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MINI-DISSERTATION

PROBLEMATIC ISSUES PERTAINING TO RACKETEERING OFFENCES IN THE PREVENTION OF ORGANISED CRIME ACT 121 OF 1998

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Summary

Organised crime is a worldwide phenomenon, which also affects South Africa. In many instances organised crime is transnational. Consequently, South Africa had to develop legislation in order adequately to deal with organised syndicates and associations of criminals, and bring its legal system in line with international standards aimed at combating transnational organised crime.

In the United States of America organised crime, and any conduct that meets a "pattern of racketeering", are prosecuted under the Racketeering Influenced and Corrupt Organizations Act 18 USCA 1961-1968. This legislation played a significant role when racketeering offences were formulated in the South African Act.

The Prevention of Organised Crime Act 121 of 1998 *inter alia* includes aspects such as racketeering, money laundering, gangs and the civil recovery of property. It also deals with conduct of individual wrongdoing and crimes that cannot be categorised as organised crime. This study focuses on problematic aspects with regard to racketeering offences in Chapter 2 of the Act that are probably going to labour the Constitutional Court and/or the Supreme Court of Appeal in the near future.

One of the problematic aspects of Chapter 2 of the Act is that it does not include a definition of "racketeering". It only describes the different types of conduct which may lead to a successful prosecution on racketeering offences. The legislation also introduces new concepts, such as "enterprise" and "pattern of racketeering activity". Therefore, in order to determine whether the State will succeed in prosecuting an accused with racketeering offences, it must be established what is meant by the terms of being part of an "enterprise" and what a "pattern of racketeering activity" entails.

Also of importance is the requirement that two or more offences referred to in Schedule 1 of the Act must have been committed for a successful prosecution. Although the South African courts have considered this aspect there is still room for

discussion as to whether an accused must have previously been convicted of two or more criminal offences referred to in Schedule 1 for a conviction on racketeering offences, or whether the commission of one offence will suffice.

The offence of racketeering does not only consist of the commission of an act in itself. The membership or association with a legal or illegal organisation also plays a vital role to determine culpability. This study looks at the possible role (s) that an accused may fulfil when he is involved as a member of an organisation involved with racketeering offences.

Another aspect that needs to be clarified is the requirement relating to fault. The element of unlawfulness is also problematic when an accused did not foresee the possibility of unlawfulness of his actions. Close consideration is given to the requirements for culpability and whether mere negligence on the part of a role player is sufficient as a form of *mens rea* for a successful prosecution or not.

The element of unlawfulness is also discussed. Ordinary citizens may raise the issue that they did not know that the commission of two or more offences mentioned in Schedule 1, may lead to the prosecution of a racketeering offence. Therefore, it is crucial to determine whether a role player must have the necessary knowledge of unlawfulness to commit the racketeering offences.

The fact that the Act has been introduced in the South African legal system to criminalise racketeering offences does not exclude the scenario that each case must be decided on its own particular set of facts. It is clear from the research presented that there must be one or other link between the accused person, the “enterprise” and the “pattern of racketeering activities” for a successful prosecution on a racketeering offence.

This study seeks to provide assistance to legal practitioners when their clients are faced with prosecution on a racketeering offence. The study also discusses the real risk of a possible duplication of convictions.

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CHAPTER 1

Introduction

> "We can begin by acknowledging some absolute truths…Two of those truths are: Men are basically good but prone to evil; some men are very prone to evil - and society has a right to be protected against them."[1]

1.1 Background

The Prevention of Organised Crime Act commenced in January 1999[2] to address organised crime, money laundering and criminal gang activities and to prohibit certain activities in respect of racketeering. The Act also provides for civil recovery of the proceeds of unlawful activities and for civil forfeiture of property used to commit an offence.[3] The Act is for the greater part thereof based on the American Racketeering Influenced and Corrupt Organizations Act (RICO).[4]

The different chapters of the Act reveal that it deals with aspects which are of a commercial nature.[5] The Act applies to offences committed before and after the commencement of the Act.[6] The application of the Act, and that of RICO, is not limited to organised crime,[7] but there must be some element of organised crime before the provisions of the Act in respect of racketeering offences can apply.[8] It serves an important purpose to combat racketeering offences in South Africa.

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[1] Stated by the former American President Ronald Reagan in J Hagan *Who are the criminals? The Politics of Crime Policy from the Age of Roosevelt to the Age of Reagan* (2010) 113.
[2] 121 of 1998 (the Act). See the *Government Gazette* 19553: 402 of 4 Dec 1998.
[3] *Van der Burg & Another v NDPP & Another* 2012 2 SACR 331 (CC) 339.
[4] 18 USCA 1961-1968. See J Burchell & J Milton *Principles of Criminal Law* (2005) 976. Also see JRL Milton & SV Hoctor *et al South African Criminal Law and Procedure* Vol 3 *Statutory Offences* (2010) B4-1 2.
[5] *NDPP v Mcasa & Another* 2000 1 SACR 263 (TkH) 279. Also see *NDPP v Alexander* 2001 2 SACR 1 (T) 16.
[6] *Mohunram & Another v NDPP & Another* 2007 2 SACR 145 (CC) 158.
[7] A Kruger *Organised Crime and Proceeds of Crime Law in South Africa* (2008) 6. Also see LP Baily & RA Sasser *et al* "Racketeer Influenced and Corrupt Organizations Act" (1999) 36 *American Criminal Law Review* 1 <htpp://www.heinonline.org (accessed 23 July 2012).
[8] Burchell (2005) above n 4 976.

This study focuses on problematic aspects with regard to racketeering offences housed in Chapter 2 of the Act. The chapter creates different offences in respect of the receipt, use or investment of property from a "pattern of racketeering activity".[9] Subsection 2(1) creates substantive offences when a person, through a "pattern of racketeering activity" conducts himself[10] in a particular manner. Instead of proving that an accused committed a particular offence, it is sufficient for a conviction that certain conduct of an accused is capable of being linked to a pattern of illegal conduct.[11]

Since its inception problematic aspects of the Act came to light and legal challenges followed.[12] Constitutional validity of the Act has been challenged in the Durban High Court by a Uruguayan businessman who has *inter alia* been charged with racketeering offences with regard to tenders presented to the Provincial Government of KwaZulu Natal.[13] The case is still pending as at date of writing this mini-dissertation. The applicant applied to have the Act declared unconstitutional on the basis that the definition of racketeering is vague to the extent that ordinary citizens cannot determine whether they have contravened the Act or not.[14] It is foreseen that the application to declare the Act unconstitutional will be argued in the Constitutional Court in the near future.[15]

In another prominent case, arguments will soon be presented in the Supreme Court of Appeal in respect of a Ponzi-scheme whereby investors lost R928 million as the

[9] See my discussion hereunder. M Dendy "Watching your back: A guide to FICA and POCA" (2006) March *De Rebus* 33 indicates that property includes money or any other movable or immovable property, whether corporeal or incorporeal.
[10] In terms of ss 6(a) of the Interpretation Act 33 of 1957 a reference to the masculine gender includes the female gender.
[11] MG Cowling "Fighting organised crime: Comment on the Prevention of Organised Crime Bill 1998" (1998) 11 *South African Journal of Criminal Justice* 359 - 360.
[12] For examples see *Mcasa* above n 5 279; *S v Dos Santos & Others* [2006] JOL 18028 (C) 17 & *S v Eyssen* 2009 1 SACR 406 (SCA) 409.
[13] D Liebenberg "Wet om misdaad te voorkom, is 'teen Grondwet'" *Beeld* 2 October 2012 at 2. Also see *S v Savoi* 2012 1 SACR 438 SCA 443 where the same accused (as mentioned in the newspaper article) and who is facing numerous counts regarding deals for his Intaka's Group of Companies to supply water purification and oxygen generation systems (of which losses of R144 million were allegedly suffered by the complainants) applied for the amendment of his bail conditions pending the mentioned application in the High Court.
[14] *Ibid*.
[15] *Ibid*.

result of *inter alia* racketeering offences.[16] Some of the issues dealt with by the court *a quo* relate to the issues also addressed in this mini-dissertation, namely whether the accused had the necessary knowledge or awareness of unlawfulness to commit the racketeering offences and whether the Act requires that an accused must first have been convicted of an underlying predicate offence before the Act is applicable.[17]

Before discussing these and other problematic issues, it is prudent to first explain certain terms with regard to racketeering offences and to draw attention to Schedule 1 of the Act and the Jurisdiction afforded by the Act.

1.2 Terminology, Schedule 1 of the Act and Jurisdiction

1.2.1 Racketeering

The word "racketeering" was an unknown legal concept in South African law prior to the enactment of the Act.[18] The offence racketeering has characteristics similar to that of the common law crime of conspiracy[19] and is usually a crime committed by organised crime groups.[20] Traditionally, racketeering involved a system of organised crime where money from businesses was extorted by intimidation, violence or other illegal methods.[21] It has also been described as a practice of engaging in a fraudulent scheme.[22] The ordinary meaning of a person who is a "racketeer" is "a person engaging in fraudulent business dealings".[23]

Common law offences such as fraud, extortion, bribery and corruption may also be constituted by racketeering activities.[24] Racketeering activities can be relatively easily being identified when the offences are conducted by, for example, drug

[16] *S v Prinsloo & Others* (unreported) case no CC384/2006 (NGP) 517. This case is also known as "the Krion-case".
[17] *Prinsloo* above n 16 453 & 456.
[18] Burchell (2005) above n 4 976.
[19] According to Burchell (2005) above n 4 653 "a conspiracy is an agreement between two or more persons to commit, or to aid or procure the commission of a crime".
[20] Kruger (2008) above n 7 11.
[21] NM Garland *Criminal Law for the Criminal Justice Professional* 2nd ed (2009) 425.
[22] Garland (2009) above n 21 425. Also see *Prinsloo* above n 16 450.
[23] J Pearsall (ed) *The Concise Oxford Dictionary* 10th ed (1999) see "racketeer".
[24] Burchell (2005) above n 4 979.

lords.[25] The Act does not limit racketeering activities to organised groups,[26] but it also applies to cases of individual wrongdoing.[27] Offences relating to racketeering activities can be prosecuted separately as common law offences or statutory contraventions in terms of the Act.[28] It is doubtful whether courts will impose similar sentences for the common law transgressions as the penalties for a commission of racketeering offences is severe.[29]

1.2.2 The concept of an "enterprise"

The existence of an "enterprise" must be proved for purposes of the different racketeering offences.[30] The term "enterprise" refers to the organisational structure behind the racketeering activities.[31] The definition of an "enterprise" is widely formulated in the Act.[32] It includes any individual person who commits racketeering offences, as well as every possible type of association of persons known to the law.[33] The definition[34] only refers to the categories of persons who can be involved with an "enterprise" and not what the specific meaning of an "enterprise" is.[35] Notice must be taken of the ordinary meaning of an "enterprise". The word "enterprise" is defined as "a project or undertaking, especially a bold one" or as "a business or company".[36]

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[25] Burchell (2005) above n 4 972.
[26] Kruger (2008) above n 7 11.
[27] *NDPP v R O Cook Properties (Pty) Ltd*; *NDPP v 37 Gillespie Street Durban (Pty) Ltd & Another*; *NDPP v Seevnarayan* 2004 2 SACR 208 (SCA) 239; *NDPP v Van Staden & Others* 2007 1 SACR 338 (SCA) 340; *NDPP v Vermaak* 2008 1 SACR 157 (SCA) 16.
[28] N Boister "Transnational Penal Norm transfer: The transfer of civil forfeiture from the United States to South Africa as a case in point" (2003) 16 *South African Journal of Criminal Justice* at 282 refers to money laundering and organised crime which could have been dealt with existing criminal laws. Also see *S v Boekhoud* 2011 2 SACR 124 (SCA) 134.
[29] In terms of ss 3(1) a fine not exceeding R1 000 million or imprisonment for a period up to imprisonment for life is the penalties for racketeering. See Kruger (2008) above n 7 34. Also see WA Joubert & JA Faris (ed) *The Law of South Africa* 2nd ed Vol 6 (2004) 11 who state that the most serious problems facing criminal law today is over-criminalisation.
[30] Kruger (2008) above n 7 25.
[31] *Ibid*.
[32] *Eyssen* above n 12 409; *S v Naidoo* 2009 2 SACR 674 (GSJ) 682; *Dos Santos & Another v S* [2010] 4 All SA 132 (SCA) 149. Also see Milton (2010) B4-38 above n 4 23.
[33] *Van Staden* above n 27 340; *Eyssen* above n 12 409 & *Dos Santos* [2010] above n 32 149.
[34] In terms of ss 1(1) an "enterprise" includes any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity.
[35] *S v Green & Others* (unreported) case no CC39/2002 (D) 3.
[36] Pearsall (1999) above n 23 see "enterprise".

There is no stipulation in the Act that the "enterprise" has to be an illegal enterprise.[37] The effect hereof is that a well-established legitimate business will also fall within the definition of an "enterprise".[38] It is the "pattern of racketeering activity", through which the accused must participate in the affairs of the "enterprise", which creates illegality.[39]

In *S v Green and Others*[40] the State relied on three factors to prove the existence of the "enterprise", namely that the various accused purchased drugs from the same source, the method of sale was the same and the accused sold the drugs from a common place. There was no evidence that the accused shared a common fund or bank account and it was the court's view that the three factors fell short of proving an "enterprise".[41] The "Fancy Boys Gang" in *S v Eyssen*[42] was not an "enterprise" as the evidence did not reveal that there was an organisation, a structure or a hierarchy. It is submitted that the court came to the correct conclusion that the "Fancy Boys Gang" was "no more than a loose association of individuals" who committed various robberies at private homes.[43] Despite the fact that there were structural and descriptive name differences with regard to the different entities involved in *S v Prinsloo and Others*[44] the court held that an "enterprise" was proven as the activities of the "enterprise" in essence never changed.

The definition of an "enterprise" is also widely formulated in RICO. The definition includes individuals, legal entities and groups or individuals associated together, although not necessarily legal entities.[45] RICO also applies to "enterprises" where there is no economic motive,[46] and to legitimate businesses.[47] There is a further requirement to prove racketeering offences, namely that the entities must engage in

[37] *Naidoo* (2009) above n 32 682. Also see Milton (2010) B4-38 above n 4 23.
[38] Milton (2010) B4-38 above n 4 23.
[39] *Eyssen* above n 12 409.
[40] *Green* above n 35 6 - 7.
[41] *Green* above n 35 6 - 8.
[42] *Eyssen* above n 12 411.
[43] *Ibid*.
[44] *Prinsloo* above n 11 450.
[45] J Madinger *Money Laundering: A Guide for Criminal Investigators* 2nd ed (2006) 92.
[46] A Jones & Satory J *et al* (2002) "Racketeer Influenced and Corrupt Organizations" (2002) 39 *American Criminal Law Review* at 979 <htpp://www.heinonline.org (accessed 23 July 2012).
[47] Baily (1999) above n 7 1.

interstate or foreign commerce.[48] The illegal activity must in some way be related to interstate commerce and have an effect on it.[49] Using a telephone or a computer to contact someone in another state during the course of an illegal activity will be sufficient proof of interstate commerce.[50] The "enterprise" can affect interstate commerce through "a pattern of racketeering activity" consisting of at least two acts of racketeering activity within ten years.[51] Many states have enacted their own legislation to overcome the risk that someone escapes prosecution because it lacks the element of interstate commerce.[52] Courts often exercise jurisdiction even though the predicate offences have a minimum impact on interstate commerce.[53]

1.2.3 The concept of a "pattern of racketeering activity"

Subsection 2(1) of the Act makes persons who through a "pattern of racketeering activity" commit offences, punishable whilst they are involved in an "enterprise".[54] In terms of subsection 1(1) a "pattern of racketeering activity" means the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1. However, it is also required that at least two offences referred to in Schedule 1, must have been committed within a ten year time period. It is further provided that one of the offences must have been committed after the commencement of the Act and the last offence must have occurred within ten years (excluding any period of imprisonment) after the commission of such prior offence.

The prosecution must establish the existence of an "enterprise", a "pattern of racketeering activity" and a link between it and the accused.[55] Proof of the "pattern of racketeering activity" may establish proof of the "enterprise", but it is not necessarily the case.[56]

[48] Madinger (2006) above n 45 92. Also see Baily (1999) above n 7 1 & 9; Jones (2002) above n 46 981.
[49] Garland (2009) above n 21 431.
[50] *Ibid*.
[51] Madinger (2006) above n 45 92.
[52] Garland (2009) above n 21 432 - 433.
[53] Jones (2002) above n 41 995. Also see Baily (1999) above n 7 9.
[54] Burchell above n 4 976 - 977.
[55] Burchell (2005) above n 4 977. Also see *Dos Santos* [2010] above n 32 149.
[56] *Naidoo* (2009) above n 32 682.

There is a limited number of reported case law in South Africa in respect of the meaning of a "pattern of racketeering activity". The repeated participation in dealing in unpolished diamonds in *S v Dos Santos and Others*[57] formed a "pattern of racketeering activity". The definition of a "pattern of racketeering activity" is not clear[58] when managers, employees or associates commit offences mentioned in subsection 2(1)(e).[59] The court in the *Green* case stated that the prosecution need not prove that the accused was involved or participated in each of the various offences charged with.[60] It was sufficient if the prosecution established a series of offences committed by the "enterprise" and that the accused participated directly or indirectly in one or more of those offences.[61]

It is difficult to determine which actions form a "pattern of racketeering activity" or not. The *Eyssen* case[62] gave some indication of what is meant by the concept by stating that "neither unrelated instances of proscribed behaviour nor an accidental coincidence between them constitute a 'pattern' and the word 'planned' makes this clear". Offences which were committed "virtually simultaneously" do not satisfy the requirement for a "pattern of racketeering activity".[63] In *HJ Inc v Northwestern Bell Telephone Co*,[64] the court referred to the "continuity plus relationship test"[65] to explain when a "pattern of racketeering activity" is proved:

> Criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

There is a duty upon the prosecution to stipulate in the indictment that a series of specific offences forms a "pattern of racketeering activity".[66] It is possible to

[57] *Dos Santos* [2006] n 12 18.
[58] *Green* above n 35 8.
[59] Ss 2(1)(e) stipulates the racketeering offence as being committed "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."
[60] *Green* above n 35 8.
[61] *Green* above n 35 8 - 9.
[62] *Eyssen* above n 12 410. Also see *Dos Santos* [2010] above n 32 149.
[63] *S v De Vries & Others* 2009 1 SACR 613 (C) 626.
[64] *HJ Inc v Northwestern Bell Telephone Co* 492 US 229 (1989) 230.
[65] Baily (1999) above n 7 2.
[66] *Green* above n 35 9.

constitute a "pattern of racketeering activity" when an offender commits racketeering offences and the co-offender is involved or participates in the conduct of the "enterprise".[67] The indictment must indicate if the offender was not necessarily involved in the commission of the offences stipulated to form a "pattern of racketeering activity", but he participated or involved himself in the "enterprise" as he had knowledge of the "pattern of racketeering activity".[68] It is difficult to define the requirements to prove a "pattern for a racketeering" violation in the Act and in RICO, but it is required that courts use their common sense.[69] The facts of each particular case must be considered to establish whether a "pattern of racketeering activity" exists.[70]

In the United States of America the prosecutor must prove both the relationship and continuity of the relationship as separate elements to fulfil the requirements of a "pattern of racketeering activity".[71] The prosecutor must establish that a relationship existed between the defendants and that they were working together to achieve a common criminal goal.[72] RICO requires a minimum of two acts occurring within ten years of each other, but more than two racketeering acts may be required to proof the violation.[73] Isolated predicated acts do not form a "pattern of racketeering activity".[74] Two racketeering acts that are not directly related to each other may nevertheless be related indirectly as each is related to the RICO "enterprise".[75] A "pattern of racketeering activity" may be established when there is a threat of continuity of the related racketeering acts.[76]

1.2.4 Schedule 1 of the Act

The State needs to prove that an accused planned and continuously participated in, or have been involved in, any offence referred to in Schedule 1.[77] One of the

[67] *Eyssen* above n 12 409.
[68] *Ibid.*
[69] *Hartz v Friedman* 919 F2d 469 (7th Cir 1990) 472.
[70] LJ Culligan & AV Amodio (eds) (1994) 77 *Corpus Juris Secundum* 451.
[71] Garland (2009) above n 21 431.
[72] *Ibid*.
[73] Baily (1999) above n 7 2.
[74] *Ibid*.
[75] *US v Eufrasio* 935 F2d 553 (3rd Cir) 565.
[76] Baily (1999) above n 7 3.
[77] Ss 1(1) refers to Sch 1 offences to form a "pattern of racketeering activity".

offences must have been committed after the commencement of the Act and the last offence must have been committed within ten years after the commission of the first offence.[78] Any period of imprisonment imposed upon an accused by another court during the said ten year period, is excluded when calculating the required period.[79] The Act requires at least two offences to have been committed during the prescribed period.[80]

The list of Schedule 1 offences is referred to as the "underlying predicate offences".[81] In the United States of America the RICO charges are referred to as the "umbrella charges".[82] Various offences are listed in Schedule 1, including serious offences such as murder,[83] robbery[84] and less serious offences such as theft.[85] Schedule 1 also includes offences of which the punishment may be for a period of imprisonment exceeding one year, without the option of a fine.[86] In *Prinsloo* the court refused to interpret the latter offences widely to refer to all offences of which the punishment may be for a period of imprisonment exceeding one year, irrespective of whether a fine may be imposed or not.[87]

In *Van der Burg*[88] the Constitutional Court considered whether the unlawful selling of liquor fell under Schedule 1 of the Act as it was not explicitly mentioned therein. The Constitutional Court found that the offence fell under item 33 of Schedule 1 where a court may impose a fine or imprisonment without the option of a fine.[89] The case dealt with forfeiture provisions[90] in respect of immovable property of the appellants from where they operated an illegal shebeen.[91] It is submitted that a distinction must

[78] *Ibid*.
[79] *Ibid*.
[80] *Dos Santos* [2010] above n 32 150.
[81] *Dos Santos* [2010] above n 32 150. Also see *Boekhoud* above n 28 134; *S v De Vries & Others* 2012 1 SACR 186 (SCA) 205.
[82] *De Vries* (2012) above n 81 204.
[83] Sch 1 item 1.
[84] Sch 1 item 6.
[85] Sch 1 item 17. Also see CN Nkuhlu "Organised Crime - escaping the full consequences?" (2003) Oct *De Rebus* 27.
[86] Sch 1 item 33.
[87] *Prinsloo* above n 16 473.
[88] *Van der Burg* above n 3 340 & 346.
[89] *Van der Burg* above n 3 357.
[90] Ss 50(1) of the Act.
[91] *Van der Burg* above n 3 350 - 351.

be drawn between racketeering offences and when a forfeiture order is considered in the interpretation of offences falling under item 33 of Schedule 1. It appears that the judgment in the *Prinsloo* case is correct in this regard.[92]

1.2.5 Jurisdiction

The general principle is that South African courts may only exercise jurisdiction in respect of offences committed on South African territory.[93] The four kilometre rule[94] is not applicable to extend jurisdiction to foreign states.[95] South African courts in general[96] also do not have jurisdiction in respect of offences which commenced on South African soil, but are completed in a foreign state.[97]

However, South African courts may exercise jurisdiction in respect of offences committed beyond South African borders when a statutory provision secures jurisdiction.[98] Subsection 2(1) provides that the Act applies to acts mentioned in the subsection, committed within the South African borders "or elsewhere". The Act therefore provides for extra-territorial jurisdiction when offenders commit some of the elements of racketeering offences within South African borders and other elements occurred beyond South African borders.[99]

There is definitely a need for extra-territorial jurisdiction in respect of racketeering offences. As *Boister*[100] states in this regard:

> 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 for a perfect opportunity for the globalization of culture, commerce and crime.

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[92] *Prinsloo* above n 16 473.
[93] *S v Makhutla & Another* 1968 2 SA 768 (O) 771. Also see *S v Mathabula & Another* 1969 3 SA 265 (N) 266 & *S v Maseki* 1981 4 SA 374 (T) 377.
[94] See s 90 Act 32 of 1944 in terms of which the jurisdiction of district and regional courts include offences committed within the distance of four kilometres beyond the courts' boundaries.
[95] *Maseki* above n 93 377 - 378.
[96] T Geldenhuys & JJ Joubert *et al* Criminal Procedure (2011) at 39 - 40 for exceptions to the general rule.
[97] *Maseki* above n 93 377.
[98] Geldenhuys (2011) above n 96 40.
[99] *Boekhoud* above n 26 136.
[100] N Boister "The trend to 'universal extradition' over subsidiary universal jurisdiction in the suppression of transnational crime" (2003) *Acta Juridica* 287.

In *S v Boekhoud*[101] the respondent contended that the court *a quo* lacked jurisdiction to try him on the counts relating to the racketeering activities. The prosecution alleged that the respondent was part of a scheme which exported unwrought precious metals from South Africa to a refinery in the United Kingdom.[102] The respondent argued that the court lacked jurisdiction because the racketeering activities were performed by persons in South Africa, whilst he (the respondent) was in the United Kingdom.[103] The court *a quo* found in passing that the definition of a "pattern of racketeering activity" only referred to offences committed in South Africa.[104] The court held that the extra-territorial jurisdiction provided for in the Act seemed to be based on the one accused committing the predicate offences in South Africa, whilst the other accused was to some degree involved in the "enterprise" from another country.[105] The matter was not decided finally.[106]

1.3 Purpose of the study

The purpose of the study is to critically analyse the issues mentioned *supra* and to provide guidelines to legal practitioners when their clients encounter indictments in terms of subsection 2(1) of the Act.

The issues can be summarised as follows:

(1) Chapter 1 of the Act contains the definitions and interpretation of relevant phrases referred to in the Act, and more specifically as referred to in subsections 2(1)(a) to (f) thereof, but it does not address the issue of fault. The crucial question is whether the Act requires intention or negligence to prove contraventions of the Act?

(2) The position with regard to unlawfulness is unclear. The question as to the legal position of an accused that genuinely did not know, or did not foresee the possibility of unlawfulness, begs an answer.

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[101] *Boekhoud* above n 28 126.
[102] *Boekhoud* above n 28 127.
[103] *Boekhoud* above n 28 128.
[104] *Boekhoud* above n 28 140.
[105] *Ibid*.
[106] *Ibid*. It may be problematic for the prosecution to prove jurisdiction in instances when an offender participates in the affairs of the "enterprise" from a foreign state. The offender may raise absence of jurisdiction in respect of the racketeering acts as the co-offenders committed the racketeering activities on South African territory.

(3) The meaning of the word "offence" is still not clear. Is it a prerequisite for a conviction of racketeering offences that an accused person must first have to be convicted of two or more criminal offences referred to in Schedule 1 or can a person be prosecuted before any convictions?

(4) Lastly, the issue of a possible duplication of offences should be looked at. Will it amount to double jeopardy when a racketeering prosecution requires two predicate offences for a conviction? Also, can the plea of prior conviction or acquittal be proffered?

1.4 Methodology and overview of chapters

This mini-dissertation focuses on the South African position supplemented by a comparison with the position in the United States of America. Some answers to the raised questions[107] can be found in the Act itself and in our common law principles (more specifically the principles of criminal law). Other answers can be found in our case law, text books and academic journals but the sources are limited, and indigenous jurisprudence in this particular branch of the law is not developed.[108]

A comparative study is therefore important. Yet, caution must be exercised in applying foreign law as the solutions developed in one jurisdiction may be inappropriate elsewhere.[109] However, the Act is to a large extent modelled on RICO and therefore suitable for comparison.[110] Several sections in RICO can be of assistance in the interpretation of the Act.[111]

Because the Constitution is the supreme law of the country[112] and operates as a protective umbrella over all areas of the law and state action, a discussion of the relevant sections in the Constitution are included.[113] More specifically, the rights of

[107] As stated in par 1.3 above.
[108] *S v Makwanyane & Another* 1995 3 SA 391 (CC) 414. There are limited reported South African case law and textbooks on racketeering offences. See also D Gupta "Republic of South Africa's Prevention of Organised Crime Act: A Comparative Bill of Rights Analysis" (2002) 37 *Harvard Civil Rights - Civil Liberties Law Review* 162.
[109] *Park-Ross & Another v Director: Office for Serious Economic Offences* 1995 2 SA 148 (C) 160.
[110] Gupta (2002) above n 108 162.
[111] Kruger (2008) above n 7 8.
[112] S 2 Constitution of the Republic of South Africa of 1996.
[113] Geldenhuys (2011) above n 96 15.

arrested, detained and accused persons in section 35 of the Bill of Rights are considered.

Courts must prefer a reasonable interpretation of legislation that is consistent with international law, over an interpretation that is inconsistent with international law.[114] This study will therefore include a comparison between reported case law, textbooks and academic journals written on the American position and our legal position.[115]

The study is presented in five chapters. Chapter 1, the introductory chapter, deals with various aspects of racketeering offences by providing background information on the issue of racketeering offences in general in South Africa and the United States of America.[116] Chapter 1 also explains the purpose of the study to indicate briefly what each chapter addresses and what the delimitations of the study are.

In Chapter 2, the common law position is considered in order to establish what the requirements are to prove fault when the prosecution intends to prove that an accused contravened subsections 2(1)(a) to (f). Chapter 2 also includes a discussion of the different parties that may be involved with racketeering offences. More specifically, this chapter questions whether negligence of the different parties will be sufficient to prove contraventions of the mentioned subsections.

Chapter 3 examines the practical difficulty encountered when an accused genuinely did not know, or did not foresee the possibility of unlawfulness and is subsequently convicted of racketeering offences. Further, this chapter looks at whether the commission of two or more offences referred to in Schedule 1 in the prescribed period of time is a contributing factor to determine whether an accused knew or foresaw the possibility of unlawfulness of his actions.

Chapter 4 discusses the question whether it is a prerequisite that an accused must first have been convicted of two or more criminal offences referred to in Schedule 1

[114] S 233 Constitution above n 112.
[115] Boister (2003) above n 28 282 states that it becomes a subject of concern when simply transferring penal norms from a developed country to a developing country.
[116] *Dos Santos* [2006] above n 12 20.

for a conviction of racketeering offences. Aspects that will be dealt with in this chapter include the concept of predicate offences and what the position is to substantiate the predicate offences when previous convictions do not exist.[117] A significant part of this chapter will focus on the crucial question whether double jeopardy is involved, if the accused person was in fact previously convicted of one or both of the predicate offences.[118]

Finally, Chapter 5 clarifies the research results of the central questions of this study. Chapter 5 includes concluding remarks and recommendations on the various aspects addressed in the mini-dissertation.

1.5 Difficulties and limitations of this study

Difficulties were brought about by the following: The Act originated against the backdrop of South African common and statutory law which was not in line with international measures combating organised crime, money laundering, criminal gang activities and racketeering.[119] The offence of "racketeering" itself was a new concept under South African law.[120] Because of this a provision worded similarly to the RICO provision was adopted in the Act. [121]

Given the correlation between the Act and RICO on the aspect of racketeering, courts turned to the United States case law when interpreting the Act.[122] However, it appears that South African crime syndicates operate in loose associations rather than in structured organisations that are generally found in the United States.[123] The American case law should thus be viewed with caution.[124]

The supremacy of the South African Constitution[125] also plays a vital role when constitutional aspects regarding racketeering offences are considered. The task to

[117] Burchell (2005) above n 8 982.
[118] *Ibid*.
[119] Kruger (2008) above n 7 5.
[120] Burchell (2005) above n 8 976.
[121] *Ibid*.
[122] *Dos Santos* [2010] above n 32 150.
[123] Kruger (2008) above n 7 5.
[124] Kruger (2008) above n 7 8.
[125] S 2 Constitution above n 112.

explore solutions to the different problematic aspects of racketeering was not made easier due to limited reported South African case law on the topic. It may also be difficult to make indisputable distinctions between organised crimes and ordinary crimes.[126]

The scope of this study is also limited by the fact that it is not possible to research and compare all aspects relating to racketeering offences under South African and American law in a mini-dissertation. A decision was made to select certain aspects of racketeering offences, which has been the most contentious in the South African courts.

[126] *Mohunram* above n 6 174.

CHAPTER 2

Culprits and Culpability

2.1 Introduction

It is necessary to criminalise the management of, and related conduct, in connection with "enterprises".[127] The offence of racketeering does not consist of the commission of an act in itself, but in the membership of an organisation, also known as the "enterprise", from which it has been shown that at least two underlying predicate offences have been committed.[128] In the *Green* case[129] the accused were *inter alia*[130] acquitted on the racketeering offences as the murder and attempted murder had no link with the "enterprise".[131] Offences relating to racketeering activities involve a group activity.[132]

To determine whether a culprit is criminally connected with an illegitimate group, the element of fault also needs to be discussed. As a general rule offenders who are not at fault should not be prosecuted.[133] The requirement of fault is an element of both common law and statutory crimes.[134] Contravention of subsections 2(1)(a) to (c) and (f) requires fault as a requirement in the form of intention or negligence. However,

[127] Preamble of the Act.
[128] A Kruger *Organised Crime and Proceeds of Crime Law in South Africa* (2008) 12.
[129] *S v Green & Others* (unreported) case no CC39/2002 (D) 6 - 7.
[130] *Green* above n 129 8 where two of the accused were also acquitted on the racketeering offences relating to the counts of kidnapping and attempted murder as there was no connection between the offences and the pattern of dealing in drugs.
[131] *Green* above n 129 7 where there was no evidence that the counts of murder and robbery were related to the dealing in drugs.
[132] Kruger (2008) above n 128 12.
[133] *S v Coetzee & Others* 1997 3 SA 527 (CC) 597.
[134] J Burchell & J Milton *Principles of Criminal Law* (2005) 455.

the degree of blameworthiness required for contravention of subsections 2(1)(d) and (e) is not expressly stipulated in the Act.[135]

2.2 The parties involved with racketeering activities

2.2.1 General

The Act, in general terms, refers to "any person" who commits offences regarding racketeering activities.[136] Provision is also made for managers, employees or associates who participate in the affairs of the "enterprise".[137] Furthermore, the racketeering activities regarding property acquired, used or invested in by offenders are specifically dealt with in the Act.[138]

The offences mentioned in subsections 2(1)(d) and 2(1)(e) are referred to as the "participation offences" committed by persons in general or by managers, employees and associates.[139] The offences are created by the participation in the affairs of the "enterprise".[140] In the United States of America a defendant participates in the affairs of an "enterprise" by operating in the upper management thereof or by participation on a lower level under the direction of management.[141] Consequently, the American position also includes managers and employees who participate in the commission of racketeering offences. The concepts of "manager" and "associate" are further elaborated on in the following discussion.

2.2.2 Manager

A manager of an "enterprise" contravenes the Act in circumstances where he either participates in the racketeering offences or manages the operation of an "enterprise", whilst he knew or ought to have reasonably known that a person employed by or associated with the "enterprise" commits racketeering activities.[142] Thus, mere knowledge of the racketeering activities committed by his employees or associates is

[135] Burchell (2005) above n 134 977.
[136] Ss 2(1).
[137] Ss 2(1)(e) & (f).
[138] Ss 2(1)(a) to (c). Also see Kruger (2008) above n 128 12.
[139] Kruger (2008) above n 128 12.
[140] Kruger (2008) above n 128 13.
[141] LJ Culligan & AV Amodio (eds) *Corpus Juris Secundum* (1994) Vol 77 444 - 445.
[142] Ss 2(1)(e) & (f).

sufficient and actual participation in the offences is not required.[143] The essence of the managerial offence is knowledge.[144] This demonstrates that subsection 2(1)(e) is wider than subsection 2(1)(f), as the last mentioned subsection focuses on the knowledge of the manager and not on participation as such.[145] Consequently, it is possible that an offender could be convicted of managing an "enterprise"[146] and participating in the affairs of an "enterprise" through a "pattern of racketeering activity".[147]

Given that a manager faces criminal liability purely on the basis of knowledge one would expect the Act to define "manage". However, this concept is not defined, making it necessary to take notice of its ordinary meaning,[148] which in the context of the Act is to "be in charge of, run" or "supervise (staff)".[149] *Claassen*[150] defines the word "manage" as "it is the ordinary meaning of being in charge or supervising". The Act also does not define "manager". A "manager" is defined in its ordinary meaning as "a person who manages an organisation or group of staff".[151] Reference to case law provides clarity on the practical application of the ordinary meaning of "manage" and "manager", for instance the person in the *De Vries* case, who issued instructions to the various members of the "enterprise" regarding their different roles and responsibilities during the robberies, was regarded as the person who managed the "enterprise".[152] Whereas, in the *Eyssen* case the appellant was acquitted on the racketeering offences as he did not manage the operations of the gang and he was not involved with the planning of the illegal activities.[153]

2.2.3 Associate

[143] *S v Eyssen* 2009 1 SACR 406 (SCA) 409.
[144] WA Joubert & JA Faris (ed) *The Law of South Africa* 2nd ed Vol 6 (2004) 408. Also see *Eyssen* above n 140 409.
[145] *Eyssen* above n 143 409 states that ss 2(1)(e) covers a person who was managing or employed by or associated with the enterprise" whereas ss 2(1)(f) is limited to a person who manages the operations or activities of the enterprise.
[146] Ss 2(1)(f).
[147] Ss 2(1)(e). Also see *S v De Vries & Others* 2009 1 SACR 613 (C) 625; *S v Prinsloo & Others* (unreported) case no CC384/2006 (NGP) 478.
[148] *Eyssen* above n 143 409. Also see *De Vries* (2009) above n 147 623.
[149] J Pearsall (ed) *The Concise Oxford Dictionary* 10th ed (1999) see "manage".
[150] RD Claassen *Dictionary of Legal Words & Phrases* 2nd ed Vol 3 (1997) see "manage".
[151] Pearsall (1999) above n 149 see "manager".
[152] *De Vries* (2009) above n 147 623.
[153] *Eyssen* above n 143 413.

The prosecution must indicate that the accused is associated with the "enterprise" by linking the accused and the enterprise's affairs through the offences committed by a "pattern of racketeering activity". It would have also been expected that the concept of "associated"[154] be defined in the Act as the word on its own it is a wide term. Consequently, the Act should have limited the meaning thereof.[155] Therefore, it is necessary to take notice of the ordinary meaning of the word "association" which is defined as "a group of people organised for a joint purpose".[156] In the context of racketeering, case law indicates that the association with the "enterprise", at the very least, needs to be a conscious association.[157] Further, a common factor or purpose needs to exist such as that the association is functioning as a continuing unit.[158]

In the United States of America the concept of association with an "enterprise", is more refined and offers a workable definition thereof. The position in the American legal system is that an association must "have a shared purpose, continuity, unity and identifiable structure", as well as "goals separate from the predicate acts themselves".[159] Therefore, in order to be associated with an "enterprise" a defendant must be aware of the existence and the general nature of the entity and knows that the "enterprise" extends beyond his individual role.[160] The concept of association is further refined by not requiring of a defendant to have specific knowledge of every member or component of the "enterprise".[161]

2.3 Culpability

2.3.1 Common law

The element of fault needs to be discussed to determine whether an offender is criminally connected with an "enterprise". Generally, the common law position is that conduct is not unlawful unless it is committed with a guilty mind (*mens rea* or

[154] Ss 2(1)(e) & (f).
[155] *De Vries* (2009) above n 144 627.
[156] Pearsall (1999) above n 147 see "association".
[157] *S v Naidoo* 2009 2 SACR 674 (GSJ) 682.
[158] *Ibid*.
[159] A Jones & J Satory *et al* "Racketeer Influenced and Corrupt Organizations" (2002) 39 *American Criminal Law Review* 990.
[160] *US v Eufrasio* 935 F2d 553 (3rd Cir 1991) 577. Also see Culligan (1994) above n 141 445.
[161] *Eufrasio* above n 160 577.

fault).[162] *Mens rea* or fault may be divided into two broad terms, namely intention (*dolus*) or negligence (*culpa*)[163] and neither can overlap each other.[164] In all common law crimes, with two exceptions,[165] the prosecution needs to prove that an accused committed the offence with the necessary intention.[166] In this respect, there are four varieties of intention[167] and courts assess all forms of intention subjectively.[168] Whereas, negligence indicates that the conduct of the accused does not comply with the accepted standards of a reasonable person.[169]

There is no general rule as to the extent of the degree of *mens rea* required for the violation of a statutory prohibition.[170] Usually words such as "wilfully", "intentionally" and "maliciously" indicate the requirement of intentional wrongdoing.[171] However, it is sufficient with numerous statutory offences that the fault element is proven through negligence.[172] In some instances a person's conduct "does not comply with a certain standard of care required by the law".[173] Under such circumstances the person acts negligently and the law also punishes such unlawful acts.[174] The standard of the reasonable person is used to test whether an offender acted negligently or not[175] and the test is always an objective one.[176] The existence of negligence can be ascertained by applying the standard of conduct which the law applies to the facts of the case.[177] When an accused has special knowledge or skill above the norm of the reasonable person, the standard of the reasonable person is raised to include such person with special knowledge or skill.[178] The prosecution must then prove beyond

[162] Burchell (2005) above n 134 151.
[163] *S v De Blom* 1977 3 SA 513 (A) 529. Also see Burchell (2005) above n 134 152.
[164] *S v Ngubane* 1985 3 SA 677 (A) 686. Also see JC De Wet & HL Swanepoel *Strafreg* (1985) 160.
[165] CR Snyman *Criminal Law* (2008) at 209 states that the two exceptions are culpable homicide and contempt of court by a newspaper editor in whose paper commentary is published concerning a pending case.
[166] Burchell (2005) above n 134 152.
[167]Burchell (2005) above n 134 152 namely *dolus directus*; *dolus indirectu; dolus eventualis* & *dolus indeterminatus*.
[168] Burchell (2005) above n 134 152.
[169] Burchell (2005) above n 134 552.
[170] *S v Arenstein* 1964 1 SA 361 (A) 366.
[171] *Ibid*.
[172] Burchell (2005) above n 134 154.
[173] Snyman (2008) above n 165 208.
[174] *Ibid*.
[175] Burchell (2005) above n 134 154.
[176] Snyman (2008) above n 165 209.
[177] *R v Meiring* 1927 AD 41 45.
[178] Burchell (2005) above n 134 154.

reasonable doubt that a reasonable person, in the same circumstances of the accused, would have foreseen the consequence of his conduct and that a reasonable person would have taken the necessary steps to guard against such consequence.[179]

If there is a duty on a person to be cautious and careful not to take risks, negligence as a form of criminal liability may constitute sufficient proof of the guilty mind, even where it is not the gist for the contraventions of the offences charged with.[180] In *S v Burger*[181] the court stated that it is not expected of the reasonable person to act in the extreme, such as to have:

> Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of a racing driver. In short, a *diligens paterfamilias* treads life's pathway with moderation and prudent common sense.

2.3.2 Culpability where subsection 2(1) is contravened

Chapter 2 of the Act makes provision for six substantive offences relating to racketeering activities. Subsections 2(1)(a) to (c) and (f) specifically stipulate fault as a requirement to prove contraventions, either in the form of intention or negligence. *Burchell*[182] correctly questions whether this approach is in accordance with the current position of South African criminal law by allowing the Act to cover both the elements of intention and negligence. Especially, since intention in the form of *dolus eventualis*[183] is not excluded in racketeering offences when a court is satisfied that an accused "must have realised the consequences of his action".[184]

Furthermore, subsections 2(1)(d) and (e) do not expressly stipulate the degree of blameworthiness to be proven by the prosecution.[185] In cases where legislation is

[179] *Ibid.*
[180] *R v H* 1944 AD 121 130. Also see *Arenstein* above n 170 366.
[181] *S v Burger* 1975 4 SA 877 (A) 879.
[182] Burchell (2005) above n 134 977.
[183] Snyman (2008) above n 165 184 states *dolus eventualis* is proven when the commission of the unlawful act or the causing of the unlawful result is not the main aim, but the accused subjectively foresees the possibility that the unlawful act may be committed or the unlawful result may be caused and he reconciles himself to the possibility.
[184] Kruger (2008) above n 128 148.
[185] Burchell (2005) above n 134 977.

silent on *mens rea* there is a very strong presumption that the legislative provision is to be interpreted as requiring some form of *mens rea* for a contravention.[186] In the absence of any words indicating the particular mental state required for a conviction, the degree of *mens rea* depends on what the Legislature anticipated with the statute.[187] It appears that the Act was *inter alia* adopted because common law and statutory law failed to keep pace with international measures dealing with racketeering offences.[188] Having regard to the main purpose of the Act and to the severe penalties prescribed for a contravention of subsections 2(1)(d) and (e), *mens rea* appears to be an essential part of the offences created in the Act.[189]

Contrary hereto, subsections 2(1)(a) to (c) requires that a person must know or ought reasonably to have known that he committed certain racketeering acts. Subsection 2(1)(f) also stipulates that a manager is guilty of an offence if he knew or ought reasonably to have known that any person, employed by or associated with the "enterprise" conducted the affairs of the organisation through a "pattern of racketeering activity". More specifically, subsection 2(1)(f) is primarily focused on the head of the criminal organisation who manages the "enterprise" with the required knowledge of liability. Consequently, knowledge of the racketeering offences is crucial to determine liability in the mentioned subsections.[190] In this respect the Act provides a certain degree of clarity and defines the concepts of "knowledge"[191] and when a person "ought reasonably to have known"[192] to commit a racketeering activity. The *Prinsloo* case[193] enlightened this aspect further as the court mentioned that it is sufficient for a contravention of subsection 2(1)(f), when the prosecution proves that a person managed the operation or activities of an "enterprise"

[186] Burchell (2005) above n 134 131. Also see *S v Selebi* 2012 1 SA 487 (SCA) 504.
[187] *Arenstein* above n 170 366.
[188] *NDPP & Another v Mohamed NO & Others* 2002 2 SACR 196 (CC) 203.
[189] *Arenstein* above n 170 366.
[190] *Naidoo* (2009) above n 157 681.
[191] Ss 1(2) states that a person has knowledge of a fact if the person has actual knowledge of the fact or the court is satisfied that the person believes that there is a reasonable possibility of the existence of the fact and he fails to obtain information to confirm the existence of the fact.
[192] Ss 1(3) states that a person ought reasonably to have known or suspected a fact if the conclusions that he ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both the general knowledge, skill, training and experience that may reasonably be expected of a person in his position and the general knowledge that he in fact has.
[193] *Prinsloo* above n 147 433.

negligently. This approach is in line with the argument of *Kruger*,[194] that the phrase "knows or ought reasonably to have known" refers to the reasonable man test.

It appears that the finding in the *Prinsloo* case regarding negligence is in accordance with other reported case law which previously considered the common law position regarding culpability.[195] For example, in the *Oberholzer* case[196] the court held that the explicit instruction of the degree of blameworthiness as an essential element indicates that intention is required for a contravention. Furthermore, when the degree of blameworthiness is not explicitly stated, it is clear that intention is not required and that negligence will suffice.[197] However, where a statute is ambiguous in respect of the element of fault required for a particular statutory offence, *Burchell*[198] states that fault ought to be an element of the offence. Furthermore, when considering whether *culpa* is sufficient for criminal liability in statutory offences, courts must be careful not to hold an accused liable for the unintended consequences of a prohibited act.[199] Care must also be taken that a statute is interpreted in such a fashion to extend criminal liability to negligence only where there is the clearest indications in the Act justifying it.[200] *Burchell*[201] states that perhaps the Legislature assumed that "even if *mens rea* in the form of intention is required for these subsections, this would not defeat the object of the legislation". It therefore appears that mere negligence is sufficient as a form of *mens rea* for a successful prosecution on contravention of subsections 2(1)(d) and (e).

However, it is sometimes difficult for the prosecution to prove that an offender had the necessary intention to commit racketeering offences. To overcome this hurdle, the prosecution argued in *S v Naidoo*[202] that previous convictions may be proven

[194] Kruger (2008) above n 128 148.
[195] *Prinsloo* above n 147 433. Also see *S v Oberholzer* 1971 4 SA 602 (A) 611.
[196] *Oberholzer* above n 195 611.
[197] *Oberholzer* above n 195 611 - 612.
[198] Burchell (2005) above n 134 546.
[199] *S v Naidoo* 1974 4 SA 574 (N) 596. Also see Burchell (2005) above n 134 544.
[200] *Naidoo* (1974) above n 199 596.
[201] Burchell (2005) above n 134 977.
[202] *Naidoo* (2009) above n 157 683 - 684.

during the subsequent trial to prove *mens rea*.[203] It is in line with the Act that evidence may be tendered regarding previous convictions, subject thereto that such evidence would not render a trial unfair.[204] The evidence so tendered to proof the "pattern of racketeering" provides evidence of the state of mind of the accused in general and his *mens rea* when he committed the racketeering offences.[205]

When the position in the United States of America is considered regarding the determination of culpability, it appears to be less complicated than the South African position. The *mens rea* requirement is met for RICO offences, if the defendant knew that the predicate acts were illegal.[206] Furthermore, the intent of the defendant is shown when he is "engaging in some affirmative conduct that contributes to the success of the venture".[207] Consequently, it is not required that *mens rea* extends beyond what is necessary to prove the underlying predicate acts.[208] It is sufficient for the American courts to examine the underlying predicate acts to establish whether intention or negligence is required to proof the mentioned underlying predicate acts.[209]

2.4 Conclusion

Any person who acquires or maintains any interest or control of any "enterprise" could potentially commit an offence.[210] Furthermore, subsection 2(1)(e) includes persons who commit racketeering activities who are managers of an "enterprise" or who are employed by or associated with any "enterprise". Most of the offences are created by the participation in the affairs of the "enterprise".[211] The essence of these offences is that the accused must participate in the conduct of the affairs of the "enterprise".[212]

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[203] Ss 2(2). Also see s 197(d) of Act 51 of 1977 wherein it is stipulated that the prosecution is allowed to prove that an accused has previously committed or was convicted of an offence to indicate that he is guilty of the offence charged with.
[204] Ss 2(2).
[205] *Naidoo* (2009) above n 157 683.
[206] *Bruner Corporation v RA Bruner Company* 133 F3d 491 (7th Cir 1998) 495.
[207] Culligan (1994) above n 141 448.
[208] Jones (2002) above n 159 979.
[209] *US v Baker* 63 F3d 1478 (9th Cir 1995) 1493.
[210] Ss 2(1)(d).
[211] Kruger (2008) above n 128 13.
[212] Joubert (2004) above n 144 408 - 409. Also see *Eyssen* above n 143 409.

Whether an offender participates in the activities of an "enterprise" or manages the operation thereof, the Act requires fault in either the form of intention or negligence from the parties involved with the "enterprise".[213] The prosecution has to identify what the involvement of the different parties is and any particular act relied upon to prove participation in the affairs of the "enterprise".[214] Unfortunately the Legislature did not specifically state whether negligence is sufficient for a contravention of subsections 2(1)(d) and (e) since words such as "negligently" or "without due care" were not used.[215] The intention of the Legislature appears to be to also punish those who are not complying with the Act through negligence.[216] It also appears that a high degree of cautiousness and carefulness not to take risks is required for a conviction.[217] However, from reported case law it appears that mere negligence is sufficient as a form of *mens rea* for a successful prosecution on contravention of subsections 2(1)(d) and (e).[218] When the evidence led before court is considered and reasonable doubt exists whether *mens rea* was proved, the prosecution will not be in a position to prove its case beyond reasonable doubt.[219] Furthermore, having regard to the possibility of severe sentences which may be imposed when only negligence was proved, it is suggested that courts will take it into consideration when a suitable sentence is considered.[220]

Subsequently, the onus rests on the prosecution to prove the elements of the offence, which includes intention, with the component of knowledge of unlawfulness.[221] The next chapter deals with the concept of knowledge of unlawfulness of the "pattern of racketeering activity" to enable the prosecution to prove the commission of the racketeering offences.

[213] Kruger (2008) above n 128 148.
[214] *Naidoo* (2009) above n 157 682.
[215] Burchell (2005) above n 134 538.
[216] *Ibid*.
[217] *Naidoo* (1974) above n 199 597.
[218] *Prinsloo* above n 147 433.
[219] *De Blom* above n 163 532.
[220] Snyman (2008) above n 165 209.
[221] *S v Ngwenya* 1979 2 SA 96 (A) 100.

CHAPTER 3

Unlawfulness

3.1 Introduction

The knowledge of unlawfulness to prove intention[222] can be divided into two subsections.[223] Firstly, the knowledge of the existence of the particulars of the elements of the crime and, secondly, the knowledge of unlawfulness or awareness of the act committed.[224] The accused must at least be aware that there are no grounds of justification to cover his conduct.[225] The knowledge of unlawfulness refers to the knowledge of the facts of the case and the awareness that the conduct of the accused constitutes a crime in terms of the law.[226] In essence it means that the accused must know that his conduct is forbidden by law.[227]

Knowledge or awareness of unlawfulness is an essential element of the intention to commit an offence and that will be the position when an accused knowingly acts in conflict with the law.[228] It does not entail that the offender must know that he contravenes a specific section in an Act or that the offender must know what the prescribed sentences are in case of a contravention.[229] The offender must be aware of the fact that his actions are forbidden by law and that is sufficient to prove knowledge or awareness of unlawfulness.[230] It is further not required that the offender must have certainty that his actions are unlawful.[231] All that is required is that the offender formed the perception that what he intends to do is possibly not legally allowed and he reconciled himself with the possibility.[232] Knowledge or

[222] *S v Ntuli* 1975 1 SA 429 (A) 436 states that *dolus* consists of the intention to commit an unlawful act. Also see CR Snyman *Criminal Law* (2008) 95 wherein it is stated that unlawfulness is traditionally an element of crime standing on its own.
[223] Snyman (2008) above n 222 201.
[224] *Ibid*.
[225] Snyman (2008) above n 222 97 & 201. Also see JC De Wet & HL Swanepoel *Strafreg* (1985) 153.
[226] Snyman (2008) above n 222 202.
[227] Snyman (2008) above n 222 203.
[228] De Wet (1985) above n 225 152.
[229] *Ibid*. Also see *S v Hlomza* 1987 1 SA 25 (A) 32.
[230] De Wet (1985) above n 225 152.
[231] *Ibid.*
[232] *Ibid*.

awareness of unlawfulness will be lacking when the offender is convinced that his proposed conduct is legally allowed.[233]

3.2 Common law

It was previously accepted in our common law that every person is presumed to know the law and that ignorance of the law is no excuse.[234] It was not possible to raise a defence of ignorance of the law. For example, in *S v Tshwape and Another*,[235] the accused alleged that they did not know that they needed a permit for the slaughtering of animals in a public place. The court held that an accused will only escape prosecution of a statutory offence where it appears in the absence of *mens rea* that the accused through ignorance or mistake was unaware that such conduct constitutes an offence.[236] The court was not prepared to develop the common law as it knew of no principle where a person can escape criminal responsibility merely because he was unaware of the rule of law.[237] The court emphasised that the prosecution needed to prove that the accused had knowledge of the procedures and provisions of the law.[238]

The case of *S v De Blom*[239] changed the common law position as it was found that there is no ground for existence in our law of the expression that "every person is presumed to know the law and that ignorance of the law is no excuse". The facts of the case were that the appellant was charged with contravention of Exchange Control Regulations as a large amount of American dollar notes were found in her luggage and she had expensive jewellery in a separate suitcase.[240] The appellant admitted at the airport[241] that she had no authority of taking the foreign currency from South Africa, but that she did not know that authority was required by law to take the money through South African borders.[242] The appellant did not give an explanation

[233] De Wet (1985) above n 225 153.
[234] Snyman (2008) above n 222 203.
[235] *S v Tshwape & Another* 1964 4 SA 327 (C) 330.
[236] *Ibid.*
[237] *Ibid*.
[238] *Tshwape* above n 235 335.
[239] *S v De Blom* 1977 3 SA 513 (A) 529.
[240] *De Blom* above n 239 522 - 523.
[241] *De Blom* above n 239 525 states that the appellant later denied this aspect.
[242] *De Blom* above n 239 523.

at the airport for the money hidden in her suitcase in a separate hand bag.[243] With regards to the jewellery she mentioned that it was her personal belongings[244] and that she was under the impression that she did not need permission to take the jewellery out of the country.[245] The prohibitions in the regulations did not state explicitly that the prosecution must prove that the person taking currency or jewellery out of South Africa acted knowingly or wilfully.[246] The regulations also did not in specific terms exclude the element of *mens rea.*[247] In respect of the jewellery the court accepted that the evidence of the appellant could have been reasonably possible true as she previously took jewellery with her on holiday and returned with it.[248] Even if negligence was sufficient to proof contravention of the statutory offence, the court concluded that the prosecution did not establish the required *mens rea* in respect of the jewellery.[249] The qualification, that it is expected of a person who involves himself in a particular field to keep him informed of the legal provisions which are applicable thereto,[250] only applies to where negligence is the fault element for the crime.[251]

3.3 The position when an accused did not know, or did not foresee the possibility of unlawfulness and is subsequently convicted of committing racketeering offences

An accused cannot be held accountable for his actions if he genuinely did not know the possibility of unlawfulness of his conduct or did not foresee the possibility of unlawfulness.[252] For the purposes of the Act, an accused person has knowledge of a fact, if he has actual knowledge of the fact or when the court is satisfied that the accused believes there is a reasonable possibility of the existence of a fact and he fails to obtain information to confirm the existence of that fact.[253] The meaning of the term "when a person ought reasonably to have known or suspected a fact" is

[243] *Ibid*.
[244] *Ibid*.
[245] *De Blom* above n 239 533.
[246] *De Blom* above n 239 529.
[247] *Ibid*.
[248] *De Blom* above n 239 533.
[249] *Ibid*.
[250] *De Blom* above n 239 532.
[251] *Ibid*.
[252] J Burchell & J Milton *Principles of Criminal Law* (2005) 153.
[253] Ss 1(2).

explained in the Act.[254] In the *Naidoo* case[255] knowledge of unlawfulness was tested and the prosecution submitted that the evidence tendered to establish the "pattern of racketeering activity" was relevant to proof knowledge or awareness of unlawfulness on the part of the accused. Consequently, it provided evidence of the state of mind of the accused when he illegally committed the acts forming a "pattern of racketeering activity".[256]

It follows that an inference may be drawn when the prosecution presents evidence that the prohibited act was committed with knowledge and intent, that an accused knowingly committed the prohibited act.[257] Subsequently, the absence of knowledge or awareness of unlawfulness will exclude the element of intention.[258] Furthermore, if only negligence is required to proof the commission of an offence, a reasonable possibility must exist that the accused can be legally blamed for his actions.[259] Therefore, reliance on the absence of knowledge or awareness of unlawfulness will not necessarily exclude prosecution when negligence is sufficient to proof the prohibited act[260] unless the accused acted with the necessary circumspection to keep him informed of what is expected of him.[261] Further, it must be reasonably possible that in the circumstances of the case an accused acted with the necessary circumspection to keep him informed of what is expected of him.[262]

Consequently, if an accused relies on the fact that he had no knowledge that his acts were illegal, his defence will only succeed if an inference to that effect can be made from the evidence as a whole.[263] It seems to be a prerequisite for a conviction on the racketeering offences that the accused had knowledge of the "pattern of racketeering activity" and with the knowledge of the racketeering activity, associated with and participated in one or more of the offence.[264] A person who is in association with the

[254] Ss 1(3).
[255] *S v Naidoo* 2009 2 SACR 674 (GSJ) 683.
[256] *Ibid*.
[257] *De Blom* above n 239 532.
[258] De Wet (1985) above n 225 153.
[259] *De Blom* above n 239 532.
[260] De Wet (1985) above n 225 153.
[261] *De Blom* above n 239 532.
[262] *Ibid*.
[263] *Ibid.*
[264] *S v Green & Others* (unreported) case no CC39/2002 (D) 9.

"enterprise" need not to know everything about its activities, but it is sufficient if the person "knows of the general nature of the 'enterprise' and knows that the 'enterprise' extends beyond his individual role".[265] For example, in the *De Vries* case, one of the accused persons (the associate) purchased large consignments of cigarettes from a co-accused who had robbed it from commercial vehicles.[266] The court emphasised that the associate must have realised, that there was a large group of persons involved to steal from or rob such large consignments of cigarettes from third parties.[267] The court came to the conclusion that associate participated in the affairs of the "enterprise" by purchasing the consignments and that was sufficient to meet the requirements of association with the "enterprise".[268]

In the United States of America the prosecution must at least prove that the defendant was aware of the general existence of the "enterprise" as stated in the indictment.[269] The prosecution also needs to prove that the defendant was aware that a group of persons organised themselves into some sort of a structure, which was involved in ongoing racketeering activities.[270] Furthermore, in *United States v Rastelli*[271] it was stated that it is unrealistic in organised crime cases to require that "every member of the RICO conspiracy should have knowledge of every member and component of the enterprise" or "to have full knowledge of all the details of the conspiracy". It only needs to be proven that the defendant had knowledge of the essential nature of the planned offence.[272] Therefore, it is required that the defendant agreed to commit the substantive racketeering offences through agreeing to participate in two predicate acts.[273]

3.4 Conclusion

[265] *S v De Vries & Others* 2009 1 SACR 613 (C) 627. Also see *US v Rastelli* 870 F2d 822 (2nd Cir 1989) 827 - 828.
[266] *De Vries* (2009) above n 265 628.
[267] *Ibid*.
[268] *Ibid*.
[269] *Rastelli* above n 265 827 - 828.
[270] *Ibid*.
[271] *Ibid*.
[272] *Ibid*.
[273] *Ibid*.

It is expected of a person who involves himself in a particular field to keep him informed of the legal provisions which are applicable thereto[274] when negligence is the fault element for the crime.[275] However, the prosecution may rely on circumstantial evidence to prove that the accused knowingly participated in the affairs of the "enterprise".[276] Furthermore, it is not a requirement that an accused must know every fine detail of the entire conspiracy to commit racketeering offences or that he is acquainted with all the offenders involved.[277]

Therefore, the Act specifies that a person has knowledge of a fact if the person has actual knowledge of the fact or the court is satisfied that the person believed that there is a reasonable possibility of the existence of a fact and he failed to confirm the existence of the fact.[278] However, the culpability of a racketeering offender is not measured by comparing him to himself, but against the measurement stated in the Act.[279] It is suggested that more objective considerations should be introduced whereby a better balance is established between subjectivity and objectivity.[280]

It is further submitted that the remarks made in *De Wet*[281] is correct that most offenders know that their conduct is contrary to the law or they are at least aware of the possibility that that their conduct may be illegal. It is doubtful that an offender can honestly allege that he was not aware of the unlawfulness of his actions when he committed racketeering offences.[282] In similar fashion *Snyman*[283] is of the opinion that it is incorrect to allow all mistakes of the law as a defence. Therefore, it is further submitted that the merits of each case will determine the blameworthiness.

Chapter 3 dealt with knowledge of unlawfulness. Aspects regarding the conduct of a racketeer and the question whether racketeering offences constitute a splitting of

[274] *De Blom* above n 239 532.
[275] *Ibid*.
[276] *Rastelli* above n 265 829.
[277] *US v Boylan* 898 F2d 230 (1st Cir 1990) 242.
[278] Ss 1(2).
[279] Ss 1(2) & 1(3). Also see CR Snyman "The tension between legal theory and policy considerations in the general principles of criminal law" (2003) *Criminal Justice in a New Society - Essays in Honour of Solly Leeman* 5.
[280] Snyman (2003) above n 279 5.
[281] De Wet (1985) above n 225 153.
[282] *Ibid*.
[283] Snyman (2003) above n 279 5.

charges (which leads to an improper duplication of convictions) will be addressed in the next chapter.

CHAPTER 4

The conduct of a racketeer

4.1 Introduction

The prosecution normally drafts the indictment concerning the Act in such a fashion that contravention of subsection 2(1) is stated as the main count.[284] The counts following the main count, usually relate to the racketeering activities relevant to establish a "pattern of racketeering activity".[285] It is necessary for the prosecution to prove all the elements of the common law or statutory offences which constitute a "pattern of racketeering activity".[286]

It is also necessary for the prosecution to consider the definition of the acts[287] which constitutes a "pattern of racketeering activity" since it is a more limited concept as the definition of the substantive offences itself.[288] Furthermore, the *actus reus* only refers to certain elements of the offences relating to racketeering activities.[289] It follows that the *actus reus* refers to the conduct which is prohibited or the commission or omission of a specific act or the causation of a certain result.[290] However, the participation of the accused in the affairs of the "enterprise" may be through direct or indirect conduct and actual participation is required.[291] Although only knowledge of the racketeering activities is required for a contravention of subsection 2(1)(f) and not participation as such.[292] Further, different categories of persons are stated in the Act who can commit racketeering offences,[293] namely

[284] *S v De Vries & Others* 2009 1 SACR 613 (C) 618. Also see *S v Naidoo* 2009 2 SACR 674 (GSJ) 683.
[285] *S v Boekhoud* 2011 2 SACR 124 (SCA) 126.
[286] *Naidoo* (2009) above n 284 683. Also see *S v Dos Santos & Others* [2006] JOL 18028 (C) 2.
[287] Also referred to as the *actus reus*.
[288] WA Joubert & JA Faris (ed) *The Law of South Africa* 2nd ed Vol 6 Criminal Law (2004) 16.
[289] *Ibid*.
[290] *Ibid*.
[291] Ss 2(1)(e). Also see *S v Green & Others* (unreported) case no CC39/2002 (D) 2; *Naidoo* (2009) above n 284 681.
[292] *Naidoo* (2009) above n 284 682.
[293] Ss 2(1).

those that qualify as the perpetrators,[294] such as ordinary persons, managers, employees and associates.[295]

As different perpetrators are involved with racketeering offences, it might become problematic for the prosecution to draft an indictment from which all the different role players are clearly identified. For example, in *S v Naidoo*[296] the appellant raised an objection against the indictment served on him as he was not charged with all the counts brought against the main suspect.[297] It was alleged that the appellant and his co-accused associated together in an illegal "enterprise" where they dispatched illegal precious metals from South Africa to the United Kingdom.[298] The court reiterated that all the accused were charged with the main count of contravention of subsection 2(1)(e).[299] Consequently, the fact is that the main suspect was also charged with alternative counts and it did not alter the position that they all faced a contravention on the main count of racketeering.[300] There was thus no justifiable reason for the appellant to claim that he was not charged with the same offences as his co-accused.[301] The court held that the Act has indeed been designed to: [302]

> Deal with the organised racketeering of entities, irrespective of the particular parts played by persons associated with such enterprises, in achieving the object of their collective conspiracy, to commit a particular crime or a series of crimes.

4.2 Common purpose to commit racketeering offences

The doctrine of common purpose is a rule in the South African criminal law whereby the conduct of a perpetrator may be imputed to the other participants who shares a common purpose.[303] In *S v Boekhoud*[304] the doctrine of common purpose was challenged when the prosecution intended to impute the conduct of perpetrators in

[294] Joubert (2004) above n 288 16.
[295] Ss 2(1)(e) & (f).
[296] *Naidoo* (2009) above n 284 675.
[297] A Van Der Merwe "Criminal Procedure" (2009) 325 *Annual Survey of South African Law* 347 states that the appellant did not raise an objection against the indictment on the recognised grounds of s 85 of Act 51 of 1977, but on a misjoinder in terms of s 155 of Act 51 of 1977.
[298] *Naidoo* (2009) above n 284 675.
[299] *Naidoo* (2009) above n 284 681.
[300] *Naidoo* (2009) above n 284 682.
[301] *Naidoo* (2009) above n 284 683.
[302] *Naidoo* (2009) above n 284 675.
[303] J Burchell & J Milton *Principles of Criminal Law* (2005) 155.
[304] *Boekhoud* above n 285 138 - 139.

South Africa to the respondent on the basis of his own acts committed in the United Kingdom. Consequently, the court held that the prosecution should indicate "clearly and unequivocally" whether the doctrine of common purpose will be relied on in respect of each charge it intends to prosecute in relation to the racketeering offences.[305]

In the United States of America a substantive RICO violation requires the commission of the predicate acts and not just an agreement to commit such predicate acts.[306] It is not necessary that a person personally commit the predicate acts where he is associated with the "enterprise" as he aided the racketeering acts.[307] The position changes when the RICO "enterprise" is a conspiracy as the "predicated acts committed by one member of the 'enterprise' in furtherance of the conspiracy may be attributed to another member of the 'enterprise'".[308]

4.3 Duplication of convictions

4.3.1 General

It is possible that the same act of an offender causes more than one offence and that more than one act causes only one offence.[309] The description of an offence may indicate whether there was more than one offence committed.[310] If there is any uncertainty as to the facts which can be proved of several offences, the prosecution may prosecute an accused, directly or alternatively, in the same trial for any number of such offences.[311] It may seriously prejudice an accused, if the prosecution formulate different charges from one set of facts.[312] The duplication of charges is allowed, but not the improper duplication of convictions.[313]

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[305] *Boekhoud* above n 285 138 & 140.
[306] LJ Culligan & AV Amodio (eds) (1994) 77 *Corpus Juris Secundum* 448.
[307] *Ibid*.
[308] *Ibid*.
[309] *S v Grobler & Another* 1966 1 SA 507 (A) 511; *S v Ndebele & Others* 2012 1 SACR 245 (GSJ) 258. Also see T Geldenhuys & JJ Joubert *et al Criminal Procedure* (2011) 214.
[310] *Grobler* above n 308 512.
[311] S 83 of Act 51 of 1977.
[312] VG Hiemstra & A Kruger *Suid-Afrikaanse Strafproses* (2010) 254.
[313] FG Gardiner & CWH Lansdown *South African Criminal Law and Procedure* (1957) 298. Also see Hiemstra (2010) above n 311 254.

There are two general guidelines in determining whether a splitting of charges exists or not.[314] In *S v Benjamin and Another*[315] it was mentioned that there are two offences when the one charge does not contain the same elements as the other charge.[316] It needs to be determined whether the evidence which is necessary to establish the one charge, also established the other charge.[317] If there are two acts and there is a continuous criminal transaction there is only one offence.[318] Normally when a particular form of intention is the required element for criminal liability, the "single intent test" delivers the best results.[319] Either both of the tests may be applied to a certain set of facts or the tests may be used in the alternative as the tests are not equally applicable in every case.[320] There are cases where neither of the two tests is of assistance to the court.[321] The various tests are not rules of law and are merely practical guidelines to courts.[322]

It is sometimes helpful to take note of the "dominant intention" of the accused to determine whether there was a splitting of charges.[323] In *S v Whitehead and Others*[324] it was ruled that "there is no infallible formula to determine whether or not, in any particular case, there has been a duplication of convictions". The "logical point of departure is to consider the definition of those offences"[325] to determine whether a possible duplication of convictions have taken place. It seems that this aspect must be decided on the basis of common sense and the court's perception of fairness.[326] The main aim of the rule against the duplication of convictions is to avoid prejudice in

[314] Hiemstra (2010) above n 311 255. Also see *De Vries* (2009) above n 284 623.
[315] *S v Benjamin* 1980 1 SA 950 (A) 958.
[316] *Benjamin* above n 314 956 where "the same evidence test" is referred to.
[317] *Benjamin* above n 314 957. Also see *Grobler* above n 308 524.
[318] *Benjamin* above n 314 956 where "the single intent test" is also discussed.
[319] Hiemstra (2010) above n 311 255.
[320] *S v Maneli* 2009 1 SACR 509 (SCA) 512. Also see Van Der Merwe (2009) above n 297 344.
[321] Hiemstra (2010) above n 309 255.
[322] *S v Whitehead & Others* 2008 1 SACR 431 (SCA) 443.
[323] *S v Petersen & Others* 1971 2 SA 130 (R) 133.
[324] *Whitehead* above n 321 443. Also see *De Vries* (2009) above n 284 623; *S v De Vries & Others* 2012 1 SACR 186 (SCA) 205.
[325] *Whitehead* above n 321 443. Also see E Du Toit & FJ De Jager *et al Commentary on the Criminal Procedure Act* (2007) 14-7.
[326] *R v Kuzwayo* 1960 1 SA 340 (A) 344.

the form of "double jeopardy".[327] It will be regarded unfair towards the accused if he is convicted of offences based on the same facts.[328]

4.3.2 Duplications and the Act

In *S v De Vries and Others*[329] a possible improper duplication of convictions was considered. The accused were charged with various common law offences, as well as statutory offences in terms of the Act.[330] The court first considered the common law offences, before the court dealt with the offences formulated to prove a "pattern of racketeering activity".[331] It was reiterated that:[332]

> There is no insoluble formula to determine accurately whether or not a duplication of convictions occurred. Nor is it possible to develop a single guiding principle that applies to all circumstances. The result is that the question of whether an accused's criminal conduct gives rise to one or more offences must be decided on the basis of sound reasoning and on the court's perception of fairness.

The court referred to the "single intent test" and the "evidence test" as the tests normally used to determine whether there is a duplication of convictions in a particular case.[333] The court used the "evidence test" to determine whether a duplication of convictions occurred.[334] The main reason why there was no duplication of convictions was that the elements of the racketeering offences differ significantly from the individual predicate offences.[335] The same evidence is not used to prove the racketeering offences and the predicate offences. The court also considered the purpose of the Act as revealed in its long title and preamble.[336] It was inferred from the Act that the Legislature must have realised that an accused could be found guilty

[327] MG Cowling "Criminal Procedure" (2007) 20 *South African Journal of Criminal Justice* at 274 wherein "double jeopardy" is explained as the conviction and punishment twice for the same offence when an accused only committed one offence.
[328] Cowling (2007) above n 326 274.
[329] *De Vries* (2009) above n 284 623.
[330] *De Vries* (2009) above n 284 617 where 12 accused faced a total of 25 charges arising from three armed robberies of commercial trucks carrying large consignments of cigarettes, including contraventions of ss 2(1)(e) & (f).
[331] *De Vries* (2009) above n 284 622. Also see Van Der Merwe (2009) above n 297 345.
[332] *De Vries* (2009) above n 284 623.
[333] *Ibid*.
[334] *Ibid*.
[335] *De Vries* (2009) above n 284 623. Also see Van Der Merwe (2009) above n 297 345 wherein it is stated that the elements of ss 2(1)(f) differ significantly from the robbery offences.
[336] *De Vries* (2009) above n 284 624. Also see Van Der Merwe (2009) above n 297 345.

of the predicate offences, as well as managing or participating in the activities of the "enterprise".[337] For example, the evidence in the *De Vries* case[338] revealed that accused 1 participated[339] actively and directly in the robberies committed on behalf of the "enterprise". Accused 1 was also the person who managed[340] the "enterprise".[341] The question was considered whether there was a duplication of convictions in respect of the participation offence[342] and the managerial offence.[343] The court held that there was no such danger of a duplication of convictions as the phrase "whilst managing the enterprise" in subsection 2(1)(e) indicates that a manager can also participate in the conduct of the affairs of the "enterprise".[344] The elements of the participation offence and the managerial offence are also different to the elements of the underlying predicate offences.[345]

The court suggested in the *De Vries* case that through its sentencing discretion "any possible sentencing anomalies which may arise" will avoid unfair treatment of the accused.[346] However, a court may not ignore incorrect duplications of convictions because it is possible to correct the effect thereof by imposing concurrent sentences.[347] Therefore, it appears that the *De Vries* case "clearly accepted the case scenario envisaged by the Legislature when creating new statutory offences".[348] But *Kruger* reiterates that "each conviction, by the mere fact of being a conviction, has consequences apart from sentencing".[349]

4.3.3 The American view on duplications

The American Constitution provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb".[350] This provision *inter alia* entails

[337] *Ibid*.
[338] *De Vries* (2009) above n 284 625.
[339] Ss 2(1)(e).
[340] Ss 2(1)(f).
[341] *De Vries* (2009) above n 284 623.
[342] Ss 2(1)(e).
[343] Ss 2(1)(f).
[344] *De Vries* (2009) above n 284 625.
[345] *Ibid*.
[346] *De Vries* (2009) above n 284 625. Also see Van Der Merwe (2009) above n 297 346.
[347] A Kruger *Organised Crime and Proceeds of Crime Law in South Africa* (2008) 34.
[348] Van Der Merwe (2009) above n 297 346.
[349] Kruger (2008) above n 346 34.
[350] United States of America Bill of Rights 5th Amendment at htpp://www.billofrightsinstitute.org (accessed 10 August 2012).

that an accused may raise the defence of "double jeopardy" to avoid a second prosecution for the same events after an acquittal or conviction on the first charge.[351] In American courts defendants often raise pleas of "double jeopardy" when they are simultaneously charged with the RICO offences and the underlying predicate offences.[352] American courts have held that the RICO offences are separate and discreet from the underlying predicate offences and capable of being charged and punished separately.[353] The RICO offences were enacted to supplement the underlying predicate offences rather than to replace it.[354] In the *De Vries* case[355] it was held that the same reasoning applies to the Act as being a supplement to the underlying predicate offences and not a replacement thereof.

4.4 Position whether it is required that an accused must have been previously convicted of two or more criminal offences

The question with regard to whether a person has previously been convicted of an offence is similarly approached as the question whether there is a splitting of charges causing a duplication of convictions.[356] The South African Constitution provides that an accused may not be tried for an offence in respect of an act or omission for which that person has previously been acquitted or convicted.[357] A special plea may be raised if an accused has previously been convicted or acquitted of an offence which he is prosecuted for in a subsequent trial.[358] However, it is not required that a person must first have been convicted of an underlying predicate offence to form the "pattern of racketeering activity" before the Act is applicable. As the word "offence" is not defined in the Act the word should bear its ordinary meaning.[359] It is defined as "an act or instance of offending" and "offend" is defined as to "commit an illegal act".[360] Furthermore, *Claassen*[361] defines the word "offence"

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[351] *De Vries* (2012) above n 323 203.
[352] *De Vries* (2012) above n 323 204.
[353] *Ibid*. Also see *US v Beale* 921 F2d 1412 (11th Cir 1991) 1437; *US v Crosby* 20 F3d 480 (DC Cir 1994) 484; *US v O'Connor* 953 F2d 338 (7th Cir 1994) 344.
[354] *Crosby* above n 352 484.
[355] *De Vries* (2012) above n 323 205.
[356] Hiemstra (2010) above n 309 257.
[357] Ss 35(3)(m) of the Constitution of the Republic of South Africa of 1996.
[358] Ss 106(1)(c) & (d) of Act 51 of 1977.
[359] *Dos Santos* [2006] above n 286 21.
[357] J Pearsall *The Concise Oxford Dictionary* 10th ed (1999) see "offence" and "offend".
[361] RD Claassen *Dictionary of Legal Words & Phrases* 2nd ed Vol 3 (1997) see "offence".

as "such a transgression of the law as will make the transgressor liable to trial and punishment".

At least two underlying predicate "offences" needs to be proven for a successful racketeering prosecution.[362] The underlying predicated "offences" are listed in Schedule 1 of the Act.[363] In *S v Dos Santos and Others*[364] arguments were submitted that the meaning of the word "offence" as stated in the definition of "pattern of racketeering activity" must imply a conviction in a court of law as an "offence" cannot be proven without a conviction. In *Dos Santos and Another v S*[365] it was argued on appeal that an accused person must first be brought before a court of law and be convicted of committing the underlying predicate offences, before the accused is prosecuted on the racketeering offences. According to the submissions made, at least two prior convictions must exist, before the prosecution can invoke the provisions of the Act. The main argument to these statements was that an improper splitting of charges should be avoided as it would lead to an improper duplication of convictions.[366] These submissions were rejected by South African courts,[367] although it was stated that at that stage there was no reported case law on the issue.[368] It was accepted that the arguments were not without substance.[369]

Previous convictions may be proven during the subsequent trial to prove the "pattern of racketeering activity".[370] The court may also hear evidence with regard to previous convictions relating to the racketeering offences.[371] In the United States of America evidence may be led of a previous acquittal to proof a "pattern of racketeering activity".[372] *Kruger*[373] states that elements of the prior conviction or acquittal are

[362] J Burchell & J Milton *Principles of Criminal Law* (2005) 982.
[363] *Ibid*.
[364] *Dos Santos* [2006] above n 286 19. Also see *Dos Santos & Another v S* [2010] 4 All SA 132 (SCA) 150.
[365] *Dos Santos* [2010] above n 363 150.
[366] *Ibid.*
[367] *Dos Santos* [2006] above n 286 21. Also see *Dos Santos* [2010] above n 363 151.
[368] *Dos Santos* [2006] above n 286 20.
[369] *Ibid.*
[370] In terms of ss 2(3) it is sufficient to proof the original or certified copy of the record in the initial proceedings. Also see Burchell (2005) above n 361 982.
[371] Ss 2(2).
[372] *US v Farmer* 924 F2d 647 (7th Cir 1991) at 649. Also see A Jones & J Satory *et al* "Racketeer Influenced and Corrupt Organizations" (2002) 39 *American Criminal Law Review* at 982 & Kruger (2008) above n 343 32.

different from the racketeering offences and there is no improper duplication of convictions. Previous convictions and acquittals are used to constitute a "pattern of racketeering activity" and arguments that there is improper duplication of convictions, normally do not succeed.[374] In the *Dos Santos* case[375] it was mentioned that the Legislature would have expressly stated it, if the definition of a "pattern of racketeering activity" means a prior conviction. The ordinary meaning of the word "offence" must apply.[376] In the appeal case of *Dos Santos*[377] the court *obiter* remarked that it may be sufficient for a court to hold that the predicate charge has been proved, without a guilty verdict.[378] A final decision was not made in this regard.[379]

In the United States of America courts have held[380] that it was possible that a criminal defendant could properly be convicted of the underlying predicate acts which formed the "pattern of racketeering" activity basic to the RICO charge, and then later be charged under RICO.[381] It was also held the defendants could have been charged in one indictment with both a RICO conspiracy charge and a substantive RICO offence, as the defendants had not been indicted and convicted previously.[382] It is not necessary that RICO defendants need to be convicted of each underlying offence before the defendant is charged with a RICO offence.[383] Even underlying offences, of which the defendant has been previously acquitted on, may be used by the prosecution to form a basis of a RICO offence.[384]

4.5 Conclusion

[373] Kruger (2008) above n 346 24.
[374] Kruger (2008) above n 346 32.
[375] *Dos Santos* [2006] above n 286 21.
[376] *Ibid.*
[377] *Dos Santos* [2010] above n 363 150.
[378] *Ibid.*
[379] *Ibid.*
[380] *US v Martino* 648 F2d 367 (5th Cir 1981) 386; *US v Peacock* 654 F2d 339 (5th Cir 1981) 346 & *US v Hartley* 678 F2d 961 (11th Cir 1982) 992.
[381] *Dos Santos* [2010] above n 363 150.
[382] *US v Brooklier* 685 F2d 1208 (9th Cir 1982) 1220.
[383] Jones (2002) above n 371 981 - 982. Also see LP Baily & RA Sasser *et al* "Racketeer Influenced and Corrupt Organizations Act" (1999) 36 *American Criminal Law Review* 2.
[384] Jones (2002) above n 371 982.

The prosecution has to exercise its discretion whether to prosecute or not, and what charges to formulate.[385] It is generally accepted that courts do not convict accused persons if there is a splitting of charges causing an improper duplication of convictions.[386] It seems to be the attitude of the courts that it is not necessary for a court to convict a person in respect of the underlying predicate offences before an accused can be charged for contravening the racketeering offences.[387] *Kruger*[388] correctly states that if a person is part of an entity which is involved in racketeering activities, the person may be found guilty of contravening subsection 2(1) although the person had not previously been convicted of any criminal acts. The Act makes provision therefore that previous convictions may be taken into account to prove the "pattern of racketeering activity"[389] and it is sufficient to prove the record of proceedings as evidence of the previous convictions.[390] It is uncertain whether the two offences referred to in Schedule 1 mean participation as perpetrators, co-perpetrators or accomplices for which there was a prior conviction of the underlying predicate offences.

There appears to be no convincing reason why the racketeering offences and the underlying predicate offences cannot be proved in the same trial to constitute a "pattern of racketeering activity".[391] The evidence is relevant to prove the racketeering offences and it is in the interest of justice to allow it.[392] The prosecution may exercise its discretion to prosecute offenders in the same trial or in separate trials as the elements are different.[393] There appears to be no prohibition when a court sentences an offender consecutively for two different offences.[394] In fairness to

[385] *Dos Santos* [2010] above n 363 150. Also see Geldenhuys (2011) above n 308 62 - 63.
[386] Geldenhuys (2011) above n 308 215. Also see *S v Radebe* 2006 2 SACR 604 (O) 609.
[387] *Dos Santos* [2010] above n 363 150.
[388] Kruger (2008) above n 346 2.
[389] Ss 2(2). Also see *De Vries* (2012) above n 323 206; *S v Ndebele & Others* 2012 1 SACR 245 (GSJ) 249 where evidence of previous convictions was not allowed as it was unfair towards the accused.
[390] Ss 2(3).
[391] *De Vries* (2012) above n 323 206. Also see *S v Prinsloo & Others* (unreported) case no CC384/2006 (NGP) 430.
[392] *Naidoo* (2009) above n 284 684.
[393] *De Vries* (2012) above n 323 206. Also see Du Toit (2007) above n 324 14-8.
[394] *De Vries* (2012) above n 323 206.

the accused courts normally order that sentences run concurrently for the racketeering offences and the underlying predicate offences.[395]

The South African position should preferably not be different from the American position with regard to duplications of convictions.[396] If a RICO offence contains different elements as the underlying predicate acts, an offender will probably fail with a plea of double jeopardy.[397] If the charge sheet includes both racketeering offences and underlying predicate offences, it does not in itself appear to be unfair towards an accused.[398]

[395] *Ibid*.
[396] *Dos Santos* [2010] above n 363 151.
[397] Burchell (2005) above n 361 982.
[398] *De Vries* (2012) above n 323 207.

CHAPTER 5

Conclusion and Recommendations

The Act was adopted because of the rapid growth of organised crime in South Africa and the fact that our common law and statutory law failed to keep pace with international measures dealing with organised crime, money laundering, criminal gang activities and racketeering.[399] The estimated number of syndicates actively involved in organised crime in South Africa varied in 2004 between 200 and 240 syndicates.[400] It is difficult to prove the direct involvement of organised crime leaders in particular cases. The crime bosses do not perform the actual criminal activities themselves and the criminal foot soldiers of the crime bosses are apprehended.[401] In the *Dos Santos* case[402] the court stated that one of the aims of the Act is to "prevent organised crime as it infringes on the rights of the people of South Africa" and it is difficult to prove "organised crime and related conduct in connection with 'enterprises' which are involved in a 'pattern of racketeering activity'".

Chapter 2 contains all the requirements or elements which must be proved before a person can be convicted of offences relating to racketeering activities.[403] One of the advantages of the prosecution of racketeering offences is that it allows the prosecution of several offences before a single court if there is a relationship between the underlying predicate offences and the "enterprise".[404] A disadvantage is that a court might hear evidence of a number of offences and negative inferences may be drawn from the individual offences constituting a "pattern of racketeering

[399] *NDPP & Another v Mohamed NO & Others* 2002 2 SACR 196 (CC) 203.
[400] C Goredema (ed) *Tackling Money Laundering in East and Southern Africa* Vol 1 (2004) 15.
[401] A Kruger *Organised Crime and Proceeds of Crime Law in South Africa* (2008) 8.
[402] *S v Dos Santos & Others* [2006] JOL 18028 (C) 19.
[403] Also see WA Joubert & JA Faris (ed) *The Law of South Africa* 2nd ed Vol 6 *Criminal Law* (2004) 16.
[404] J Burchell & J Milton *Principles of Criminal Law* (2005) 980.

activity".[405] It is important that the court stipulates on which underlying predicate acts are relied on as a basis for the conviction on the racketeering offences.[406]

Each case must be decided on its own set of facts to decide whether the prosecution has proved the existence of an "enterprise" and the "pattern of racketeering activity".[407] Different facts apply to different scenarios. A "pattern of racketeering activity" may not be established without proving the racketeering acts are related to each other and to the "enterprise" and that there is continuity thereof.[408] A threat of continuity is insufficient to proof a "pattern of racketeering activity" in South African law.[409]

The Act does not stipulate that there has to be a relationship or an association between the underlying predicate offences respectively to determine whether participation or involvement in the Schedule 1 offences was planned and continuous.[410] Two isolated acts of racketeering do not constitute a "pattern of racketeering activity" and there has to be a relationship between the predicate offences and the continuation thereof.[411] The Supreme Court of Appeal emphasised that "the State must do more than merely prove the underlying predicate offences".[412] A relationship between the "enterprise" and the conduct of an accused constituting a "pattern of racketeering activity" needs to be proven.

Difficulties may be experienced when application is made for extradition of an offender for the racketeering offences as the principle of double criminality requires that the conduct for which extradition is being requested is an offence in both the requested and requesting states.[413] The United States of America has experienced problems with extradition requests for complex racketeering offences as there is

[405] Burchell (2005) above n 404 981.
[406] Baily LP & Sasser RA *et al* "Racketeer Influenced and Corrupt Organizations Act" (1999) 36 *American Criminal Law Review* 12.
[407] Baily (1999) above n 406 2.
[408] Baily (1999) above n 406 3.
[409] *Ibid*.
[410] Ss 1(1) defines a "pattern of racketeering activity".
[411] Burchell (2005) above n 404 978.
[412] *S v De Vries & Others* 2012 1 SACR 186 (SCA) 205.
[413] N Boister "The trend to 'universal extradition' over subsidiary universal jurisdiction in the suppression of transnational crime" (2003) *Acta Juridica* 287 296 - 297.

often not a similar offence in the requested state.[414] It is necessary that countries globally acknowledge the recognition of racketeering offences.[415]

It is required that an accused participates in the affairs of the "enterprise" for a contravention of subsections 2(1)(d) and (e)[416] from which the degree of blameworthiness can be deducted. It is uncertain why the Legislature made a distinction between subsections 2(1)(a) to (c) and (f) and subsections 2(1)(d) and (e) respectively in respect of the degree of blameworthiness. When a person acquires or maintains an interest in or control of an "enterprise" through a "pattern of racketeering activity"[417] or manages or is employed in such an "enterprise" through a "pattern of racketeering activity",[418] he in all likelihood foresees the possibility of a "pattern of racketeering activity".[419] There is no reported case law where guidance is given whether the Legislature intended that subsections 2(1)(d) and (e) requires *mens rea* in the form of intention or of negligence. It appears that mere negligence is sufficient as a form of *mens rea* for a successful prosecution on contravention of subsections 2(1)(d) and (e) of the Act.

The Act elaborates on the concept of "ought reasonably to have known" by taking into consideration the general knowledge, skill, training and experience that may reasonably be expected of a person in his position and the general knowledge, skill, training and experience that he indeed has.[420] It seems that the bar has been lifted to a higher standard of criminal liability as the normal test for negligence. The difference between subsections 2(1)(e) and 2(1)(f) lies therein whether negligence is a sufficient form of criminal liability for contravention of subsection 2(1)(f).[421] It may become problematic for the prosecution when it is found that negligence is sufficient to prove contravention of subsection 2(1)(e), but that intention is required for

[414] Boister (2003) above n 413 297.
[415] *Ibid*.
[416] *S v Naidoo* 2009 2 SACR 674 (GSJ) 681.
[417] Ss 2(1)(d).
[418] Ss 2(1)(e.
[419] Burchell (2005) above n 404 977.
[420] Ss 1(3).
[421] *S v Prinsloo & Others* (unreported) case no CC384/2006 (NGP) 433.

subsection 2(1)(f) as an accused may be acquitted on one of the charges on the basis of different criminal liability.[422]

The prosecution may find it difficult to refute an allegation by the accused that he did not know that his conduct was forbidden by law.[423] Difficulties may also arise if ignorance of the law is always an excuse as culprits would lack to establish the legal position as they know they would not be punished for ignorance of the law.[424] It is accepted that genuine ignorance of the law excludes culpability in the form of intention and a purely subjective test applies.[425] Even if a mistake of law is unreasonable or avoidable, the prosecution will not be in a position to proof fault on the side of the offender.[426] An accused charged with an offence for which it is sufficient if negligence is proven, must be acquitted if he genuinely and reasonably did not know what he was doing was unlawful.[427]

Usually prosecutions under the Act and prosecutions of the underlying predicate offences involve an overlap in the evidence led.[428] The reason for the overlap is the "enterprise" exists of persons who associated themselves with the "enterprise" by conducting individual offences which constituted a "pattern of racketeering activity".[429] Such an overlap does not in itself cause a splitting of charges to constitute a duplication of convictions.[430] If the offences have different elements to be proven, evidence necessary to establish one offence would not support the offence in another charge.[431] There appears to be no convincing reason why the racketeering offences and the underlying predicate offences cannot be proved in the same trial to constitute a "pattern of racketeering activity".[432]

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[422] CR Snyman *Criminal Law* (2008) 209.
[423] CR Snyman "The tension between legal theory and policy considerations in the general principles of criminal law" (2003) *Criminal Justice in a New Society - Essays in Honour of Solly Leeman* 4.
[424] *Ibid*.
[425] *Ibid.*
[426] *Ibid*. Also see Burchell (2005) above n 404 153.
[427] Burchell (2005) above n 404 153.
[428] *Dos Santos & Another v S* [2010] 4 All SA 132 (SCA) 151. Also see E Du Toit & FJ De Jager *et al Commentary on the Criminal Procedure Act* (2007) 14-7.
[429] *Ibid*.
[430] *Dos Santos* [2010] above n 428 151.
[431] Du Toit (2007) above n 428 14-8.
[432] *De Vries* (2012) above n 412 206.

The final conclusion is that the Act is beneficial to assist the public and helps to curb crime. The inconsistencies are not so crucial as to declare the Act unconstitutional. The Legislature could make some amendments which could bring more certainty to the legal fraternity.

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