

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: A167/2013

In the matter between

LUCKY IMADOR

Appellant

and

THE STATE

Respondent

JUDGMENT DELIVERED ON THURSDAY, 19 DECEMBER 2013

BLIGNAULT J:

[1] Appellant was convicted on 13 August 2012 in the Regional Court at Bellville on a charge of money laundering in contravention of s 4 of the Prevention of Organised Crime Act 121 of 1988 ('POCA'). He was sentenced to 5 years' imprisonment.

[2] Section 4 of POCA reads as follows:

'4 Money laundering

Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and-

(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or

(b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person,

which has or is likely to have the effect-

(i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or

(ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere-

(aa) to avoid prosecution; or

(bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence,

shall be guilty of an offence.'

[3] Section 4 of POCA must be read with the following definitions:

'proceeds of unlawful activities' is defined as 'any property or any service advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived;

'unlawful activity' is defined as 'conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere.'

[4] Sub-sections 1(2) and 1(3) of POCA read as follows:

‘(2) For purposes of this Act a person has knowledge of a fact if-

- (a) the person has actual knowledge of that fact; or*
- (b) the court is satisfied that-*
 - (i) the person believes that there is a reasonable possibility of the existence of that fact; and*
 - (ii) he or she fails to obtain information to confirm the existence of that fact.*

(3) For the purposes of this Act a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both-

- (a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and*
- (b) the general knowledge, skill, training and experience that he or she in fact has.’*

[5] The full charge sheet reads as follows:

‘PREAMBLE TO CHARGE SHEET

Whereas at all material times relevant to the charge sheet.

- 1. The accused is a Nigerian, with a South African identity number 7....., and is self employed*

2. **Izak Jacobus Lintvelt** (Hereinafter referred to as the complainant) responded to an E-mail that he received on the 31st January 2008 from a person unknown to him, who introduced himself as Barrister Tom Hickman "Hickman", a London legal practitioner.
3. Barrister Tom Hickman told the complainant that he was the executor of the estate of the late Randolph Lintvelt who passed away in October 1989.
4. Hickman informed the complainant that he, the complainant, was the only surviving relative of the late Randolph Lintvelt and that a sole beneficiary of the estate worth thirteen million eight hundred pounds.
5. Hickman also informed the complainant that he required him to make several payments, which would be the following purposes:
 - Legal and consultation fees;
 - Preparation of various documentation;
 - Revenue charges,
6. Accused before court approached a South African National by the name of **LONWABO MQONCI** alias "Toto", who at the time worked as a teller for ABSA to use his account number as a recipient (sic) of the money from the complainant, in return **LONWABO MQONCI** would leave an amount of **R100 00.00** (one hundred thousand rand) for his assistance, in his bank account.
7. **LONWABO MQONCI** then gave the two Nigerian nationals, one of which was the accused before the court, his bank account details to wit **Abisa savings account number 9.....**
8. On the 06th March 2008 **Izak Jacobus Lintvelt** deposited an amount of R 789 300.00 (seven hundred and eighty nine thousand three hundred rand) into the **LONWABO MQONCI** account with Absa, **account number 9.....**
9. On the 08th March 2008 **LONWABO MQONCI** then made two consecutive withdrawals of **R 290 000.00** (two hundred and ninety thousand rand) each from his own bank account **9.....** (sic) held with Absa Bank.
10. At this stage the accused was standing at the next teller and was waiting to receive the money.

11. Accused is the holder of an Absa bank account with account number **9**.....
12. The accused then deposited one of the **R 290 000.00**, that was withdrawn by **LONWABO MQONCI**, into the account mentioned in **para 11 supra**, and the other amount to another separate account.
13. From the 08th March 2008, the money was deposited into the account mentioned in **para 11 supra**, there has been numerous cash withdrawals.
14. It is common cause that **LONWABO MQONCI** was found guilty of **section 5 (Assisting another to benefit from proceeds of unlawful activities)** of the Prevention of Organised Crime Act 121 of 1998 on the 28 January 2010.
15. The state alleges that the accused actively acted in furtherance of a common purpose in that he was actively involved in the conspiracy to obtain money from the complainant.

COUNT 1

MONEY LAUNDERING

CONTRAVENTION OF SECTION 4 READ WITH SECTIONS 1 AND 8 OF THE PREVENTION OF ORGANISED CRIME ACT NO 121 OF 1988, AS AMENDED.

IN THAT on or about 08 March 2009 at or near Sea Point in the Regional Division of the Cape, the accused did unlawfully and intentionally well knowing and/or where he ought to have known that the funds mentioned in **paragraphs 11 supra** of the preamble to this charge sheet were and/or formed part of the proceeds of unlawful activities; to wit fraud and/or theft

- (a) Enters into any agreement or engages in any arrangement or transactions with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not

Which has, or is likely to have, the effect-

Of concealing or disguising the nature, source, location disposition or movement of the said money or its ownership or any interest which anyone may have in respect there of;

TO WIT *by engaging in the arrangement or transactions and or performing the following acts;*

- *Casusing (sic) or allowing cash money, to be fraudulently diverted or misappropriated from the banking account **of Izak Jacobus Lintvelt** into his personal banking account as mentioned supra in para 11 of the preamble to this charge sheet, misrepresented that the monies were due to him from **Izak Jacobus Lintvelt**.*
- *By spending or utilization of the proceeds of the unlawful activities.'*

[6] The first witness for the State was Mr Lonwabo Mqonci ('Mqonci'). In January 2008 he was employed as a teller at the Sea Point branch of Absa Bank. He had his own personal bank account at Absa. He knew appellant because he was a client of Absa and he often came into the bank to do transactions on his own account. He testified that appellant approached him one day and told him that he wanted to deposit money in a bank account but he did not have one. He said that he got the money from a job but he did not specify what the job was.

[7] Mqonci said that he agreed to allow appellant to use his account for making the deposit. Appellant told him that the amount involved would be R500 000,00 and that he (Mqonci) would receive a reward of R100 000,00. He went with appellant to someone's house in Table View and he gave appellant his bank account details. A few days later a sum of about R700 000,00 was transferred into his account. He assisted appellant in withdrawing the money in the form of two amounts of R290 000,00 each. He gave R290 000 in cash to appellant. He (Mqonci) received a reward of about R180 000,00 for his efforts.

[8] Under cross-examination Mqonci denied that he was involved in the transaction with four other Nigerians. He stated that he received about R150 000,00 to R160 000,00 as his reward. He denied the allegation that appellant withdrew only R290 000,00. He said that he met appellant only once after the transaction had been completed. Appellant complained about the fact that he had not received any reward.

[9] Ms Annemarie Niemand testified that she is a captain in the South African Police Service. She was the investigation officer. Her investigation started in 2008 in respect of a complaint of Mr Sakkie Lynveld of Ceres. He had received e-mails from London in which he had been promised a large inheritance. She established that he had paid an amount of R789 300,00 into the bank account of Mqonci. She examined Mqonci's bank statements and found that he had transferred the money by way of two transfers of R290 000,00 each, an amount of R290 000,00 to appellant's account and the same amount to an account of one Mohamed. She examined appellant's bank statements and found that he received R290 000,00 and then, after about 19 days, he started making some withdrawals, some small, others bigger, over a period of time.

[10] Appellant testified that he knew Mqonci as a bank teller and as a friend. He himself owned a shop. One day four Nigerians entered his shop and bought certain articles. He did not know them but he knew that their names were Slim, Morris, Hakeem and Jude. They asked him whether he had a cheque account to which he replied that he only had a savings and a credit card account. He asked them why they were looking for a cheque account and they said they were expecting money

from their uncle overseas. He said he would let them know when he found someone with a cheque account.

[11] One day he met Mqonci in Sea Point and he gave him a lift to town. He asked Mqonci whether he had a bank account. Mqonci replied that he had one. On their way he told Mqonci about the Nigerians looking for a cheque account. He phoned the one called Slim and arranged that Mqonci would meet them. A few days later he drove Mqonci to a house in Parklands where they met the Nigerians. He introduced Mqonci to Slim and Mqonci gave his account number to Slim. He and Mqonci stayed there for a while and then he took Mqonci back to town.

[12] Two weeks later he received a telephone call from Slim who told him that Mqonci was not picking up the phone. He (appellant) called Mqonci and told him that the Nigerians had called to say the money had arrived 'from England.' A couple of hours later Mqonci telephoned back to say the money had arrived in his bank account. Appellant called Slim who sent him a SMS that the money had to be paid into an account of a person, as he recalls, with a Muslim name. He (appellant) went to the bank and gave that account number to Mqonci. Mqonci said he was busy and that he would get back to him later. The Nigerians kept on telephoning him on the same day to find out where the money was. That evening he met Mqonci outside the bank. The Nigerians were also present. Mqonci told them he would transfer the money the next day.

[13] The next day he went to see Mqonci at the bank. Mqonci told him that he had told the Nigerians that the best thing would be to split the money between two accounts. Appellant telephoned Slim who told them that they could pay R290 000 into his (appellant's) account. He went back into the bank and spoke to Mqonci.

Mqonci then transferred the money as requested. Slim telephoned him again and he told him that the money had been transferred into the account of which he had given him the number. He asked them what reward they were going to give him. Slim said he must talk to Mqonci about that.

[14] When appellant approached Mqonci he told him that he (Mqonci) was not giving him any money and that if he (appellant) paid out all the money from his account that would be his problem. He (appellant) then started to give the money to the Nigerians bit by bit. After a while Slim asked him to help him to buy foreign currency. He asked for his reward and Slim said that he would get R5 000,00. They got into a big argument. Slim then started to phone his wife and threaten her. He became worried because he had a small baby and he decided to change the money in his account that he still owed Slim into dollars and gave it to Slim. Appellant was unable to explain why the withdrawals of the money from his account were in small amounts over a period of about 6 months. At a later stage appellant went to see Mqonci in Mitchell's Plain but Mqonci told him that he had no money for him and gave him only a Coke and a pie.

[15] In his judgment the magistrate discussed the facts of the case against the backdrop of the provisions of the Act. He pointed to various inconsistencies and improbabilities in appellant's version and concluded as follows:

'The court is satisfied that the state proved beyond reasonable doubt that the accused when engaging in this transaction had knowledge that the property, money to the value of R290 000,00 formed part of the proceeds of unlawful activities. The way in which the accused spent and utilised the money over a period of six months clearly indicate that he used it his leisure as his own ...'

[16] I agree with the magistrate that appellant's version of the facts falls to be rejected outright. The improbabilities and inconsistencies in his evidence count heavily against him. These include the following aspects:

- (1) Appellant's dealings with four unknown persons who did not even own a bank account between them.
- (2) Appellant's apparent lack of interest in the source of the money.
- (3) Appellant's decision to approach Mqonci, a person whom he did not know well at all.
- (4) The roundabout manner in which money was transferred from account to account.
- (5) The magnitude of the reward ostensibly paid to Mqonci.
- (6) The reason for the payment of one half of the monies into his account and the other into the account of an unknown person.
- (7) The urgency with which the Nigerians' persisted him to be informed about the receipt of the money / the urgency with which the Nigerians enquired about the receipt of the money.
- (8) The absence of any reward for appellant, compared to that of Mqonci.
- (9) Appellant's lie about the existence of an account of his own into which the money could have been paid.

(10) The mysterious meeting with the Nigerians in the house at Parklands.

(11) The manner of the subsequent withdrawal of the funds from appellant's account and his inability to explain it.

[17] A legal issue, however, is whether it was incumbent upon the state to identify and prove the exact nature of the alleged unlawful activity. In the present case the state did not do so. The evidence of Ms Niemand in regard to the original crime was in our view correctly rejected by the magistrate on the basis that it was hearsay evidence.

[18] Counsel for respondent referred us to the judgment of the England and Wales Court of Appeal (Criminal Division) per Lord Justice Latham in *Anwoir & Ors, R. v* [2008] EWCA Crim 1354 (27 June 2008). Under consideration was a statutory provision similar to s 4 of POCA. The comparable concept was '*criminal property*'. After examining a number of previous judgments, Lord Justice Latham said the following, in para 21:

'There is a clear tension between these two paragraphs. Laws L.J. stated that the issue was a pure matter of law. But it is perhaps important to note that NW was a case in which the prosecution's evidence was essentially based upon the fact that NW had no visible means of support. That is quite a different case from the scenarios envisaged by Sullivan J in paragraphs 33 and 34 of his judgment. We consider that in the present case the Crown are correct in their submission that there are two ways in which the Crown can prove the property derives from crime, a) by showing that it derives from conduct of a specific kind or kinds and that conduct of that kind or those kinds is unlawful, or b) by evidence of the circumstances in which the property is

handled which are such as to give rise to the irresistible inference that it can only be derived from crime.'

[19] We find the reasoning of Lord Justice Latham persuasive. It accords in our view with a sensible interpretation of section 4 of POCA. In the present case it is my view that the evidence of the circumstances (including appellant's own mendacity) are such as to give rise to the irresistible inference that he knew that the monies in question were derived from an unlawful activity.

[20] I am accordingly of the view that appellant's appeal against his conviction should be dismissed.

[21] A probation officer's report and a correctional services officer's report were placed before the magistrate for purposes of sentencing. Appellant's personal circumstances appear from these reports and were confirmed by him in evidence. He was born on 10 September 1970 in Nigeria and he grew up in Nigeria. He fled Nigeria in 1996 due to political issues. He came to South Africa and moved to Cape Town. He has owned various small businesses including a clothes stand from which he currently earns about R10 000 per month. He was married in 2007 and he has a 5 year old daughter. He is a South African citizen as he has been naturalised. Appellant has been described by his wife as a caring family man. He resides in a three room apartment in Milnerton.

[22] Appellant has one previous conviction for producing false immigration papers, committed in 2003. He was sentenced to a fine of R4 000. He expressed remorse for the crime committed by him in the present case but it appears that the money

was never recovered. Appellant was found to be a suitable candidate for correctional supervision.

[23] The magistrate gave a balanced judgment on sentence. It is my view, however, that he failed to give due weight to the principle of consistency. See Terblanche: *A Guide to Sentencing in South Africa* (second edition) (2007) at 124-126. The author points out that consistency in sentencing is a worthy ideal, internationally and in South Africa. It does not mean, however, that relevant distinguishing features may be ignored.

[24] Mqonci was also convicted for his role in the crime but he was sentenced to 3 (three) years' imprisonment only. On the face of it appellant's criminal conduct did not differ substantially from that of Mqonci. Having regard to all the circumstances of the case a sentence of 3 (three) years' imprisonment would in my view be appropriate for appellant.

[25] Appellant's sentence of 5 (five) years' imprisonment should therefore be set aside and replaced by a sentence of 3 (three) years' imprisonment.

[26] In the result , I grant the following orders:

- (1) Appellant's appeal against his conviction is dismissed. The conviction is confirmed.
- (2) Appellant's appeal against his sentence is upheld. His sentence of 5 (five) years' imprisonment is set aside and replaced by a sentence of 3 (three) years' imprisonment.

A P BLIGNAULT

NYMAN AJ: I agree

R M NYMAN