THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 522/10

THE STATE Appellant

and

HENDRIK LOURENS JACOB BOEKHOUD Respondent

Neutral citation: *S v Boekhoud* (522/10) [2011] ZASCA 48 (30 March 2011)

CORAM: Navsa, Heher, Cachalia, Bosielo JJA and Petse AJA

HEARD: 1 March 2011

DELIVERED: 30 March 2011

SUMMARY: Application for leave to appeal following on refusal by high court to reserve questions of law in terms of s 319 of the Criminal Procedure Act 51 of 1977 – uncertainty about facts to which questions relate – confusion and contradictions in indictment, summary of substantial facts and further particulars supplied by State – questions concerning the application of doctrine of common purpose unrelated to specific charges – State still considering redrafting of indictment – application for leave to appeal refused.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Borchers J sitting as court of first instance).

1. The application for condonation for late filing of the application for leave to appeal is granted.
2. The application for leave to appeal is dismissed.

JUDGMENT

NAVSA JA (Heher, Cachalia, Bosielo JJA and Petse AJA concurring)

[1] This is an application by the Director of Public Prosecutions, South Gauteng, for leave to appeal to this court against a decision of the South Gauteng High Court (Borchers J), in terms of which it had refused an application to reserve certain questions of law in terms of s 319 of the Criminal Procedure Act 51 of 1977 (the CPA). The high court had ruled that it had no jurisdiction in relation to offences allegedly committed by the respondent, Mr Hendrik Boekhoud, whilst he was resident in the United Kingdom. The matter was referred for the hearing of oral argument before us as was an application for condonation for the late filing thereof.[1]

[2] During 2006 Mr Boekhoud, along with four co-accused, was indicted in the high court on a main charge of contravening s 2(1)(e) read with sections 1, 2(2), 2(3), 2(4) and 3 of the Prevention of Organised Crime Act 121 of 1998 (POCA) ─ these offences relate to racketeering activities ─ and 54 other counts, which include a number of counts of theft, fraud, money laundering in contravention of s 4 of POCA, read with sections 7A and 8 thereof and also contraventions of the provisions of the Mining Rights Act 20 of 1967. A number of alternative charges to each of the 55 charges was preferred

[1] In terms of s 21(3)(c) of the Supreme Court Act 59 of 1959.

against the respondent. These include contraventions of Exchange Control Regulations, the Mining Rights Act and POCA. The indictment, itself extends to 72 pages. The associated summary of substantial facts comprises 11 pages.

[3] As appears to be the wont of the State in certain high profile cases, it appears to have adopted a scattergun approach to the prosecution, covering as many bases as possible. Whilst at face value this approach may appear prudent it often leads to a lack of focus and imprecision.

[4] Unsurprisingly, the extensive and voluminous charge sheet led to Mr Boekhoud requesting further particulars in terms of s 87 of the CPA. The request comprised 36 pages. The State furnished 67 pages of further particulars.

[5] At the commencement of the trial Mr Boekhoud tendered a plea in terms of s 106(1)(f) of the CPA.[2] He averred that with the exception of the main count (the racketeering charge in terms of s 2 of POCA) the court lacked jurisdiction to try him on all the others. The reason for the racketeering charge being excluded is that s 2(1) provides that a person who commits any of the acts listed thereunder shall be guilty of the offence whether or not they were committed 'within the Republic or elsewhere'.

[6] At this stage it is necessary to set out the background against which the charges were brought and the plea of a lack of jurisdiction raised. At the centre of the charges is the theft of unwrought precious metals (upms) stolen from South African mines, principally in the Rustenburg area, and which ultimately found their way to the United Kingdom. The upms it appears might have contained one or other of the precious metals in the platinum group, which includes gold, platinum, palladium and rhodium.

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[2] Section 106(1)(f) provides:
'When an accused pleads to a charge he may plead –
. . .
(f) that the court has no jurisdiction to try the offence.'

[7] The State's case was that after certain persons had physically stolen the upms from South African mines Mr Boekhoud's co-accused came to possess them within South Africa, knowing they were stolen. Thereafter the upms were exported by them to a refinery in the United Kingdom, which for all practical purposes was owned and controlled by Mr Boekhoud.

[8] To export the ore to the United Kingdom documentation had to be prepared, which, according to the State, did not represent the true value of the ore. Consequently the documentation was false. This explains the theft, fraud and unlawful possession of upms charges as well as the charges involving exchange control regulations.

[9] If the State's affidavit in support of the present application for leave to appeal is to be believed (in conjunction with the heads of argument filed on its behalf both in this court and the court below) its case against Mr Boekhoud, as set out in the indictment, is 'accurate, clear succinct and detailed'. It was submitted that simply put the State's case was that Mr Boekhoud was involved in the planning of all of these offences with his co-accused. According to the State, an examination of the indictment, the summary of substantial facts and the further particulars reveals that this was a scheme involving all of the accused, including Mr Boekhoud. The veracity of the State's assertions in this regard is in issue in this case.

[10] In upholding Mr Boekhoud's plea of lack of jurisdiction, Borchers J recorded (at para 11 of her judgment), that in its reply to the request for further particulars the State had alleged that all the acts which constituted criminal conduct by Mr Boekhoud were performed by him outside the boundaries of South Africa. She said the following:

'These are the central facts which run through the indictment. Minor exceptions to the pattern which I have sketched and small variations in the manner in which certain acts were performed are in my view relevant.'

[11] Before us the State was adamant that the further particulars supplied by it did not allege that all of Mr Boekhoud's acts, constituting the criminal

conduct in respect of which he had been charged, were committed outside of South Africa. The State submitted that Borchers J had erred in this regard.

[12] In her judgment Borchers J noted that Mr Boekhoud was originally a South African citizen but that in the 1980's he renounced his South African citizenship and became a citizen of the Netherlands. Since then he has resided and worked in the United Kingdom. Whilst he owns assets here and visits this country occasionally he is neither resident nor domiciled here.

[13] The learned judge's material findings were that the court lacked jurisdiction on two grounds. First, the acts, which constitute the crimes of theft, fraud and the various alternatives, were committed not by him but by his co-accused. Second, such acts as he had performed were all committed in the United Kingdom and South African courts consequently have no jurisdiction.

[14] In reaching those conclusions the court below postulated the general position in regard to territorial jurisdiction: South African courts only exercise jurisdiction over offences committed by persons within South Africa. Generally, offences committed beyond the borders of South Africa cannot be prosecuted here.

[15] Borchers J expressed views concerning the interpretation and application of s 2 of POCA, which she expressly stated were *obiter*. This is an aspect to which I shall return briefly in due course.

[16] The learned judge went on to consider a submission by counsel for the State that Mr Boekhoud was liable to be convicted on counts 2-55 on the basis of having formed a common purpose with his co-accused. It was contended on behalf of the State that the *actus reus* of one person can be imputed to another where there is proof of a common purpose between them. The court below thought that what was being sought was the extension of extra-territorial jurisdiction over Mr Boekhoud for acts committed by his co-accused in South Africa. Borchers J considered that there was no authority for

this proposition by the State, which she considered 'remarkable'. She stated the following:

'There is as far as I can ascertain, no occasion on which a court has exercised extra-territorial jurisdiction over actions performed entirely outside South Africa's borders, save where such jurisdiction is extended expressly by statute. Treason may be a partial exception but even there I note that the courts found that by broadcasting propaganda from abroad the accused overseas was creating airwave disturbances or changes in South African air or atmosphere. Even here some sort of *actus reus* in South Africa was required by the courts.'

[17] For all the reasons stated Borchers J held that the court below had no jurisdiction to try Mr Boekhoud on counts 2-55, nor on any of the alternative charges in the indictment.

[18] I have doubts about the correctness of the learned judge's approach to the application of the doctrine of common purpose, spurred no doubt by the State's own confusion in this regard. Put differently, it is not clear to me that the application of the common purpose doctrine involves a court extending its jurisdiction extra-territorially. This is an aspect discussed in more detail later in this judgment. However, as will become clear the central issue in this application for leave to appeal is whether certainty exists in regard to all of the facts to which the question relates or on which the legal point hinges. That issue is inextricably linked to the intelligibility and precision with which the indictment, the summary of substantial facts and the further particulars were framed.

[19] As will become clear, the expression 'extra-territorial jurisdiction' was wrongly employed and it distracted all concerned and led to confusion.

[20] Subsequent to the finding of the court below, that it lacked jurisdiction in respect of counts 2-55, the State resorted to s 319 of the CPA, in terms of which it applied to that court to reserve questions of law for the consideration of this court.[3] Expectedly, the application was opposed by Mr Boekhoud.

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[3] Section 319 reads as follows:
'(1) If any question of law arises on the trial in a superior court of any person for any offence, the court may of its own motion or at the request either of the prosecutor or the accused

[21] Not dissimilarly to the manner in which it framed the indictment and the accompanying documentation, the questions were rather intricate. The first question was framed as follows:

'(1) Whether, as a question of law, having regard to the wording of section 2 as well as the definition of "pattern of racketeering offences" in section 1, as well as the list of offences set out in Schedule 1 to POCA, and the law applicable to them (which offences include theft, fraud, any offence relating exchange control, any offence under any law relating to illicit dealing in or possession of precious metals or precious stones, contravention chapter 3 of POCA (sections 4 and 6), the racketeering acts set out in counts 2 – 55, for a conviction under section 2 to *ensue*, have to have occurred within the borders of South Africa only.'

This question was accompanied by four related questions, which for present purposes it is not necessary to repeat.

[22] Borchers J's response to this question was that it postulates that she had held that for a prosecution of racketeering under s 2 of POCA to succeed, the racketeering act as defined must have occurred within the borders of South Africa. She stated that she had made no such finding and that anything she had said regarding s 2 of POCA had been *obiter*. She held that for that reason it could not form the subject matter of a reserved question of law in terms of s 319 of the CPA. The State does not persist in challenging the learned judge's refusal to reserve this question.

[23] The second set of questions that the State sought to reserve comprised a primary question accompanied by four associated questions:

'(2) Whether in law, the operation of the doctrine of common purpose is applicable to someone beyond the borders of the Republic of South Africa as well, the latter who (1) conspires with others in the Republic to perpetrate theft, fraud and/or statutory offences related to the theft, fraud and/or statutory offences, and/or, (2) who acts in concert with others in the Republic through acts of association (such as refining property, selling property, remitting profits) for the mutual benefit of the participants.

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reserve that question for the consideration of the Appellate Division, and thereupon the first-mentioned court shall state the question reserved and shall direct that it be specially entered in the record and that a copy be transmitted to the registrar of the Appellate Division.
(2) The grounds upon which any objection to an indictment is taken shall, for the purposes of this section, be deemed to be questions of law.
(3) The provisions of ss 317(2), (4) and (5) and 318(2) shall apply *mutatis mutandis* with reference to all proceedings under this section.'

[A] Related questions to question 2

(a) Whether in law, a person abroad who conspired or reached agreement with others in South Africa to perpetrate an offence in South African, can, once the said offence has been executed by such others in South Africa, be charged in a South African court with the completed offence because of the conspiracy/agreement earlier reached?

(b) If the offence is perpetrated over a period of time, and the agreement or conspiracy to commit a particular crime or crimes of an ongoing nature, is the answer to the question still the same?

(c) Can such person abroad also be charged on the basis of common purpose, having regard to acts of association perpetrated abroad?

(d) Which law with regards to the elements of unlawfulness and *mens rea* is applicable to such person abroad, that of South Africa or that of the place abroad where such person was located at the time of the perpetration of the offence or offences by others in South Africa.'

[24] Questions 3, 4 and 5, drafted in the same convoluted and extended fashion relate to the offence of theft and, as recorded by the court below, all arise from the State's contention that the doctrine of theft is a continuing offence, which it was submitted afforded extra-territorial jurisdiction. One of the related questions was whether the doctrine of continuity was also applicable in 'taking-out' cases, where someone outside the country knows that the property was stolen, intentionally assists the thieves in South Africa by further dealing with or handling the stolen property.

[25] The court below responded to these questions by stating that the fact that theft is a continuing offence did not entitle it to exercise extra-territorial jurisdiction. Borchers J said the following:

'This is the law, whether the case is a so called "bringing in" or "taking out" case.'

[26] Questions 6 and 7 ask whether ss 4 and 6 of POCA[4] apply to acts committed extra-territorially. The learned judge answered these two questions tersely, in the negative.

[4] Section 4 creates money laundering offences and s 6 makes it an offence for any person to acquire, use or have possession of property which he or she knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person.

[27] Question 8 is framed in a broad and somewhat curious manner:

'Whether as a question of law, the power of the High Court to develop the common law, becomes a duty because of the interest of justice principle envisaged in section 173 of the Constitution, 108 of 1996, and/or because of the constitutional duty of the State to effectively prosecute crime, once that court forms the view that common law principles with regards to common law offences do not provide for extra – territorial jurisdiction and therefore ought to be developed.'

[28] Borchers J had the following to say about that question:

'Question 8 was never raised before judgment and therefore forms no part of the judgment. I have never formed the view that the common law ought to be developed to provide for extraterritorial jurisdiction in the factual situation presently before the court. I was not asked even to consider that question. This question can therefore not be reserved as a question for the consideration of the Supreme Court of Appeal.'

[29] The learned judge consequently refused the application to reserve questions in terms of s 319 of the CPA in its entirety. It is necessary to record, as the court below did in its judgment upholding the plea of non-jurisdiction, that Mr Boekhoud's co-accused have either had charges against them withdrawn or have pleaded guilty in terms of s 105A of the CPA and entered into plea bargain agreements with the State. Mr Boekhoud remained the only accused in the court below.

[30] At the outset before us, counsel for the State readily accepted that not all of the counts between count 2 and 55 were applicable to Mr Boekhoud. Several were primarily directed against his co-accused. Counsel indicated that the State might have to give consideration to whether the counts involving contraventions of the Exchange Control Regulations should be withdrawn. The State might also give consideration to withdrawing some of the theft charges. Importantly, counsel for the State conceded that in relation to the indictment and associated documentation, it might have to 'return to the drawing board' before resuming Mr Boekhoud's prosecution.

[31] Before the judgment of the Constitutional Court in *S v Basson* 2007 (1) SACR 566 (CC), this court had repeatedly held that a question of law could

only be reserved in terms of s 319 of the CPA, upon conviction or acquittal of an accused and that an order upholding an exception to a charge was neither a conviction nor an acquittal and consequently could not be reserved for consideration by this court. In *Basson* the Constitutional Court was concerned with circumstances where the upholding of an objection to an indictment had the effect of barring the State from prosecuting the accused on charges which were quashed.

[32] The Constitutional Court had regard to the State's prosecutorial authority, enabling it to fulfil its constitutional obligations to prosecute those offences that threaten or infringe the rights of its citizens. It noted that the purpose of s 319 was amongst others to allow the State to appeal on a point of law to the SCA. At para 148 the following is stated:

'Section 319(1) provides that if "any question of law arises on the trial in a superior court", the Court may of its own motion or at the request of the prosecutor or accused reserve that question for consideration by the SCA. There is nothing in the language to suggest that the State may only request the reservation of questions directed at the conviction or acquittal of the accused. Section 319(2) indeed strongly suggests that the Legislature intended to permit an appeal against any order upholding or dismissing an objection by way of a reservation of a question of law. The subsection provides that "(t)he grounds upon which any objection to an indictment is taken shall, for the purposes of [s 319], be deemed to be questions of law." '

[33] Whilst appreciating that that there was a well-established legislative and judicial policy which precluded piecemeal appeals to the SCA the Constitutional Court noted there was no such problem where the only charge against an accused is quashed. That effectively brings the proceedings to an end.[5] The same would apply in the event that all the charges in an indictment were to fall away because of a ruling on jurisdiction.[6] It went on to hold that there is no bar to a question being reserved in this regard.

[34] Whenever a question of law is reserved in terms of s 319 of the CPA, certainty must exist in regard to all of the facts to which the question relates or

[5] Para 149.
[6] See *Basson* para 151.

on which the legal point hinges. In *S v Basson* 2003 (2) SACR 373 (SCA) the following summary appears at 378-379:

'The State has no right to appeal in terms of the Act against incorrect factual findings by a trial court. The State can appeal only if the trial court gave a wrong decision due to a mistake of law. In order to determine whether the trial court erred in law the factual basis upon which it based its decision must be determined. Another factual basis cannot give an indication whether the court made a mistake of law. It follows that a question of law arises only when the facts upon which the trial court based its judgment could have another legal consequence than that which the trial court had found. For those reasons (a) there must be certainty regarding the legal issue being raised and the facts upon which the trial judge based her or his findings, and (b) when a question of law is reserved, it has to be set out clearly not only which legal issue is raised but also the facts on which the trial court based its finding.'

See also S v Goliath 1972 (3) SA 1 (A) at 9H.

[35] The five questions set out in paragraph 23 above are couched in the abstract. They are posed theoretically without reference to specific charges or the allegations in those charges that the State will set out to prove. Furthermore, the questions conflate conspiracy with common purpose. Whilst one could agree beforehand to act together with others, prior agreement is not always necessary before an accused can be convicted on the basis of common purpose. Before us it was submitted on behalf of the State that this court ought to consider all the charges and the alternatives, relate them to the summary of substantial facts and the request for further particulars and the responses thereto and that this would then provide the factual background against which the questions should be answered. So much then for precision and the notion that counsel are there to assist the court and not the other way around.

[36] At this stage it is necessary to consider in some detail, the indictment, the summary of substantial facts, the request for further particulars and the responses thereto. A careful reading of the first 26 pages of the indictment reveals that the 55 offences allegedly committed by the accused are named, without amplification or factual setting. On page 27 of the indictment there is a 'preamble' to the racketeering charge and the alternatives thereto. The preamble purports to explain the genesis and purpose of section 2 of POCA.

It records that it was modelled on legislation that exists in the United States of America, namely, The Racketeer Influenced and Corrupt Organisations Act (RICO), found at Title 18, United States Code, Section 1961 *et seq*.[7]

[37] I interpose to consider the provisions of section 2 of POCA and the definition of 'a pattern of racketeering activity'. Section 2 provides:

'Offences

(1) Any person who ─

(a) (i) receives or retains any property derived, directly or indirectly, from a pattern of racketeering activity; and

(ii) knows or ought reasonably to have known that such property is so derived; and

(iii) uses or invests, directly or indirectly, any part of such property in acquisition of any interest in, or the establishment or operation or activities of, any enterprise;

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

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

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

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

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

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

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

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[7] In the twentieth century the opening of markets, the free movement of persons, goods, capital and services and the improvement in transport and telecommunications provided a perfect opportunity for the globalisation of crime. We are living in times in which governments are rightly concerned about suppressing transnational crimes. Legislation creating offences such as money laundering abound. For an interesting discussion of the topic see an article by Neil Boister 'The trend to "universal extradition" over subsidiary universal jurisdiction in the suppression of transnational crime' 2003 *Acta Juridica* 287.

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

[38] Section 1 of POCA defines 'a pattern of racketeering activity' as

'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.'

Schedule 1 refers, amongst others, to the offences of theft and fraud.

[39] In count 1 Mr Boekhoud was charged with a contravention of s 2(1)(e) of POCA. In two alternatives to the main count he was charged with contraventions of s 2(1)(g) and 2(1)(b) of POCA.

[40] Returning to the indictment, the State purports therein to explain how an enterprise can be a legitimate entity, or not. The indictment notes that at least two predicate offences, listed in Schedule 1 have to be committed within the listed period. The indictment states that the acts that comprise the 'pattern of racketeering activity' are also separate criminal offences that may be charged separately. Counts 2-55, according to the State, were meant to do just that.

[41] The 'enterprise' contemplated in s 2 of POCA is explained in two further pages of the indictment and amounts to what is set out in summary form in para 9 above. In the next two pages of the indictment the State sets out the objects and the activities of the enterprise, which is in effect a repetition of what has already been described with a little more detail added.

[42] The indictment then goes on to explain that the constituent racketeering acts or the predicate offences, as they are now commonly referred to, are those set out in counts 2-55. The indictment proceeds to link the predicate offences and the alternative counts to the enterprise.

[43] At page 69 of the indictment the following appears:

'At the time of stealing the unwrought precious metals in question a common purpose existed between accused 1, 2, 4 and 5 to steal, export and sell the material with a view to profit from the sale.'

[44] The State was requested to provide exact details concerning the *actus reus* of Mr Boekhoud in the illegal procurement (theft) and smuggling (fraud) of the upms. The State responded as follows:

'As can be gleaned from the Indictment it is not alleged by the State that accused 1 physically partook in the acquiring (theft) or illegal exportation (fraud) of the unwrought precious metals. It is alleged that he and the other accused were associated together in an illegal enterprise that had as its main aim the procurement of unwrought precious metals, the unlawful dispatch of those metals from South Africa to the United Kingdom and money laundering as regards the remittances and proceeds unlawfully earned as consequences of the first two activities.'

[45] In regard to the preparation and presentation of falsified export documentation the indictment alleged that 'on occasion' Mr Boekhoud had directed how it was to be done.

[46] In response to the question whether Mr Boekhoud performed any act or acts in relation to any of the preferred charges at any place other than in Ramsay, Peterborough in the United Kingdom, the State said:

'Accused 1 always acted through [his refinery] and the said address belongs to [the refinery]. In that sense he always acted from the said address, except with regard to counts 27, 29 and 51. . . .

Accused 1, however, communicated from time to time with one or more accused, . . . who were in South Africa.'

[47] Significantly, in response to an enquiry about the legal and factual basis upon which common purpose is to be inferred, the State said the following:

'The State will ask the court to look at all the evidence and all of the acts of all the accused *as a whole at the end of the trial* to determine whether or not a common purpose (objective of the group) existed between the participants to steal, dispatch and sell for profit. With regard to the legal basis upon which the existence or otherwise of a common purpose needs to be determined the position is well established. With reference to S v Mgedezi 1989 (1) SA 687(A), the Constitutional Court in S v Thebus and Another 2003 (6) SA 505 (CC) at 532 H-I,

said the following about common purpose, in particular with regard to *mens rea*: "If the prosecutions relies on common purpose, it must prove beyond reasonable doubt that each accused had the requisite mens rea concerning the unlawful outcome at the time the offence was committed." And, further, that: "He or she must have intended that criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself or herself reckless as to whether the result was to ensue." The State can rely on circumstantial evidence. See S v Blom 1939 (AD) 188.' (My emphasis.)

[48] In response to a question whether Mr Boekhoud committed the crime of racketeering in Johannesburg, the State said:

'The State did not allege that Accused 1 was in Johannesburg when he acted as alleged. . . .'

[49] In response to a question about whether Mr Boekhoud acted elsewhere ─ other than in Johannesburg ─ the State responded in the following manner:

'The State does not allege that the accused acted "elsewhere". However, other members/associates of the enterprise did.

The word elsewhere is used in the Indictment because some acts by enterprise members/associates happened at places other than Johannesburg and surroundings in the UK. In this regard the State alleges that in respect of counts 2 – 7, 15, 17, 18, 19, 26, 30, 32 - 34 the stolen unwrought precious metals originates from the Bushveld platinum area (Rustenburg). In respect of counts 14 and 16, the State alleges that the bulk of the material in these counts were stolen from the Bushveld platinum area, but that a portion of the stolen material originates from the Great Dyke area . . . Even where the theft of unwrought precious metals happened outside the jurisdiction area of the Gauteng South Division of the High Court or borders of South Africa, the Gauteng South Division of the High Court of South Africa still has jurisdiction in regard to such stolen material found or handled within its jurisdiction area.

. . .

What is important is that the State must be able to prove that Accused 1 knew that the unwrought precious metals that he received from the Oliver Tambo International Airport in collaboration with others was stolen, not where it was stolen from . . .'

[50] Mr Boekhoud requested the following particulars in respect of count 1:

'The State is required to indicate on what basis it is alleged, in fact and in law, that the Witwatersrand Local Division of the High Court . . . has jurisdiction in respect of accused 1 and the acts he is alleged to have performed in the execution of the crimes perpetrated by the enterprise'.

[51] The State responded thus:

'The unwrought precious metals in the Indictment was handled and/or possessed within the jurisdiction area of this Honourable court. It was dispatched from the Oliver Tambo International airport to Accused 1. This Honourable Court has jurisdiction in respect of Accused 1's activities because he is *inter alia* charged in terms of section 2(1)(e) of POCA as an associate/participant of an enterprise that acted through a pattern of racketeering activity to commit the offences set out in the Indictment, which provides for extra territorial jurisdiction. It furthermore has jurisdiction because Accused 1 has been charged with 2(1)(b), 4 and 6 of POCA, which provides for extraterritorial jurisdiction. Moreover, he is charged with conspiracy (refer section 2(1)(g) of POCA) and/or that *he acted with a common purpose, which doctrines also provides for extraterritorial jurisdiction*.' (My emphasis.)

[52] The State was asked to provide the dates, times and places where Mr Boekhoud is alleged to have stolen the upms and the 'precise and exact *actus reus*' of Mr Boekhoud in committing the theft of upms. The State said the following:

'The State does not allege that Accused 1 physically stole or handled the unwrought precious metals in question in South Africa. As already stated above, he received it in the United Kingdom. It is trite law that theft is a continuous offence. . . .'

[53] Insofar as possession in contravention of the Mining Rights Act is concerned, the State was asked to 'indicate the factual and legal basis for the allegation that accused 1 possessed the unwrought precious metal..' The response was as follows:

'The State relies on the doctrine of common purpose re possession in South Africa. With reference to possession in the UK, the State relies on the provisions of sections 6, 4, and 2(1)(b) [of POCA], the latter three counts which provide for *extraterritorial jurisdiction*. . . .' (My emphasis.)

[54] In a subsequent paragraph in the further particulars supplied by the State in relation to the possession of upms the following appears:

'With reference to contravening the Mining Rights Act, the State relies on the doctrine of common purpose. Knowing that he was trading in stolen unwrought precious metals forwarded to him from South Africa, accused 1 would then have known as a necessary consequence that the Mining Rights Act or another statute was being contravened…'

[55] In relation to fraud connected to the export of the upms the State, inter alia, said the following:

'With reference to the specific facts in this matter the State will prove that accused 1 knew or ought reasonably to have known (dolus eventualis) when importing stolen unwrought precious metals, that fictitious/false documentation would have to be prepared and presented to Customs. This is a necessary consequence when exporting stolen precious metals.'

[56] I consider it necessary to now deal briefly with the doctrine of common purpose in order to demonstrate the confusion in the State's case flowing from the indictment, the summary of substantial facts, the further particulars provided by the State, and the heads of argument filed by the State in this court. Professor C R Snyman deals with the doctrine of common purpose fairly extensively in his *Criminal Law* 4 ed (2002) (at 260 *et seq).* The learned author provides a 'summary of principles':

'1 If two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others.

2. In a charge of having committed a crime which involves the causing of a certain result (such as murder), the conduct imputed includes the causing of such result.

3. Conduct by a member of the group of persons having a common purpose which differs from the conduct envisaged in the said common purpose may not be imputed to another member of the group unless the latter knew that such other conduct would be committed, or foresaw the possibility that it might be committed and reconciled himself to that possibility.

4. A finding that a person acted together with one or more other persons in a common purpose is not dependent upon proof of a prior conspiracy. Such a finding may be inferred from the conduct of a person or persons.

5. A finding that a person acted together with one or more other persons in a common purpose may be based upon the first-mentioned person's active association in the execution of the common purpose. However, in a charge of murder this rule applies only if the active association took place while the deceased was still alive and before a mortal wound or mortal wounds had been inflicted by the person or persons with whose conduct such first-mentioned person associated himself. . . .'

[57] When the acts of an accused's cohorts committed here are imputed to him, notwithstanding that he is a foreign national resident in that country there is no need to speak of extra-territorial jurisdiction. This is illustrated by the following example. A Portuguese national who lives in Lisbon who plans with

his corporate associates who are South African nationals resident here to assassinate business rivals based in South Africa and who is actively involved in the procurement of weapons for that purpose can hardly be heard to object to a South African court trying him for the murders committed here by his co-accused, even though he was in Lisbon at the time of the murders. This would apply even if he left to them the details and the execution of the murders as long as they had the common purpose to murder. A South African court would be trying the Portuguese national for the murder committed here. The imputed acts would be sufficient to found jurisdiction.

[58] The State vacillated between seeking to hold Mr Boekhoud liable on the doctrine of common purpose by imputing the acts of his co-accused to him, and holding him liable on the basis of his own acts committed in the United Kingdom. The reference to extra-territorial jurisdiction being afforded either by way of statute or the doctrine of common purpose is confusing and demonstrates the lack of a proper appreciation of the doctrine of common purpose. This is demonstrated by the practice note on behalf of the State in this court, which reads as follows:

'The aspect that will need to be pronounced upon relates to extra-territorial jurisdiction by a South African court with specific reference to the doctrine of common purpose and several other doctrines and principles pertaining to *inter alia* the common law crimes of theft and fraud, as well as whether section 4 & 6 (money laundering) of the Prevention of Organized Crime Act, No 121 of 1998 (POCA) has extra-territorial effect.'

The confusion permeates the indictment read with the summary of substantial facts and the further particulars. It is therefore not surprising that Borchers J recorded that the State, in supplying further particulars, alleged that the acts which constituted criminal conduct were performed by him outside the boundaries of South Africa.

[59] At this stage it is necessary to deal briefly with the purpose and significance of further particulars provided in terms of s 87 of the CPA. The particulars provided must be clearly worded and concise. *S v Alexander & others* 1964 (1) SA 249 (C) at 251H, *S v Mpetha* 1981 (3) SA 803 (C) at

806E-F and E Du Toit, F J De Jager, A Paizes, A St Q Skeen, S van der Merwe *Commentary on the Criminal Procedure Act* p 14-27.

[60] Section 87(2) of the CPA provides:

'The particulars shall be delivered to the accused without charge and shall be entered in the record, and the trial shall proceed as if the charge had been amended in conformity with such particulars.'

Thus, the particulars that the State provides become part of the record. The State is bound by them[8] and must prove them.

[61] Although no obligation rests on the State to disclose the evidence by means of which material facts are to be proved it is obliged to provide particulars of the material facts, which it intends to prove.[9]

[62] A question framed in terms of s 319 must be framed in such a way that it accurately expresses the legal point, but there must also be certainty concerning the facts on which the legal point is intended to hinge. See *Director of Public Prosecutions, Natal v Magidela & another* 2000 (1) SACR 458 (SCA) para 9. This principle is usually applied to questions being framed at the end of a trial upon conviction or acquittal. I can see no reason why the same should not apply to the present situation where the indictment and associated documentation runs into hundreds of pages and where the need for clarity is equally imperative. Indeed, it should notionally be easier to frame such questions when a charge is quashed at the outset. One would in such event be confined to the indictment and related documentation to which the questions should easily relate.

[63] Tellingly, the State, as pointed out in para 47 above, stated that it would ask the court to look at all the evidence and all the acts of the accused as a whole at the end of the trial to determine whether the accused acted with others in a common purpose to steal, dispatch and sell the upms for a profit. More damning for the State, however, is the concession during argument that

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[8] *R v Verity-Amm* 1934 TPD 416 at 422, *R v Wilken* 1945 EDL 246 at 254, *S v Mandela* 1974 (4) SA 878 (A) at 882E, *S v Nathaniel & others* 1987 (2) SA 225 (SWA) at 235D.

[9] *S v Cooper & others* 1976 (2) SA 875 (T) at 885H-886A.

several of the counts preferred against Mr Boekhoud have to be revisited or abandoned.

[64] In relation to the set of questions in para 23 above, the following questions arise:
To which specific counts do they apply? Is common purpose still relied upon by the State to extend the jurisdiction of the court below extra-territorially? In respect of which particular acts was there a common purpose and in respect of which is there reliance placed on the provisions of POCA for the extension of jurisdiction extra-territorially?

[65] Generally, the question remains: which counts are to be revisited or redrafted or withdrawn? One must guard against being seduced into answering questions such as those set out in para 23 in a vacuum. Should the State wish to ground its case on common purpose and seek to impute the conduct of perpetrators in South Africa to Mr Boekhoud then it should say so clearly and unequivocally in respect of each of the charges it intends to prefer against him. The State is seriously contemplating redrawing the indictment because it recognises that there are flaws. There is therefore no finality or clarity in respect of the charges it intends finally to prefer against Mr Boekhoud. That in itself is fatal to the State's case.

[66] In *Basson* the Constitutional Court was concerned that the State should not lose its right to prosecute by not having the ability to appeal against an exception to a charge. It is not a concern we should lose sight of. However, in the present case, the main count and its alternatives remain extant. Having regard to the main count and the material parts of the summary of substantial facts, it is the racketeering offences that the State is most intent on establishing.

[67] Borchers J expressed the *obiter* view that the reference in the definition to a pattern of racketeering activity is a reference to offences committed in South Africa. She expressed the view that the predicate offences, which constitute the pattern of racketeering activity, can be committed by a person

or persons other than the accused and all that is required is involvement or participation in some form by the accused.[10] In summary, the learned judge's *prima facie* view appears to be that the extra-territorial jurisdiction afforded to the court below in relation to Mr Boekhoud is premised on his co-accused having committed the predicate offences and that he was involved to some degree or participated in some form. She appears to hold the view that the predicate offences have to be committed in South Africa. She did not, however, decide all those questions finally.

[68] In *S v Dos Santos* [2010] ZASCA 73 (27 May 2010); 2010 (2) SACR 382 (SCA) Ponnan JA said the following (para 39):

'For a pattern of racketeering activity, POCA requires at least two offences committed during the prescribed period. In this court, as indeed the one below, counsel argued that the word "offence" in that context meant a prior conviction. Absent two prior convictions, so the submission went, POCA could not be invoked. Underpinning that submission is the contention that an accused person must first be tried and convicted of the predicate offences (here the charges in terms of the Diamonds Act) before he/she could be indicted on the racketeering charge in terms of POCA. Allied to that submission is the argument that in this instance there has been an improper splitting of charges resulting in an improper duplication of convictions.'

[69] In para 40 of *Dos Santos*, the following appears:

'In my view, whether to prosecute and what charge to file or bring before a court are decisions that generally rest in the prosecutor's discretion. Nor would it be necessary, it seems to me, for the court to return a verdict of guilty in respect of the predicate offences for the POCA racketeering charge to be sustained. It may well suffice for the court to hold that the predicate charge has been proved without in fact returning a guilty verdict. But that need not be decided here.'

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[10] In *S v Eyssen* 2009 (1) SACR 406 (SCA) para 7, this court said the following of a charge in terms of s 2(1)(e) and (f) of POCA:
'It is a requirement of the subsections in question that the accused (in ss *(e)*) or the other person (in ss *(f)*) must participate in the enterprise's affairs. It will therefore be important to identify what those affairs are. It will also be important for the State to establish that any particular criminal act relied upon, constituted participation in such affairs. . . . The participation may be direct, or indirect.'
At para 9 of *Eyssen* Cloete JA said the following:
'The participation must be by way of ongoing, continuous or repeated participation or involvement. The use of "involvement" as well as the word "participation" widens the ambit of the definition. So does the use of the words "ongoing, continuous or repeated". Although similar in meaning, there are nuances of difference. "Ongoing" conveys the idea of "not as yet completed". "Continuous" (as opposed to "continual") means uninterrupted in time or sequence. "Repeated" means recurring.'

[70] It appears that the State intends to prove the predicate offences and if it proves that Mr Boekhoud shared a common purpose with his co-accused in respect of one such offence, but does not establish a pattern of racketeering activity it might consider whether a decision of guilt on one such offence is a competent verdict in terms of s 270 of the CPA. If the court below is disinclined to agree, the State will have a clearly defined set of facts against which to frame a question in terms of s 319, should it be so advised.

[71] Furthermore, if the State proves a common purpose in respect of a pattern of racketeering activity and the court below is disinclined to convict Mr Boekhoud in respect thereof because it considers that this would mean it was exercising extra-territorial jurisdiction, which in its view the statute or the doctrine precludes it from doing, then there would be a defined set of facts against which a question could be framed. Courts of appeal are, however, not in the business of giving advice. It is for the State to consider its options and to act advisedly.

[72] The problems referred to above are also evident in relation to questions 2, 3, 5, 6 and 7. As stated earlier in this judgment, the State has misconceived its own case and has employed the expression ‘extra-territorial’ loosely and without due regard to the principles of the doctrine of common purpose. It appears not to be able to decide the foundations of its case and is caught betwixt and between a number of conflicting concepts. I must confess that the meaning of question 8 eludes me. It is so broad and unconnected to any particular count as to be virtually unintelligible. In any event, as pointed out by Borchers J, it was never an issue pertinently raised before her.

[73] It was submitted on behalf of Mr Boekhoud that the application for condonation for the late filing of the application for leave to appeal be refused. The State, as is often the case, was at the mercy of transcribers. It took some time for it to obtain the judgment of the court below. The explanation of the steps taken by the State is, in my view, a reasonable one. I would accordingly grant condonation.

[74] There is some force in the submission on behalf of Mr Boekhoud that the State's application for leave to appeal is not, as required by SCA rule 6(5)(a), 'clear and succinct and to the point'. In my view, it should not in the totality of circumstances for that reason alone be dismissed.

[75] For all the reasons stated above, there are no prospects of success and the application for leave to appeal must fail. The following order is made:

1. The application for condonation for late filing of the application for leave to appeal is granted.
2. The application for leave to appeal is dismissed.

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M S NAVSA
JUDGE OF APPEAL

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