THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 263/08

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
Appellant

and

SAROJINI MOODLEY **First Respondent**
SHUNMUGAM JAMES MOODLEY
Second Respondent
SHAWN BEHARIE
Third Respondent

Neutral citation: ***National Director of Public Prosecutions v Moodley*** **(263/08) [2008] ZASCA 137 (26 November 2008)**

Coram **:SCOTT, MAYA, COMBRINCK, CACHALIA JJA *et* MHLANTLA AJA**

Date of hearing : **10 NOVEMBER 2008**

Date of delivery : 26 NOVEMBER 2008

Summary: Written authorisation of NDP in terms of s 2(4) of POCA given prior to accused pleading to charge of racketeering – whatever meaning given to 'charged' in s 2(4), prosecution lawful at least from date of authorisation.

ORDER

On appeal from: the High Court, Pietermaritzburg (NICHOLSON J and NTSHANGASE J concurring, sitting in review of a decision of the Regional Court:

The following order is made:

(1) The appeal is upheld with costs, including the costs of two counsel.

(2) The order of the court a quo is set aside and the following substituted in its place.

'The application is dismissed with costs.'

JUDGMENT

SCOTT JA (MAYA, COMBRINCK, CACHALIA JJA and MHLANTLA AJA
concurring):

[1] This is an appeal from the judgment of Nicholson J, with whom Ntshangase J concurred, sitting in the High Court,

Pietermaritzburg. It concerns the interpretation and application of s 2(4) of the Prevention of Organised Crime Act 121 of 1998 ('POCA'). Before considering the contentions advanced by counsel in this court it is necessary to set out as briefly as the circumstances permit the events which culminated in the appeal.

[2] The three respondents are respectively accused numbers one, two and four in a pending criminal trial in the Pietermaritzburg Regional Court. On 8 July 2003 the second and third respondents were arrested together with two others (accused number three and five) on drug related charges, ie dealing in and the possession of mandrax (methaqualone) tablets. On 10 September 2003 the matter was postponed to 2 December 2003 at the request of the prosecutor to enable the State to investigate the possibility of preferring racketeering charges against the accused. On the latter date the matter was postponed for trial in the regional court commencing on 31 May 2004.

[3] On 10 December 2003 the respondents' attorney, Mr Kogulan Chetty, was handed a charge sheet containing 14 counts of which three related to racketeering. According to the prosecutor, Mr Hansraj Cheetanlal, the charge sheet was given to Chetty in an envelope marked 'Draft Charge Sheet' and was not lodged with the clerk of the court. This allegation was not denied by Chetty in his replying affidavit and must be accepted. The first respondent was cited as accused number one although she was in fact arrested only subsequently on 15 December 2003.

[4] The charge sheet runs to 21 pages. It sets out in detail the State's case against the accused. In short, it alleges that the first and second respondents, who are married to each other, have for many years engaged in a drug dealing business on a large scale involving the purchase in bulk, storage and selling of drugs, mainly mandrax tablets. It is alleged further that as the enterprise increased in size, the other accused (including the third respondent) were employed to assist in the sale and distribution of drugs. Count one is the contravention of s 2(1)(e) of POCA and relates to all three respondents and one other. The offence, in short, is the conducting of, or participation in, the affairs of [a drug dealing] enterprise through a 'pattern of racketeering activity'.[1] Count 2 is the contravention of s 2(1)(f) of POCA, namely the management of a [drug dealing] enterprise through a 'pattern of racketeering'. This count relates only to the first and second respondents. Count three is the contravention of s 2(1)(g). It relates only to accused number five who is not a party to these proceedings. The remaining counts relate to one or more of the accused. They include counts of possession and dealing in methaqualone in contravention of various provisions of the Drugs and Drug Trafficking Act 140 of 1992, assault with intent to do grievous bodily harm, theft and intimidation in contravention of the Intimidation Act 72 of 1982.

[1] 'Pattern of racketeering activity' is defined in s 1 of POCA to mean:
"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 period of imprisonment) after the commission of such prior offence referred to in Schedule 1."
The offences listed in Schedule 1 include
"any offence referred to in section 13 of the Drugs and Drug Trafficking Act 140 of 1992." '

[5] On 11 May 2004 the respondents' attorney wrote to the prosecutor requesting a copy of the appellant's written authorisation in terms of s 2(4) of appellant's POCA. The subsection reads:

'A person shall only be charged with committing an offence contemplated in subsection (1) if a prosecution is authorised in writing by the National Director.'

(The first three counts all relate to offences contemplated in subsection 1.) On 17 May 2004, the prosecutor replied, enclosing the appellant's authorisation which is dated 24 March 2004. This document is headed 'Authorisation in terms of section 2(4) of the Prevention of Organised Crime Act, no 121 of 1998'. Beneath the heading appear the words: 'The State versus' followed by the names of the five accused. Thereafter, the document proceeds:

'I, BULELANI THANDABANTU NGCUKA, the National Director of Public Prosecutions of South Africa, do hereby, in terms of section 2(4), read with section 1 and 2 of the Prevention of Organised Crime Act, No 121 of 1998, authorize the institution of prosecution in respect of a contravention of section 2(1)(e), 2(1)(f) and 2(g) of the Prevention of Organised Crime Act, No 121 of 1998, against the above accused.'

The signature of Mr Ngcuka appears at the foot of the page under the words 'Given under my hand at Pretoria this 24th day of March 2004'. The signature is followed by Ngcuka's full names and title, 'National Director of Public Prosecutions'. On 28 March 2004, ie after the written authorisation had been given, a second charge sheet (albeit identical to the first) was handed to the respondents' attorney.

[6] The trial did not commence on 31 May 2004, although the prosecutor was ready to proceed. Instead, the regional magistrate heard and rejected an application brought by the accused for an inquiry to be held into an alleged unreasonable delay in the proceedings in terms of s 342A of the Criminal Procedure Act 51 of 1977. On 1 June 2004 the accused applied for the 'recusal' of the prosecutor. This application dragged on for a total of 27 court days. Ultimately on 1 December 2006 the application was 'suspended' when another prosecutor was assigned to the case so as to avoid further delay.

[7] In the meantime on 19 August 2005, and while the 'recusal' application was still pending, the respondents launched an application in the High Court, Pietermaritzburg, in which they sought an order (a) declaring counts 1, 2 and 3 to be unlawful and (b), setting those counts aside. The relief sought was founded on the contention that the respondents had been 'charged' with racketeering on 10 December 2003, ie prior to the written authorisation by the appellant which was signed on 24 March 2004. The matter was enrolled for hearing on 3 November 2005 and again on 25 November 2005. On the latter occasion the application was postponed sine die, apparently because the judge had indicated in chambers that the relief sought should be pursued in the regional court.

[8] On 28 November 2005 the respondents launched an application in the regional court in which the same relief was sought, founded on the same grounds. In its judgment, delivered on 3 April 2006, the regional court declined to consider the merits of the application but dismissed it on the grounds of lack of jurisdiction and that it amounted to an abuse of the process of the court. By this time the application in the High Court had been withdrawn.

[9] The next step was the application by the respondents in the High Court for an order reviewing and setting aside the regional magistrate's decision and the substitution of an order declaring unlawful, and setting aside, counts 1, 2 and 3 of the charge sheet.

This application was launched on 21 September 2006. Various grounds of review were advanced but the central issue raised and the one that was argued in the court a quo was that the three counts were unlawful because the respondents had been 'charged' before the appellant had given his written authority as required by s 2(4) of POCA. The matter came before the High Court which upheld the application and set aside the three racketeering counts. It did so, however, not on the grounds relied upon by the respondents but on a ground raised *mero motu* and in respect of which, we were told in this court, no argument was presented. The ground relied upon was that the authorisation by the appellant was inadequate because it 'was too broad and lacked the necessary specificity required'. In support of this conclusion, Nicholson J, who delivered the judgment of the court, observed that there 'was a total failure to mention any dates, or places at which the offences were committed' and that 'it would lead to abuse for such an authorisation to be permissible'. In the result the court a quo made the following order with regard to the merits of the application:

'(a) The authorization issued by the National Director of Public Prosecutions dated 24 March 2004, purporting to authorize charges against the three applicants [now the respondents] in terms of section 2(4) of the Prevention of Organised Crime Act 121 of 1998 is declared to be invalid and of no force and effect.
(b) Counts 1, 2 and 3 of the charges brought against the two applicants [now the respondents] before the Regional Court, Pietermaritzburg under Case No 430/04 are declared to have been invalidly instituted and are set aside.'

When the appellant applied for leave to appeal the respondents abandoned the judgment in so far as paragraph (a) of the order was concerned. Although para (b) of the order flowed directly from the order in para (a), the respondents nonetheless sought to uphold the order granted in terms of para (b) but on the basis that they had been 'charged' on the counts of racketeering prior to the written authorisation required in terms of s 2(4) of POCA.[2] This issue was not dealt with by the court a quo in its judgment.

[2]The subsection is quoted in para 5 above.

[10] In view of the abandonment, it is unnecessary to say anything more about the validity of the authorisation save to comment that in my view the respondents were correct in the circumstances to abandon para (a) of the order, which is clearly not to be regarded as a precedent.

[11] As pointed out by Kriegler J in *Sanderson v Attorney-General, Eastern Cape* 1998 (1) SACR 227 (CC) para 16 at 236e-g, 'the word "charge" is ordinarily used in South African criminal procedure as a generic noun to signify the formulated allegation against an accused' but that 'used as a verb it bears no defined or precise meaning in the [Criminal Procedure Act] nor in criminal law procedure.' The learned judge observed 'that "charged" can be interpreted very narrowly, so as to refer to formal arraignment or something tantamount thereto, or broadly and imprecisely to signify no more than some or other intimation to the accused of the crime(s) alleged to have been committed.' He cautioned that 'it is not useful to attempt a universally valid interpretation of a word so vague and which therefore derives much of its content and meaning from the particular context in which it may be used'. In this court counsel for the appellant contended for a narrow interpretation of 'charged' in s 2(4) of POCA to mean 'charged' in the sense of a charge or indictment being put to an accused who is asked to plead. In the alternative, it was contended that 'charged' had to be construed as a reference to the stage when the charge sheet is lodged with the clerk of the court. The basis for this contention was s 76(1) of the Criminal Procedure Act which

provides that the proceedings at a summary trial in a lower court (unless the accused has been summoned to appear) 'shall be commenced by the lodging of the charge sheet with the clerk of the court'. I should add that there is no evidence that a charge sheet has been lodged with the clerk of the court. It is, however, common cause that the respondents have not yet been asked to plead. The respondents, on the other hand, contended for a broad interpretation. They argue that for the purposes of s 2(4) a person is 'charged' when advised by a competent authority that it has been decided that he or she is to be prosecuted. In the present case, they say, this occurred on 10 December 2003 when the charge sheet was handed to the respondents' attorney. In support of this submission reliance was placed on the meaning attributed to 'charged' in *Du Preez v Attorney-General, Eastern Cape* 1997 (2) SACR 375 (E) at 384e. But in that case, as in *Sanderson,* supra, the court was concerned with 'charged' in the context of s 25(3)(a) of the Interim Constitution (Act 200 of 1993) which afforded every accused person the right 'to a public trial before an ordinary court of law within a reasonable time after having been charged.' Quite clearly the considerations relevant to the meaning to be attributed to 'charged' in the context of s 25(3)(a) of the Interim Constitution are very different from those relevant to 'charged' in s 2(4) of POCA and the meaning attributed to 'charged' in the former context provides no assistance.

[12] Counsel on both sides sought to rely on various indicators which they submitted supported the interpretation for which they contended. None, in my view, can be regarded as decisive. It was

argued on behalf of the respondents, for example, that a charge of racketeering would affect an accused's prospects of being granted bail and that accordingly the legislature would have intended the written authorisation contemplated in s 2(4) to be given before an accused person could be prejudiced in this way. But, as pointed out by counsel for the appellant, the fact that racketeering charges were being investigated and could be added to the charge sheet would similarly weigh with a court when deciding whether to grant bail or not. It seems to me, however, unnecessary for the purposes of the present case to decide precisely where the word 'charged' in s 2(4), to borrow from the language of Kriegler J in *Sanderson*, 'falls along the continuum of possible meanings of the word'. In my view, counsel for the appellant correctly submitted that once the prosecution is authorised in writing by the National Director there can be no reason, provided the accused has not pleaded, why the further prosecution of the accused on racketeering charges would not be lawful, even if the earlier proceedings were to be regarded as invalid for want of written authorisation. The respondents contended, however, that in the latter event the further prosecution would be 'tainted' and would remain invalid. But they were unable to advance any proper basis to support this contention. Indeed, until an accused has pleaded the state would be at liberty to withdraw the charge and recharge the accused once the authorisation had been granted.[3] But such an exercise would serve no purpose and I can see no reason why it should be necessary.

[13] It follows that whatever the position may have been prior to

[3] See s 6(a) of the Criminal Procedure Act.

24 March 2004 – and it is unnecessary to express a view in this regard – once the written authorisation to prosecute was granted, the prosecution, in my view, was lawful in terms of s 2(4) of POCA.

[14] The following order is made:

(1) The appeal is upheld with costs, including the costs of two counsel.

(2) The order of the court a quo is set aside and the following substituted in its place.

'The application is dismissed with costs.'

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D G SCOTT
JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT	**:**	**M WALLIS SC** **R KEIGHTLEY (MS)** **D A DAMERELL**
Instructed by	**:**	**State Attorney, DURBAN**
Correspondents	**:**	**State Attorney, BLOEMFONTEIN**

FOR RESPONDENT:		**C J HARTZENBERG SC** **G P SCHELTEMA SC**
Instructed by	**:**	**Chetty, Asmall &Maharaj PIETERMARITZBURG**
Correspondents	**:**	**Webbers BLOEMFONTEIN**