THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 69/2018

In the matter between:

ALFEUS CHRISTO SCHOLTZ	**FIRST APPELLANT**
TRIFECTA INVESTMENTS HOLDINGS (PTY) LTD	**SECOND APPELLANT**
TRIFECTA HOLDINGS (PTY) LTD	**THIRD APPELLANT**
TRIFECTA TRADING 434 PROPERTY 4 (PTY) LTD	**FOURTH APPELLANT**
TRIFECTA TRADING 434 PROPERTY 5 (PTY) LTD	**FIFTH APPELLANT**
TRIFECTA TRADING 434 PROPERTY 7 (PTY) LTD	**SIXTH APPELLANT**
TRIFECTA TRADING 434 PROPERTY 11 (PTY) LTD	**SEVENTH APPELLANT**

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**RESPONDENT**

Neutral citation: *Scholtz v NDPP* (69/18) [2019] ZASCA 136 (1 October 2019)

Coram Petse DP, Tshiqi, Saldulker, Swain, and Molemela JJA

Heard: 9 September 2019

Delivered: 1 October 2019

Summary: Application for leave to appeal - application for condonation of the late filing of the application for leave to appeal – envisaged appeal has no reasonable prospects of success – condonation therefore not granted.

ORDER

On appeal from: Northern Cape Division of the High Court, Kimberley (Phatshoane J sitting as court of first instance):

1 The application for condonation of the late filing of the application for leave to appeal is dismissed.
2 The application for leave to appeal is struck off from the roll.

JUDGMENT

Tshiqi JA (Petse DP, Sadulker, Swain and Molemea JJA concurring):

[1] There are two applications that have to be considered in this matter. The main one is an application for leave to appeal against a confiscation order granted by the Northern Cape Division of the High Court , Kimberley (court *a quo*) against the first to seventh applicants in terms of s 18 of Prevention of Organised Crime Act 121 of 1998 (POCA). The second application is ancillary to the main one and is an application for condonation of the late filing of the main application. Both applications were first considered by this court on 22 March 2018 and were referred for oral argument in terms of s 17(2) of the Superior Courts Act 10 of 2013. The court also ordered the parties to be prepared, if called upon to do so, to address it on the merits of the appeal against the confiscation order.

[2] The first to seventh applicants were convicted in the court *a quo* on counts of corruption and money laundering. Subsequent to the convictions, an enquiry was held in terms of s 18 of POCA and, on 6 December 2016, the court made the confiscation order which is the subject of this application for leave to appeal. The amounts ordered to be confiscated were R6 043 960.15 and R53 763 021.85 respectively, against all the applicants, jointly and severally, the one paying the other to be absolved. The total

amount was R59 806 982.00. Subsequent to the convictions and the confiscation order, the court *a quo* sentenced the applicants as follows:
a) the first applicant was sentenced to 15 years imprisonment on each of the two counts of corruption and 12 years imprisonment on each of the two counts of money laundering. The court ordered that the sentences imposed be served concurrently.
b) the second to seventh applicants were each sentenced to a fine of R150 000 on a count of corruption and second and third applicants were sentenced to a fine of R75 000 on the money laundering count.

[3] In terms of Rule 49(1) of the Uniform Rules of Court, an appeal ought to be filed within 15 days of the order against which the appeal lies. However, an arrangement was reached between the applicants and the National Director of Public Prosecutions (NDPP) that the applicants would apply for leave to appeal against the convictions and sentences, as well as the confiscation order on 6 February 2017. Only the application for leave to appeal against the convictions and sentences was brought before the court *a quo* on this date. The court *a quo* dismissed the application. A subsequent appeal to this court against the convictions was partially successful in that only the convictions on corruption in count 8 were confirmed. The sentences relating to the other counts consequently fell away and only the sentence of 15 years imprisonment remained. The appeal against this sentence was unsuccessful.

[4] The application for leave to appeal against the confiscation order, together with an application for condonation for its late filing, were filed in the court *a quo* only on 10 October 2017. This was approximately 10 months after the date of the confiscation order and approximately 8 months after the date agreed to between the parties, 06 February 2017. The court *a quo* dismissed both applications with costs.

[5] In explaining the delay, the first applicant, who attached a confirmatory affidavit of his attorney, Mr Du Plessis, stated that on 6 February 2017 the application for leave to appeal against the confiscation order had already been drawn, together with the application for condonation for its late filing, although these had not yet been filed. On the same date, Mr Du Plessis approached Phatsoane J's Registrar in order to ascertain her availability, which was apparently for the purposes of setting the applications down for hearing. He was told that the Judge was not available. He then

handed over the applications to a Mr Pino, employed as a candidate attorney at the offices of Mjila Attorneys, his correspondent attorneys in Kimberley. Mr Du Plessis requested Mr Pino to file and serve the applications and make arrangements with the office of the Judge for the hearing of the applications.

[6] Mr Du Plessis stated further that he made enquiries regarding the date of the hearing of the applications from time to time and was informed that it was not yet allocated. At some stage he was furnished with a letter dated 7 July 2017 from Mjila Attorneys confirming that Mr Pino had gone to the court *a quo* on 8 February 2017. The letter, which was attached to the application for condonation, simply stated that when Mr Pino went to the court on 8 February 2017, the Judge's clerk was off-sick and was therefore not able to 'furnish' dates on which the Judge would be available. In his affidavit, Mr Du Plessis went on to state that it later transpired that the applications were never filed. According to him, he was informed that Mr Pino was under the impression that a date for the hearing had to be arranged before the applications were filed. Mr Du Plessis asserted that it was always his intention to have the applications filed timeously and that there was a misunderstanding concerning the procedure to be followed. Mr Du Plessis did not attach a confirmatory affidavit from Mr Pino to support the application for condonation.

[7] The applications were opposed by the NDPP. In an affidavit deposed to by the senior Deputy Director of Public Prosecutions, Dr Nkululeko Ndzengu, he stated that he only became aware of the applications on 25 October 2017, after he was notified through an email from the Registrar's office. He stated that the applicants' attorneys knew his contact details and further that the State Attorney, Kimberley was the address of service for the NDPP. Dr Ndzengu stated that it had always been the understanding of the parties that the applicants would only seek leave to appeal against the convictions and sentences. The rationale for this, according to Dr Ndzengu, was that if the convictions and sentences were ultimately set aside on appeal, then the confiscation order would fall away, but that if the appeal failed, then the confiscation order would stand. Dr Ndzengu contended further that the confiscation order was in any event not final and thus not appealable. He stated that for this reason the confiscated amount had been deposited into the National Treasury's suspense account pending the appeal against the convictions and that there would consequently

be no prejudice to the applicants if the confiscation order stood, pending the appeal on the convictions.

[8] In determining the application for condonation, the court *a quo* correctly stated that it had to exercise its discretion by having regard to the degree of lateness, the explanation therefor, the reasonableness of the non-compliance, the importance of the matter, any prejudice likely to be suffered by any of the parties, and the applicant's prospects of success on appeal (*Melane v Santam Insurance Co Ltd* 1962(4) SA 531 (A) at 532; *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) para 6).

[9] The main difficulty for the applicants in the application for condonation is that the availability of a Judge was not a prerequisite for the filing of an application for leave to appeal. The timelines set for the filing of court papers and the availability of a Judge for the purposes of setting a matter down for hearing are two separate processes. Even if Phatsoane J was unavailable, the applications could have been filed and a date would have been arranged later. In any event, the unavailability of a Judge who made the order does not prevent the Judge President or the Deputy Judge President from hearing an application for leave to appeal or from allocating the application to another Judge for the purposes of hearing such an application. This is a common occurrence in all the high courts, whenever a Judge is temporarily unavailable to hear an application for leave to appeal. In any event, it does not seem that this alleged unavailability of Phatsoane J was ever brought to the attention of the Judge President or his Deputy. The other difficulty for the applicants is that Mr Du Plessis does not state what steps he took to follow up on the matter between 6 February and 7 July 2017 to satisfy himself that the application had been filed. As the court *a quo* noted, there is no explanation why Mr Du Plessis did not diarise his client's file and why a matter of such importance to the applicants, which involves millions of rands, would be entrusted to a candidate attorney without any measure of supervision. There is thus no proper explanation for the lengthy delay in filing the application for leave to appeal.

[10] This then leads me to the second consideration: whether there are any reasonable prospects of success on appeal. The main ground on which the applicants

seek to appeal the confiscation order is that the court *a quo* erred in its finding that the parties had concluded an agreement on the amounts that would be the subject of the confiscation order. Counsel for the applicants submitted that clause 1.2 had to be interpreted to mean that the amounts to be confiscated were dependent on a finding by the court *a quo* that each of the entities had received proceeds of crime as envisaged in s 18 of POCA through the income received as rental from the lease agreements stipulated in the agreement. And that clause 1.3 had to be interpreted to mean that each of the entities received proceeds of a crime as a result of the increase in value of any of the buildings relevant to the lease agreements. That in the event that any of the entities had not been proven to have received any income generated from the lease agreements, or if at the time of the sale of any of the buildings, it was not proved that there was an increase in the value of any such buildings, as a result of the lease agreements, then the agreed amounts would have to be reduced proportionately. Counsel submitted that as the state did not prove that there was an increase in the value of any building sold, which increase was as a result of the lease agreements, the amount reflected in the agreement had to be reduced proportionately.

[11] The respondent has submitted that the interpretation of the agreement advanced by the applicants is inconsistent with the clear wording of the settlement agreement which, in relevant parts, provides as follows:

'1. The parties agree that the following issues are still in dispute and remain in dispute for adjudication by this Honourable Court:

1.1 The question whether Applicant is entitled to a confiscation order in terms of section 18 of POCA.

1.2 The question whether the Applicant established that the First to Seventh Defendants, or *any of them* received proceeds of crime as envisaged in section 18 of POCA, with reference to the income received as rental from the lease agreements relevant to this case ie.

1.2.1 Kimberlite Hotel, Kimberley . . .;

1.2.2 Northern Cape Training Centre, Kimberley . . .;

1.2.3 Du Toitspan Building . . .;

1.2.4 14 Van Riebeeck Street, Springbok . . .;

1.2.5 Summerdown Place, Kuruman . . .; and

1.2.6 Keur and Geur Biulding, Douglas . . .

1.3 The question whether the Applicant established that the Defendants, or *any of them* received proceeds of a crime as envisaged in section 18 of POCA, as a result of the increase in value of *any of the buildings* relevant to the lease agreements set out in paragraphs 1.2.1 to 1.2.6 above.
2. In the event that this Honourable Court finds that:
2.1 The Applicant did establish that Applicant is entitled to a confiscation order in terms of section 18 of POCA, relating to the income generated with reference to the lease agreements entered into by the relevant Defendant(s) and the relevant Governmental Department(s); and
2.2 This Honourable Court further finds that Applicant established that the relevant Defendant(s) did receive proceeds of crime as envisaged in section 18 of POCA, relating to the income generated with reference to the lease agreements relevant to this case.

Then the parties agree that the amount that the Court should make an order for confiscation in terms of section 18 of POCA relating to the income generated with reference to the lease agreements, referred to in paragraph 1.2 above, should be an aggregate amount of R6 000 000.00 (Six Million Rand) payable by the First to Seventh Defendants, the one to pay the other to be absolved.

3. In the event that this Honourable Court finds that:
3.1 The Applicant did establish that Applicant is entitled to a confiscation order in terms of section 18 of POCA, relating to the increased value of the properties relevant to the lease agreements set out in paragraph 1.2 above; and
3.2 The applicant did establish that Applicant is entitled to a confiscation order in terms of section 18 of POCA relating to the increase in capital value of the buildings relevant to the lease agreements referred to in paragraph 1.2 above.

THEN the Parties agree that the amount that the Court should make an order for confiscation in terms of section 18 of POCA, relating to the increased value of the properties relevant to the lease agreements set out in paragraph 1.2 above, should be an aggregate amount of R54 000 000.00 (Fifty-Four Million Rand), payable by the First to Seventh Defendants, the one to pay the other to be absolved.'

[12] A court must have regard to the words used in a document and construe them objectively (*KPMG Chartered Accountants (SA) v Securefin Ltd & another* [2009] ZASCA 7**;** 2009 (4) SA 399 (SCA) para 39, and *Natal Joint Municipal Pension Fund v*

Endumeni Municipality [2012] ZASCA 13**;** 2012 (4) SA 593 (SCA) para 18). If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (*Johnson v Leal* 1980 (3) SA 927 (A) at 943B). To the extent that evidence may be admissible to contextualise the document to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible' (*Delmas Milling Co Ltd v du Plessis* 1955 (3) SA 447 (A) at 455B-C; *Novartis v Maphil* [2015] ZASCA 111; 2016 (1) SA 518 (SCA)).

[13] The language of the agreement is clear. In terms of clause 1.2 of the agreement the state had to prove that the defendants, or *any of them* received the proceeds of crime as envisaged in s 18 of POCA with reference to the income received as rental from the lease agreements. In terms of clause 1.3 the state had to prove that the defendants, or *any of them*, received proceeds of a crime as envisaged in s 18 of POCA, as a result of the increase in value of *any of the buildings* relevant to the lease agreements. The interpretation advanced by the applicant would entail a substitution of the highlighted clear wording of the agreement ie '*any of them'* with '*each of them*' and '*any of the buildings' with* '*each of the buildings*' respectively. And also entirely ignores the fact that the parties expressly agreed that the applicants' liability, once established, would be joint and several, the one paying the other to be absolved. There is no legal basis for interpreting the agreement in this fashion.

[14] The context within which the agreement was concluded supports the above interpretation. Mr White, the NDPP's auditor, had deposed to an affidavit in the court *a quo* complaining that the applicants had not provided him with all their financial documents. The parties were also faced with the reality that there were huge discrepancies between Mr White's calculations on behalf of the NDPP, pertaining to the income generated and those of his counterpart, Mr Bouwer, the auditor for the applicants. Both parties foresaw that any attempt to determine the applicants' benefit accurately would result in protracted litigation. In order not to prolong the s 18 enquiry, the parties agreed to enter into the settlement agreement. During his address in the court *a quo*, counsel for the applicants referred to the agreement and said that 'the

agreement will assist . . ., especially the fact that the . . . agreed amounts relating to the leases and the capital increases in value had been properly set out in annexures . . .'. There is thus no basis for departure from the terms of the agreement. I therefore agree with the finding of the court *a quo* that there are no prospects of success on appeal on this aspect. I also endorse the conclusion of the court *a quo* that where there are no prospects of success on appeal, there would be no point in granting condonation.

[15] I therefore make the following order:

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

2 The application for leave to appeal is struck off from the roll.

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Z L L Tshiqi

Judge of Appeal

APPEARANCES:

For First to Seventh Appellants:	M M W van Zyl SC
Instructed by:	Werner Du Plessis Attorneys, Pretoria
	Claude Reid Inc., Bloemfontein
For Respondent:	H J van der Linde SC
Instructed by:	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein