THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 52/2018 and 149/2018

In the matter between:

NAZIER AHMED TIRY	**FIRST APPELLANT**
PATRICIA DUDU NONO SANGWENI	**SECOND APPELLANT**
SIPHO ABRAM TSHABALALA	**THIRD APPELLANT**
SANDILE ANTHONY NYAMUSA	**FOURTH APPELLANT**
MSOLENI GOODENOUGH MTHETHWA	**FIFTH APPELANT**
QHEKEKA ALFRED BUTHELEZI	**SIXTH APPELLANT**
VELI MAXWELL SITHOLE	**SEVENTH APPELLANT**
SOLOMON NKOSI	**EIGHTH APPELLANT**
JOSEPH MOISI	**NINTH APPELLANT**

and

THE STATE	**RESPONDENT**

Neutral citation: *Tiry and Others v The State* (52/2018 and 149/2018) [2020] ZASCA 137 (29 October 2020)

Coram: WALLIS, MAKGOKA and PLASKET JJA

Heard: The matter was disposed of without an oral hearing in terms of s 19*(a)* of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, and by publication on the Supreme Court of Appeal website and release to SAFLII. The time and date for hand down is deemed to be 10h00 on the 29th day of October 2020.

Summary: Prevention of Organised Crime Act 121 of 1998 (POCA) – sections (1)*(e)* and 2(1)*(f)* thereof – meaning of the phrase 'conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs' – conviction under both s 2(1)*(e)* and s 2(1)*(f)* – whether amounts to duplication of convictions.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Moloi J sitting as court of first instance).

1 The following appeals succeed and the convictions and sentences are set aside:

(a) Appellants 1 and 2, Mr Tiry and Ms Sangweni, in respect of counts 4, 8,19, 20, 22, 23, 25, 30, 34, 35, 42, 43 and 45 in their entirety, and in respect of count 33 to the extent that the conviction of theft is altered to one of attempted theft;

(b) Appellant 3, Mr Tshabalala, in respect of counts 2, 34 and 35;

(c) Appellant 4, Mr Nyamusa, in respect of count 2;

(d) Appellant 6, Mr Buthelezi, in respect of counts 2, 19 and 45;

(e) Appellant 7, Mr Sithole, in respect of counts 22 and 35;

(f) Appellant 9, Mr Moisi, in respect of count 2.

2 All the other appeals against conviction are dismissed and the order of the high court is amended to reflect that Mr Nkosi, appellant 8, was convicted on counts 14, 31 and 32.

3 Mr Tiry's appeal against sentence succeeds to the extent reflected below:

(a) The sentence of 30 years' imprisonment imposed on count 1 is set aside and substituted with a sentence of 20 years imprisonment;

(b) The sentence of 20 years imprisonment imposed on count 2 is set aside and replaced by a sentence of 15 years imprisonment to run concurrently with the sentence on count 1;

(c) The sentence of 15 years imprisonment on count 33 is set aside and replaced by a sentence of 3 years imprisonment;

(d) It is ordered that the sentence of 15 years' imprisonment imposed in respect of each of counts 3, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 24, 26, 31, 32, 36, 39, 40 and 41, and the 3 years' imprisonment on count 33, shall run concurrently with the sentence of 20 years imprisonment imposed on count 1. The effective sentence is 20 years' imprisonment.

4 Ms Sangweni's appeal against sentence succeeds to the extent set out below:

(a) The sentence of 18 years imprisonment imposed on count 2 is set aside and replaced by a sentence of 12 years imprisonment;

(b) The sentence of 15 years imprisonment on count 33 is set aside and replaced by a sentence of 3 years imprisonment

(c) It is ordered that the sentence of 15 years' imprisonment imposed in respect of each of counts 1, 3, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 24, 26, 31, 32, 36, 39, 40 and 41, and the 3 years' imprisonment on count 33, shall run concurrently. The effective sentence is 12 years imprisonment;

5 The appeals against sentence by appellants 3, 4, 6, 7, 8 and 9 succeed. Their existing sentences on each count on which their convictions were upheld are set aside and replaced by sentences of 7 years imprisonment on each count, all such sentences to run concurrently. The effective sentence in each case is 7 years imprisonment.

6 In terms of s 282 of the Criminal Procedure Act 51 of 1977 (the CPA) the substituted sentences are antedated to 13 October 2016, being the date on which the appellants were sentenced.

JUDGMENT

Wallis *et* Makgoka JJA (Plasket JA concurring):

[1] The appellants' convictions and sentences to lengthy terms of imprisonment arose from the operation of two tank farms for the receipt and storage of stolen petroleum products and the sale of the stolen product to the retail market and end users. The tank farms were established by the first appellant, Mr Tiry, who was the kingpin of the entire unlawful operation. Arising out of the operations of these two tank farms, he and his partner, the second appellant, Ms Sangweni, were both charged on count 1 with managing an enterprise conducted through a pattern of racketeering activities in terms of s 2(1)*(f)* of the Prevention of Crime Act 121 of 1998 (POCA). Together with the remaining appellants they were also charged on count 2 with conducting or participating in an enterprise conducted through a pattern of racketeering activities in terms of s 2(1)*(e)* of POCA. In addition, Mr Tiry and Ms Sangweni were charged with 43 separate counts of theft of petroleum products arising from their acquisition of the petroleum products. The remaining appellants were charged with theft in respect of those transactions with which they were involved. The appellants were convicted on various counts on 7 June 2016 and sentenced pursuant to those convictions by Moloi J in the Free State Division of the High Court, Bloemfontein.

[2] The appellants appeal against both their convictions and their sentences. Moloi J having died after the trial, leave to appeal was granted by Rampai J. The following are the convictions and sentences that are the subject of the appeal:

(a) Appellant 1, Mr Tiry, was convicted on count 1 and sentenced to 30 years imprisonment. Appellant 2, Ms Sangweni, was acquitted on count 1 but convicted on count 2 and sentenced to 18 years imprisonment.

(b) Mr Tiry and appellants 3, 4, 5, 6, 7, 8 and 9 were convicted on count 2. Mr Tiry was sentenced to 20 years imprisonment and each of the others to 15 years imprisonment. In the case of Mr Tiry this was to be served concurrently with his sentence on count 1.

(c) Appellants 1 and 2 were convicted of theft on counts 3 to 26 and 30 to 45 and sentenced to 15 years imprisonment on each count to run concurrently with their sentences on count 1 and 2 respectively.

(d) Each of appellants 3, 4, 5, 6, 7, 8 and 9 was convicted of various counts of theft and sentenced to 15 years imprisonment on each count, to run concurrently with their sentences on count 2.

[3] The effect of the sentences imposed was the following: in the case of Mr Tiry an effective sentence of 30 years imprisonment; in the case of Ms Sangweni an effective sentence of 18 years imprisonment; and in the case of each of the remaining appellants an effective sentence of 15 years imprisonment.

[4] Some matters need to be clarified at the outset. Another accused, Mr Elliot Thembisiline Njalula, formerly accused 8, died during the trial. In the result Messrs Nkosi and Moisi, who are reflected in the record as accused 9 and 10 respectively, are appellants 8 and 9. Appellant 5, Mr Mthethwa, has died since the appeal was lodged. Accordingly, his appeal falls away. Appellant 8, Mr Nkosi, is reflected in the court order as having been convicted on counts 9, 31 and 34 and sentenced to an effective 15 years imprisonment. That was a patent typographical error by the registrar in regard to the relevant counts, as he was

charged with counts 14, 31 and 32 and it is apparent from the judgment that it was on these counts that he was convicted. No point was made of this in argument and the count numbers can be corrected in this court's order. Appellant 6, Mr Buthelezi, allowed his appeal to lapse, but brought an application to reinstate it, which was not opposed. His appeal was accordingly reinstated.

[5] Due to the fact that the events giving rise to the various counts occurred in two different areas of jurisdiction, Free State and Limpopo, the Director of Public Prosecutions issued a directive in terms of s 111 of the Criminal Procedure Act 51 of 1977 authorising the trial court to deal with those counts which arose outside its jurisdiction.

The factual background

[6] The trial was protracted. The evidence was not led in any sequential manner due to a number of interruptions caused by, among others, the ill-health of former accused 8 and, on occasions, the judge; the unavailability of certain witnesses on certain dates; and objections by defence counsel to the leading of certain evidence by the State. However, the State's case against the appellants can be summarised as follows. The principal complainants, Sasol and Engen, are producers of petroleum products. They use freight companies to transport their products with tankers to various central destinations around the country, in this case, the Sasol refinery at Secunda and the Engen depot in Mokopane. Two counts (25 and 26) involved another producer BP Southern Africa and the transport of fuel to its depot in Pretoria.

[7] Mr Tiry and Ms Sangweni were lovers, and initially lived on Zutundu farm (Zutundu) in Mookgophong (formerly Naboomspruit) in Limpopo Province, where an unlawful tank farm was operated supplying petroleum products throughout the province as far as Musina. When this enterprise was discovered

and Mr Tiry arrested, he and Ms Sangweni moved to Free State and a new unlawful tank farm operation was established on a farm, Quarry Hoek,[1] near Warden. The evidence showed that Mr Tiry was the mastermind of, and ran, a criminal enterprise through which he stole petroleum products from Sasol and Engen, using the tank farms at both Zutundu and Quarry Hoek for this purpose. The farms were strategically situated in close proximity to the national roads used by the freight companies to transport Sasol and Engen's petroleum products. Both farms were surrounded by high walls, and a number of bulk storage tanks and pipes had been erected, which were used to decant and store the products. Mr Tiry was said to have had contact with the tanker drivers (among others, appellants 3, 4, deceased appellant 5 and appellants 6 and 9), who would divert from their routes onto the farms and unlawfully decant petroleum products there. Mr Tiry would pay them for this and later on-sell the stolen products to fuel retailers and possibly others at a reduced price lower than the regulated price. These activities gave rise to counts 1 and 2 under the provisions of POCA.

[8] The charges faced by the appellants were in two categories. Counts 3 to 11 (all predicated on counts 1 and 2) were allegedly committed at Zutundu. The stolen petroleum products were loaded from Sasol's Secunda plant, and were destined to be delivered at the Engen depot in Mokopane, or in one instance at Rustenberg. The basis for the charges was that drivers of tankers carrying diesel or petrol consigned to the Engen depot would divert to Zutundu, discharge all or part of their cargo in return for payment of an agreed price and then Mr Tiry would dispose of the stolen product to various retail outlets and possibly others. The evidence showed that the drivers were aware that if they diverted in this way Mr Tiry would purchase the product they were carrying. It was not established how the drivers came to know this, although a list of drivers' mobile phone numbers was found on a phone belonging to Mr Tiry and one witness, who

[1] This name is an adaptation of Guarrihoek, the original name of one of the farms forming part of the property.

testified in terms of s 204 of the CPA, said that he received a phone call from Mr Tiry.

[9] The thefts in counts 12-26 and 30-41 (also all predicated on counts 1 and 2) were allegedly committed at Quarry Hoek. The stolen products were loaded at Island View Storage (IVS) in Durban and were destined for Sasol's tank farm in Secunda. As with the other counts, the State alleged that the products did not reach their destination, but were decanted on Quarry Hoek. Appellants 3, 4, 6, 7, 8 and 9 are implicated in this regard. Appellants 3, 4, 6 and 9 were the drivers for various freight companies, whilst appellants 7 and 8 were employed by Sasol in Secunda as officials entrusted with receiving products from IVS delivered by appellants 3, 4, 6 and 9. They allegedly falsified documents to the effect that tankers were shown as arriving in Secunda and off-loading petroleum products, whereas, in fact, the tankers either never entered the tank farm, or arrived there with a tank containing water.

[10] The State led evidence both of a factual and technical nature. The appellants did not testify in their own defence, but led the evidence of three technical witnesses. We do not intend burdening this judgment with the testimony of each witness. Where necessary, we will refer to the specific aspects of a particular witness' evidence.

Zutundu counts

[11] In respect of the Zutundu counts, the trigger for their discovery was the events of 3 May 2006. A tanker belonging to Rand Forwarding and Freight was instructed by Mr Moolman of MBT Petroleum to collect a consignment of 42 000 litres of diesel from Total in Alrode and deliver it to Marikana near Rustenburg. The truck did not reach its destination, and was found abandoned in Naboomspruit on 4 May 2006. Its driver, Mr Victor Mabule, disappeared without

a trace. This event led to an investigation, using information from the vehicle's satellite tracking equipment, which led the police, Mr Moolman and Mr van Eeden from Rand Forwarding and Freight to Zutundu farm. There, diesel was found in a tank erected on the farm. This diesel was compared with residual diesel in the pipes of the tanker and found to match it in both colour and appearance. On that basis it was reloaded for delivery, although there was a shortfall of some 3 000 litres. Mr Tiry was present while this happened. These facts formed the basis of count 3.

[12] The discovery of the tank farm at Zutundu led to a further investigation, which revealed that between 13 December 2005 and February 2006, petroleum products loaded from Sasol, Secunda, and destined for the Engen depot in Mokopane did not reach their destination. Mr du Preez testified that, after measuring the supposed deliveries against sales and the quantities left in the storage tanks at the depot, over 200 000 litres of premium petrol and nearly 240 000 litres of diesel was not delivered. The vehicle satellite tracking reports for tankers making deliveries to the depot revealed that some tankers deviated to Zutundu, and in most instances remained there for long enough to discharge their cargo. Appellant 4 was the driver in counts 5, 7, 9 and 10. In counts 4, 6, 8, and 11 the drivers all disappeared without a trace. In count 4 the evidence was that the tanker was only stationary at Zutundu for 8 minutes and 50 seconds, while in count 8 no evidence was given of how long the tanker remained at Zutundu.

[13] Evidence against Mr Tiry was given by an owner of a fuel retailer and the employee of another, who operated fourteen service stations in the vicinity of Mokopane, Naboomspruit and Polokwane. They testified that they used to buy petroleum products from Mr Tiry at below market value. One described the petrol as 'hot'[2], conveying that he knew it was stolen. All testified that Mr Tiry would

[2] He testified in Afrikaans and used the word 'warm', meaning 'hot'.

insist on cash payment or cash cheque, and issued no receipts or invoices. It was common cause that Mr Tiry had no licence to deal in petroleum products. Considerable quantities of petroleum products were purchased from Mr Tiry. The evidence of the two witnesses was corroborated by a businessman and a friend of Mr Tiry's, Mr Jose dos Santos, who testified that he knew that he sold petroleum products.

Quarry Hoek

[14] The facts giving rise to the Quarry Hoek counts took place subsequent to Mr Tiry's arrest and release on bail, following the exposure of his activities at Zutundu. In a deceptive violation of his bail conditions, in June 2006, Mr Tiry moved to Quarry Hoek with Ms Sangweni. There, he purchased the Quarry Hoek property through his friend and proxy, Mr dos Santos, and immediately set up a similar infrastructure to that he had previously utilised at Zutundu. A high wall was erected around the property; tanks, pumping equipment and appropriate pipe lines were installed, some inside a large shed and some outside; and a large dam was built on the property to hold the water that would replace the contents of the tankers once off-loaded. Two huge steel tanks and 53 JoJo plastic tanks of different sizes were also set up on the farm to keep the stolen petroleum products.

[15] Quarry Hoek was situated north of Warden and slightly off the N3 national road that tankers would use when conveying petroleum and diesel products from Durban to the Sasol tank farm in Secunda. A large, prominent sign pointing to the farm was erected on the road, ostensibly to guide the drivers. The man who set up this infrastructure at the instance of Mr Tiry, Mr Willem Basson, testified about this. He also testified that Mr Tiry specifically told him that the intention of the infrastructure was to set up a fuel depot and that on behalf of Mr Tiry he solicited sales and made deliveries of fuel. After these activities were discovered

by the police a considerable quantity of petroleum products was discovered in the tanks on the farm and shown after testing to belong to Sasol.

[16] The main witness in respect of the Quarry Hoek counts was Mr Fredolines Peach, a forensic investigator, who had been engaged by Sasol to investigate the cause of its losses. Mr Peach testified from a spreadsheet he co-authored with the investigating officer, Warrant Officer Gert van der Merwe. The contents of the spread-sheet included particulars of vehicle tracking devices installed on the specific truck tankers, locations of those tankers at different times, and the Global Positioning System (GPS) co-ordinates. More about these later.

[17] The following background, distilled from Mr Peach's evidence, is necessary to appreciate the nature of the Quarry Hoek counts. At the time Sasol was importing petrol, described in the charge sheet as Ron65 petrol or Reformate petrol (the two are synonymous), and it was then transported by fuel tankers from IVS in Durban to its tank farm in Secunda, where it was further processed. The quantities imported were so great – more than 50 tankers a day – that they followed a different route into the tank farm in Secunda in accordance with the procedure described below. Four freight entities were used for that purpose, namely Lobtrans SA (Pty) Ltd (Lobtrans); Freight Dynamics (Pty) Ltd (Freight Dynamics); Wardens Cartage CC (Wardens) and 777 Logistics (Pty) Ltd (Logistics). Appellants 3, 4, 6, 8 and 9 were among the drivers of the tankers for these companies.

[18] The following procedure had to be followed for the loading of the petroleum products from IVS Durban up to their off-loading in Secunda. The Oil Unit at Sasol's headquarters in Rosebank would generate an order, prefixed with number 53. The various transport companies operating the tankers would be given the orders, which entitled those companies to uplift the product referred to

in the order from IVS. The transport company would issue the driver with a delivery note with details of the driver and the registration numbers of the tanker and the trailer (if any). At IVS the driver would exhibit the documents in his possession, load and proceed to the weighbridge to weigh the load.

[19] An independent company, Intertek Testing Services (South Africa) (Pty) Ltd (Intertek), inspected the vehicles as they arrived at IVS. After loading, the tanker would be inspected and sealed. The seals would have sequential numbers. Each driver would sign the weighbridge ticket, and an acknowledgment that they had received the product. These two documents would have to be handed in upon arrival at the Sasol tank farm in Secunda. The tanker would then be weighed to check that the weight corresponded with the weight shown on the IVS documents within a tolerance of 500kgs. Once so satisfied, the process controller at the weighbridge would generate a 'non-commercial goods' receipt and allow the tanker to proceed to off-loading. There the product would be tested for possible contamination and the off-loading official would generate an off-loading statement essentially certifying that the tanker had not been tampered with, was full of product and ready for off-loading. After the tanker had off-loaded the product the off-loading official would make a declaration of the time when off-loading was complete and that the tanker had been fully off-loaded. The tanker would then proceed outbound to the weighbridge where it would be weighed again and the 'non-commercial goods' receipt would be completed. It would then be allowed to leave the tank farm and its departure time would be logged by the security personnel at the exit gate. Thus, for theft of the product to occur under this procedure, the driver of the tanker, the weighbridge official, the off-loading official and the buyer of the stolen product, and possibly the security officer, all had to co-operate.

[20] In respect of the specific counts relating to Quarry Hoek, the catalyst was the events of 14 December 2006, which form the basis of count 12. Appellant 3, Mr Tshabalala, was literally caught 'red-handed'. On 13 December 2006 he loaded a Freight Dynamics tanker with reformate octane at IVS in Durban. When he arrived at the Secunda tank farm, it was discovered that the tanker was full of water. He could not provide any satisfactory explanation as to how this came about, and was arrested. An examination of the vehicle's satellite tracking report later revealed that the tanker, on its way from Durban, had entered Quarry Hoek at midnight on 14 December 2006 and left at 05h00. In this regard, Mr Marius Seaman testified that as a result of this incident, he used the tanker's vehicle tracking reports to trace the movements of the tanker on its journey from Durban. This showed that the tanker stopped in Warden and spent about six hours there. As a result, he and the late Mr Peter Dafel travelled to Warden, where the GPS co-ordinates from the replay led them straight to Quarry Hoek.

[21] The police later obtained a search and seizure warrant in respect of Quarry Hoek, which they visited on 15 December 2006. Mr Tiry was not present. Upon arrival, the police found fuel, reformate octane 95. Samples of it were lifted and sent for forensic analysis, which confirmed that this was the same product which Mr Tshabalala had loaded from IVS in Durban on 13 December 2006, destined for Secunda. By this time Mr Tiry and Ms Sangweni had abandoned the Quarry Hoek farm and fled. They were eventually arrested in Polokwane on 18 December 2006.

[22] The investigation triggered by the event on 14 December 2006 revealed that between 19 August and 14 December 2006 tankers driven by appellant 3 (Mr Tshabalala), appellant 6 (Mr Buthelezi), and appellant 9 (Mr Moisi) and others loaded product from IVS in Durban. En route to Secunda, they deviated to Quarry Hoek, where the product was stolen. At the Secunda tank farm, all the

security processes referred to above would be reflected as having been satisfied. This involved falsification of documents through the cooperation of the drivers, weighbridge and off-loading officials referred to above. In this regard, the weighbridge and off-loading officials who were charged were appellants 7 (Mr Sithole) and 8 (Mr Nkosi). In truth, however, the tanker either did not enter the Sasol tank farm or did so empty or filled wholly or partly with water. The satellite tracking reports revealed that the tankers had diverted to Quarry Hoek where they spent some time. Count 25 involved a different fuel retailer, BP Southern Africa (BP). As a result, the rest of the appellants were arrested.

Grounds of appeal

[23] The convictions were assailed on the grounds of violations of fair trial rights based on the following:

(a) A denial of the opportunity to cross-examine witnesses and the limitation of an expert witness' evidence;

(b) Acceptance of hearsay evidence in the form of the satellite vehicle tracking reports;

(c) The trial judge's conduct;

(d) Invalidity of the search and seizure warrant in respect of Quarry Hoek.

The first two of these are closely connected and can conveniently be dealt with together.

The satellite tracking reports

[24] An important component of the State's case against the appellants was the vehicle satellite tracking reports, which linked the drivers with the diversion of their tankers to Zutundu and Quarry Hoek in all but two instances, namely counts 25 and 26, where the vehicles were observed at Quarry Hoek. The vehicle tracking reports were highly contested, as the appellants attacked their reliability and contended that this evidence should have been excluded as hearsay. The

State's main witness in respect of the Quarry Hoek counts, Mr Peach, relied heavily on the tracking reports.

[25] That evidence is summarised below. Experts from various companies whose tracking devices had been fitted on the tankers involved in each of the alleged thefts testified about the workings of the tracking systems.

[26] The Wardens tankers were involved in counts 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24. They were fitted with tracking devices managed by Global Telematics. Mr Desmond Naidoo, its fleet manager, testified about the satellite tracking system, its workings and reliability. The GPS unit on the vehicle detects a locational signal[3] from at least three satellites circling the earth and transmits this information to the tracking company via GMS.[4] This enables the tracking company to identify the location of the vehicle at any time to an accuracy of 10 metres. Mr Naidoo testified that the extracted information in respect of the tankers' movements related to these twelve counts showed that these tankers were indeed at the Quarry Hoek farm on the dates and times indicated in the reports. On each occasion they spent a few hours at Quarry Hoek before departing for Secunda. In four instances the extracted information showed that from Quarry Hoek farm, the tankers went to a truck stop in Secunda and never went to Sasol's tank farm. In one instance a tanker arrived at the weighbridge bay, but did not go to the off-loading bay and returned to the truck stop in Secunda.

[27] Counts 12, 34, 35, 36, 40 and 41 involved tankers belonging to Freight Dynamics. Those tankers were fitted with Comtech[5] tracking devices. Mr Joao Pedro Pedregal, an expert in satellite tracing of motor vehicles employed by

[3] Consisting of a longitude and latitude.
[4] Google Mobile Services.
[5] Comtech was taken over by Altech Netstar in 2008 and Mr Pedregal then worked for that company.

Altech Nestar, testified about how the satellite tracking of vehicles worked. The only difference between his description and that of Mr Naidoo was that the Comtech system required the GPS device on the vehicle to detect locational signals from four satellites instead of three. All the information received from the unit installed on a particular vehicle was sent to the client through a power track light software program. This enabled the client to view the vehicle movements in real time. The software also allowed the client to view trip replays so that all position data on any trip was available. In the event of the vehicle stopping, the program recorded the duration of the period before the next occasion the ignition was switched on.

[28] Mr Pedregal testified that it was impossible for the client to manipulate any information sent by the tracking unit to the hub server and from the hub server to the client server. Mr Pedregal also attested to the reliability and accuracy of the system. Based on the above considerations, his conclusion was that the tankers in these counts were at Quarry Farm on the dates and at the times reflected in the extracts produced in respect of those tankers.

[29] Counts 30, 31, 32 and 33 involved tankers belonging to Logistics. The tankers were fitted with tracking devices by C-Track Digital. Mr Eugene van Niekerk attested to the accuracy and reliability of the tracking system. He testified about movement reports in respect of the tankers involved in the counts referred to above, during the period 26 November to 6 December 2006. The extracted information showed that between 29 November and 4 December 2006 the four tankers involved in these counts entered Quarry Hoek at various times en route from IVS Durban and spent a few hours there before departing for Sasol Secunda tank farm.

[30] In respect of the Zutundu counts, the investigating officer, Captain Schutte, obtained two compact discs from the tracking company for the vehicles involved in these counts and they were analysed by Constable Ravat. He had plotted the location of the four corners of the walled homestead area on Zutundu using a GPS device and his analysis showed that all the vehicles in question in relation to those counts had diverted to Zutundu from their intended route from Secunda to the Engen depot at Mokopane.

[31] None of these witnesses were cross-examined, nor was their evidence challenged. As the appellants were represented through Legal Aid SA (Legal Aid), they had to obtain approval from Legal Aid to engage the services of satellite tracking expert. When the State's expert witnesses testified, counsel had not identified a potential expert witness and that approval had not yet been given. Consequently, counsel for the appellants elected not to cross-examine those witnesses on the ground they needed an expert themselves in order to cross-examine effectively.

[32] Eventually the State closed its case on 26 February 2015. The appellants' application to recall the State's witnesses for cross-examination was refused. Mr Shone, the appellants' expert, testified from 26 to 27 March 2015, while the other expert, Mr Dormehl, delivered a report and testified on 17 and 18 February 2016. At the end of his evidence, a further application to recall the State's expert witnesses was refused. In the circumstances, it is not correct that the appellants' right to cross-examine the witnesses was denied. They elected not to do so, and allowed the State to close its case.

[33] It is no answer for the appellants to argue that they were dependent on Legal Aid for funding. What they needed to do was identify a suitable expert and then ask Legal Aid to provide funds to obtain a report from that expert on the

issues in the case. This they could have done immediately they received the contents of the docket, from which it would have been clear that the satellite tracking reports were to form the bedrock of the State's case. They elected not to do this, and waited until towards the closure of the State's case. And in the light of the evidence of their own expert witnesses, the trial court was correct in refusing the applications to recall the witnesses.

[34] None of the appellants testified in their own defence. To counter the State's tracking reports evidence, the appellants relied on the evidence of Mr Shone and Mr Dormehl. Mr Shone, a tachograph consultant, did not add any value to determining the issue of reliability of the tracking reports, as it was not his field of expertise. In response to a direct question on this aspect during cross-examination, he conceded that he was unable to testify on the reliability of the satellite tracking equipment. Furthermore, he was unable to testify as to how the satellite tracking system worked. All he did was compare some of the documents with a schedule prepared by Mr Peach and note some discrepancies. None of these was relied upon in argument. In light of the above, the court a quo was correct in attaching little value to his evidence.

[35] Mr Dormehl's evidence was tendered in support of an application to re-open the appellants' cases, both to receive his evidence and to enable the witnesses who had given evidence regarding the tracking devices and reports to be recalled for further cross-examination. The trial court refused the application on the basis that the evidence did not take the matter any further. The upshot of Mr Dormehl's evidence was that the tracking reports lacked credibility due to the unavailability of supporting documentation like monitoring software, installation certificates, etc; no records of regular maintenance of the devices; no proof of how data was stored for over a period of four years. As he expressed it in his report: 'There is no proof that industry standards were complied with at the time

of the alleged capturing of the data now sought to be introduced by the State'. He testified that the documents he referred to would only be called for by insurance companies if there was a dispute over the accuracy of information obtained from the device.

[36] Mr Dormehl, while admittedly an expert, did not address the fundamental issue of whether these particular tracker readings accurately reflected the movement of the vehicles in question. He raised a number of potential issues, such as the certification of the tracking devices. He gave evidence in regard to the way in which they could go wrong. However, none of that evidence indicated that any of the devices in issue in this case had in fact gone wrong. Unless and until it was put to any witness on behalf of the State that the information they were deriving from the tracking devices was incorrect, and that the tankers in question had not diverted from their required routes, technical evidence of how such devices could go wrong was neither here nor there. In the absence of any proper challenge to the correctness of that evidence the issue was academic.

[37] These substantial difficulties with Mr Dormehl's evidence are best illustrated by his assertion that in the absence of certain documents there was no evidence that the GPS devices were even installed on the vehicles mentioned in the different counts. However, no basis existed for thinking that the evidence of tracking reports had been fabricated, which was the necessary corollary to his view. His approach depended on the absence of certain documents he regarded as necessary, but whose relevance he failed to demonstrate.

[38] Even if taken at face value,[6] we are of the view that objective facts were proved that served as sufficient safeguards to accept the reliability of the tracking reports. In this regard we consider the testimony of the two s 204 witness, Messrs

Mofokeng and Mahosane, the truck drivers in respect of counts 30 and 33, to be useful. As would become clear later, the tracking reports located their presence at Quarry Hoek on the dates and times they testified to have been there. So the reports were accurate as far as these two drivers were concerned. Furthermore, Mr Seaman's evidence is important. We have already mentioned how he was led to Quarry Hoek with precision by the co-ordinates obtained from the replay of the tanker movement involving appellant 3 on 14 December 2006.

[39] Furthermore, Mr Deon Pienaar, a covert surveillance operator did a surveillance of Quarry Hoek over two days in August 2006 on behalf of Sasol. He observed two Lobtrans tankers entering Quarry Hoek and took photographs. Similarly, the lead to Zutundu was as a result of the satellite tracking reports. And the fact that stolen petroleum products which had been loaded in those tankers were found on both farms, underlines the reliability of the reports.

[40] Most importantly, if the version of appellants 3, 4, 6 and 9 had been that they never diverted to Zutundu or Quarry Hoek, they could simply have instructed their counsel to put that to the witnesses during cross-examination. It would have been put that the tracking data must be incorrect because the instructions from the accused were to the effect that the tankers had not deviated as alleged. They never did. Furthermore, those appellants elected not to testify, which is their constitutional right. But it is not without consequences. As is trite, the fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the

evidence. [7] Given all the above considerations, we conclude that the reliability of the satellite tracking reports was established.

[41] There remains the contention that the contents of the tracking reports constitute hearsay evidence. We do not agree. The contents of the reports merely reflect the locational data that was transmitted from the GPS transmitter fitted to each vehicle. That data identifies the position of the vehicle from time to time during the journey in question. It is the product of a measuring device in the same way that a thermometer reflects body temperature or a barometer air pressure. The information it produces is not hearsay. It is a matter of fact and admissible as such. That is not to say that it must be accepted at face value. One can readily imagine circumstances in which any measuring device may be defective or provide inaccurate information, but once it has been shown on a prima facie basis to be doing its job properly, the absence of any basis for thinking that the information it provides is inaccurate may mean that the correctness of that information is established beyond reasonable doubt.

[42] One related point raised in the heads of argument, but not developed, was that the trial judge failed to recognise that the contents of the tracking reports constituted 'data messages in terms of the definition in s 1 of the Electronic Communications and Transactions Act 25 of 2002 (the ECTA). We say that this point was not developed because we were not told why this made any difference to their admissibility. In terms of s 15(1)(*a*) of the ECTA the rules of evidence must not be used to deny the admissibility of a data message on the mere grounds that it is constituted by a data message. In terms of s 15(2) it must be given due evidential weight and s 15(3) prescribes certain factors to which regard must be had in considering the message's evidential weight. We have already considered

[7] *Osman and Another v Attorney-General, Transvaal* [1998] ZACC 14; 1998 (4) SA 1224 (CC); 1998(11) BCLR 1362 (CC); *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36; para 25.

the relevant factors and concluded that the tracking reports were reliable. Therefore, there is nothing in this point. For those reasons the first two grounds of appeal must fail.

The trial judge's conduct

[43] It was submitted that the trial judge, in breach of the norms of permissible judicial conduct, violated the appellants' fair trial rights by unjustifiably interrupting the appellants' counsel throughout the trial, thus hindering their defence. The incidents relied upon in the heads of argument primarily involved attempts by counsel to persuade the judge that there should be a trial within a trial on undefined issues of admissibility. On other occasions the complaint was that their endeavours to obtain an expert witness were stultified by the judge. We have already dealt with that and the judge did not in fact prevent them from leading the expert evidence they procured. Their difficulties more probably stem from the absence of any respectable evidence to contradict that led on behalf of the State. Be that as it may, the judge was entitled, especially in view of the protracted nature of the proceedings, which had been going on for nearly six years, to be firm.

[44] However, there are several incidents on record which show that on a few occasions the judge was impatient, sarcastic, overbearing, brash and downright rude towards counsel. This is especially so in respect of Mr Nkhahle. Throughout the record, it is evident that the judge did not think much of counsel's abilities or experience. This conduct was unfortunate. To his credit, Mr Nkhahle showed remarkable resilience. Irrespective of the length of the trial, the irritations and the inevitable frustrations, it is important for a judge to maintain a dignified and detached disposition. Having said that, we do not think that the conduct of the judge was so gross as to render the appellants' trial unfair. The appellants were afforded every opportunity to advance their defence over a protracted period.

Witnesses were cross-examined at length without it being suggested at any stage that their evidence was erroneous, deliberately untruthful or inconsistent with a version to be advanced by any of the accused. Taking the record as a whole, the appellants had a fair trial.

The search and seizure warrant

[45] The warrant, in respect of Quarry Hoek, was issued by Colonel Tsatsa on 15 December 2006. It is common cause that the warrant was issued irregularly. It was issued to the investigating officer on his mere say so, without a statement on oath from a person who might have reported the matter to him. No specific crime, nor names of possible suspects, was mentioned in the warrant. What the trial court had to determine was whether, notwithstanding the irregularities, the evidence secured pursuant to the search fell to be excluded in terms of s 35(5) of the Constitution. That section provides that 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. This is not an absolute exclusionary provision for evidence obtained in violation of an accused's constitutional rights.

[46] The next enquiry is whether the admission of the evidence would render the trial unfair or otherwise be detrimental to the administration of justice. In *Dos Santos and Another v The State*[8] a warrant was defective as the regional magistrate who issued it was not a magistrate as defined for the purposes of s 21 of the CPA. It was concluded under the circumstances, that the evidence should not be excluded. Ponnan JA explained (at paras 23 and 24):

'Here the investigating team did not act in flagrant disregard of the first appellant's constitutional rights. On the contrary, they sought judicial authority for their conduct. That

[8] *Dos Santos and Another v The State* [2010] ZASCA 73; 2010 (2) SACR 382 (SCA); [2010] 4 All SA 132 (SCA).

judicial imprimatur was an attempt to uphold the law in spirit and letter. None of those executing the warrant knew that it suffered a defect...

In those circumstances it is plain that the task team was not attempting to garner any unfair advantage for themselves. Rather it plainly was an endeavour to protect the interests of the first appellant. For that they should be commended, not penalised by having the evidence that has been secured pursuant to that warrant excluded. To exclude the evidence in those circumstances would not conduce to a fair trial. Nor for that matter would it serve to advance the administration of justice. To exclude the evidence simply because the wrong magistrate had been inadvertently approached would run counter to the spirit and purport of the Constitution. In our view, on the facts of this case s 35(5) could hardly countenance the exclusion of the impugned evidence. Accordingly the conclusion reached by the trial court on this score cannot be faulted.'

[47] In *S v Van Deventer and Another*[9] the validity of a warrant issued in terms of s 74D of Income Tax Act 58 of 1962 was attacked on the ground that it was issued in terms of the wrong statute. The court allowed the evidence seized pursuant thereto, after taking into consideration the following factors: that the documents seized constituted valuable evidence of the existence and extent of income tax evasions, and as such, the documents fell within the ambit of the warrant; that the evidence was obtained without any compelled participation by or conscription of appellants; that the violation of appellants' right was technical and not flagrant; that the officers executing the warrant acted bona fide; and that if the evidence would in any event have been discovered by lawful means, the exclusion thereof would generally be detrimental to administration of justice.

[48] *Dos Santos* and *Deventer* are illuminating, and the general principles distilled from them apply with equal force to the present case. It must be borne in mind that the search and seizure in this case yielded real and valuable evidence of a vast network of theft of petroleum products, as well as actual products stolen

[9] *S v Van Deventer and Another* 2012 (2) SACR 263 (WCC).

from Sasol. To exclude such evidence would be detrimental to the administration of justice. The farm itself had been abandoned by Mr Tiry and Ms Sangweni, who had decamped and gone into hiding. Thus, although the trial court admitted the evidence on an incorrect basis, the decision was ultimately correct. Despite the irregularity in issuing the warrant, the evidence obtained pursuant to its execution was correctly accepted.

The individual charges

[49] Challenges were raised to the conviction of Ms Sangweni on all charges; to the convictions on the theft counts of the two Sasol officials, Messrs Sithole (Appellant 7) and Nkosi (Appellant 8) and consequently their conviction on count 2 under POCA; to the conviction of Mr Nyamusa (Appellant 4) on counts 5, 7, 9 and 10 in relation to the Zutundu counts; and the other drivers (Appellants 3, 6 and 9) in respect of all the theft counts on which they were convicted and consequently their conviction on count 2 under POCA. Mr Tiry did not advance a challenge to his conviction on any specific count as opposed to the general challenges already disposed of. In preparing the appeal, however, it became apparent to the members of the court that there were certain counts to which no specific challenge had been raised where the convictions could not be upheld. We will deal with these, which may to some extent overlap with the individual cases raised in the heads of argument, before dealing with Ms Sangweni's arguments and some more general issues regarding the POCA counts.

Count 4

[50] This was one of the Zutundu charges, the general *modus operandi* of which has been described. In all of them the basis for the convictions was the following. Mr Tiry was proved to have been operating an unlawful tank farm at Zutundu, by purchasing stolen petroleum products from tanker drivers and re-selling them at

prices less than the regulated price. There was evidence that some at least of the stolen product had been destined for the Engen depot in Mokopane as demonstrated by the shortfall established to exist in the latter's tanks. On counts 4 to 11 there was evidence that tankers carrying petroleum from Secunda to the Engen depot diverted from their prescribed route to Zutundu and remained there for significant periods of time. In the absence of any legitimate reason for them to do so the inference was that all or part of the contents of these tankers, was stolen and sold to Mr Tiry. This evidence raised a prima facie case and in the absence of any lawful explanation for the tankers going to Zutundu it was a proper inference that the drivers and Mr Tiry were parties to the theft of all or part of the contents of the tankers. And as already noted no innocent explanation was forthcoming.

[51] The State's problem in relation to count 4 is that according to Constable Ravat the tanker in this case was only on the farm at Zutundu for 8 minutes and 50 seconds. The evidence of Mr Peach was that this would not provide anything like sufficient time for the entire contents of the tanker, or even a substantial portion thereof, to be discharged. The driver is not identified and Mr Tiry's silence in respect of this count alone is understandable. The possibility exists that the tanker went to Zutundu dishonestly, perhaps to discuss the possibility of stealing and selling a later consignment, but without any of its contents being stolen. According to Mr du Preez's schedule, the driver was a regular driver on this route. In those circumstances, while the visit to Zutundu was highly suspicious the evidence was insufficient to establish theft. The convictions of Mr Tiry and Ms Sangweni on this count must be set aside.

Count 8

[52] The problem with this count, which also relates to Zutundu, is that Constable Ravat gave no evidence in regard to it. While the tracking reports in the record show that the vehicle visited the tank farm at Zutundu, there was no evidence of how long it remained there. As with count 4, while the visit to Zutundu was highly suspicious the evidence was insufficient to establish theft. The convictions of Mr Tiry and Ms Sangweni on this count must be set aside.

The Quarry Hoek counts

[53] In respect of the Quarry Hoek counts, as already stated, the State relied on the evidence of Mr Peach. It is necessary to preface the analysis of his evidence with the following observation. His was not direct evidence, but involved an analysis of tracking records against the consignment documents and the drawing of conclusions from those documents. The drawing of those conclusions was a matter for the court, not Mr Peach.[10] He started from a premise that any tanker driver who visited Quarry Hoek was a thief who stole the consignment of fuel they were transporting. In doing so he failed to have regard to any other possibilities. Also, in some respects his evidence was not supported by the documents to which he referred.

[54] The key to Mr Peach's conclusions was the tracking reports. Given the nature and *modus operandi* of Mr Tiry, where the tracking reports demonstrated that a fully-laden vehicle en route to Secunda diverted and went to Quarry Farm, it was a legitimate inference that it did so for the purpose of selling the cargo to Mr Tiry. That sufficed to call for an explanation for the diversion other than theft of the product and, in the absence of an innocent explanation, the prima facie inference might harden into proof beyond reasonable doubt. However, it was only

[10] *PriceWaterhouseCoopers Inc v National Potato Cooperative and Another* [2015] ZASCA 2; [2015] 2 All SA 403 (SCA) paras 78-95.

where the tracking reports provided the necessary support that this would be the case. For that reason, the evidence on counts 19, 20, 22, 23, 25, 30, 33, 34, 35 and 37 requires closer scrutiny.

Count 19

[55] In count 19 the driver was Mr Buthelezi (Appellant 6). The State's case was that on 13 October 2006, having uplifted petroleum product from IVS in Durban, and while en route to Secunda tank farm, he deviated to Quarry Hoek and decanted the product there, before proceeding. At Secunda documents were falsified to create an impression that the product was off-loaded there, whereas, this was not true.

[56] According to the IVS weighbridge ticket, the tanker left IVS in Durban at 01h50 am on 13 October 2006. Mr Peach said that Sasol's security documents showed that it arrived at the tank farm at Secunda at 19h36 on 13 October 2006 and according to the offloading statement had been fully offloaded by 20h00. However, the goods receipt reflected that the tanker left the tank farm at 21h05. According to Mr Peach, it was impossible for the tanker to have been fully off-loaded by 20h00 if it arrived at 19h36. In cross-examination it was suggested to Mr Peach that the offloading statement, which should have been completed at the beginning of the offloading operation and the declaration, which should have been completed at the end of the offloading operation, were frequently completed at the same time. Whilst he rejected the suggestion it does not strike us as implausible.

[57] Apart from the off-loading statement the remaining documents were not inconsistent with delivery of the product at Secunda. The other entries were correct, including the seal numbers on the offloading statement, according to the IVS documents. The only exception was the discharge declaration reflecting that

the off-loading took only less than half an hour. That was the high water mark of the State's case. However, if one accepts the possibility that the tanker left the tank farm at 21h06, this would have given sufficient time to discharge the entire consignment. It is therefore plausible that the high-pressure official recorded the time incorrectly in the discharge declaration. Another consideration is that if there was theft of the product, Mr Peter Mbatha and the official who prepared the declaration, one Moses, would have been charged. They were not. Mr Peach's evidence was that for theft of consignments to the Sasol Secunda tank farm to take place, the cooperation of the weigh-in and off-loading officials was necessary.

[58] What is more, the allegation that the tanker driven by Mr Buthelelzi was at Quarry Hoek en route to Secunda, was not supported by the tracking records he relied on. They showed the tanker leaving Secunda at about midnight on 12 October 2006 and arriving at Quarry Hoek at 02h40. It remained there until 02h56, before travelling to a spot southwest of Warden on the R714. It was shown as leaving there at about 06h30 and the next relevant entry shows it at the IVS premises in Durban at 22h14 on Thursday 12 October 2006. That is consistent with the IVS loading documents for the vehicle's departure from Durban, but it had no relevance to that journey.

[59] From the tracking reports, it is apparent that the trip Mr Peach relied on, was an in-bound trip from Secunda to Durban on Thursday 12 October and not a trip from Durban to Secunda on Friday 13 October 2006. The next document in the record related to another return journey from Secunda leaving there on the evening of 13 October 2006. Once again it tracked the return journey of the tanker travelling generally south and east from Standerton to Harrismith with a half an hour stop, possibly at Quarry Hoek, before continuing to Harrismith. This did not reflect the journey from Durban to Secunda and accordingly did not prove that

the tanker entered Quarry Hoek on its way from Durban to Secunda. The tracking reports which formed the basis of Mr Peach's testimony do not relate to the critical period, being from the early hours of the morning on 13 October until 14 October 2006. Mr Peach's conclusion that the tracking reports showed that the tanker was on the farm Quarry Hoek en route Durban to Secunda cannot possibly be correct. Both visits to Quarry Hoek reflected on the tracking records were on return journeys from Secunda to Durban.

[60] We have no idea why Mr Buthelezi went to Quarry Hoek on these occasions. All we know is that on 13 October he was shown as discharging product at Secunda. One can only speculate about the purpose of his stop-over at Quarry Hoek on his journeys back to Durban from Secunda. The charge of theft was not proved and both he and Mr Tiry and Ms Sangweni should have been acquitted on this count.

Counts 20, 22 and 23

[61] In count 20 Mr Mthetwa, formerly appellant 5, loaded a consignment of unleaded petrol from IVS in Durban and set out on a journey to Sasol Secunda on 23 October 2006 at 04h04. The goods receipt completed by a dispatch controller mentioned that the tanker arrived at the tank farm on 24 October 2006 at 03h17 and departed at 04h49. The off-loading statement at Sasol tank farm stated that the product was off-loaded on 24 October 2006 at 03h40. A declaration was made that at 03h40 the tanker had been fully off-loaded and could leave the premises empty.

[62] According to Mr Peach, the tanker visited Quarry Hoek on 23 and 24 October 2006. He based his conclusion on a tracking report. That report was not particularly helpful. It did not have particulars of the entire journey and did not identify any particular location. The entry that Mr Peach relied on showed

that the tanker was stationary on 23 October 2006 from 21h54 and resumed its journey the following morning at 00h22. It is not clear on what basis Mr Peach concluded that the place where the tanker had stopped was Quarry Hoek. The report contained no co-ordinates that would identify the spot. He criticised the times shown on the off-loading report in Secunda saying that it was impossible to discharge a full cargo in the time available, but made no allowance for human error. In our view the evidence fell short of sustaining a conviction.

[63] The same difficulties exist in regard to the tracking reports for count 22, which involved Mr Sithole (Appellant 7) and the original accused 8 who died in the course of the trial, and count 23, involving a driver and tank farm officials not charged, where similar set of facts obtained. Unless it could be shown that the tanker had been to Quarry Farm it could not be inferred that its cargo had been stolen there or that the documents prepared by Mr Sithole were designed to conceal the theft. Accordingly, on these three counts Mr Tiry and Ms Sangweni should have been acquitted, and on count 22 Mr Sithole should have been acquitted.

Count 25

[64] Count 25 involved a Lobtrans tanker engaged by BP South Africa to transport low sulphur diesel from IVS Durban to its depot in Waltloo, Pretoria on 14 October 2006. The driver was Mr Joseph Ramogale, who was not charged. According to Mr Peach, the tanker left IVS in Durban and en route entered Quarry Farm at 17h37 and departed at 17h57. There are two difficulties with this count. First, it is doubtful that any theft of fuel could have been completed in just less than 20 minutes that the tanker had stopped there. In any event, there is no evidence that the tanker arrived without its cargo or with a contaminated product at Waltloo, Pretoria. In fact, there are no delivery documents at all and no evidence of documents being falsified upon arrival of the tanker at its destination.

The prosecutor put it to Mr Peach that the documents were administrative and 'would not implicate any of the accused before court' and Mr Peach agreed. The court asked Mr Peach whether he knew of the procedures followed by Lobtrans. His answer was that he was not familiar with its procedures. For all these reasons the convictions of Mr Tiry and Ms Sangweni on this count are not sustainable, and should be set aside.

Count 30

[65] In count 30 the driver was Mr Frans Mofokeng, a witness warned in terms of s 204 of the CPA. He loaded a 777 Logistics (Pty) Ltd tanker at IVS Durban and set out to Secunda on 28 November 2006. Mr Mofokeng testified that he had heard about Mr Tiry buying petroleum products from drivers. This, according to him, was common knowledge amongst the drivers. Someone had told him that R70 000 would be paid for the product in his tanker. He therefore diverted to Quarry Hoek on 28 November 2006 en route to Secunda, intending to sell his consignment to Mr Tiry. However, he found a significant queue, and was prevented from speaking to Mr Tiry in person. Anyway, he said, it would take too long to decant his load. As he could not wait that long, he left without doing so. Mr Mofokeng's evidence of the tanker's presence at Quarry Hoek is corroborated by the tracking reports, which show that the tanker arrived there at 23h42 on 28 November 2006 and made start stop movements at a very slow pace until 5h50 on 29 November 2006 when it left.

[66] No inference that petrol was in fact stolen, can be drawn in this instance, as there is a plausible explanation by Mr Mofokeng as to why he eventually left without decanting his consignment. Given that the court a quo accepted his evidence, it must a fortiori be accepted that no petrol was stolen at Quarry Hoek. Accordingly, the convictions against Mr Tiry and Ms Sangweni must be set aside.

Count 33

[67] This count also involved a witness warned in terms of s 204, Mr Eric Mahosane. He loaded a Logistics tanker with reformat at IVS in Durban on 4 December 2006. He diverted to Quarry Hoek with the intention of selling his consignment to Mr Tiry, whom he had never met before, but had spoken to telephonically. He testified that when he was about to discharge his tanker the pumps stop working. They could not be fixed, and a second pump would also not work. In the result no petrol was in fact stolen. The tracking report showed that the tanker entered Quarry Hoek on 4 December 2006 at 23h27 and left the following morning at 03h51.The State conceded that because there was no petrol stolen, the conviction on this count should be altered to one of attempted theft.

Count 34

[68] The driver in count 34 was Mr Tshabalala (Appellant 3). Mr Peach testified that the tanker loaded product at IVS in Durban, proceeded to Sasol in Secunda and on its return entered the farm Quarry Hoek for a period of a little over one hour. The convictions are not supported by the documentation – the IVS weighbridge ticket and Sasol's non-commercial goods receipt. The former shows that the tanker loaded reformate on 23 November 2006 at IVS and left at 12h38. Sasol's goods receipt shows that the tanker arrived at the tank farm in Secunda at 09h00 on 24 November 2006 and left at 11h26 the same day. Although there are discrepancies in all the weights shown on that document, nothing really turns on this as they fell within the allowable 500-kilogram tolerance. The tanker's movements described above are consistent with the tanker having been driven directly from Durban.

[69] The tracking reports are of no assistance in this regard. The first one reflects the tanker at Secunda on 22 November 2006, the day before it left Durban on the journey in question. It appears to relate to a return trip from Secunda to

Durban arriving at about 16h06 on that day. The second report, dated 24 November 2006, is also a return journey. It shows the tanker being stationary, or travelling a minimal distance, between 10h24 and 11h47 on that day, presumably in Secunda. It then travelled 180 kilometres, which corresponds with the distance between Secunda and Warden. The plot in the record shows it in the middle of Warden, presumably at the truck stop and then leaving the town and travelling northward. Eventually, it ended at Quarry Hoek at 20h00 and left an hour later.

[70] The inference that the State asked the court to draw in respect of the Quarry Hoek counts should be borne in mind. It was that loaded tankers en route from Durban to Secunda, which diverted to Quarry Hoek before resuming their journeys to Secunda, must have decanted their loads into the tanks at Quarry Hoek and replaced them with water or some other substance to deceive the officials at Sasol. Indeed, where it was established that a tanker entered Quarry Hoek en route to Secunda from Durban, that inference could legitimately be drawn, calling for a rebuttal. However, a similar inference cannot legitimately be drawn in respect of a reverse trip, ie a diversion to Quarry Hoek on a trip from Secunda to Durban.

[71] To draw a legitimate inference would require the tanker to enter and leave Sasol without offloading at all. The State's case, it must be remembered, was that the drivers had developed a method to disguise the fact that the petroleum or diesel had been stolen on the way to Sasol. Given that fact, it is hard to think of a reason why a driver would depart from that practice, complete his journey, obtain fraudulent documents and then return to perpetrate the theft. For these reasons, the convictions of Mr Tiry, Ms Sangweni and Mr Tshabalala on this count must be set aside.

Count 35

[72] Count 35 involved Mr Tshabalala (Appellant 3) as the driver and Mr Sithole (Appellant 7) as the Sasol official who signed a receipt for the goods. The IVS dispatch note shows that Mr Tshabalala left Durban on 25 November 2006 at 04h35. This was shortly after his return from the journey in relation to count 34. Mr Peach's conclusion from the documentation was that the vehicle entered Quarry Hoek at about 20h00 on the evening of 25 November 2006 and left at approximately at 21h08. This was based on two tracking reports. However, those tracking reports are dated 24 November 2006, which is the previous day and a comparison with the similar reports in count 34 reveals them to be the same documents. The tracking report for 25 November 2006 does not show a significant stop in or around Warden at any time on 25 November 2006. In fact, those reports do not reflect the tanker going beyond Standerton. There are no offloading reports at Secunda, but the goods receipt reflects the tanker as having arrived at the Sasol tank farm at 6h00 on Sunday 26 November 2006 and left at 8h17 the same day. That would be consistent with the vehicle having spent some time in Standerton, before travelling on to Secunda. The court a quo's conclusion that the tanker entered Quarry Hoek on 25 November 2006 and never entered the Sasol tank farm is not sustained by the evidence. The convictions of Mr Tiry, Ms Sangweni, Mr Tshabalala and Mr Sithole must similarly be set aside.

Counts 42, 43 and 45

[73] Mr Tiry and Ms Sangweni were discharged on counts 27, 28 and 29 at the close of the State case in terms of s 174 of the Criminal Procedure Act 51 of 1977. On counts 42, and 43 the only evidence against them consisted of two unexplained documents that were presumably found when Mr Tiry's premises were searched. No evidence was led to explain where they were found; what they were about; or why they were connected to Mr Tiry. On their face they referred

to sales of petrol and paraffin, the latter a commodity in respect of which there was no evidence whatsoever of theft. The trial court did not mention them in its judgment or furnish any reasons for holding that they provided evidence of theft on the part of Mr Tiry and Ms Sangweni. They were also convicted on count 45 as was Mr Buthelezi (Appellant 6), but the State accepted that it led no evidence, on this count. The convictions on each of these counts must be set aside.

Sasol: Counts 12, 13, 14, 15, 16, 17, 18, 21, 24, 26, 31, 32, 36, 37, 38, 39, 40, and 41

[74] Below is a summary of the evidence in respect of the rest of the counts. In each case it sufficed to establish a prima facie case of theft involving the driver and the relevant off-loading official at Secunda. In none was an innocent explanation forthcoming. Accordingly, the relevant accused were properly convicted.

[75] Count 13 involved Mr Sithole (Appellant 7). A Wardens tanker driven by Mr Aubrey Mzimela loaded unleaded petrol at IVS Durban and left for Secunda on 18 August 2006 at 10h12. According to the goods receipt signed by Mr Ferguson Mbuthi as the dispatch officer, the tanker arrived at the tank farm at 01h41 on 19 August 2006. The off-loading statement completed by Mr Sithole did not reflect the time of the off-loading. However, he signed a declaration that the tanker had been fully off-loaded at 02h00 and could leave the premises empty. However, the tracking records showed that the tanker entered Quarry Hoek at 22h33 on 19 August 2006 and left the following morning, 19 August 2006 at 00h36 and arrived in Secunda at 04h06. The conclusion by Mr Peach was that the tanker was never at the off-loading bay, and must have come empty, as at the time reflected in the discharge documents as being when the tanker was at the Sasol tank farm, it was in fact at Quarry Hoek

[76] Count 14 involved Mr Buthelezi (Appellant 6) as the driver for a Wardens tanker, and Mr Nkosi (Appellant 8) as the weighbridge official at Sasol tank farm in Secunda. According to the IVS document, the consignment was loaded on 20 August 2006 and left Durban at 07h50. According to the off-loading statement at Sasol tank farm, signed by Mr Nkosi, the tanker was off-loaded at 00h15 on 22 August 2006. Also at 00h15, he made a declaration to the effect that the consignment had been fully off-loaded at high pressure tank farm and was certified to leave the premises empty. However, the tracking report showed that the tanker entered Quarry Hoek farm at 18h56 on 21 August 2006 and left at 20h40. It arrived at Secunda at 23h13 but never entered the tank farm. Instead, it parked at a truck stop in town until 06h45 on 22 August 2006. The upshot was that the documents certifying the tanker to have entered the tank farm were falsified.

[77] In count 15, a Wardens tanker driven by Mr Alpheus Mabaso loaded petrol at IVS Durban and left for Sasol Tank farm, Secunda at 20h43 on 22 August 2006. Mr Sithole was the off-loading official at Secunda. According to the goods receipt, completed by the former accused 8, now deceased, the tanker arrived at Secunda at 14h48 on 24 August 2006. The off-loading statement reflected no time of the off-loading, only the date of 24 August 2006. In his capacity as the high pressure official, Mr Sithole signed a declaration that the tanker had fully off-loaded the consignment and could leave the tank farm at 15h00 on 24 August 2006. This was merely 12 minutes after the stated arrival time of 14h48 stated above.

[78] The tracking reports showed that the tanker had, on 21 August 2006, en route from Durban to Secunda, entered Quarry Hoek at 19h30 on 23 August 2006 and left at 21h35. It arrived in Secunda the next morning at 07h24 but went to the

truck stop in town, and remained there until 19h02 when it undertook another trip to Durban. It never entered the Sasol Tank farm on its arrival in Secunda.

[79] Count 16 involved a driver and security officials who were not charged. Mr Alpheus Mabaso, on 23 October 2006, drove a Wardens tanker from IVS Durban, loaded with unleaded petrol and set out to Secunda tank farm. The tracking reports showed that en route to Secunda from Durban, the tanker entered Quarry Hoek at 19h13 and remained there for over two hours until 21h20. The goods receipt at Secunda tank farm, signed by Mr Jack Manamela, reflected the arrival time at Secunda tank farm as 01h26 on 24 August 2006. The off-loading statement reflected the off-loading time as 02h10. A security officer, Mr Mofokeng, declared that at 02h10 the tanker had been fully off-loaded and could leave the premises empty. The goods receipt reflected that the tanker left the tank farm at 03h17 on 24 August 2006.

[80] In count 17, a Wardens tanker driven by Mr William Ngqekethe loaded unleaded petrol at IVS in Durban. The IVS weighbridge ticket reflects that the tanker was sealed with seals numbered A047480 to A 047492 by Intertek. The tanker left for Secunda at 02h58 on 23 August 2006. The goods receipt at Sasol Secunda tank farm reflected that the tanker arrived there at 13h51 on 24 August 2006. Mr Sithole completed an off-loading statement in which he, among others, confirmed that the tanker seal numbers corresponded with the seal numbers as sealed by Intertek at IVS. In his capacity as the high pressure official, he also signed the declaration that the tanker had been fully off-loaded at 15h00 on 25 August 2006 and was ready to leave the premises empty.

[81] The tracking reports showed that the tanker, en route from Durban, entered Quarry Hoek at 21h59 on 24 August 2006 and left the following morning,

25 August 2006, at 03h59. The report further showed that the tanker drove to Secunda, but never entered the tank farm.

[82] On this count, Mr Peach also testified about a seal with number A047481 he discovered at Quarry Hoek on 27 November 2007. On that occasion he had accompanied the investigation officer to the farm to load product for testing. He concluded that the seal was part of the seals used by Intertek when the tanker left loaded at IVS in Durban. His conclusion was therefore that the off-loading statement that the tank number corresponded with the seal numbers as sealed by Intertek at IVS, could not be true and was falsified.

[83] Count 18 also involved a driver and security officials who were not charged. Mr Branty Ntuli drove a Wardens tanker on 26 August 2006, loaded with unleaded petrol, from IVS in Durban and set out to Secunda tank farm at 18h40. The goods receipt completed by dispatch controller, Mr Peter Mbatha, showed that the tanker arrived at the tank farm at 10h52 on 27 August 2006. The off-loading statement completed by Mr TA Letebele reflected the off-loading time as 12h35. The same time is reflected as the time when the tanker was declared fully off-loaded and ready to leave the tank farm empty. The goods receipt reflected that the tanker left the tank farm at 14h24, without any explanation for it remaining there for two hours after discharge was complete. The tracking reports showed that the tanker entered Quarry Hoek on its way to Secunda at 03h24 and left at 04h04. From there it ended at Roberts Drift near Meyerville. It never entered the tank farm at Secunda.

[84] Count 21 involved the deceased appellant 5 as the driver of a Wardens' tanker which, on 25 October 2006 at 07h56 left IVS Durban after loading petrol, destined for Sasol Secunda tank farm. According to security documents completed at the tank farm, the tanker arrived on 26 October 2006 at 03h01 and

was fully off-loaded by 03h30, which according to Mr Peach, was ‘impossible’. To fully off-load a tanker, he explained, normally took over an hour. The tracking report showed that the tanker entered Quarry Hoek en route to Secunda on 25 October 2006 at 21h21 and left at 00h09 the morning of 26 October 2006.

[85] Count 31 involved Mr Nkosi (Appellant 8) and Mr Moisi (Appellant 9). The latter was a driver for Logistics. On 28 November 2006 he loaded reformate (octane 95) from IVS Durban. The goods receipt at Sasol tank farm in Secunda completed by the dispatch controller, showed that the tanker arrived at 06h40 on 29 November 2006. The off-loading statement was completed by Mr Nkosi, who to the effect that the truck was fully off-loaded at 06h50. A Mr Letebele declared that the tanker was cleared to leave the premises empty, at the same time, ie 06h50. The tracking reports showed that the tanker entered Quarry Hoek at 00h12 on 29 November 2006 and left at 03h50. Appellant 8 (Mr Nkosi) was the high pressure official.

[86] Messrs Nkosi and Moisi was also involved in count 32. He loaded reformate octane from IVS in Durban on 30 November 2006 and left for Secunda tank farm at 14h38. The goods receipt reflected the tanker’s arrival time as 06h51 the following morning. The off-loading statement completed by Mr Nkosi reflected the off-loading time as 07h00 on 1 December 2006. The time on the declaration is reflected as ‘07h’, ie no indication as to how long after 07h00. The goods receipt reflected that the tanker left the tank farm at 08h18. The tracking report showed that en route to Secunda the tanker diverted to Quarry Hoek on 1 December 2006 at 00h21and left at 03h48.

[87] Count 36 involved appellants 3 and 7. Mr Buthelezi loaded a Freight Dynamic tanker with reformate at IVS Durban on 3 December 2006. The bulk tank inspection was conducted by Intertek, which sealed the tanker with ten seals,

with numbers from 089660 to 089669. The tanker left for Secunda at 23h55 on 3 November 2006. The goods receipt, signed by appellant 3 and a dispatch controller, reflected the arrival time at Secunda tank farm as 18h27 on 4 December 2006. The off-loading statement does not state the off-loading time.

[88] However, among other things, Mr Sithole, as the off-loading officer, certified he had compared the tanker number and seal numbers with those recorded at IVS. A security officer declared that at 17h45 the tanker had been fully off-loaded and could leave the premises empty. The goods receipt reflected that the tanker left the tank farm at 18h27 on 4 December 2006. Mr Peach testified that he visited Quarry Hoek on 30 July 2007 when samples of petroleum products found there, were to be obtained for analysis. While there, he discovered an Intertek seal with number A089662.

[89] Mr Peach concluded from this discovery that the tanker driven by Mr Buthelezi referred to earlier, was at Quarry Farm. According to Mr Peach, the statement by Mr Sithole that the seals were intact when the tanker was inspected on 4 December 2006, was false. Mr Peach further testified that no seals would ever have the same number. This was confirmed by Mr Eiston Naidoo, a coordinator at Intertek, who positively identified the seal as the one allocated by Intertek to the tanker.

[90] In count 37 Mr Tshabalala was again the driver of a Freight Dynamic tanker, destined for Sasol tank farm, Secunda on 5 December 2006. The goods receipt at Sasol stated that the tanker arrived at 04h39 on 6 December 2006. The off-loading statement by Mr Sithole (Appellant 7) reflected no time, but the off-loading declaration recorded that the tanker had been fully off-loaded at 04h50, that is, 11 minutes later, which was impossible. The goods receipt reflected that the tanker left the weighbridge at 05h42, but so did the security gate

checkout, which was two kilometres further away. However, the tracking report showed that the tanker was at Quarry Hoek at 23h10 on 5 December 2006 and left the following morning at 01h38. Mr Peach concluded from this that the documents had been falsified. The unexplained diversion for a significant period of time to Quarry Hoek, when taken in conjunction with the difficulties with the documents relating to the discharge process, was sufficient to make a prima facie case of theft of product and it being covered up by the falsification of documents. Yet neither appellant 3 nor appellant 7 gave evidence to provide an innocent explanation.

[91] Although this count involved appellants 3 and 7, as driver and off-loading official respectively, for some reason, there is no verdict on this count in respect of appellant 3. This is despite the fact that the court a quo dealt with this count in its judgment. However, Mr Sithole, who would have falsified the official documentation at the Sasol Secunda tank farm, was convicted of the count. One can only attribute the omission to inadvertence on the part of the learned judge. That is perhaps fortunate for Mr Tshabalala, but it is not a reason to disturb the conviction of Mr Sithole, or those of Mr Tiry and Ms Sangweni.

[92] In count 38 a tanker driven by Mr Tshabalala left IVS in Durban shortly before 09h00 on 7 December 2006. The tracking report showed that at approximately 20h00 on 7 December 2006 it passed Warden and continued on the road before doubling back to Quarry Hoek. There is no indication as to how long it remained there or what time it left. Despite Mr Peach baldly testifying that the tanker was on the farm for three hours, that was not supported by the documents. However, the tracking report for 8 December 2006 shows the vehicle underway shortly after midnight, having travelled 11 kilometres and slightly north of Warden. It then travelled 175.67 kms which is consistent with the distance between Warden and Secunda. It is shown on the security gate reports

as arriving at 03h14 and leaving at 04h21. The off-loading certificate said that it was completely off-loaded by 03h37, which was impossible. There was sufficient evidence to raise a prima facie case calling for an answer, but none was forthcoming.

[93] In count 39, a Freight Dynamics tanker driven by Mr Bongane Dlamini loaded reformate at IVS in Durban. The IVS weighbridge ticket reflects that Intertek sealed the tanker with seal numbers from 083448 to 083455 (bottom seals) and 083440 to 083447 (top seals). The tanker left for Secunda at 14h52 on 6 December 2006. The goods receipt at Sasol Secunda tank farm reflected that the tanker arrived there at 08h35 on 7 December 2006.

[94] An off-loading statement completed by Mr RZ Maseko confirmed, among others, that the tanker's seal number corresponded with the seal numbers as sealed by Intertek at IVS. Also, in his capacity as the high pressure official, Mr Maseko, signed the declaration that the tanker had been fully off-loaded at 08h55 on 7 December 2006 and was ready to leave the premises empty.

[95] There were no tracking reports in this instance. However, Mr Peach testified that on 27 November 2007, among the seals he picked up at Quarry Hoek, was one with number 083446. His conclusion was that this seal was one of the seals utilized by Intertek to seal the tanker on 6 December 2006 as stated above. As in count 36, this was confirmed by Mr Eiston Naidoo. By parity of reasoning, Mr Peach concluded that the statement by Mr Maseko that he inspected the seal at the tank farm on 7 December 2006 could not be correct as the seal had clearly been broken and left at Quarry Hoek. The upshot of his evidence was that the tanker, en route from Durban to Secunda, entered Quarry Hoek where the consignment was stolen.

[96] Count 40 involved Mr Sithole as the weighbridge official at the Secunda tank farm. A Freight Dynamics tanker, driven by the same Mr Dlamini as in count 39, loaded reformate at IVS in Durban and left for Secunda tank farm at 01h21 on 8 December 2006. The goods receipt reflected the tanker's arrival time as 02h03 on 10 December 2006. The off-loading statement completed by appellant 7, reflected the off-loading date only (10 December 2006) but no time. The time on the declaration is reflected as 02h15. The tracking report showed that en route to Secunda the tanker entered Quarry Hoek on 9 December 2006 at 10h09 and left at 17h30.

[97] Count 41 also involved appellant 3 as driver and appellant 7 as a weighbridge official at Secunda tank farm. Appellant 3 loaded a Freight Dynamics tanker with reformate at IVS in Durban on 9 December 2006. The goods receipt at Sasol tank farm in Secunda signed by appellant 3 and a dispatch controller, Mr Ferguson Mbuti, shows that the tanker arrived at 22h54 on 10 December 2006. In the off-loading statement, appellant 3 only recorded the date, but no time. He further completed the declaration that the truck was fully off-loaded and cleared to leave the premises empty, at 23h00 on 10 December 2006. The tracking reports showed that en route from Durban to Secunda, the tanker entered Quarry Hoek at 14h38 on 10 December 2006 and left at 19h00, after which it left for Secunda.

[98] The upshot of this evidence is that on all these counts the State established that appellants 3, 6 and 9 diverted from their established route to Quarry Hoek. Given the proven activities of Mr Tiry and the evidence of losses and contaminated reformat arriving in Secunda this served to establish a very strong prima facie case of theft of product, which called for a rebuttal. In the absence of any rebuttal, the court a quo was correct to accept the State's evidence.

Zetundu: Counts 3, 5, 6, 7, 9, 10, 11 and 44

[99] The evidence in regard to these counts has been described in some detail in paragraphs 11 to 13 and it need not be repeated. Mr Tiry was operating an illegal tank farm on the farm Zetundu and in the case of all counts save count 44 there was evidence from vehicle tracking devices of vehicles diverting from their authorised routes to the Engen depot in Mokopane and visiting the Zetundu property for sufficient lengths of time to discharge their cargoes. This called for an answer but none was forthcoming.

[100] Count 44 arose from the evidence of Mr du Plooy, at the time the co-owner of F M Marketing, who over the period from April 2005 to February 2006 purchased diesel from Mr Tiry for a little over R385 000. Taking into account the value of the diesel stolen from Engen that probably amounted to somewhere between 70 and 80 000 litres of diesel. Mr Tiry had no licence to trade as a wholesaler of diesel and no legitimate source of such diesel. The inference is that it was stolen and that was reinforced by Mr du Plooy's evidence that he purchased it at below the regulated price. In the result there was sufficient evidence calling for an answer and not receiving one to justify the convictions on this count.

Summary on theft counts

[101] In sum, in respect of both Zutundu and Quarry Hoek counts, the evidence that Mr Tiry was operating an unlawful enterprise, purchasing petroleum products from tanker drivers, for resale at discounted rates using the two farms Zutundu and Quarry Hoek as his bases, was overwhelming. The evidence of losses of petroleum products by Engen and Sasol was likewise substantial. Given those factors, the drivers (appellant 4 in respect of Zutundu and appellants 3, 6 and 9 in respect of Quarry Hoek) needed to give an innocent explanation for the diversion from their established routes to the respective farms if an inference was not to be drawn that they went there and sold the whole or part of their loads. As far as

appellants 7 and 8 are concerned, similarly they needed to explain the clearly falsified security documents at the Sasol tank farm in Secunda. In the case of Mr Tiry he needed to give an explanation for the tankers visiting the two farms. No such explanation was proffered in cross-examination and none of the appellants testified. The court a quo was thus correct to accept the State's case.

Ms Sangweni

[102] As far as Ms Sangweni is concerned, it is so that there is no evidence of her direct involvement with the buying and selling of petroleum products or the physical operation of any of the two farms. However, her association with Mr Tiry's activities was clearly established. They were apparently in an intimate relationship and lived together at Zutundu and Quarry Hoek. The nature of the business being carried on there would have been immediately apparent to her, surrounded as she was by a fully equipped tank farm in each place. She would have known that tankers would arrive at the properties at all times of day or night and discharge their cargoes. She cannot have believed that such clandestine activities were lawful.

[103] As to her involvement, bank accounts used by the enterprise were opened in her name, or that of a close corporation, PDN Investments CC, of which she was the sole member. The motor vehicles were registered in the name of the close corporation. The keys to one of the vehicles, a Range Rover that had been abandoned at a shopping centre in Pretoria, were found in a briefcase in the room where she was arrested together with a large sum of money in cash. The municipal account at Zutundu was in her name, and so was the post box used at Quarry Hoek. Mr Dos Santos' evidence was that on certain occasions she collected the monies for the sales in the Polokwane area. Both she and Mr Tiry deposited amounts in part payment for the acquisition of Quarry Hoek. When Mr Tiry fled from Quarry Hoek after his activities were exposed on 14 December 2006, she

accompanied him to Monument Park in Pretoria. When Mr Tiry got wind that the police were closing in on him, Ms Sangweni fled with him and went into hiding in a village in Polokwane, where they were eventually arrested. When the police arrived and questioned her about Mr Tiry, she tried to conceal him, but he was found hiding on the same property. A search of the property revealed sixteen mobile phones with five batteries; deposit slips showing deposits of large sums of money into her accounts; a number of keys and documents. Her handbag had a substantial sum in cash in it.

[104] On these considerations, she must have been aware of the nature of the business being conducted there. She could not explain the source of the money in her handbag and the large sums of money found around the house, as well as the multiple keys, telephones and other items. Overall there was sufficient evidence of her association with Mr Tiry in his criminal activities. In the absence of evidence from her explaining the extent of her knowledge and involvement it is a proper inference that she was his associate in the unlawful scheme and participated in it.

The POCA charges

[105] We turn now to the relevant provisions of POCA,[11] namely ss 2(1)*(e)* and 2(1)*(f)*, on which counts 1 and 2 are based. Section 2(1)*(f)*, under which only appellants 1 and 2 were charged, provides:

'Any person who manages the operation or activities of an enterprise[12] and who knows or ought reasonably to have known that any person, whilst employed by or associated with that

[11] The preamble to POCA states among its purposes as being 'to introduce measures to combat organised crime, money laundering and criminal gang activities; and 'to prohibit certain activities relating to racketeering activities.'

[12] In terms of the definitions in s 1 of POCA, 'enterprise' 'includes any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity and 'pattern of racketeering activity' means 'the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and 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

enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity, shall be guilty of an offence.'

Mr Tiry was convicted of count 1 but Ms Sangweni was acquitted.

[106] In addition, Mr Tiry, Ms Sangweni and the remaining appellants were each charged with, and convicted of, an offence under s 2(1)*(e)*, which reads:

'Any person who, whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity, within the Republic or elsewhere, shall be guilty of an offence.'

[107] The difference between s 2(1)*(e)* and s 2(1)*(f)* was explained as follows in *S v Eyssen*:[13]

'The essence of the offence in ss (e) is that the accused must conduct (or participate in the conduct) of an enterprise's affairs. Actual participation is required (although it may be direct or indirect). In that respect the subsection differs from ss *(f)*, the essence of which is the accused must know (or ought reasonably to have known) that another person did so. Knowledge, not participation, is required. On the other hand, ss *(e)* is wider than ss *(f)* in that ss *(e)* covers a person who was managing, or employed by, or associated with the enterprise, whereas ss *(f)* is limited to a person who managers the operations or activities of an enterprise . . .'

[108] As a general expression of the difference between the two sections, there can be no quarrel with the above statement. However, when taken together with the fact that count 1 under s 2(1)*(f)* was, in that case and in the present case, preferred against the principal perpetrator or mastermind of the criminal enterprise, whilst count 2 was levelled as a supplementary charge against both the mastermind and the other participants, it tends to obscure the fact that s 2(1)*(f)* is intended to supplement the provisions of s 2(1)*(e)* and to close a potential loophole in the latter. That loophole arises because s 2(1)*(e)* requires of a person managing an enterprise to conduct or participate in the conduct of such

[13] *S v Eyssen* [2008] ZASCA 97; [2009] 1 All SA 32 (SCA); 2009 (1) SACR 406 (SCA) para 5.

enterprise's affairs and to do so through a pattern of racketeering activity. In terms of the definition in s 1(xii) of POCA the latter means 'the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in schedule 1' of which theft is one. It must include two such offences. The word 'planned' qualifies all three of the other concepts, as explained at para 8 in *Eyssen*. It was further observed that 'neither unrelated instances of proscribed behaviour nor an accidental coincidence between them constitute a "pattern" and the word "planned" makes this clear'.

[109] There may be cases where a particular enterprise is conducted through a pattern of racketeering activity, but the manager does not conduct or participate in the conduct of such affairs by way of participation or involvement in the offences constituting the racketeering activities. However, they may know, or ought reasonably to know, that persons employed by or associated with the enterprise are conducting or participating in the conduct of the enterprise's affairs through a pattern of racketeering activity. In other words, s 2(1)*(f)* is directed at bringing within the net of the criminal conduct constituted by s 2(1) the manager who removes themself from the actual conduct of the enterprise. An example of such a case, derived from the facts of this matter, would be the position of the owner of a number of service stations, who was unaware that the managers of the service stations were conspiring with someone like Mr Tiry to obtain stolen petrol for sale at the service stations. However, if as a result the sales of petrol generated unexpectedly high profits for the volumes involved, it might be said that the owner ought reasonably to have known of the employees' criminal mode of conducting the enterprise. That would attract liability under s s 2(1)*(f)*.

[110] In simple terms, following the distinction identified in *Eyssen*, s 2(1)*(e)* catches the manager who is involved actively in the conduct of the enterprise through a pattern of racketeering activity, whilst s 2(1)*(f)* catches the manager

whose hands are clean, but who knows or ought reasonably to have known that the enterprise was being conducted through a pattern of racketeering activity. Knowledge of what subordinates are doing, or ignorance, where there ought reasonably to be knowledge, suffices to attract liability.

[111] Once that distinction is recognised, it appears that charging and convicting someone of both offences may well involve an impermissible splitting of charges, as held in the minority judgment in *S v Prinsloo and Others*.[14] The fact that the State relied on precisely the same facts for both charges immediately suggests that there was an improper splitting of charges. What is more, Mr Tiry's active involvement in the conduct of the enterprise brought him squarely within s 2(1)*(e)*. There was no need to invoke s 2(1)*(f)*. However, his counsel did not take this point, nor have we had argument on the question of splitting of charges.[15] The majority in *Prinsloo* rejected a submission along these lines in paras 55 to 59 of their judgment. They said:

'Apart from the above, we, in any event, see no reason why the legislature would have intended to restrict the prosecution of persons under s 2(1)*(f)* of POCA solely to those managers who have not dirtied their hands by personal acts of participation in the conduct of the affairs of the enterprise. Such a construction would lead to an absurdity, where the manager of a multi-billion rand racketeering enterprise who has had minimal personal active participation, would only be liable for the minimal participation role under s 2(1)*(e)* and not under s 2(1)*(f)* for the extensive managerial role played in a highly successful criminal enterprise.'

[112] With respect we have a difficulty with this reasoning. It seems to us that it is not a case of having to choose whether liability is confined to the one or other section, but a matter of selecting the charge that most appropriately covers the criminal conduct in question. If the manager has 'dirtied their hands' extensively

[14] *S v Prinsloo and Others* [2015] ZASCA 207; 2016 (2) SACR 25 (SCA).
[15] A question posed by the Bench as to whether convictions on both the POCA counts and the theft charges constituted an improper splitting of charges fell away once we were referred to *Dos Santos v S* [2010] ZASCA 731; 2010 (2) SACR 382 (SCA) and *De Vries v S* [2011] ZASCA 162; [2012] 1 All SA 13 (SCA).

s 2(1)(*e)* may be more appropriate, while if their active involvement is more limited, but their oversight of the enterprise greater, s 2(1)*(f)* may fit the bill. However, we limit ourselves to expressing those reservations because it is not appropriate for a three-judge court to overrule a relatively recent decision by a similarly constituted court in circumstances where the issue was not raised or argued. Fortunately, in this case conviction on both charges affects only Mr Tiry and the sentence to be imposed will ameliorate the problem.

[113] Apart from the submissions which we have already considered, no real argument was advanced on behalf of Mr Tiry against his conviction. With regard to Ms Sangweni, we have, in paragraphs 102 to 104, set out her involvement and proximity to Mr Tiry's criminal activities. That would justify her conviction on the theft counts and on the contravention of s 2(1)*(e)* of POCA.

[114] As regards appellants 7 and 8, the security officials at the Sasol tank farm, the inference that their participation must have been organised in advance, is ineluctable. That being so, even if they were not employed by Mr Tiry's criminal enterprise, they were associated with it and participated directly in the conduct of the enterprise's affairs through a pattern of racketeering activity. Thus, appellants 7 and 8 were properly convicted on count 2.

[115] The same cannot be said of appellants 3, 4, 6 and 9, the drivers. The evidence of the two s 204 witnesses was that there was a general awareness amongst drivers in the industry that Mr Tiry was willing to purchase petroleum products being transported by them from IVS to Secunda – presumably a similar word of mouth knowledge existed when he was operating at Zutundu. In the absence of evidence as to the precise nature of their role in appellant's operations, it is difficult to accept the notion that the mere fact of their having stolen the product in their tankers and sold it to him means that they were associated with

the enterprise and engaged indirectly in conducting its activities. It is so that the enterprise could not have been conducted unless Mr Tiry was able to find sources from which he could purchase stolen petrol. However, there is no evidence that he organised a network of dishonest drivers. The nearest to such evidence is an unidentified list of telephone numbers and a phone call to one of the s 204 witnesses. Random dishonesty by drivers does not, in our view, amount to association with appellant's criminal enterprise. That accords with the observations in *Eyssen* (para 6) that:

'Taking a group of individuals associated in fact, which is the relevant part of the definition for the purposes of this appeal, it seems to me that the association would at least have to be conscious; that there would have to be a common factor or purpose identifiable in the association; that the association would have to be ongoing; and that the members would have to function as a continuing unit.'

[116] There is no evidence that there was a conscious association between the drivers and Mr Tiry or that they functioned as part of a 'continuing unit'. In order for them to be convicted they needed to be part of the enterprise operated by Mr Tiry. They were not, any more than those who purchased stolen diesel and petrol from appellant were part of his enterprise. Criminal liability under s 2(1)*(e)* flows from managing, being employed by or being associated with the enterprise. It is directed at those who are actively engaged in that enterprise on an ongoing basis. The drivers did not fall in that category. In the result the conviction of appellants 3, 4, 6 and 9 of count 2 should be set aside.

Sentence

[117] Finally, we turn to sentence. As stated in the introduction, Mr Tiry was sentenced to an effective period of 30 years' imprisonment; Ms Sangweni to an effective 18 years' imprisonment; and the rest of the appellants each to 15 years imprisonment. The theft counts carried a prescribed minimum sentence of

15 years' imprisonment in terms of s 51(2) of the Criminal Law Amendment Act 105 of 1997 (the CLLA). It was submitted on behalf of the appellants that the sentences are excessive and unreasonably harsh.

[118] A court of appeal is not at large to interfere with the sentence imposed by the trial court. It is only entitled to do so where there is an irregularity or material misdirection. If the complaint is that the sentence is too severe, an appeal court would only interfere if it considers that there is a striking disparity between the sentence passed and that which the court of appeal would have passed.[16]

[119] Only appellant 9 testified in mitigation of sentence. The rest elected to place their personal and mitigating circumstances on record from the bar. No useful purpose would be served by reciting those in any detail. In the light of the seriousness of the offences, and the substantial period of imprisonment prescribed by the law in respect of the theft counts, the absence of anything exceptional in their personal circumstances tends to render them largely immaterial in determining what period of imprisonment should be imposed.[17]

[120] Mr Tiry was sentenced to an effective 30 years' imprisonment. The established practice is that such a sentence is usually imposed in very exceptional circumstances.[18] Whilst sentence is always individualised and bound to the facts of a particular case, value can be gained by considering sentences imposed in comparable cases. In this regard *Prinsloo* comes to mind. It involved a multi-million rand, fraudulent Ponzi scheme, that impoverished many elderly people and people of limited means. The mastermind behind it was sentenced to an effective 25 years' imprisonment. For Mr Tiry, whose conduct was neither so

[16] *S v Berliner* 1967 (2) SA 193 (A) at 200G; *S v Sadler* 2000 (1) SACR 331 (SCA); [2000] 2 All SA 121 (SCA) para 8; *S v Cwele and Another* [2012] ZASCA 155; 2013 (1) SACR 478 (SCA); [2012] 4 All SA 497 (SCA) para 33.
[17] *S v Vilakazi* [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA) para 58.
[18] See *S v Tuhadeleni and Others* 1969 (1) SA 153 (A) at 189H and *S v Whitehead* 1970 (4) SA 424 (A).

widespread, nor so harmful in its consequences, we would have considered a sentence of 20 years' imprisonment a heavy sentence as a trial court. The disparity between the sentence imposed by the trial court and that which we would have imposed is therefore so substantial as to justify interference. In all the circumstances, an effective sentence of 20 years' imprisonment would be more appropriate.

[121] As regards Ms Sangweni, in respect of count 2, the minimum sentence is 15 years' imprisonment in terms of s 51(2) of the CLLA. The court a quo gave no reasons for going beyond that in imposing 18 years' imprisonment. We are unable to think of any. Her involvement appears to have been limited notwithstanding her close relationship to the principal perpetrator. To our mind, that constitutes a substantial and compelling circumstance, justifying a lesser sentence. Again, comparing her sentence to the one imposed on her 'counterpart' in *Prinsloo*, a sentence of 12 years' imprisonment would have been more appropriate. There is a startling disparity between that sentence and the one imposed by the trial court, which justifies interference, and we would reduce it accordingly.

[122] We have already found that the conviction of appellants 3, 4, 6 and 9 on count 2 (racketeering) should be set aside. That must necessarily affect the sentence. They were sentenced to 15 years' imprisonment because they were found to have acted in the furtherance of Mr Tiry's criminal enterprise. Those convictions having been set aside, their convictions are for theft simpliciter. In all the circumstances, we consider a sentence of seven years imprisonment on each count to be appropriate, the sentences to run concurrently.

[123] Even though the racketeering count stands, appellants 7 and 8's contribution is similarly limited in the overall scheme of things. They stand in the

same position as the drivers. However, as explained already, their conviction brings the sentencing within the purview of s 51(2) of the CLAA, which enjoins a sentencing court to impose 15 years' imprisonment, unless substantial and compelling circumstances are found. The truth of the matter is that Messrs Sithole and Nkosi, like the drivers, were a 'small fish'. They stand in stark contrast to even Ms Sangweni, who continuously and actively abetted Mr Tiry's criminal enterprise in exchange for a lavish lifestyle. We have an unease about imposition of the prescribed minimum sentence in the circumstances of the case.

[124] This court has set out the proper approach in such instances, in *S v Malgas*.[19] At para 22 it was explained:

'[T]he greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.'

[125] And at para 25I:

'If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.'

This approach was endorsed by the Constitutional Court in *S v Dodo*.[20]

[19] *S v Malgas* 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469 (SCA); [2001] 3 All SA 220 (SCA) para
[20] *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) para 40.

[126] It is with that approach in mind that we are of the view that the injustice which would occur with the imposition of the prescribed minimum sentence of 15 years on appellants 7 and 8, constitutes a substantial and compelling circumstance. This enables this court to impose a sentence which is deemed just and appropriate. Taking into account all the circumstances, we are of the view that seven years imprisonment on count 2 and each of the theft counts will serve the purpose of sentence, be fair to society and both Messrs Sithole and Nkosi.

[127] Before we conclude, we feel constrained to record this concern. The tracking records show that some drivers were literally driving from Durban to Secunda, back again and almost immediately returning with a fresh load. This, without adequate rest and breaks. It is not at all clear how legally permissible that is. These are dangerous vehicles carrying dangerous cargoes. It is incumbent on the owners of the freight tankers to place systems in place to ensure that drivers take mandatory, adequate, rests and breaks before they set out on major journeys.

[128] The following order is made:

1 The following appeals succeed and the convictions and sentences are set aside:

(a) Appellants 1 and 2, Mr Tiry and Ms Sangweni, in respect of counts 4, 8, 19, 20, 22, 23, 25, 30, 34, 35, 42, 43 and 45 in their entirety, and in respect of count 33 to the extent that the conviction of theft is altered to one of attempted theft;

(b) Appellant 3, Mr Tshabalala, in respect of counts 2, 34 and 35;

(c) Appellant 4, Mr Nyamusa, in respect of count 2;

(d) Appellant 6, Mr Buthelezi, in respect of counts 2, 19 and 45;

(e) Appellant 7, Mr Sithole, in respect of counts 22 and 35;

(f) Appellant 9, Mr Moisi, in respect of count 2.

2 All the other appeals against conviction are dismissed and the judgment of the high court is amended to reflect that Mr Nkosi, appellant 8, was convicted on counts 14, 31 and 32.

3 Mr Tiry's appeal against sentence succeeds to the extent reflected below:

(a) The sentence of 30 years' imprisonment imposed on count 1 is set aside and substituted with a sentence of 20 years' imprisonment;

(b) The sentence of 20 years imprisonment on count 2 is set aside and replaced by a sentence of 15 years imprisonment to run concurrently with the sentence on count 1;

(c) The sentence of 15 years imprisonment on count 33 is set aside and replaced by a sentence of 3 years imprisonment;

(d) It is ordered that the sentence of 15 years imprisonment imposed in respect of each of counts 3, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 24, 26, 31, 32, 36, 39, 40 and 41, and the 3 years' imprisonment on count 33, shall run concurrently with the sentence of 20 years' imprisonment imposed on count 1. The effective sentence is 20 years' imprisonment.

4 Ms Sangweni's appeal against sentence succeeds to the extent set out below:

(a) The sentence of 18 years imprisonment imposed on count 2 is set aside and replaced by a sentence of 12 years imprisonment;

(b) The sentence of 15 years imprisonment on count 33 is set aside and replaced by a sentence of 3 years imprisonment;

(c) It is ordered that the sentence of 15 years' imprisonment imposed in respect of each of counts 1, 3, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 24, 26, 31, 32, 36, 39, 40 and 41, and the 3 years' imprisonment on count 33, shall run concurrently. The effective sentence is 15 years' imprisonment;

5 The appeals against sentence by appellants 3, 4, 6, 7, 8 and 9 succeed. Their existing sentences on each count on which their convictions were upheld are set

aside and replaced by sentences of 7 years imprisonment on each count, all such sentences to run concurrently. The effective sentence in each case is 7 years imprisonment.

6 In terms of s 282 of the Criminal Procedure Act 51 of 1977 the substituted sentences are antedated to 13 October 2016, being the date on which the appellants were sentenced.

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M J D Wallis

Judge of Appeal

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T M Makgoka

Judge of Appeal

APPEARANCES:

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For Third, Fourth and Ninth Appellants:	R J Nkhahle (with him M Mazibuko)
Instructed by:	Mokhomo Attorneys, Bloemfontein
For Respondent:	J W Roothman
Instructed by:	Director of Public Prosecutions, Bloemfontein