THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 582/09

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **Appellant**

v

PETER GRAHAM GARDENER **First Respondent**

RODNEY MITCHELL **Second Respondent**

Neutral citation: *NDPP v Gardener* (582/2009) [2011] ZASCA 25 (18 March 2011).

Coram: Heher, Cachalia and Seriti JJA

Heard: **18 February 2011**

Delivered: **18 March 2011**

Summary: Confiscation orders under s 18(1) of the Prevention of Organised Crime Act 121 of 1998 – A court exercises a discretion when considering whether to confiscate the value of a benefit that was derived from an offence. When it does so, it must bear in mind that the purpose of the Act is to confiscate the proceeds of unlawful activity, even if this consequence appears harsh.

ORDER

On appeal from: Western Cape High Court, Cape Town (Uijs AJ sitting as court of first instance).

The following order is made:

The appeal is upheld with costs to be paid by the respondents jointly and severally. The high court's order is substituted with the following order:

'1. The first respondent is ordered to pay to the State the sum of R6 583 231.14, increased at the rate of the Consumer Price Index from 30 June 2007 to the date of this order.

2. The second respondent is ordered to pay to the State the sum of R3 594 339.10, increased at the rate of the Consumer Price Index from 30 June 2003 to the date of this order.

3. The respondents are to pay to the State interest on the amounts unpaid, at the prescribed rate, from the date of this order to date of payment.

4. The respondents are ordered, jointly and severally, to pay the appellant's costs in the high court.'

JUDGMENT

CACHALIA JA (Heher, Seriti, JJA concurring):

[1] The respondents, Mr. Peter Graham Gardener and Mr. Rodney Mitchell, were convicted in the Western Cape High Court on one charge of fraud. They were sentenced to twelve years' imprisonment, of which, in Gardener's case, four years was suspended and in Mitchell's case the suspended portion of the sentence was five years. Their effective terms of imprisonment were therefore eight and seven years respectively. On their convictions the National Director of Public Prosecutions (the NDPP), the appellant in these proceedings, applied to confiscate the amount of the value of the benefits that the respondents derived from the offence. The high court (Uijs AJ) dismissed the application but granted the NDPP leave to appeal to this court against its judgment. It also permitted the respondents to appeal against their convictions and sentences.

[2] This court has now, in a judgment handed down at the same time as this one, dismissed the respondents' appeal against their convictions. Gardener's appeal against his sentence succeeded partially. His sentence was reduced from eight years' imprisonment to seven years and the suspended portion of the sentence was set aside. Mitchell's appeal was also partially successful in that the suspended portion of his sentence was set aside. But, in his case, the sentence of seven years' imprisonment, which the high court imposed on him, was confirmed.[1]

[3] The confiscation orders being sought follow from this court's dismissal of the respondents' appeal against their convictions. Accordingly, we must now consider the NDPP's appeal against the high court's refusal to order the confiscation of the value of the benefits that the respondents derived from the offence.

[4] The essential facts pertaining to the convictions relate to a transaction – the 'Dalmore transaction' as it became known during the trial. The name comes from an agreement that the respondents concluded on 16 April1999 on behalf of

[1] Reported as [2011] ZASCA 24 (18 March 2011).

LeisureNet Limited (LeisureNet) and a subsidiary LeisureNet International (Pty) Ltd (LI) for the purchase by LI of a 50 per cent interest in an entity known as Dalmore Limited (Dalmore). At the time LeisureNet, which operated fitness centres in South Africa, was a public listed company. The respondents were directors and joint chief executive officers.

[5] The genesis of the transaction was this. In early 1999 LeisureNet decided to expand its business offshore. To this end it established LI, which it registered as an offshore holding company in the United Kingdom. LI in turn owned and controlled subsidiary companies that operated fitness centres in various European countries.

[6] In respect of Germany, LI's wholly owned subsidiary was Healthland Germany Ltd, also registered in the United Kingdom. Healthland Germany Ltd owned 50 per cent of the shares in Healthland Germany GmbH (GmbH), a German registered company. Dalmore owned the remaining 50 per cent of the shares in GMbH, which in turn was jointly owned and controlled by Messrs Hans Moser and Joubert Rabie.

[7] The agreement concluded in April 1999 – at a price of DM 10 million – was, effectively, to enable LI to acquire Dalmore's interest in GmbH. It was negotiated by the respondents, acting on behalf of LI with the concurrence of LeisureNet, who would be required to confirm and fund the transaction, and by Moser and Rabie, acting on Dalmore's behalf. At the time of the purchase the respondents each held a 20 per cent interest in Dalmore, which they had acquired from Moser personally in 1996 but of which the boards of LeisureNet and LI were unaware.

[8] Following LI's purchase of Dalmore's interest, the respondents each became entitled to the sum of DM2 million – their share of the interest. Dalmore paid the money in June 1999 into two offshore trusts that the respondents had

established. At the trial the Deutschmark amount was converted into Rand at a conversion rate of 3:1, which was accepted as R6m. The actual amounts, that were paid to the trusts were, however, R6 406 138.30 in respect of Gardener, and R6 482 791.22 in Mitchell's case. These amounts reflect the true benefit that they received from the transaction at the time of payment. Their fraud convictions relating to these amounts followed from the high court's finding – now confirmed on appeal – that they had deliberately withheld knowledge of their interest in Dalmore from LeisureNet's board at all material times.

[9] LeisureNet was liquidated in October 2000 because it was unable to pay its debts, though the cause of its insolvency was unrelated to the Dalmore transaction. The liquidators then sought to recover whatever they could from the respondents.

[10] In June 2003 the liquidators entered into a settlement agreement in terms of which the respondents each paid R8,25m to them. Of this amount only R6m represented the liquidators' claim in respect of monies that the respondents had each received through their offshore entities from the Dalmore transaction. The additional amount of R2,25m was to settle other potential claims the liquidators may have had against them.

[11] The respondents also settled a further claim by paying R13m – R6,5m each – to the liquidators. This settlement arose after the liquidators had sued them personally under s 424 of the Companies Act 61 of 1973 for LeisureNet's debts. The respondents do not suggest that this amount also arose from the Dalmore transaction.

[12] In summary the respondents each paid an amount of R14,75m to the liquidators. This amount was made up as follows: R6m as a repayment for what they received through their offshore trusts from the Dalmore transaction; R2,25m to settle further claims related to this transaction; and R6,5m to settle potential

claims arising from the s 424 action. The respondents therefore paid to the liquidators a total amount of R29,5m, which the high court considered, in full, to be relevant to its decision not to make confiscation orders against them.

[13] The case for the NDPP is that the high court ought not to have taken the amounts of R2,25m and R6,5m into account because these payments were unrelated to the benefits derived from the fraud of which they were convicted. Instead, contends the NDPP, the high court ought to have to taken only the actual amounts that the respondents had received from the Dalmore transaction in determining the value of the benefits for the purpose of deciding whether or not to issue a confiscation order. As I have mentioned Gardener received R6 406 138.30 and Mitchell R6 482 791.22, exceeding the estimate of R6m each used during the criminal trial.

[14] Section 18(1)(a) of the Prevention of Organised Crime Act 121 of 1998 (POCA) deals with the circumstances under which a court may grant a confiscation order. It provides as follows:

'(1) Whenever a defendant is convicted of an offence the court convicting the defendant may, on the application of the public prosecutor, enquire into any benefit which the defendant may have derived from –

(a) that offence;

(b) . . .

(c) . . .

and, if the court finds that the defendant has so benefited, the court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.'

[15] It is a precondition or jurisdictional fact for the grant of a confiscation order that a defendant has benefited from the offence. In terms of s 12(3), a person has benefited from 'unlawful activities' if he or she has 'received or retained any

proceeds of unlawful activities'. The clause 'proceeds of unlawful activities' is defined very broadly in s 1 to include:

'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.'

[16] 'Property' is similarly broadly defined in s 1 as:

'Money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof'.

[17] Once a defendant's unlawful activities yield proceeds of the kind envisaged in s 12, he or she has derived a benefit as contemplated in s 18(1)(a). This entitles a prosecutor to apply for a confiscation order and triggers a three-stage enquiry by the court. First, the court must be satisfied that the defendant has in fact benefited from the relevant criminal conduct; second, it must determine the value of the benefit that was obtained; and finally, the sum recoverable from the defendant must be established.[2]

[18] The purpose of the enquiry is two-fold: first, the court has to decide whether to make an order against the defendant for payment to the State of an amount of money; and secondly it must determine the appropriate amount to be paid. In this regard the court exercises a discretion, which as O'Regan ADCJ said in *S v Shaik & others*[3]

'. . . [I]s peculiarly a matter for the court which has convicted the relevant person; that is no doubt the reason why the legislature sought to ensure that it would be that court which, in the first instance, would determine the appropriate amount to be confiscated. It will only be interfered with by an appellate court where that court is satisfied that the

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[2]The same three-stage enquiry is adopted by English courts when applying the Proceeds of Crime Act 2002. See Andrew R Mitchell, Kennedy V Talbot and Stephen G Hellman *Mitchell Taylor & Talbot On Confiscation and the Proceeds of Crime* (2010) vol 2 v-29.

[3] 2008 (5) SA 354 (CC).

court which determined the amount acted unjudicially or misdirected itself or where the appellate court is of the view that the amount confiscated is disturbingly inappropriate.'[4]

[19] In the exercise of its discretion a court must bear in mind the main object of the legislation, which is to strip sophisticated criminals of the proceeds of their criminal conduct.[5] To this end the legislature has, in Chapter 5 of POCA, provided an elaborate scheme to facilitate such stripping. The function of a court in this scheme, as appears from what I have said above, is to determine the 'benefit' from the offence, its value in monetary terms and the amount to be confiscated. It is undoubtedly so that a confiscation order may often have harsh consequences, not only for the defendant but also for others who may have innocently benefited, directly or indirectly, from the criminal proceeds. This is what the legislation contemplates and a court may not, under the guise of the exercise of its discretion, disregard its provisions – harsh as they may be.[6] I now turn to consider how the high court approached the matter.

[20] In exercising his discretion not to grant a confiscation order against the respondents the learned judge first considered the R8,25m which each respondent paid as part of the settlement agreement arising from the Dalmore transaction. This amount, he said, was to settle 'their indebtedness in respect of their roles' in the Dalmore transaction, and had the effect of depriving them of their ill-gotten gains.

[21] Secondly, the judge considered the R13m that the respondents had paid to dispose of the s 424 trial action as relevant to the exercise of his discretion on the ground that the Dalmore transaction would have featured strongly in evidence during the course of that case had it gone ahead. Moreover, said the judge, the R13m was paid into the pool of realisable assets available to the liquidators to satisfy the creditors' claims. He added, however, that even if he was

[4] Ibid para 67.
[5] Ibid paras 22-26, particularly at para 25.
[6] Ibid paras 68-71, where considerations relevant to the exercise of the s 18 discretion are discussed.

wrong to have included the R13m, this would not have affected his ultimate decision not to grant a confiscation order. This is because, he said, 'they had been deprived of more than the profit which they might have made from the unlawful activity' and, having regard to the severe prison sentences that have been imposed on them a confiscation order would be disproportionately harsh.

[22] A court considering whether to grant a confiscation order and if so what the appropriate amount should be must have regard to all the circumstances of the criminal activity concerned.[7] However, s 18(1)(a) says that once a court has convicted a defendant of an offence from which he or she has benefited it may, *in addition to any punishment, which it may impose in respect of the offence,* grant a confiscation order.

[23] It is plain that confiscation and sentence are to be treated separately – for good reason. The purpose of sentencing is to punish an offender for his or her criminal wrongdoing. The severity of a sentence is primarily intended to reflect the defendant's culpability in relation to the offence for which he or she is being punished. The main purpose of a confiscation order is to deprive offenders from deriving any benefit from their ill-gotten gains. The achievement of this purpose may have a punitive effect but this is not its rationale.[8] The severity of a sentence, therefore, generally ought not to have a bearing on the exercise of a court's discretion whether to make a confiscation order; especially so in this case because, in the sentencing proceedings, the high court had taken into account the repayments as an indication of remorse on the respondents' part, ie a mitigating factor. In my view the high court should therefore not have had regard to the prison sentences it imposed on the respondents in deciding on the appropriateness of a confiscation order.

[24] Turning to the R8,25m that each respondent paid concerning the Dalmore transaction, only R6m as I have mentioned, was in respect of the benefit that

[7] Ibid para 69.
[8] Ibid paras 51 and 57.

they had obtained as a result of the fraud. The further amount of R2,25m was, on the respondents' version, to settle further potential claims arising from the same transaction (primarily an amount of R4,5m that was paid to Mr Rabie's offshore structure by Dalmore as a result of the Dalmore agreement) – but was not in respect of any benefit that the respondents personally derived from it. Why the respondents considered that it was to their benefit to make such a payment to the liquidators was never satisfactorily explained.

[25] Counsel for the respondents sought to persuade us that the fact that these payments were made to the liquidator to 'get closure on the Dalmore transaction', as Gardener put it, was therefore relevant to the exercise of the court's discretion. I do not agree with this contention. Not all these claims that were settled as part of the Dalmore settlement agreement were related to the transaction. For example, the settlement included cost orders, which the courts had made against them in this country[9] and in Jersey.[10] These costs were unquantifiied but, it is common cause, would have been substantial. However, even if I were to accept that these claims were primarily related to the Dalmore transaction, they were manifestly not repayments related to any *benefit* that the respondents derived from the deal. The payments were therefore irrelevant for the purposes of determining the extent of the benefit that the respondents derived from the offence, and ought to have been disregarded by the trial judge in the exercise of his discretion.

[26] The R13m payment in respect of the s 424 proceedings was not part of the Dalmore settlement and was not connected to the transaction or the offence for which the respondents were convicted. The fact that evidence of the Dalmore transaction may have been relevant to the s 424 claim – a point that the high

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[9] *Gardener & another v Walters & another NNO* 2002 (5) SA 796 (C); *Mitchell & another v Hodes & others NNO* 2003 (3) SA 176 (C).

[10] LeisureNet Ltd (in liquidation) and in the matter of the representation of Robert John Walters and Gavin Cecil Gainsford (the joint liquidators) and in the matter of the intervention by Peter Graham Gardener and Rodney Mitchell.

court considered important but which was never proved – does not alter this fact. This amount was therefore also not related to a benefit that the respondents had received from the commission of the offence. The high court's inclusion of the amount as a factor that was relevant to the exercise of its discretion was similarly misdirected.

[27] In summary, the high court ought not to have taken into account the sentence it had imposed on the respondents in considering whether to grant confiscation orders against them. Nor should it have had regard to any payments, not related to the offence of which they had been convicted, that the respondents made to the liquidators. It follows that the high court erred by relying on factors that were irrelevant to the exercise of its discretion. This brings me to the calculation of the value of the benefit, ie the second stage of the enquiry mentioned earlier.

[28] It is common cause that the true extent of the benefit received in 1999 from the commission of the offence was, as I have mentioned earlier, R6 406 138.30 in the case of Gardener and R6 482 791. 22 in Mitchell's case. In 2003 they each repaid R6m to the liquidators. One method of calculating the current value of the benefit, as envisaged in s 15(2)(a), is to take the value of payment when the recipient received it, adjusted to take into account subsequent fluctuations in the value of money.[11] The parties agree that taking account of inflation the value of the benefit that Gardener received, was in 2003, R8 645 479.89. In Mitchell's case the value was R8 751 768.15.[12] Taking into

[11]Section 15(2) '. . . any reference in this Chapter to the value at a particular time of a payment or reward, shall be construed as a reference to-
(a) the value of the payment or reward at the time when the recipient received it, as adjusted to take into account subsequent fluctuations in the value of money; or
(b) where subsection (3) applies, the value mentioned in that subsection, whichever is the greater value.
(3) If at the particular time referred to in subsection (2) the recipient holds-
(a) the property, other than cash, which he or she received, the value concerned shall be the value of the property at the particular time; or
(b) . . .'

[12] These figures were obtained from The Quantum Yearbook by Robert Koch. The calculation is done as follows: The index value in 2003 was 3392. This is divided by the index value in 1999, namely 2511. That produces a factor of 1.35. The factor applied to the original benefit gives these

account the R6m that they repaid, the portion of Gardener's benefit that was not repaid was R2 645 479.89 and Mitchell's unpaid portion was R2 751 768.15. These figures must be adjusted by the Consumer Price Index to determine their value in today's money to determine the extent of the benefit that may now be liable for confiscation.

[29] The other method of calculating the value of the benefit is to determine the value of the property that was acquired with the proceeds, as s 15(3)(a) contemplates. Of the money that was paid into the trust that Gardener had established, R6,4m was used to buy a share in a company, Gull on the Roof (Pty) Ltd, which in turn bought a property in Hermanus in June 1977 for R7m. From this it follows that R6,4m of the R7m, which represents 91,4 per cent of the value of the Hermanus property, is attributable to the proceeds of the Dalmore transaction.

[30] The value of the property in June 2007 was R15m. A 91,4 per cent interest in the property was then R13.71m. Of this amount, R6m was repaid to the liquidators in June 2003. Adjusted to 2007 values the value of the amount repaid was R7 126 768.86. This must be deducted from the then current value of the 91,4 per cent interest (R13,71m), giving a residual benefit to Gardener of R6 583 231.14 in June 2007. The value of that benefit has to be adjusted to today's value to determine the amount liable for confiscation.

[31] In Mitchell's case, the alternative method of calculation also yields a larger amount that is liable for confiscation. The trust, which he established, invested his share of the benefit, R6 482 791.22, at an average interest rate of 5 per cent. The 2003 value of that investment was R9 594 339.10. As with Gardener, R6m was repaid to the liquidators in 2003 leaving a residual benefit of R 3 594 339.10. This value of the benefit must likewise be adjusted to today's value to determine the amount liable for confiscation.

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results.

[32] This brings me to the third stage of the enquiry, the amount of money that should appropriately be confiscated from the respondents. I have said earlier that the rationale for the legislation is to deprive offenders of the full extent of the benefit they have received from the commission of the offences. This includes the value of the appreciation of the assets that were acquired with the criminal proceeds and not just the appreciation in the money benefit they received. This is what the legislation requires and is what the high court ought to have ordered. In this regard, I bear in mind that in terms of s 18(2)(a) a court may not order a defendant to pay an amount that exceeds the value of the benefit that was derived from the offence. In Gardener's case the appropriate amount for confiscation should take account of the value of the trust's interest in the Hermanus property, and in Mitchell's case, the value of the trust's investment interest.

[33] One further matter must be considered. The respondents say that they have no assets and now survive only on the loans they have derived from their offshore entities and from other sources. In effect they say that they are bankrupt and do not have the resources to meet a confiscation order. I accept that it would be futile for this court to make a confiscation order that is practically unenforceable. But it is by no means certain that an order of this nature would be pointless.

[34] A confiscation order has the effect of a civil judgment.[13] Armed with such an order the State may pursue other avenues to recover these monies, including instituting sequestration proceedings against the respondents, which if successful would entitle the trustee to investigate whatever interests the respondents may have in any other entity with a view to recovering these debts. Alternatively, it could attempt to seek payment from the assets held by those

[13] Section 23 (2)(a).

entities themselves. These are not matters that this court need concern itself with at this stage, or that stand in the way of the grant of a confiscation order.

[35] The following order is made:

The appeal is upheld with costs to be paid by the respondents jointly and severally. The high court's order is substituted with the following order:

'1. The first respondent is ordered to pay to the State the sum of R6 583 231.14, increased at the rate of the Consumer Price Index from 30 June 2007 to the date of this order.

2. The second respondent is ordered to pay to the State the sum of R3 594 339.10, increased at the rate of the Consumer Price Index from 30 June 2003 to the date of this order.

3. The respondents are to pay to the State interest on the amounts unpaid, at the prescribed rate, from the date of this order to date of payment.

4. The respondents are ordered, jointly and severally, to pay the appellant's costs in the high court.'

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JUDGE OF APPEAL

APPEARANCES

APPELLANTS:	G M Budlender SC Instructed by The State Attorney, Cape Town The State Attorney, Bloemfontein
RESPONDENT:	F van Zyl SC (with him J C Butler SC) Instructed by Bernard Vukic Potash & Getz Attorneys, Cape Town Lovius Block, Bloemfontein