1358 (7th Cir. 1994.*In essence, a causal connection between the conduct of an individual and the commission of organised crime activities, and a pattern of racketeering activity must be established. *See Grayned v City of Rockford 408 U.S 113.* For the State to achieve that objective, each element of each predicate offence must be proved beyond reasonable doubt. *See United States v Stofsky 409,609,617(UDNY 1973).*

[110] Reference to the past act as an element of the offence charged is also permissible under section 211 of the Criminal Procedure Act, 51 of 1977 when the previous conviction as a fact is an element of an offence with which the accused is charged. However, the trial court still has to determine whether or not the accused has committed the alleged offence. In a prosecution of racketeering offences under POCA the following three common elements of racketeering must be proved:

(a) the existence of an "enterprise";

(b) a "pattern of racketeering activity" (as defined in section 1 of POCA);

(c) proof that the accused participated in the conduct of the enterprise` affairs, directly or indirectly.

[111] In order to secure conviction under section 2(1) (e) of POCA the State must do more than merely prove the underlying predicted offences. It must also demonstrate the accused's' association with an enterprise and a participatory link between the accused and enterprise's affairs by way of a pattern of racketeering. In essence a POCA conviction requires proof of a fact. The previous offences in a charge of racketeering are only used to show that the predicate acts are part of an on-going entity regular way of doing business. The attribution of predicate acts to an accused operating as part of a long-term association that exists for criminal purposes, does not constitute punishment. As a necessary

consequence Chapter 2 does not attach any legal consequence to past acts, and as such, it is not retrospective in its operation. See also *National Director of Public Prosecutors v Carolus and others 2000 (1) SA 1127 (SCA) 1145A-B*

[112] It has also been the contention of the applicants that POCA by permitting the inclusion of a prior conviction as one of the racketeering acts that comprise part of the pattern of racketeering may violate protection against a "double jeopardy" rule. The 'same offence test' may simply be stated as that if there is any difference in the elements to be proved, the two instances are not the same offence. See*Blackburger v United States 284 U.S 299, U.S Ct 180, 76 I.ED 306 (1932)*. United States case law has conclusively and uniformly held that there is no double violation on the basis that racketeering offence involves elements that must be proved for a conviction for commission of an offence that is part of the pattern of racketeering activity. *See United States v Crosby, 20F, 3r 480, 484 D.C Cir. 1994; United States v Baler; 63F, 3d 1478, 1994 (9A Cir. 1995); United States v Morgano 39F, 3d 1358 (7th Cir. 1994).*

[113] I now turn to consider whether reference to the previous offences as referred to in Schedule 1 of POCA in the definition of "pattern of racketeering activity" offends against thenotions of basic fairness and justice and the provisions of the Constitution. In my view, reference to the previous offence or an act committed or omitted in the past in order to establish a link between the predicate act and the current racketeering offence charged, is not offensive to the notions of basic fairness and justice and the provisions of the Constitution because such a reference would not in itself afford the definition of "pattern of racketeering activity" a retrospective effect. There is nothing in the Constitution prohibiting incorporation by reference of a previous offence into the current offence charged as its

element. However, the Constitution only forbids the criminalisation of the conduct which was not a criminal offence when it was committed. The predicate offences referred to in Schedule 1 of POCA were and have all been criminal offences under common law and statutory law of South Africa. The Constitution cannot therefore render something lawful which was formerly unlawful .*See S v Basson 2004 (1) SACR 285(CC) at 303 para 13*; *Article (2) of European Convention for the Protection of Human Rights and Fundamental Freedoms, 1953*. This is conclusive of the fact that also under the Constitution Chapter 2 of POCA is not a retrospective enactment.

Procedural Challenge

[114] It is the contention of the applicants that section 2 (2) of POCA is unconstitutional because it allows for the admission of certain classes of evidence in violation of an accused's right to a fair trial in terms of section 35 of the Constitution. Evidence that is excluded in criminal trials, be it hearsay, similar fact evidence or evidence relating to previous convictions is excluded by the courts on the ground that the admission of such evidence would render the trial unfair. Section 2(2) provides:

> "The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trail unfair."

Section 35(5) of the Constitution reads as follows:

> "Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of Justice."

[115] In the submission of the applicants the basis of their challenge to the provisions of section 2(2) of POCA is that the right to a fair trial is immediately compromised by their

permitting the admission of otherwise inadmissible evidence. There is no way of knowing in advance because section 2(2) is silent on the issue. The inherent prejudice, therefore, cannot be articulated and guarded against. In relation to hearsay, not even the criteria laid down under the Law of Evidence Amendment Act of 1988 are incorporated into the section. Hearsay evidence, similar fact evidence and evidence of previous conviction is ordinarily inadmissible for good reason. Such evidence is inherently unreliable, prejudicial or unfair which section 2(2) of POCA permits. In order to guard against possible violation of a right to fair trial and to prevent the admission of the evidence in the manner detrimental to the administration of justice section 2(2) of POCA must itself set the guidelines for the admission of certain classes of evidence in racketeering criminal proceedings. Section 2(2) is according to the applicants, therefore, irrational meaningless and unconstitutional and should, as a consequence, be declared invalid. However, in the argument of the respondents section 2(2) was enacted in order to cure the defect in the standard of proof by achieving flexibility in the standard of proof so to secure conviction in the present sophisticated criminal matters. The use of more flexible rules of evidence is necessary given the complexity of organised crime and the way in which its activities are manifested over time – hence, the way to use hearsay, similar fact evidence and evidence of past wrong doing so as to allow the court to draw inferences that maybe warranted. Some greater flexibility as to proof in no way changes what inferences might not properly be drawn, nor does such proof interfere with the ultimate standard of proof in a criminal trial.

[116] The admissibility of the evidence is governed by the general discretion of the courts to exclude the evidence which would render the trial unfair. The laws of evidence in criminal matters have developed in order to safeguard the fair trial right of the accused; first under the common law and more recently under the Constitution. In determining whether or

notthe accused will have a fair trial if a certain class of evidence is admitted, the court has to exercise its discretion. In exercising that discretion an appropriate guide line would be that the discretion be exercised in favour of excluding the evidence if the admission thereof would render the trial unfair or otherwise be detrimental to the administration of justice. *See S vAimes and another 1998(1) SACR 343(C) at 350 a-c.*

[117] Evidence of previous convictions is ordinarily legally irrelevant because of the highly prejudicial effect it has on the trier of facts. S*ee R v Dominic 1913 TPD P2*. However, where the probative value of such evidence outweighs its admissibility in terms of so-called 'similar fact rule', and also, where the fact of a previous conviction is an element of an offence with which the accused is charged, such evidence is admitted. *See section 211 of the Criminal Procedure Act, 51 of 1977 (CPA).*

[118] Generally, it is not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his conduct or character to have committed the offence for which he is being charged. But, similar fact evidence is admissible to show the commission of the crime and is relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. *See Makin v Attorney General for New South Wales [1894] AC 57 at 65.*

[119] Section 210 of CPA provides that no evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point or fact at issue in a criminal proceeding. The word relevant means that any two of

the acts to which it is applied are so related to each other that according to the common cause of events one, either taken by itself, or in connection with other facts, proves or renders probable the past, present of future existence of the other. *See R v Mpanza 1915 AD 348, 352 – 3; R v Trapedo 1920 AS 58, 62.*

[120] In *De Vries v The State [2011] ZA (SCA) 162* the court held that "a trained judicial officer is able to restrict the effect of otherwise inadmissible evidence to charges in respect of which it is admissible and also to exclude it from consideration in respect of charges in which it is not. Under common law there is, generally, a duty on a judicial officer not to allow prejudicial evidence in respect of previous offences to be led, especially where the accused is undefended. *See S v Zimmerie En 'n Ander 1989(3) SA 484(CC) at 492*. The admission of the otherwise inadmissible evidence is entirely dependent upon the determination whether or not the admission of such evidence will interfere with the fairness of the trial. Section 2(2) of POCA does not preclude the trail court in determining evidence from making its own examination and determination of facts and general principles of evidence with reference to the provisions of section 35 of the Constitution, which creates an obligation on the judicial officer to exclude evidence obtained in contravention of a fair trial right. The Constitution reigns supreme, and as such, is the frame of reference within which everything must function, and against which all actions must be tested. As such the Constitution is the fundamental law (*lex fundamentalis*) of the South African legal order.

[121] Under section 2(2) of POCA the admission of certain classes of evidence is expressly allowed subject to the consideration that the evidence would not render the trail unfair. This language upholds the constitutional standard of fairness, and does not violate it. In *S v*

Mfene and another 1998(9) BCLR 1157(N) at 1167C and 1168B-D it was affirmed that the question as to the admissibility of evidence is determined in accordance with the provisions of section 35(5) of the Constitution. *See also S v Ngcobo 1998(10) BCLR 1298(N) at 1252E*. Under section 35(5) of the Constitution the evidence must be excluded "if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice." In the premises, the need for the guidelines relating to the admissibility of certain classes of evidence under section 2(2) of POCA does not arise.

[122] It appears from the case law that the admissibility of the evidence is governed by the discretion of the trial court. The court has discretion to exclude illegally and improperly obtained evidence. In essence, it falls squarely within the discretion of the judicial officer to admit or exclude evidence. Most often than not, it will be the case when the state seeks to introduce evidence which was obtained in violation of the rights of an arrested or detained person. In each case the question is determined having regard to all other circumstances of a particular case. Under *Canadian Charter of Rights and Freedoms (Schedule B to 1982 Constitution)* evidence shall be excluded if it is established that, having regard to all the circumstances, admission of it in the proceedings would bring the administration of justice into disrepute. *See also Fedics Group (Pty) Ltd and another v Matus and others 1977(2) SA 617 (C).*It, therefore, follows that without the determination of such circumstances , it would be impossible to determine whether or not a particular class of evidence will be admitted, and if admitted, what effect it will have on the fairness of the trial.

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[123] *In Ferreira v Levin NO. and others 1996(1) SA 984(CC) at 1001 para 14*, it was held that the question of the admissibility of evidence is a matter for the court dealing with the criminal proceedings in question. Should the evidence be admitted incorrectly, and this

raises a constitutional issue, the Constitutional Court may ultimately be called upon to decide the issue, but not before; unless the issue is one falling within its exclusive constitutional jurisdiction.

[124] This discretion is grounded in the trial judge's duty to ensure a fair trial. In *S v Dzukuda 2000(4) SA 1078 (CC) para 11*, the court added that, in a narrower sense, the aim of the right to a fair trial is to ensure that innocent people are not wrongly convicted. Violation of the rights of arrested and detained persons may make the trial of the accused unfair. The trial of every accused has to be fair. In *Director of Public Prosecutions, Natal v Magidela 2000(1) SACR 458 (SCA) para 18,* it was held that not every breach of the provisions of the constitution automatically leads to the trial being unfair. However, fairness is an issue that has to be decided on the facts of each case. In the present case, the absence of the reality of conduct complained of as interfering with the fair trail rights of the applicants makes it impossible for this court to establish whether or not the presumed interference will occur, and if it occurs, it will be proportionate and whether the reasons given by the State in justification for it would be relevant and sufficient. *See Perna v Italy case, supra, at p20.*

[125] The concept of the fair trial cannot be extended on the basis of abstract notions of fairness. In *Klein v A-G, Witwatersrand Local Division 1995(3) SA 848(W) at 862 C-D* Van Schalkwyk J said:

> "There has, however, never been a principle that a violation of any of the specific rights encompassed by the right to a fair trial would automatically preclude the trial. Such a rigid principle would operate to the disadvantage of law enforcement and the consequent prejudice of the society which the law and the constitution is intended to serve. Before any remedy can be enforced the nature and extent of the violation must be properly considered. It is the duty of the courts to do so in fulfilment of their obligation to give effect to the principle of public policy."

[126] There is nothing to suggest that the criminal proceedings pending against the applicants are or will be tainted. Neither the irregularity nor gross departure from the established rules of procedure is alleged, that the applicants have not been properly tried and that that resulted in a failure of justice. Nor has it been alleged that by the reason of the conduct of the respondents the applicants will not be properly tried and that, if that happens it would result in a failure of justice.

[127] According to the applicants the danger in the vagueness of POCA is that it allows itself to operate as an arbitrary penalty enhancer and prosecutorial bargaining tool. There is nothing to show that the applicants have been arbitrarily targeted. In the argument of the respondents the indictment against the applicants is a measured legal response to the facts that point to their involvement in a serious criminality involving corruption, money laundering and fraud, inter alia. There is no basis and fact offered to substantiate the claim that POCA is being used in the present case to put pressure on the applicants. According to the respondents, the applicants are charged under POCA because the first respondent believes that there is a proper case for them to meet. Nor has any proof been tendered that a specific conduct as perceived by the applicants has actually occurred, and which has negatively impacted on the fairness of their trial. No has any reason for a perceived fear of infringement of the applicants' rights to fair trial has been stated for this Court to determine its reasonableness and probability. The absence of the reality of the conduct complained of as interfering or having the potential to interfere with the constitutional right of the applicants to fair trial makes it impossible for this Court to establish whether the alleged interference has occurred or might occur.

[128] Nor has any violation of the provisions of the constitution been established save the unconstitutionality and invalidity of the provisions of section 2(1)(a)(ii); (b)(ii); (c))ii) and (f)(ii) of POCA only to the extent of the words: "ought reasonably to have known", as contained in each paragraph referred to above. On the whole POCA is a valid enactment under the Constitution and the Rule of Law. Since no finding has been made as to the interference of any of the constitutionally protected rights of the applicants, the need to balance the interests of the community against that of the applicants and the question whether or not the perceived infringement could constitute a justifiable limitation of the right of fair trial do not necessarily arise. For, not only the rights and values of the individual must be emphasised, but those of the community as well. This means that the constitutional state is not only involved in upholding and protecting the traditional individual rights and values, but also has to establish and re-affirm community rights and values.

Costs

[129] It is the submission of the applicants that they should not be mulcted with costs for two reasons; first, that the applicants are pursuing a fundamental right claim in an important constitutional matter that has a wider ramifications beyond themselves, and, second, there is not suggestion that the applicants are acting in bad faith or vexatiously. In support of this submission they have referred me to the case of *Biowatch Trust v Registrar, Genetic Resources, and others 2009(6) SA 232(CC) at paras 21-25.*

[130] Generally, costs should follow the results. However, such rule is departed where the constitutionality of the statute is challenged, a matter which usually be one of public interest. *See Ferreira case, supra, at 155*. The rationale for the general rule that in constitutional litigation an unsuccessful litigant ought not to be ordered to pay costs is that

"an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights." There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. *See Affordable Medicines case*. Nor has any allegation been made that the challenge of the applicants to the constitutional validity of POCA has been frivolous or vexatious. *See Biowatch Trust case, supra, at para 23.* It therefore follows that it would not be appropriate and just to make a costs order in the present case.

Order

[131] (a) The application for the relief sought in paragraphs a, b, c, d and e of the Notice of Motion save the relief relating to the provisions of section 2(1) (a) (ii); (b) (ii);

(c)(ii) and (f) (ii) of POCA is dismissed.

(b) The provisions of section 2(1)(a)(ii); (b)(ii); (c)(ii) and (f)(ii) are with immediate effect declared unconstitutional and invalid to the extent only of the words; "ought reasonably have known", as contained in each paragraph referred to above;

(c) No order as to costs is made.

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MADONDO J.

JUDGMENT RESERVED: **5 MARCH 2013**

JUDGMENT HANDED DOWN: **17 MAY 2013**

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