IN THE REGIONAL DIVISION OF MPUMALANGA

(HELD AT NELSPRUIT REGIONAL COURT)

Case No: SH 865/10

In the matter between:

The National Director of Public Prosecutions **Applicant**

and

York Timbers Ltd **Defendant**

(as represented herein by David Mallock-Brown)

In re: State vs York Timbers Ltd.

An application for a confiscation order in terms of section 18(1) of Prevention of Organised Crime Act 121 of 1998 (**the POCA**).

THE APPLICANT'S HEADS OF ARGUMENT

INTRODUCTION

1 This is an application for a confiscation order in terms of section 18(1) of Prevention of Organised Crime Act 121 of 1998 (**the POCA**).

2 The Applicant has served and filed a founding statement in terms of section 21(1)(a) of the POCA, to which the Defendant has answered in terms of section 21(2). The Applicant has also served and filed a

replying affidavit. The court postponed the confiscation enquiry to 26 November 2012.

3 The Applicant asks for a confiscation order in the amount of **R 450 000,00** plus interest to be made against the Defendant in respect of the benefit it received in connection with the crime of which it has been convicted.

4 Before the Applicant argue the merits of the confiscation order *in casu*, a chapter is devoted to submissions on confiscation orders generally and the rules that govern them.

CONFISCATION ORDERS

Introduction

5 Chapter 5 of the POCA vests the criminal courts with a discretionary power to make a confiscation order against anybody convicted of **any** crime(s) who benefited from it, as well as related criminal activity.[1] The purpose of such an order is to deprive the defendant of the proceeds of his crime(s). It in turn serves broader penal and public purposes by ensuring and demonstrating that crime does not pay.

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1 Sections 18(1) and (2)

6 A confiscation order is a civil judgment for payment to the State or a victim of an amount of money determined by the court.[2] Although its purpose is to deprive the defendant of the proceeds of his crime(s), it is not an order for the confiscation of the proceeds themselves. It is a civil judgment for payment of an amount of money determined *inter alia* with reference to the value of the defendant's proceeds of his crime(s).

7 An application for a confiscation order may only be made after conviction of the defendant.[3] An application for a confiscation order follows a criminal conviction as an adjunct to the criminal proceedings. This is where the confiscation mechanism under chapter 5 of the POCA differs from the forfeiture mechanism under chapter 6. The latter provides for forfeiture by a civil process which is separate from any criminal proceedings and may be undertaken even in the absence of any criminal proceedings.

8 When a defendant is convicted of an offence and the prosecutor applies for a confiscation order, the court must first determine whether the defendant derived any benefit from his crime(s).[4] If it is not already

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2 Sections 18(1) and 23

3 Sections 18(1) and (5)

4 Section 18(1)

evident from the evidence before the court, then it may, undertake an enquiry into the question.[5]

9 The offences concerned need not be, as the Defendant argues, of any particular kind. **Any offence** may underpin a confiscation order as long as the defendant derived benefit from it.[6] Section 18(1) clearly states: *"Whenever a defendant is convicted of* ***an offence*** *...."* Section 18 of the POCA thus provides that a confiscation order can be made for any offence and does not limit it to certain particular offences.

10 If a court finds that the accused has so benefited, then it may make a confiscation order against him for payment to the State or a victim of "*any amount it considers appropriate"*.[7]

11 The court's discretion in determining the amount of a confiscation order is however subject to the lesser of the two limitations imposed by s 18(2):

11.1 The first is the value of the defendant's proceeds of the offences or related criminal activity as determined by the court

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5 Section 18(1)

6 **NDPP v Cook Properties 2004 (2) SACR 208 (SCA)** paras 64 to 66

7 Section 18(1)

in accordance with the provisions of Chapter 5.[8] We will later deal more fully with the determination of this amount. It is in this case the effective upper-limit of the confiscation order the court may make.

11.2 The second limit is "*the amount which might be realised as contemplated in s 20(1)"*.[9] It is the sum of two amounts namely:

- the value of the defendant's own realisable property less certain secured and preferent claims against his estate[10] plus
- the value of the "*affected gifts"* he made to others.[11]

This limit however only comes into play "if the court is satisfied" that it is less than the amount of the first limit. It is in other words incumbent upon any party who seeks to rely on this second limit, to satisfy the court of its application. None of the parties sought to do so in this case and the Honourable Court

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8 Section 18(2)(a)

9 Section 18(2)(b)

10 Section 20(1)(a) read with ss 14 and 20(4)

11 Section 20(1)(b) read with s 12(1) "*affected gift"*

earlier ruled that the Defendant does not need to file any affidavit that sets out the realisable assets of the Defendant. It consequently does not come into play in the determination of this case.

The "benefits" and "proceeds" of crime

12 As appears from this discussion of the requirements for a confiscation order under ss 18(1) and (2), there are two related concepts. The first is the "*benefit"* the defendant derived from his crimes and the second is the "*proceeds"* of his crimes. The court must first determine whether he derived any "*benefit"* from his crimes. Only if it finds that he has, may it make a confiscation order against him for any amount up to the value of the "*proceeds"* he derived from his crimes.

13 The two concepts of "*benefit"* and "*proceeds"* are interrelated. That is so because s 12(3) provides that a person "*has benefited from unlawful activities"* if he or she has at any time "*received or retained any proceeds of unlawful activities"*. It follows that in both cases the enquiry is one into the proceeds the defendant derived from his crime. If he derived any proceeds from his crime, then he has benefited from it. If he has benefited from it, a confiscation order may be made against him. It may be made for any amount up to the value of the proceeds he derived from his crime.

14 The enquiry into the value of the proceeds the defendant derived from his crime, brings into play two provisions which are sufficiently important to quote in full:

14.1 The first is s 1(1) which defines the "*proceeds of unlawful activities"* as,

"*any property or any service advantage, benefit or reward which was derived, received or retained, directly or indirectly in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived."*

14.2 The second is s 19(1) which tells one how to determine the value of a defendant's proceeds of unlawful activities:

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

15 These two provisions must be read together to determine what benefits may be taken into account in the determination of a defendant's proceeds of his crimes. We will consider them more closely and identify some of their features.

Any kind of benefit

16 The definition of "*proceeds of unlawful activities"* in s 1(1) and the provisions of s 19(1) make it clear that the kinds of benefit taken into account include any property, service, advantage, benefit or reward. The definition of "*property"* in s 1(1) casts the net even more widely by including "*money or any other movable, immovable, corporeal or incorporeal thing and … any rights, privileges, claims and securities and any interest therein and all proceeds thereof*".

17 It is presumably implied that they must have economic value. It accordingly means that any benefit of any kind is taken into account as long as it has economic value.

The connection between the crime and the benefit

18 Both the definition of "*proceeds of unlawful activities"* in s 1(1) and s 19(1) make it clear that the connection between the proceeds and the crime need not be direct:

18.1 The proceeds include everything "*derived, received or retained"*. It for instance includes benefits which the defendant legitimately acquired but retained by or as a result of his offences.

18.2 The proceeds need not have been derived, received or retained "*as a result of"* the defendant's offences. It also suffices if they were derived, received or retained "*in connection with"* the offences. The causal link in other words need not be close.

18.3 The phrase "*in connection with"* is one devoid of precise meaning and that its meaning must be determined from the context in which it is used.[12] It is consequently significant that in the POCA, parliament chose to include in the proceeds of crime subject to confiscation, any benefits received, retained or derived "*in connection with"* the defendant's crimes rather than to confine it to benefits received, retained or derived "*from"* or "*as a result of"* those crimes.

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[12] Administrator, Transvaal v J van Streepen 1990 (4) SA 644 (A) 656H

"Proceeds" means "gross proceeds"

19 The SCA in Shaik held that "*proceeds*" means gross proceeds rather than nett proceeds.[13] We respectfully submit that this interpretation accords with the language and purpose of the POCA.

20 Both the definition of "*proceeds of unlawful activities"* in section 1(1) and section 19(1) make it clear that "*proceeds"* means "*gross proceeds"*. It does not mean "*nett proceeds"* or "*profit"*. One must disregard the price or other *quid pro quo* the defendant might have paid or given for the proceeds he received in connection with his crime. The definition of "*proceeds of unlawful activities"* in s 1(1) makes it clear that it includes "*any property or any service advantage, benefit or reward which was derived, received or retained … in connection with or as a result of any unlawful activity"*. It speaks of gross values and does not leave room for the deduction of expenses. Section 19(1) is perhaps even more explicit when it says that the value of a defendant's proceeds of unlawful activities is "*the sum of the values of the property, services, advantages, benefits or rewards received, retained or derived by him"*. It is clearly the value of everything the defendant received in connection with his crime.

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13 **S v Shaik and Others [2007] ZACC 19.** See paragraph 28 of the judgment

21 This understanding accords with the interpretation adopted by his lordship Mr Justice van der Merwe in Joubert's case.[14] He also undertook a wide-ranging survey of English learning on their confiscation provisions on which ours were modelled.[15] As appears from the survey, all the English authorities make it clear that the value of the proceeds of crime taken into account, is the gross value received by the defendant without regard to the value given for it in return.

The benefit out of the crime is determined from when it's committed and it does not matter what happened to the proceeds

22 The value of the defendant's proceeds of his crime is determined from when he receives or retains it, thus from when the crime is committed. It does not depend on what he does with it or what happens to it thereafter.

23 It makes no difference if the defendant spent or lost it. What matters is the value of the property, services, advantages, benefits or rewards he "*received, retained or derived"* in connection with his crime, from when the crime is committed. It means that, if the defendant "*received"* a

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14 NDPP v Johannes du Preez Joubert and others, unreported judgment of Van der Merwe J in TPD case 24541/2002 delivered on 2 March 2003

15 Pages 13 to 37

benefit in connection with his crime, then its value constitutes the proceeds of his crime whether he has since then retained it or not.

24 This is how the SCA interpreted s 18 of the POCA in *Kyriacou*.[16] The defendant was convicted of receiving stolen property found in his possession to the value of R4,5m. The trial court ordered that the stolen property be returned to its rightful owners. The defendant was in other words deprived of all the proceeds of the crimes of which he was convicted. The SCA nonetheless held that it did not deprive the trial court of its discretion to make a confiscation order.[17] The "*value of the defendant's proceeds"* of his crime remained R4,5m despite the fact that he had been deprived of all of it.

25 The TPD and WLD have adopted the interpretation set out above. His lordship Mr Justice van der Merwe did so in *Joubert*[18] and his lordship Mr Justice Malan did so in *Swanepoel*.[19] His lordship Mr Justice van der Merwe for instance concluded in Joubert that

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16 NDPP v Kyriacou 2004 (1) SA 379 (SCA)

17 paras 12, 38 and 49

18 NDPP v Johannes du Preez Joubert and others, unreported judgment of Van der Merwe J in TPD case 24541/2002 delivered on 2 March 2003

19 Swanepoel v The State, unreported judgment of Malan J in WLD case A 3129/03

"*a defendant will be liable to a confiscation order once he has obtained the benefit but has lost it or passed it on to another"*.[20]

26 This understanding also accords with the interpretation of similar legislation by the English courts. In Smith's case[21], Lord Rodger for instance said the following in the House of Lords:

"*These provisions show that, when considering the measure of the benefit obtained by an offender in terms of section 71(4), the court is concerned simply with* ***the value of the property to him at the time when he obtained it or, if it is greater, at the material time*** *…. It therefore makes no difference if, after he obtains it, the property is destroyed or damaged in a fire or is seized by customs officers:* ***for confiscation order purposes the relevant value is still the value of the property to the offender when he obtained it. Subsequent events are to be ignored*** *… Such a scheme has the merit of simplicity. If in some circumstances it can operate in a penal or even a draconian manner, then that may not be out of place in a scheme for stripping criminals of the benefits of their crimes. That is a matter for the judgment of the legislature, which has adopted a similar approach in*

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20 Page 37

21 R v Smith [2002] 1 All ER 367 (HL)

enacting legislation for the confiscation of the proceeds of drug trafficking."[22] (**my highlights**)

27 The kind of offence for which the Defendant was convicted is a statutory regulatory offence, namely commencing with a listed activity without environmental authorisation from the relevant authorities. The NEMA and the relevant regulations thereto prescribe the legal procedure to be followed to obtain environmental authorisation for the commencement of a listed activity. The prescribed legal procedure has financial consequences for an environmental authorisation applicant, i.e. the conducting of an Environmental Impact Assessment (**EIA**) and/or a Basic Assessment Report (**BAR**).

28 If a person or entity, like the Defendant, illegally commences with a listed activity without environmental authorisation, the prescribed legal procedure and financial consequences thereof are deliberately avoided or evaded from the time that the offender commences with the listed activity.

29 The Defendant *"received"* this benefit from the time that the offence was committed, namely the commencement with a listed activity without

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[22] R v Smith [2002] 1 All ER 367 (HL) para 23

environmental authorisation. The value of the benefit is equal to the total value of the financial consequences that were avoided or evaded.

30 By way of example, the Defendant's benefit is similar to tax or customs and excise duty evasion, which is the deliberate avoidance or evasion of a regulatory regime and the financial consequences thereof. To evade or avoid tax is to obtain (*"receive or derive"*) a pecuniary advantage from the time that the offence is committed. The value of the benefit obtained from the criminal conduct is at least the tax or customs and excise duty evaded.

31 It follows that once a defendant, like *in casu*, accepts in his plea of guilty that he has avoided a regulatory regime, a confiscation order will follow for the value of the financial consequences evaded or avoided.

32 As stated above, our *juris prudence* in confiscation applications is based on the British authorities from where Chapter 5 of the POCA was adopted. In *Rezvi*[23] the House of Lords held that confiscation orders were not only intended to remove the proceeds of crime, but to penalise

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[23] [2003] 1 A.C. 1099

and deter other would be offenders. In *Forte*[24] the British Court of Appeal explained the principle as follows:

"The purpose of these provisions is to create a form of penalty, calculated by reference to 'benefit'".

33 In *Smith*[25] Lord Rodger in the House of Lords held the following:

"the offender who has derived a pecuniary advantage from his offence is treated as a person who has obtained 'property' as a result of or in connection with the commission of the offence, the 'property' in question being a sum of money equal to the value of the pecuniary advantage. Under s.74(5) for the purposes of making a confiscation order the value of the property is its value to the offender ***when he obtained it.*** *In this case the respondent derived a pecuniary advantage by evading the duty at the moment when he imported the cigarettes. The sum equalling that pecuniary advantage is treated as property obtained by the respondent* ***at that moment****. In terms of s.74(5),* ***its value must therefore be determined at that moment****, disregarding the fact that, soon after, the customs officers seized the cigarettes at Goole."* (**my highlights**)

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24 [2004] EWCA Crim 3188

25 [2002] 1 W.L.R. 54

34 In summary, the calculation of the benefit is concerned with what passes through the defendant's hands from the moment that the offence is committed, not with what sticks to his fingers.

Should interest be added to the confiscation amount

35 It is submitted that the confiscation amount that the court grants against the Defendant should include interest.

36 In this respect I refer the Honourable Court to the matter of **NDPP v Ramasamy**[26], where the court held[27]:

"As the proceedings are civil in nature and the judgement a civil judgement, I find myself in agreement with the applicant's submission that interest should be added to the amount stolen from the dates of theft. The defendant is ***in mora*** *from the dates on which the respective thefts occurred. (See* ***Kleynhans v Van der Westhuizen, NO 1970 (2) SA 749 (A)****. As this judgment debt is not governed by any other law or agreement, interest at the prescribed legal rate should be added in terms of section 1(1) of the Prescribed Rate of Interest Act 55 of 1975."*

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26 A decision of the Specialised Commercial Crimes Court in the Regional Court of the Eastern Cape held at Port Elizabeth in case number 10/39/04

27 At page 4 of the judgment

The court's discretion

37 Subject to the limitations imposed by s 18(2), a court that makes a confiscation order in terms of s 18(1), exercises a wide discretion in its determination of the amount of the order. It "*may"* make a confiscation order in "*any amount it considers appropriate"*.

38 In applying its discretion, the Honourable court should bear in mind the objectives of the POCA:

The objectives of the POCA

39 I respectfully direct this Honourable Court to the Constitutional Court's view in respect of the legal framework of confiscation orders in the important judgements of **S v Shaik and Others 2007 (1) SACR 142 (D); [2005] 3 All SA 211 (D)** (High Court criminal judgment). See also **S v Shaik and Others [2007] ZACC 19; 2008 (2) SA 208 (CC); 2007 (12) BCLR 1360 (CC)**.

40 The Constitutional Court in *Shaik* held the following in respect of the aim of confiscation orders:

40.1 Chapter 5 of the POCA deals with the making of confiscation orders by a criminal court at the end of a criminal trial. Its structure and process is therefore different to that contemplated by Chapter 6 of the POCA. The preamble of the

POCA is lengthy and captures the overall purposes of the POCA very clearly.

40.2 The ninth clause affirms that the key purpose of Chapter 5 is to ensure that no person can benefit from his or her wrongdoing. The primary purpose of a confiscation order is not to enrich the State or a victim, but rather to deprive the convicted person of ill-gotten gains.

40.3 From this primary purpose, two secondary purposes flow. The first is general deterrence: to ensure that people are deterred in general from joining the ranks of criminals by the realisation that they will be prevented from enjoying the proceeds of the crimes they may commit. And the second is prevention: the scheme seeks to remove from the hands of criminals the financial wherewithal to commit further crimes. These purposes are entirely legitimate in our constitutional order.

40.4 Understanding the purposes of chapter 5 of the POCA is best done on the terms of Chapter 2 of our Constitution and our own legislation.

41 The POCA does not merely have a “backward-looking justification” of stripping criminals of the proceeds of their crimes. It also has a

"forward-looking justification" that seeks to reduce the levels of crime by deterring people from engaging in it.

The backward-looking justification of the POCA

42 The primary purpose of chapter 5 of POCA is to deprive criminals of the benefits of their crime. This is essentially a "*backward-looking justification*": it proceeds from the premise that a criminal should be deprived of the proceeds of his crime since he has no proper entitlement to retain such ill-gotten gains. In other words, the purpose is *"to strip criminals of their present assets to the extent of their past criminal profits"*:[28]

43 A confiscation order by which a criminal is deprived of the spoils of his crime, gives expression to the principle that no one should be allowed to benefit from his own wrongdoing.[29] It is a principle well-known to our common law which has spawned a variety of rules such as those expressed by the maxims *nemo ex suo delicto meliorem suam condictionem facere potest, ex turpi causa non oritur actio, in pari delicto potior est conditio defendentis* and *de bloedige hand neemt*

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28 In re P [2000] 1 WLR 473 (CA) at 481F.

29 NDPP v Phillips 2002 (4) SA 60 (W) para 43

geen erf. Chapter 5 of the POCA extends this principle to the proceeds of crime.

44 In the leading English textbook on proceedings for the confiscation and forfeiture of the proceeds of crime[30], the authors characterise those proceedings as follows:

"*Confiscation should not be seen as a form of extra punishment for the convicted defendant but rather as a way of taking away the unjust profits and of ensuring that there will be no pot of gold waiting after any punishment has been served. It is the civil consequences of the criminal wrongdoing, taking away the raison d'etre for the criminal....*"

45 A confiscation order merely deprives the criminal of a benefit to which he was not entitled to in the first place. It strips him of the proceeds of his crime.[31] As the SCA stated in *Rebuzzi*, "*the primary object of a confiscation order is not to enrich the State but rather to deprive the convicted person of ill-gotten gains"*.[32]

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30 Mitchell, Taylor and Talbot *Confiscation and the Proceeds of Crime* 2nd ed (1997) xi to xii. (Quoted with approval in NDPP v Phillips 2002 (4) SA 60 (W) para 44.)

31 DPP: Cape of Good Hope v Bathgate 2000 (2) BCLR 151 (C) para 89

32 NDPP v Rebuzzi 2002 (2) SA 1 (SCA) para 19

The forward-looking justification of the POCA

46 Chapter 5 also has a "*forward-looking justification*" which seeks to reduce the levels of crime in South Africa. It does so by providing for a confiscation regime that deters people from engaging in crime. Moreover, the POCA also seeks to reduce crime levels by providing for confiscation of the financial resources that provide a capital base for criminal activities. In short, the POCA is intended to protect society by decreasing the occurrence of crime.

Evidence and procedure

47 Section 13 of the POCA makes it clear that these are civil proceedings governed by the civil rules of evidence and the civil burden of proof.

48 This has various consequences, some of which are spelt out in section 13 of the POCA. Amongst others, civil evidentiary rules apply; most notably that the standard of proof required is the balance of probabilities and **not** beyond a reasonable doubt.

49 The proceedings are inquisitorial in that they take the form of an enquiry undertaken by the court itself in terms of s 18(1). It is the court's enquiry held subject to its control and not the parties' lis placed before the court for its determination. The evidence upon which it is based, includes all the evidence before the court adduced in all the phases of

the criminal proceedings as well as the evidence adduced as part of the court's own enquiry under s 18(1).

50 The significance of the parties' statements in terms of s 21 is two-fold. The first is that the statements constitute evidence on oath. They constitute additional evidentiary material upon which the court may base its decision. The second is that s 21(2)(b) provides that, insofar as the Defendants do not dispute the correctness of any allegation made in the prosecution's statements, "*that allegation shall be deemed to be conclusive proof of the matter to which it relates"*.

51 The state is also aided in these proceedings by the presumption created by s 22(3)(a)(i) of the POCA:

It provides that, for the purpose of determining the value of the defendant's proceeds of unlawful activities in an enquiry such as this one, if the court finds that the defendant has benefited from an offence and that "he or she held property at any time at, or since, his or her conviction", then that fact must be accepted "as prima facie evidence that the property was received by him or her at the earliest time at which he or she held it, as an advantage, payment, service or reward in connection with the offences or related criminal activities referred to in s 18(1)".

THE CONFISCATION ORDER *IN CASU*

52 The Applicant has enlightened the Honourable Court regarding the legal principles and *juris prudence* applicable to confiscation orders. The Applicant will forthwith enlighten the Honourable court how these legal principles are applicable to the confiscation order *in casu*.

Summation of the relevant facts

53 In summary the relevant material unassailable facts *in casu* are the following:

53.1 The offence was committed ***"in late 2007"*** after the ***"catastrophic forest fires of 2007"***.

53.2 At the time that the offence was committed, the Defendant had not lodged an application for environmental authorization with the relevant authorities in terms of the prescribed provisions of the NEMA and the relevant regulations thereto (i.e: see Section 24F of NEMA and regulation 21 of GN R385). The costs associated with such an application were thus avoided and saved by the Defendant at the relevant time.

53.3 On 3 June 2008, more than 6 months after the offence was committed, the Defendant submitted an application for environmental authorization with the relevant authorities in

terms of the provisions of the NEMA and the regulations thereto (Section 24F of NEMA and regulation 21 of GN R385).

53.4 The Defendant and its appointed Environmental Assessment Practitioner (**EAP**) failed to disclose in their application to the relevant environmental authorities and the public that the Defendant had already illegally commenced with the listed activity more than 6 months prior to the lodging of the application.

53.5 As such, the application that the Defendant submitted on 3 June 2008 to the environmental authorities was impotent and had no legal standing, because the Defendant had already illegally commenced with the listed activity. The BAR that is part of this application also has fundamental shortcomings as Ernst Basson Attorneys pointed out to DEDET and the Defendant (**record 441 to 442**).

53.6 As the Defendant had already illegally commenced with the listed activity, the Defendant should have submit an application for rectification to the relevant environmental authority in terms of Section 24G of the NEMA. Such an application for rectification in terms of Section 24G of the NEMA entails other requirements as an application in terms of Section 24F of the

NEMA, i.e: an assessment of the damage already caused and investigation of measures to manage the impact on the environment.

53.7 The costs associated with such a rectification application in terms of Section 24G of the NEMA, i.e: the particular EIA and the mandatory administrative fine from the relevant environmental authority were thus avoided and saved by the Defendant.

The Defendant's motive behind the avoidance of the statutory regulatory regime

54 The unassailable facts show that the Defendant evaded or avoided the prescribed provisions of the NEMA and the regulations thereto on at least two material occasions, namely:

54.1 When the offence was committed in late 2007: The prescribed provisions of the NEMA (Section 24F) and the regulations thereto were deliberately ignored *in toto* by the Defendant and

54.2 When the Defendant deliberately submitted an incorrect application in terms of Section 24F of the NEMA to the environmental authority wherein they failed to disclose that they already illegally commenced with the listed activity: To avoid or evade the provisions of Section 24G of the NEMA.

55 The Applicant submits that the motive behind the Defendant's deliberate evasion of the statutory regulatory regimes as mentioned in paragraph 54 above was to avoid the legal and financial consequences of compliance thereto. The financial consequences amount to the pecuniary savings that accrued to the Defendant as a result of the avoidance of the statutory regulatory regimes.

56 The Defendant realised that to comply with these statutory regulatory regimes would have cost them money and they have evaded these costs by not complying therewith.

When the Defendant benefitted out of the crime

57 As stated above, the Defendant *"received or derived"* the benefit out of the crime from the time that the offence was committed, namely the commencement with a listed activity without environmental authorisation ***"during late 2007"***. The value of the benefit is equal to the total value of the financial consequences that were avoided or evaded.

Does the Defendant's application ito Section 24F on 3 June 2008 negate the benefit out of its crime?

58 In paragraph 26 of Malloch-Brown's answering affidavit he is of the opinion that the Defendant's application ito Section 24F on 3 June 2008 negates the Defendant's benefit out of its crime.

59 As stipulated above, this contention has no legal basis and is contrary to the legal authorities in this regard.

60 The value of the Defendant's proceeds of his crime is determined from when he receives or derives it, thus from the date that the crime was committed at the end of 2007. At that material time the Defendant had not as yet lodged an application in terms of Section 24F of the NEMA and the regulations thereto. The costs associated with such an application were thus avoided and saved by the Defendant at the relevant time when he *"received or derived"* the benefit.

61 In accordance with the legal authorities, it makes no difference that the Defendant *ex post facto* lodged an application ito Section 24F of the NEMA. What matters is the value of the property, services, advantages, benefits or rewards he "*received, retained or derived"* in connection with his crime, from when the crime is committed. It means that, if the defendant "*received or derived"* a benefit in connection with his crime, then its value constitutes the proceeds of his crime whether he has since then retained it or not.

62 In any event, the Defendant's subsequent application on 3 June 2008 (more than 6 months after the fact) cannot be regarded as a substitute for a prior application thereof to the relevant authorities. As pointed out above, the subsequent application was an incorrect application. The

application was impotent and had no legal standing, because the Defendant had already illegally commenced with the listed activity. The BAR that is part of this application also had fundamental shortcomings as Ernst Basson Attorneys pointed out to DEDET and the Defendant (**record 441 to 442**).

63 Seeing that the subsequent application was incorrect, impotent and without legal standing, this application is irrelevant as far as the arguments on the Defendant's benefit out of the crime is concerned.

Can Malloch-Brown depose to expert facts or opinion?

64 In the Defendant's answering affidavit Malloch-Brown often deposes to expert facts or opinion of an EAP (**record 451 to 452**) in reaction to the founding affidavit of O'Beirne (an environmental expert in the true sense of the word).

65 The Applicant submits that Malloch-Brown is not an environmental expert and he cannot depose to averments as if he is such an expert, especially where the calculation of reasonable costs of an EIA or BAR is in issue.

66 It is noteworthy that the Defendant did not obtain any affidavit from a qualified EAP to counter the expert affidavit of O'Beirne.

67 The Applicant submits that the averments of Malloch-Brown in this regard amounts to inadmissible hearsay that should be disregarded by the Honourable Court and struck out.

68 It amounts to a factual situation where the expert facts and opinion of O'Beirne and Pamela Ntuli stands unchallenged, especially where the calculation of reasonable costs and the administrative penalty are concerned.

69 Seeing that O'Beirne and Ntuli's expert evidence and opinion are in essence unchallenged, Section 21(2)(b) of the POCA is applicable, that states that these allegations *"shall be deemed to be conclusive proof of the matter to which it relates"*.

The Defendant's continuous dishonesty in this matter

70 A material factor that the Honourable Court must take cognisance of in its discretion to grant a confiscation order and a penal cost order in this matter, is the Defendant's continuous deliberate dishonesty towards the environmental authorities, the public and alas, the Honourable Court.

71 The unassailable facts of this matter show that the Defendant:

71.1 Illegally commenced with a listed activity in total disregard for the prescribed provisions of the NEMA and the regulations

thereto, despite the fact that the Defendant had an environmental manager, Mr Sean McCarthy.

71.2 On 3 June 2008 the Defendant deliberately submitted an incorrect environmental authorization application in terms of Section 24F to DEDET to avoid the legal and financial consequences of the correct application in terms of Section 24G of the NEMA.

71.3 Despite the Defendant's and Craig Gebbardt (the appointed EAP)'s formal declaration in paragraphs 4.1 and 4.2 of their application that they undertake to disclose any material information that have or may have the potential to influence the decision of DEDET to grant the application, they deliberately failed to disclose the material fact that the Defendant had already illegally commenced with the listed activity.

71.4 As Sean O'Beirne stated in the replying affidavit (**record 446 and 447**), the Defendant and their EAP's non disclosure of the material fact that the listed activity that they applied for was already commenced with, further amounts to a contravention of paragraphs 17(2)(b) and 18(1)(c) and (f) of the EIA regulations.

71.5 In the public participation process that the Defendant conducted as part of the Section 24F application process, they

also failed to disclose to the public that they illegally commenced with the listed activity that they applied for.

71.6 In the Defendant's opposing papers (see paragraph 10 of Malloch-Brown's answering affidavit), they deliberately re-shuffle the sequence of events and omitted material facts as contained in their plea-explanation to create the false impression that the offence was committed after the BAR was submitted to the environmental authorities (**record 435 to 435**). The Applicant submits that this continues dishonest behaviour is a deliberate attempt to confuse and mislead the Honourable Court of exactly when the offence was committed in order to again avoid the legal and financial consequences of a confiscation order.

72 The mentioned history of the Defendant's dishonesty shows continues deliberate attempts to avoid the legal and financial consequences of their illicit actions. It also shows a lack of remorse on the part of the Defendant for the environmental crime that they had committed.

73 This behaviour amounts to an abuse of the legal process and is worthy of the strongest censure. This behaviour is certainly not expected from a company that the Defendant alleges has a good name and reputation.

74 It is therefore submitted that a punitive order of costs, on an attorney and own client scale, including the costs of counsel, should be made by the Honourable Court against the Defendant.

The forward-looking justification of a confiscation order ito the POCA *in casu*

75 As pointed out above, Chapter 5 of the POCA also has a "*forward-looking justification*" which seeks to reduce the levels of crime in South Africa. It does so by providing for a confiscation regime that deters people from engaging in crime. Moreover, the POCA also seeks to reduce crime levels by providing for confiscation of the financial resources that provide a capital base for criminal activities. In short, the POCA is intended to protect society by decreasing the occurrence of crime.

76 In the light thereof, the Applicant submits that a confiscation order *in casu* will deter people and companies like the Defendant to engage in the commencement of listed activities without environmental authorization from the relevant authorities.

77 Potential environmental offenders will realise that they run the risk of a confiscation order against them if they deliberately evade or avoid the prescribed statutory regime that the NEMA and the regulations thereto creates.

The Defendant's benefit out of the crime

78 The applicant submits that the Defendant has benefitted out of the crime as O'Beirne describes in his founding affidavit (**record 7 to 12**).

79 As O'Beirne, an expert witness, declared in his founding affidavit (**record 12**), the total value of the Defendant's benefit amounts to at least **R 450 000,00**.

Conclusion

80 The Applicant submits that the Defendant has benefitted from its criminal activity as stipulated in the founding affidavit of O'Beirne and the confirmatory affidavits thereto.

81 The Applicant further submits that the total value of the Defendant's benefit amounts to at least **R 450 000,00**.

82 The Applicant therefore request the Honourable Court to grant a confiscation order against the Defendant in terms of Section 18(1)(a) of the POCA:

82.1 In the amount of **R 450 000,00**; **plus**

82.2 Interest at the prescribed legal rate in terms of section 1(1) of the Prescribed Rate of Interest Act 55 of 1975 (15,5 %) **and**

82.3 A punitive order of costs against the Defendant, on an attorney and own client scale, including the costs of counsel.

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SJ van der Walt

Counsel for the Applicant

Nelspruit

23 November 2012