THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 775/2023

In the matter between

ISAAC TEBOGO DITLHAKANYANE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Ditlhakanyane v The State* (775/2023) [2025] ZASCA 90 (12 June 2025)

Coram: MOCUMIE, NICHOLLS and BAARTMAN JJA and MUSI and WINDELL AJJA

Heard: 20 February 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand down is deemed to be 12 June 2025 at 11h00.

Summary: Practice and procedure – special leave to appeal – s 17(2)*(f)* of the Superior Courts Act 10 of 2013.

Appeal – application for special leave to appeal to the SCA – requirements for grant thereof – test – exceptional circumstances.

Conviction on s 2(1)*(e)* and (*f*) Prevention of Organised Crime Act 121 of 1998 (POCA) – whether unfair duplication of convictions – conviction only on s 2(1)(*e*) – same evidence test applied – principles related to the conviction on s 2(1)(*e*) and (*f*) re-affirmed – Section 322(6) of the Criminal Procedure Act 51 of 1977 applied - sentence set aside and substituted.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Moosa J, Senekal and Jordaan AJJ concurring sitting as court of appeal):

1 The application for reconsideration in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013, is granted.

2 The appeal is partially upheld, as set out hereafter.

3 The order of the full court is set aside and substituted with the following:

'(i) The conviction on count 1, contravention of s 2(1)(*f*) of the Prevention of Organised Crime Act 121 of 1998 (POCA), and the sentence imposed on this count are set aside.

(ii) The conviction on count 2, contravention of s 2(1)(*e*) of POCA is confirmed.

(iii) The accused is sentenced to 30 (thirty) years imprisonment in respect of count 2 antedated to 17 June 2015.'

JUDGMENT

Mocumie JA (Nicholls and Baartman JJA and Musi and Windell AJJA concurring):

[1] This is an application in terms of s 17(2)(*f*) of the Superior Courts Act 10 of 2023 (the Superior Courts Act), for the reconsideration of a dismissal of an application for special leave by two judges of this Court. The applicant, Mr Isaac Ditlhakanyane (Mr Ditlhakanyane) appealed against the convictions and long terms of imprisonment imposed on him by the Gauteng Division of the High Court, Satchwell J (the trial court), on 17 June 2015, which the full court subsequently confirmed on 10 October 2023. His petition for special leave to appeal was dismissed by this Court. Discontented with the dismissal of his petition, he brought this application.

[2] At the relevant time s 17(2)(*f*) read:

'The decision of the majority of the judges considering the application referred to in paragraph (b) …to refuse the application shall be final: Provided that the President of the Supreme Court

of Appeal, may *in exceptional circumstances*, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation. (Emphasis added.) It is on this basis that the President referred the matter to this Court.[1]

[3] The Constitutional Court in *Liesching and Others v The State (Liesching II)*[2] stated that*:*

'As with section 18(1), section 17(2)(f) prescribes a departure from the ordinary course of an appeal process. Under section 17, in the ordinary course, the decision of two or more Judges refusing leave to appeal is final. However, *section 17(2)(f) allows for a litigant to depart from this normal course, in exceptional circumstances only, and apply to the President for reconsideration of the refusal of leave to appeal*.[3](Emphasis added.)

[4] In *Avnit v First Rand Bank Ltd*[4] this Court had regard to what exceptional circumstances mean in the context of s 17(2)*(f).* It concluded that it is fact specific and that '… in the exercise of the discretion vested in the President the overall interests of justice will be the finally determinative feature for the exercise of the President's discretion'.

[5] In *Masiteng v Minister of Police*[5], relying on *Liesching II*, this Court stated:

'The threshold for granting an application in terms of s 17(2)(f) is therefore high. The applicant has to satisfy this Court that *the circumstances are truly exceptional to hear this matter again* after the application for leave was dismissed and the petition to this Court was unsuccessful.'[6](Emphasis added.)

[6] I now consider whether Mr Ditlhakanyane has established 'exceptional circumstances' which justify this Court's attention for the second time.

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[1] Although not applicable in this application, it is important to note that s 17(2)(*f*) was amended in 2023 and replaced 'exceptional circumstances' with 'where grave failure of justice would otherwise result' or 'the administration of justice may be brought into disrepute.'

[2] *Liesching and Others v* S [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC); 2019 (4) SA 219 (CC).

[3] Ibid para 136.

[4] *Avnit v First Rand Bank Ltd* [2014] ZASCA 132; 2014 JDR 2014 (SCA); See also *Hendrik Petrus Hough v Mzubanzi Sisilana and others* [2018] ZASCA 04; *Beadica 231 CC v Sale's Hire CC* [2020] ZASCA 76; 2020 JDR 1281 (SCA).

[5] *Masiteng v Minister of Police* [2024] ZASCA 165; 2024 JDR 5264 (SCA).

[6] Ibid para 20.

Mr Ditlhakanyane submitted that 'exceptional circumstances' existed because currently there are conflicting judgments of this Court as to whether a conviction in terms of both s 2(1)*(f)* (count 1) and s 2(1)*(e)* (count 2) of the Prevention of Organised Crime Act 121 of 1998 (POCA), based on the same set of facts and or evidence amounts to a splitting of convictions. This is a narrow question or point of law contemplated by the legislature under s 17(2)(*f)* which qualifies as an 'exceptional circumstance'. He further submitted that it was not only 'in the interests of justice' for him but for the prosecution and the society at large for the appeal to be reconsidered on this narrow question or point of law.

[7] This entails a determination on the facts of this matter whether an accused person can be convicted on contravening both s 2(1)*(e)* and *(f)* of POCA, where evidence of the same activities was led to prove both counts. The subsidiary issue is whether, if this Court finds that there was a duplication of convictions, it is at large to interfere with the sentence imposed by the full court on the remaining conviction.

[8] The factual matrix against which these issues fall to be determined is briefly as follows. Mr Ditlhakanyane and his erstwhile co-accused were indicted and subsequently convicted in the trial court. On 17 June 2015, he was sentenced to an effective period of 50 years imprisonment. He appealed against the convictions and sentences imposed. On 24 October 2022, the appeal was heard by the full court, which dismissed the appeal against the convictions. However, it reduced Mr Ditlhakanyane's sentence from a cumulative 50 years to 40 years imprisonment.

[9] The state alleges that Mr Ditlhakanyane was part of a criminal enterprise which focused on looting the South African Post Bank. The *modus operandi* in the commission of the crimes was as follows:

(a) Compromised and corrupt Post Office employees were used as 'agents' who would identify bank accounts from which the members of the criminal enterprise could steal;

(b) Once the agents had identified the accounts with a sufficient credit balance, they would forward the information to the provincial ringleader;

(c) The ringleader would then procure various documents, namely forged identification documents – either a South African identity book or a passport (Lesotho, Mozambique or Nigeria). The ringleader would also co-opt a person ('striker' or 'runner') who was prepared to falsely claim to be the account holder of the targeted account;
(d) The 'runner' would then present the false documents to the Post Office Bank with demands for monies from genuine accounts.

[10] The evidence led during the trial showed that Mr Ditlhakanyane managed and participated in the criminal enterprise which preyed upon account holders at the South African Post Office. He played a crucial role in obtaining information regarding account holders' accounts and determining the amount of money available in the said accounts. He was also the central figure who forged identity documents and passports to use in the scheme. He and his erstwhile co-accused also obtained false bank cards. These forged documents were presented at different Post Office branches and, with the assistance of tellers and employees of the Post Bank, monies were withdrawn from the targeted Post Bank accounts.[7]

[11] Cellular phone data showed that the Mr Ditlhakanyane communicated with the Post Office employees and specifically with the employees involved in processing the disputed transactions on the day that the transactions occurred. The trial court also found that the incriminating evidence indicated that the applicant along with his erstwhile co-accused was, to a greater or lesser extent, connected to the racketeering enterprise; that each of them associated themselves with its objectives; that together, they had a common purpose to promote its aims and objectives through an organised pattern of racketeering activity.

[12] Mr David Motsoane (Mr Motsoane) testified as a s 204 witness[8] in relation to specified offences, namely theft, fraud, money laundering and managing a criminal

[7] *Ditlhakanyane and Others v S* [2023] ZAGPJHC 93.
[8] Section 204 of the CPA, which is headed 'Incriminating evidence by a witness for prosecution' provides:
'(1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor- the court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness.

enterprise under POCA. He stated that he was recruited by Mr Ditlhakanyane. The latter was an active participant in the criminal enterprise. He, together with Mr Ditlhakanyane, as well as their erstwhile accused number 12 were the masterminds. He pleaded guilty in the Pretoria Commercial Crimes Court for his role in the criminal enterprise. He was subsequently sentenced to various terms of imprisonment which were ordered to run concurrently, culminating in a cumulative sentence of ten years imprisonment.

[13] Mr Motsoane implicated Mr Ditlhakanyane extensively. His evidence showed that Mr Ditlhakanyane played an active role in managing the criminal enterprise and participating in it. Despite the overwhelming evidence against him, direct and circumstantial, that he was linked with the other members of the syndicate/criminal enterprise, Mr Ditlhakanyane elected not to testify. The trial court convicted him of 26 counts of theft, fraud, participating in the activities of a criminal enterprise (racketeering) and managing a racketeering enterprise and sentenced him accordingly. However, on appeal his sentence in respect of count 2, was reduced to 20 years imprisonment which was to run concurrently with that in count 1. Thus, he was partially successful before the full court. In this Court, he now appeals the convictions and sentences on both counts.

[14] Mr Ditlhakanyane was indicted with, among others, contravention of s 2 of POCA. Count 1 is contravention of s 2(1)*(f)* of POCA provides that:

'Any person who-

(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.'

[15] Count 2 is a contravention of s 2(1)*(e)*. It stipulates:

'Any person who-

(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.'

[16] To ascertain whether a duplication of convictions has occurred is not always a clear-cut task. This Court has had to deal with duplication of convictions in a number of cases, yet as this case clearly demonstrates, the uncertainty still lingers.[9]

[17] In the judgment, the trial court identified and acknowledged the discrepancies in the evidence for the state. It, however held that those discrepancies were not material nor relevant when viewed against the overwhelming evidence which supported a conviction on both ss 2(1)*(e)* and *(f)* of POCA. It concluded that the state had proved its case beyond reasonable doubt regardless of those discrepancies. This was particularly so because Mr Ditlhakanyane chose not to testify in the face of damning evidence against him by his erstwhile partner-in-crime, his accomplice and s 204 witness, Mr Motsoane. These findings of facts are unassailable.

The law

[18] South African law prohibits duplication of convictions but not the splitting of charges. Section 83 of the CPA provides:

'If by reason of any uncertainty as to the facts which can be proved or if for any other reason, it is doubtful which of the several offences is constituted by the facts which can be proved, the accused may be charged with the commission of all or any such offences, and any number of such charges may be tried at once, or the accused may be charged in the alternative with the commission of any number of such offences.'

[19] Du Toit et al *Commentary on the Criminal Procedure Act*[10] summarises the effect of s 83 in the following manner:

'Section 83 authorizes the inclusion in the charge sheet of all the charges that could possibly be supported by the facts, even if they overlap to such an extent that convictions on all or on some of the counts would amount to a duplication of convictions . . . An accused may thus not object, at the beginning of the trial, to the charge sheet or indictment on the basis that it contains a duplication of charges. Such a duplication will occur where more than one charge is supported by the same culpable fact . . . In short, it is the court's duty to guard against a

[9] See Michael Miller '*Two for one – Duplicate convictions for one crime'* February 2013.De Rebus; Delano Cole Van Der Linde *'Managing and Participating in a Criminal Enterprise Under Poca: Duplication of Convictions? A discussion of the Conflict Between Prinsloo v S and S v Tiry'* (2022) 139 SALJ.

[10] E Du Toit et al *Commentary on the Criminal Procedure Act* (loose-leaf service 38, 2007) at 14-5.

duplication of convictions and not the prosecutor's duty to refrain from the duplication of charges.'[11]

[20] Section 336 of the Criminal Procedure Act 51 of 1977 (the CPA), stipulates:

'Where an act or an omission constitutes an offence under two or more statutory provisions or is an offence against a statutory provision and the common law, the person guilty of such act or omission shall, unless the contrary intention appears, be liable to be prosecuted and punished under either statutory provision or, as the case may be, under the statutory provision of the common law, but shall not be liable to more than one punishment for the act or omission constituting the offence.'

[21] In *S v Eyssen*[12] this Court explained the essential difference between the offences in ss *(f)* and *(e)* of POCA as follows:

'The essence of the offence in subsec (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 subsec (f), the essence of which is that the accused must know (or ought reasonably to have known) that another person did so. Knowledge, not participation, is required. On the other hand, subsec (e) is wider than subsec (f) in that subsec (e) covers a person who was managing, or employed by, or associated with the enterprise, whereas subsec (f) is limited to a person who manages the operations or activities of an enterprise.'[13]

[22] In *S v BM*,[14] this Court remarked that:

'It has been a rule of practice in our criminal courts since at least 1887 that 'where the accused has committed only one offence in substance, it should not be split up and charged against him in one and the same trial as several offences'. The test is whether, taking a common sense view of matters in the light of fairness to the accused, a single offence or more than one has been committed. *The purpose of the rule is to prevent a duplication of convictions on what*

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[11] See in this regard *S v Grobler en 'n Ander* 1966 (1) SA 507 (A) at 513E-H (per Rumpff JA) and at 522E-523E (per Wessels JA). See also *S v Gaseb and Others* 2001 (1) SACR 438 (NMS) at 441A-442B and 465F-466D. In the latter case the accused persons were charged with four counts of rape, the wording of all the charges being identical. Faced with an argument based on duplication of convictions, the Namibia Supreme Court upheld all the convictions, holding that each of the four appellants had had sexual intercourse with the complainant without her consent and that each had assisted the three others in turn in the rapes committed by them.

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

[13] Ibid para 5.

[14] *S v BM* [2013] ZASCA 160; 2014 (2) SACR 23 (SCA).

is essentially a single offence and, consequently, the duplication of punishment.'[15](Emphasis added.)

[23] In *Tiry and Others v S (Tiry)*[16], Messers Tiry and Sangweni were convicted on the same evidence on both counts contravention of s 2(1)*(e)* and *(f).* This Court held:[17]
'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*.
…
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*. 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.'

[24] In *S v Whitehead*[18] this Court stated as follows:
'It is a fundamental principle of our law that an accused [person] should not be convicted and sentenced in respect of two crimes when he or she has committed only one offence.'[19]
. . . .
In contesting multiple convictions it is often submitted that they are premised on the same set of facts. This is, in fact, the so-called 'evidence test' sometimes applied by the courts in determining whether or not there is a duplication of convictions. This test enquires whether the evidence necessary to establish the commission of one offence involves proving the commission of another offence. In this regard, Bristowe J, in the case of *R v Van Der Merwe* 1921 TPD 1 at 5 pointed out that "…if the evidence necessary to prove one criminal act *necessarily* involves evidence of another criminal act, those two are to be considered as one

[15] Ibid para 3
[16] *Tiry and Others v S* [2020] ZASCA 137; [2021] 1 All SA 80 (SCA);2021 (1)SACR 349 (SCA).
[17] Ibid paras 110-111.
[18] *S v Whitehead* [2007] ZASCA 171; [2007] SCA 171 (RSA); [2008] 2 All SA 257 (SCA); 2008 (1) SACR 431 (SCA).
[19] Ibid para 10.

transaction. *But if the evidence necessary to establish one criminal act is complete without the other criminal act being brought in at all then the two are separate crimes"* (Emphasis added)'[20]

[25] In *Prinsloo v S (Prinsloo)*[21]*,* the minority judgment, which was subsequently and unanimously confirmed in *Tiry*[22] this Court stated:

' The essence of the offence in (e) is participation in the affairs of the enterprise. The crux of (*f*), on the other hand, is knowledge, not participation. Or as Cloete JA formulated it, the essence of (*f*) is that "the accused must know (or ought to have known) that another person did so"'.[23]

. . . .

'Logic dictates that participation in racketeering activities will always include knowledge of those activities. While one can have knowledge without participation, the converse is not possible. Of necessity, the conviction of a manager under *(e)* must involve a criminal act in terms of *(f)*. In order to participate in racketeering activities for purposes of *(e)*, the wrongdoer must have knowledge, proof of which in itself will amount to proof of the offence under *(f)*. It is true that the elements of the two offences are in certain respects different, but that in itself, is no answer to an objection of duplication where, as in this case, the greater necessarily includes the lesser. An accused convicted of murder on the basis of *dolus eventualis* will almost inevitably also be guilty of culpable homicide because the wider concept of negligence will of necessity embrace the narrower concept of legal intent. Yet, no one will think of convicting the accused of both. *In so far as S v De Vries and others 2009 (1) SACR 613 (C) para 397-398 goes the other way, it was in my view wrongly decided.'* [24](Emphasis added.)

[26] It is clear from the above authorities that the court must use a common sense approach in determining whether there has been a duplication of convictions. In order to reach that conclusion, the court must examine whether the evidence needed to sustain a conviction on the one count is exactly the same as the evidence needed to sustain a conviction on another count. If the answer to that is in the affirmative then there is a duplication of convictions.

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[20] Ibid para 39.
[21] *Prinsloo v S* [2015] ZASCA 207; [2016] 1 All SA 390 (SCA); 2016 (2) SACR 25 (SCA).
[22] Op cit fn 16 para 111.
[23] Op cit fn 21 para 396.
[24] Op cit fn 21 para 398.

[27] It is common cause that the trial court and the full court did not address the issue of duplication of convictions at all. In this regard it made a fundamental mistake.

[28] In analysing whether Mr Ditlhakanyane was guilty of managing the operations of the enterprise through a pattern of racketeering activities, the trial court found, in essence, that he was central to the enterprise. He gave instructions and received information on the accounts targeted and shared the same with the tellers who then processed the fraudulent withdrawals. He worked extremely hard as the cellphone communication and constant travel throughout the day indicated. He used different phones to communicate with different tellers to obtain account details and saved those account details to process the withdrawals. He was closely linked in time and place to the fraudulent transactions. He was the constant role player throughout the existence of the enterprise. All this confirmed his centrality and leadership in the management of the enterprise.

[29] It is clear from all the evidence which the trial court relied upon to come to the conclusion that Mr Ditlhakanyane was guilty of managing and participating in the enterprise, that it did not draw any distinction between the evidence used to convict him of the respective counts. The trial court incorrectly used the terms ‘management’ and ‘participation’ interchangeably and as synonyms in the judgment. The full court said nothing about this.

[30] Viewing the evidence holistically, one can conclude that the trial court relied upon the whereabouts of Mr Motsoane in relation to his erstwhile accomplices, to convict Mr Ditlhakanyane on both counts. The full court did not interrogate the possibility of a duplication of convictions. It is therefore safe to conclude that it assumed that the trial court was correct. In these circumstances, considering the evidence and findings in respect of both counts from a common-sense point of view, it is clear that the two convictions are premised on the same set of facts. This is evinced by the evidence of Mr Motsoane stating first, how the activities were planned and how he was recruited to form part of the syndicate. Second, and in the same breath, how Mr Ditlhakanyane then participated in the commission of the offences in

person to the point where he was arrested *in delicto in flagrante* whilst committing one of the offences at one of the Post Offices they targeted.

[31] It follows therefore that in these circumstances, based on 'the [same] evidence test'[25], a conviction on both *(e)* and *(f)* offends against the duplication of convictions rule. Mr Ditlhakanyane's active involvement in the conduct of the enterprise brought him squarely within s 2(1)*(e):* the manager who is involved actively in the conduct of the enterprise through a pattern of racketeering activity. It follows that the appeal against the conviction on count 1, contravention of s 2(1)*(f)* ought to succeed.

[32] In sum, this Court in *Tiry* has endorsed and re-affirmed the principles set out in the minority judgment of *Prinsloo* that a conviction on both s 2(1)*(e)* and *(f)* based on the evidence test, thus relying on the same evidence to convict an accused person, is a duplication of convictions. As this Court stated unequivocally in *S v BM,* it is a common sense view of matters in the light of fairness to the accused and to prevent a duplication of convictions on what is essentially a single offence and, consequently, the duplication of punishment. To find otherwise would be unfair to Mr Ditlhakanyane, whose fair trial rights are enshrined in s 35(3) of the Constitution.

[33] The issue of sentence remains. This Court in *Maila v S* [26] reaffirmed that the determination of sentence is principally a matter of the trial court's discretion. And that interference with the sentence imposed should only happen when the trial court's discretion is regarded as having been unreasonably exercised. It is also trite that the power of an appellate court to interfere with a sentence imposed by a lower court is limited. In *S v Bogaards* [27], the Constitutional Court stated thus, as follows:

'It [the Appellate court] can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.'[28]

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[25] As explained in *S v BM* Op cit fn 14 para 3, this test enquires whether the evidence necessary to establish the commission of one offence involves proving the commission of another offence.
[26] *Maila v S* [2023] ZASCA 3; 2023 JDR 0130 (SCA) para 43.
[27] *S v Bogaards* [2012] ZACC 23; 2012 BCLR 1261 (CC); 2013 (1) SACR 1 (CC).
[28] Ibid para 41.

[34] Counsel for Mr Ditlhakanyane argued that the sentence imposed by the full court, replacing that of the trial court, although reduced from 50 years to 40 years, was startingly inappropriate and disproportional to the offence committed ie only one count of contravention of s 2(1)*(f).* The term of imprisonment imposed by the full court induced a sense of shock which entitles this Court to interfere and impose an appropriate sentence. It was submitted that the full court ignored similar cases including *Tiry, Dos Santos and another v S,*[29] *De Vries v S,*[30] *Prinsloo and Blignaut v S.*[31]

[35] The trial court imposed the following sentences relevant to this application: Count 1*:* 30 years and count 2: 20 years, 10 years of which was to run concurrently with the sentence imposed in respect of count 1. The full court reduced the effective sentence of 50 years imprisonment by the trial court to 40 years imprisonment.

[36] It follows logically that once this Court has found that Mr Ditlhakanyane should only have been convicted of one count, contravention of s 2(1)*(e)*, automatically, the 30 years imprisonment in respect of count 1 falls away. What then remains for consideration is the sentence imposed in respect of count 2: 20 years imprisonment of which 10 years is to run concurrently with the 30 years imposed in count 1. Without count 1, does it mean that the original 20 years must be confirmed? Can this Court, increase the sentence if it is of the view that 20 years imprisonment is not appropriate under the circumstances?

[37] This issue was addressed extensively. Counsel for Mr Ditlhakanyane submitted that the trial court took into account all relevant factors. The state did not cross-appeal the sentence. Therefore, this Court cannot exercise its discretion to interfere, absent a cross-appeal by the state. It was submitted that 20 years imprisonment was fair under the circumstances.

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[29] *Dos Santos and another v The State* [2010] ZASCA 73; 2010 (2) SACR 382 (SCA); [2010] 4 All SA 132 (SCA).
[30] *De Vries v The State* [2011] ZASCA 162; 2012 (1) SACR 186 (SCA); [2012] 1 All SA 13 (SCA).
[31] *Blignault v S* [2020] ZAECGHC 7.

[38] The Preamble to POCA highlights the growth of organised crime, and money laundering which infringes upon the rights of citizens and threatens economic stability. It recognises the importance of preventing individuals from benefiting from the fruits of unlawful activities. That is why the legislature has introduced measures to combat these crimes by, inter alia, setting high penalties and long terms of imprisonment to curb the recurrence of these crimes.

[39] There is no doubt that the contravention of s 2(1)*(e)* as part of organised crime, is a serious offence which cuts at the heart of the economy of this country. Had the trial court had to deal with only one count, it would in all probability have been alive to this. After full argument on sentence, the parties were granted leave to submit supplementary heads of argument in this regard. Counsel for Mr Ditlhakanyane submitted extensive heads of argument for which we are indebted. Counsel for the state did not file any, which leaves much to be desired since the issue of sentence became critical once the conviction on one count fell away.

[40] The general rule is that when an appellate court envisages increasing the sentence imposed, an accused person must be forewarned to address the issue adequately and weigh their options. In the supplementary heads of argument on whether this Court may increase the sentence imposed in respect of count 2, counsel for Mr Ditlhakanyane conceded that there is no doubt that s 322(6) of the CPA empowers a court of appeal to impose a more severe sentence than the sentence imposed by the trial court where the trial court committed a material error. However, the submission was made that such an appeal must be properly before this Court, arguing that there was no such appeal before this Court.

[41] Section 322(6) of the CPA, it was argued, must be read in the context of s 322[32] as a whole. The plain reading of the section, counsel submitted, reveals that the

[32] Section 322 of the CPA: Powers of a court of appeal:
(1) In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may- (a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or (b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or (c) make such other order as justice may require: Provided that, notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has

section confers upon a court of appeal an additional power to increase sentence. However, if this Court were to impose a more severe sentence than that imposed by the trial court, that would be prejudicial to Mr Ditlhakanyane. This was not something within the legislature's contemplation.

[42] Furthermore, counsel for Mr Ditlhakanyane submitted that the trial court took into account favourable factors. These include that the account holders were refunded by the Post Bank and, as such, they suffered no financial loss. The State presented no victim impact report for the trial court to have considered. Thus, the impact on the Post Bank, whether it was insured or out of pocket or what the loss was, was never set out. All the accused played a pivotal role in the enterprise and there should not be any distinction between them, in that the enterprise was not able to function without each role player performing the function within the enterprise. Counsel stressed the importance of attaining a balance between the *Zinn* triad of factors which consists of the crimes, the accused person's circumstances and the interest of society.

[43] There is no dispute that the trial court noted the personal circumstances of Mr Ditlhakanyane and all other mitigatory which counsel tabulated. It is also clear that the trial court noted the aggravating circumstances, including the nature and seriousness of the offence, and the fact that monies were stolen from the poorest of society, including those who had retired and opted to save their retirement monies at the Post Offices because it afforded less cumbersome processes than traditional banks.

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in fact resulted from such irregularity or defect. (2) Upon an appeal under section 316 or 316B against any sentence, the court of appeal may confirm the sentence or may delete or amend the sentence and impose such punishment as ought to have been imposed at the trial. (3) Where a conviction and sentence are set aside by the court of appeal on the ground that a failure of justice has in fact resulted from the admission against the accused of evidence otherwise admissible but not properly placed before the trial court by reason of some defect in the proceedings, the court of appeal may remit the case to the trial court with instructions to deal with any matter, including the hearing of such evidence, in such manner as the court of appeal may think fit. (4) Where a question of law has been reserved on the application of a prosecutor in the case of an acquittal, and the court of appeal has given a decision in favour of the prosecutor, the court of appeal may order that such of the steps referred to in section 324 be taken as the court may direct. (5) The order or direction of the court of appeal shall be transmitted by the registrar of that court to the registrar of the court before which the case was tried, and such order or direction shall be carried into effect and shall authorize every person affected by it to do whatever is necessary to carry it into effect. (6) The powers conferred by this section upon the court of appeal in relation to the imposition of punishments, shall include the power to impose a punishment more severe than that imposed by the court below or to impose another punishment in lieu of or in addition to such punishment.

[44] The trial court noted the high level of planning that went into the racketeering enterprise, and that it was employees who, with inside knowledge of the Post Office system, 'robbed' the Post Office and pensioners and indigent people who banked with it. The planning ran over years before it was executed. Outsiders were recruited because of their criminal record of defrauding people. The full court noted that the individual sentences imposed by the trial court were appropriate as they took into account the purposes of punishment, which are aimed at rehabilitation, preventative deterrence and retribution. For that reason, and believing that the cumulative effect of the sentence imposed by the trial court was inappropriate, it imposed a lesser sentence of 40 years imprisonment.

[45] However, on a reading of the trial court's judgment on sentence, having noted the serious aggravating circumstances, the creation of an enterprise with a specific *modus operandi* to plunder an institution such as the Post Office despite being its employees, is contrary to the clear intention of the legislature. It is difficult to fathom why the trial court imposed 20 years imprisonment when the legislature prescribes a fine of R1000 million or imprisonment for a period up to life upon conviction of contravention of s 2(1)*(f)*.[33]

[46] The trial court deviated from the prescribed sentence without providing reasons therefor. This, *per se,* indicates a discretion not exercised judiciously, if not a material misdirection. It would be correct to say that the full court was conscious of this. Thus, it reduced the effective sentence to 40 years imprisonment. However, it is still not clear why it perceived the sentence imposed by the trial court to be unduly harsh when the legislature prescribed a much higher sentence. To reduce the effective sentence imposed by the trial court by 10 years does not address the problem. The reasons for reducing the sentence without interrogating the issue of the duplication of convictions also point to a discretion not judiciously exercised on the part of the full court.

[33] Sentence imposed by the trial court was as follows: Accused 1, on Count 1 managing an enterprise, was sentenced to serve a term of 30 years imprisonment. On Count 2 conducting an enterprise through a pattern of racketeering, he was sentenced to serve a term of 20 years imprisonment. 10 years of the sentence imposed in respect of count 2 is to run concurrently with the sentence imposed in respect of count 1. That results in a sentence in respect of counts 1 and 2 of 40 years imprisonment.

[47] It follows that as s 322(6) of the CPA provides, this Court with all the evidence before it, is in as good a position, having forewarned the applicant, to increase the sentence if it deems such sentence to be inappropriate. The section empowers this Court to forewarn an accused person at any time of the proceedings particularly when it comes to the conclusion that the sentence is less than that which the trial court ought to have imposed, considering the seriousness of the offence and the prescribed minimum sentences.

[48] Mr Ditlhakanyane's personal circumstances are on record. They are not extraordinary. They pale next to the aggravating circumstances recorded by both courts. What still stands out starkly is the brazen manner in which the applicant and his cohorts went about plundering the Post Office. And years later, having made off with millions, they have shown no shred of remorse.

[49] The sentence of 20 years imprisonment imposed by the trial court and reduced by 10 years by the full court is startlingly inappropriate and inadequate for an offence as serious as this, which the legislature ordained to be punished with life imprisonment. Besides, the CPA makes provision for the imposition of concurrent running sentences in terms of s 280(2)[34]. However, sentences running concurrently pose a particular difficulty when one count is set aside, as this case demonstrates. Courts must exercise extreme caution when declaring sentences to run concurrently.

[50] If this Court does not interfere with this sentence, the administration of justice will be brought into disrepute. This sentence is contrary to the objectives of POCA to appropriately punish those who participate in organised economic crimes, within the prescribed sentences ordained by the legislature. A sentence that will fit the offence, the personal circumstances of the accused person and address the interests of society can only be one over 20 years of imprisonment. Such a sentence will be in line with precedents of this Court including *Tiry,* balanced along the lines of the triad and the prescribed sentence for this kind of offence.

[34] Section 280(2) of the Criminal Procedure Act 51 of 1977 allows a court to order that multiple sentences imposed on an accused person run concurrently. This means the sentences will be served at the same time, effectively reducing the total time to be spent in prison.

[51] In the result, the following order issues.

1 The application for reconsideration in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013, is granted.

2 The appeal is partially upheld, as set out hereafter.

3 The order of the full court is set aside and substituted with the following:

‘(i) The conviction on count 1, contravention of s 2(1)(*f*) of the Prevention of Organised Crime Act 121 of 1998 (POCA), and the sentence imposed on this count are set aside.

(ii) The conviction on count 2, contravention of s 2(1)(*e*) of POCA is confirmed.

(iii) The accused is sentenced to 30 (thirty) years imprisonment in respect of count 2 antedated to 17 June 2015.’

BC MOCUMIE

JUDGE OF APPEAL

Appearances:

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