CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 86/06

SCHABIR SHAIK	First Applicant
NKOBI HOLDINGS (PTY) LTD	Second Applicant
NKOBI INVESTMENTS (PTY) LTD	Third Applicant
KOBIFIN (PTY) LTD	Fourth Applicant
KOBITEC (PTY) LTD	Fifth Applicant
PROCONSULT (PTY) LTD	Sixth Applicant
PROCON AFRICA (PTY) LTD	Seventh Applicant
KOBITEC TRANSPORT SYSTEMS (PTY) LTD	Eighth Applicant
CLEGTON (PTY) LTD	Ninth Applicant
FLORYN INVESTMENTS (PTY) LTD	Tenth Applicant
CHARTLEY INVESTMENTS (PTY) LTD	Eleventh Applicant

versus

THE STATE	Respondent

Heard on : 23-24 May 2007

Decided on : 2 October 2007

JUDGMENT

THE COURT:

Introduction

[1] This is an application for leave to appeal to this Court against a decision of the Supreme Court of Appeal. It emanates from criminal proceedings in the Durban High Court (High Court) in which Mr Schabir Shaik (first applicant or Mr Shaik), a businessman, and the companies represented by him (the second to the eleventh applicants or corporate applicants) were the accused. Mr Shaik was convicted on two counts of corruption and one of fraud on 2 June 2005. An effective sentence of 15 years imprisonment was imposed,[1] being the minimum sentence in terms of section 51(2)(a)(i) of the Criminal Law Amendment Act (Amendment Act).[2] The corporate applicants were convicted of various counts of corruption and fraud,[3] and sentenced to the payment of fines in varying amounts.[4]

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[1] Mr Shaik was sentenced to 15 years imprisonment for the first and third counts each and three years imprisonment on the second count. The sentences were ordered to run concurrently resulting in an effective sentence of 15 years.

[2] Act 105 of 1997. The section provides:

> "Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court, including a High Court to which a matter has been referred under section 52(1) for sentence, shall in respect of a person who has been convicted of an offence referred to in—
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> (a) Part II of Schedule 2, sentence the person, in the case of—
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> (i) a first offender, to imprisonment for a period not less than 15 years".

Part II of Schedule 2, before amendment by the Prevention and Combating of Corrupt Activities Act 12 of 2004, provided:

> "Any offence relating to exchange control, corruption, extortion, fraud, forgery, uttering or theft—
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> (a) involving amounts of more than R500 000,00".

[3] All the corporate applicants were found guilty on the first count (corruption). The fourth, seventh, ninth and tenth applicants were convicted on the second count (fraud), while the remaining corporate applicants were acquitted. All the corporate applicants were acquitted on the main charge to count three (corruption), but the fourth and fifth applicants were found guilty of the first alternative charge of contravening sections 4(a) and (b) of the Prevention of Organised Crime Act 121 of 1998 (money laundering).

[4] On count one, the third applicant was sentenced to a fine of R1 million and the second, fourth, fifth and eighth applicants to fines of R125 000 each. On the same count, the remaining applicants were sentenced to fines of R25 000 each, suspended under certain conditions. On the second count, the fourth applicant was sentenced to the payment of a fine of R1.4 million. The seventh, ninth and tenth applicants were sentenced to fines of R33 000 each on that charge, also suspended under certain conditions. On the first alternate charge to count three, the fourth and fifth applicants were ordered to each pay fines of R500 000 each.

[2] On application by the State, the High Court subsequently granted confiscation orders against certain of the property of the applicants that was considered to be the proceeds of unlawful activity in terms of section 18 of the Prevention of Organised Crime Act (POCA).[5]

[3] All the applicants applied for leave to appeal to the High Court against the convictions and sentences imposed, as well as against the confiscation orders. The High Court refused leave to appeal to certain of the applicants and granted limited leave to others.[6] The applicants then applied to the Supreme Court of Appeal for leave to appeal against the adverse decisions and orders of the High Court where leave to appeal had been refused by the High Court; where the High Court had granted

[5] Act 121 of 1998. Section 18 of POCA provides in relevant part:

> "(1) Whenever a defendant is convicted of an offence the court convicting the defendant may, on the application of the public prosecutor, enquire into any benefit which the defendant may have derived from—
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> (a) that offence;
> (b) any other offence of which the defendant has been convicted at the same trial; and
> (c) any criminal activity which the court finds to be sufficiently related to those offences,
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> and, if the court finds that the defendant has so benefited, the court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.
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> . . . .
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> (6) A court before which proceedings under this section are pending, may—
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> (a) in considering an application under subsection (1)—
> (i) refer to the evidence and proceedings at the trial;
> (ii) hear such further oral evidence as the court may deem fit;
> (iii) direct the public prosecutor to tender to the court a statement referred to in section 21(1)(a); and
> (iv) direct a defendant to tender to the court a statement referred to in subsection (3)(a) of that section . . . ."

[6] On count 1, the High Court refused leave to appeal except to the third applicant to which leave was granted on limited grounds. On count 2 and 3, all the applicants convicted were granted leave to appeal their convictions on limited grounds, but not their sentences.

limited leave, the application was to broaden the leave to appeal to a general leave to appeal.

[4] The Supreme Court of Appeal issued a preliminary order granting further leave to appeal on some grounds, dismissing leave to appeal on other grounds and setting the remaining applications for leave to appeal down for oral hearing.[7] The Supreme Court of Appeal gave judgment on 6 November 2006 in which it dismissed all of the applications for leave to appeal, and all of the appeals in the criminal matter.[8] It partially upheld the appeal against the High Court's confiscation orders.

[5] The convictions concerned three related elements of the applicants' relationship with Mr Jacob Zuma (Mr Zuma). The first count was a general charge of corruption in terms of section 1(1)(a) of the Corruption Act 94 of 1992.[9] Central to

[7] On count one, the Supreme Court of Appeal referred the following issues for oral argument: (a) the third applicant's leave to appeal against its conviction to the extent it was refused by the High Court; (b) the convictions of all the other applicants; and (c) the first applicant's sentence argument. It granted leave to appeal against the second to fifth and the eighth applicants' sentences; and refused leave to appeal against the remaining sentences. The Supreme Court of Appeal granted leave to appeal against all the convictions on the second count to the extent it was refused by the High Court, but refused leave for all the sentences. On count three, the Supreme Court of Appeal granted leave to appeal against the convictions to the extent it was refused by the High Court; referred leave to appeal against the first applicant's sentence to oral argument; and refused leave to appeal against the remaining sentences.

[8] The judgment is reported as *S v Shaik and Others* 2007 (1) SA 240 (SCA); 2007 (1) SACR 247 (SCA).

[9] Section 1(1)(a) reads:

> "Any person—
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> (a) who corruptly gives or offers or agrees to give any benefit of whatever nature which is not legally due, to any person upon whom—
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> (i) any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any office or any relationship of agency or any law, or to anyone else, with the intention to influence the person upon whom such power has been conferred or who has been charged with such duty to commit or omit to do any act in relation to such power or duty; or
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> (ii) any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any office or any relationship of agency or any law and who committed or omitted to do any act constituting any excess of such power or any neglect of such

the convictions on this count was the High Court's finding that the applicants had, from October 1995 to September 2002, corruptly made certain payments to Mr Zuma, the object being to influence him to use his name and political influence for the benefit of Mr Shaik and his business enterprises. At the time the payments were made Mr Zuma was, from October 1995 to mid-1999, the Member of the Executive Council for Economic Affairs and Tourism in KwaZulu-Natal and then subsequently, from mid-1999 onwards, the Deputy President of the Republic of South Africa and leader of Government business in Parliament. The second count was one of fraud. The High Court held that these payments had been fraudulently written off in certain accounting records of the corporate applicants. Finally, the third count was also one of contravening section 1(1)(a)(i) of the Corruption Act and related to a specific payment to Mr Zuma. The first alternative charge to count three was of money laundering in contravention of sections 4(a) and (b) of POCA.[10] The High Court held that Mr Shaik had conspired with a local director of French company Thomson-CSF (Pty) Ltd

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duty, with the intention to reward the person upon whom such power has been conferred or who has been charged with such duty because he so acted".

[10] Section 4 provides:

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

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

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

which has or is likely to have the effect–

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

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

(aa) to avoid prosecution; or

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

shall be guilty of an offence."

(Thomson) – renamed in August 2003 as Thint (Pty) Ltd (Thint) – Mr Alain Thétard (Mr Thétard), to offer payment to Mr Zuma in exchange for his authority and influence, to protect and promote Thint in the so-called "arms deal".[11] The arrangement was accepted and confirmed by an encrypted fax which was sent by Mr Thétard to Thomson's head office in Paris. The fax was admitted as evidence by the High Court.

[6] Thint was originally indicted in the criminal matter. However, pursuant to an agreement concluded between it and the National Director of Public Prosecutions (NDPP), the charges against Thint were withdrawn before it was required to plead. The agreement provided that Mr Thétard would provide evidence for the State pertaining to his authorship of the encrypted fax in exchange for withdrawal of the charges against Thint and Mr Thétard.

[7] The applicants now seek leave to appeal to this Court against the decision of the Supreme Court of Appeal. When the matter was set down for hearing, the directions issued by the Chief Justice required the parties to address the application for leave to appeal only.[12]

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[11] The Government of the Republic conducted a lucrative arms acquisition programme with both local and foreign contractors. The applicants were particularly involved in the contract for an armaments suite for corvettes for the South African Navy.

[12] The directions issued by the Chief Justice on 4 April 2007 stated:

> "1. The application for leave to appeal, including the applications to adduce evidence and amend the notice of motion, is set down for hearing on Wednesday 23 May and Thursday 24 May 2007 at 10h00.
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> . . . .
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> 3. . . . Parties should note that argument should address only the issue of whether leave to appeal should be granted on any or all of the grounds raised by the applicants in their

[8] The application before us is in two parts. The first, which is directed at the criminal proceedings, is based on contentions that the rights of the applicants to a fair trial, equality and dignity have been infringed. The sentences imposed are also challenged. We refer to this part of the application as the "criminal proceedings". The second part is concerned with the orders for the confiscation of the assets of the first to the third applicants and is referred to as the "POCA proceedings".

Issues before this Court

[9] A number of issues as to the alleged unfairness of the trial were raised on the applicants' papers, but were not pursued in oral argument before this Court. These were concerned with the admissibility of the encrypted fax, the validity of search and seizure operations, the alleged influence of the media on the decision of the Supreme Court of Appeal and an alleged unconstitutional joinder of charges. In oral argument, counsel for the applicants confined himself to two issues, namely the unfairness of the trial as a consequence of the non-joinder of Mr Zuma, Thint and Mr Thétard as co-accused in the criminal proceedings and what was referred to as prosecutorial misconduct. He submitted that the enquiry into the alleged unfairness of the trial fell to be dealt with on these two grounds only and specifically disavowed any reliance on the other issues that are raised in the written submissions.

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application for leave to appeal. Should leave to appeal be granted on any or all of the grounds, directions shall be issued for the further conduct of the appeal."

[10] Mr Shaik challenges the sentence imposed on him on the basis that the High Court and the Supreme Court of Appeal failed to consider the socio-economic context of racial discrimination that had, according to this submission, denied Mr Shaik equal opportunities and caused him to commit "economic crimes". The applicants also contend that the provisions of the Amendment Act should not have been invoked as the initial commission of the crime predates the advent of the legislation.

[11] As to the POCA proceedings, the applicants raise three main issues. The first is concerned with an application to introduce new facts in the confiscation proceedings that had not been raised at the criminal trial. The second issue is concerned with the question whether certain of the benefits that became the subject of the POCA proceedings had been obtained as a result of Mr Zuma's intervention, and the third is whether the confiscation was proportionate.

Interlocutory applications

[12] Before considering the substantive matters raised, it will be convenient to deal with some preliminary applications made by the applicants. The following applications were made:

(a) to condone for the late filing of the application for leave to appeal;[13]

(b) to amend the notice of motion;[14]

(c) to adduce further evidence;[15]

[13] The application should, in terms of Rule 19(2) of the Rules of this Court, have been filed by 27 November 2006. It was only filed on 15 December 2006.

[14] The amendment was in response to an objection by the respondent that the applicants in issuing the notice improperly attempted to appeal against certain decisions of the Supreme Court of Appeal refusing leave to appeal, where those appeals should properly be directed at the High Court's decisions.

(d) to amend the application to adduce further evidence;[16]

(e) to condone the late filing of written submissions;[17]

(f) for leave to file supplementary written argument;[18] and

(g) to condone the late filing of supplementary written argument.[19]

[13] The State opposes all these applications except (e). Its opposition to (a) is based on the lack of a satisfactory explanation for the delay. The opposition to (c) is addressed below. It does not provide any reasons for its opposition to the applications to amend. By the time applications (f) and (g) were filed, the State argues, the applicant's continued non-compliance with this Court's Rules and directions had created a "labyrinthine morass" of papers and had as a result caused them prejudice. It also opposes (f) on the ground that the argument had not been mentioned in the original application.

[14] We have considered the application for condonation of the late filing of the application for leave to appeal. The matter is indeed a complicated one and we consider that the applicants have given sufficient reasons for the delay. Condonation is accordingly granted. There are also, in our view, no reasons not to grant the two applications to amend. In view of the conclusions we reach below on the merits, it is

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[15] This application is dealt with in detail below at paras 16-37.

[16] The applicants wanted to adduce further evidence in part D of their supplementary founding affidavit that was not part of the original application to adduce new evidence.

[17] In terms of the Chief Justice's directions, the written submissions should have been filed by 20 April 2007. They were only filed on 24 April 2007.

[18] On 26 April 2007 the applicants filed supplementary written argument which raised, for the first time, the issue regarding the application of the Amendment Act to Mr Shaik's sentence.

[19] These submissions were also filed after the deadline of 20 April 2007.

unnecessary to consider the applications relating to the written submissions, described in (e) to (g), as the outcome would not affect the result of the application for leave to appeal. The way is now clear to consider the test for the granting of an application for leave to appeal.

The test for the granting of leave to appeal

[15] Leave to appeal will be granted if an applicant raises a constitutional matter or an issue connected with a decision on a constitutional matter[20] and if it is in the interests of justice to grant leave to appeal.[21] Whether it is in the interests of justice for an application for leave to appeal to be granted depends on a careful and balanced weighing-up of all relevant factors including the importance of the constitutional issues and the prospects of success.[22] With regard to the prospects of success, the Court must have regard to and make an evaluation of the evidence which is before it. In this regard, it is appropriate to consider the new evidence which the applicants

[20] Section 167(3) of the Constitution provides:

> "The Constitutional Court—
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> (a) is the highest court in all constitutional matters;
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> (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
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> (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter."

[21] See, for example, *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC); 2006 (1) SACR 78 (CC) at para 30; *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another* 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 19.

[22] See *African Christian Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC) at paras 17-18; *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12; *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3; *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at para 35; *Fraser v Naude and Others* 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 7; *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32.

sought to introduce to supplement that which was before both the High Court and the Supreme Court of Appeal. It is to that matter that we now turn.

Application to admit new evidence

[16] In an application lodged on 1 February 2007, the applicants seek to introduce new evidence before this Court. The evidence is contained in bundles marked A and B. Thereafter the applicants sought to amend the application so as to introduce part D to their supplementary founding affidavit. The applicants submitted that the documents sought to be introduced are necessary to support their primary contention that their trial before the High Court was not fair. The grounds for unfairness on which the applicants rely are firstly the non-joinder of Mr Zuma, Thint and Mr Thétard as co-accused with the applicants and allegations of prosecutorial misconduct on the part of Mr Downer, who led the prosecution on behalf of the State.

The law regarding the admission of new evidence on appeal

[17] In this application to introduce further evidence, the applicants rely on rules 30 and 31 of the Rules of this Court. Rule 30 incorporates, amongst other sections, section 22 of the Supreme Court Act[23] and provides:

[23] Section 22 provides:

> "**Powers of court on hearing of appeals.—**The appellate division or a provincial division, or a local division having appeal jurisdiction, shall have power—
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> (a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary; and
>
> (b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require."

"**Application of certain sections of the Supreme Court Act, 1959 (Act No. 59 of 1959)**

The following sections of the Supreme Court Act . . . shall apply, with such modifications as may be necessary, to proceedings of and before the Court as if they were rules of their court.

. . .

22 Powers of court on hearing of appeals".

[18] Rule 31 provides:

"**Documents lodged to canvass factual material**

(1) Any party to any proceedings before the Court and an *amicus curiae* properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts—

(a) are common cause or otherwise incontrovertible; or

(b) are of an official, scientific, technical or statistical nature capable of easy verification.

(2) All other parties shall be entitled, within the time allowed by these rules for responding to such document, to admit, deny, controvert or elaborate upon such facts to the extent necessary and appropriate for a proper decision by the Court."

[19] It will be convenient to deal first with the applications made under Rule 31. In *Prince v President, Cape Law Society, and Others*[24] this Court found that if the evidence sought to be adduced under Rule 31[25] is not incontrovertible then it is inadmissible.[26] This approach was confirmed in *Rail Commuters*[27] where this Court

[24] 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC).

[25] See the discussion of the application of this rule in *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at paras 37-38 and *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at paras 22-23.

[26] See *Prince II* above n 24 at para 10 where Ngcobo J enunciated this principle as follows:

held that the evidence sought to be introduced was not admissible since it was "all put in issue by the respondents . . . [and] therefore fall[s] to be excluded on that basis alone."[28] In essence, Rule 31 will find no application where facts sought to be canvassed are irrelevant or genuinely disputed, in other words, where they are not incontrovertible.[29]

[20] The second route by which new evidence can be adduced is provided by Rule 30 which, as already stated, incorporates section 22 of the Supreme Court Act. That section deals with the powers of the court on hearing of appeals. Although appeal courts have a discretion[30] under section 22, leave to adduce further evidence is ordinarily granted only where "special grounds exist, [or where] there will be no prejudice to the other side and further evidence is necessary in order to do justice between the parties."[31] (Footnote omitted.)

> "The Rule has no application where the facts sought to be canvassed are disputed. A dispute as to facts may, and if genuine usually will, demonstrate that the facts are not 'incontrovertible' or 'capable of easy verification'. If that be the case, the dispute will in effect render the material inadmissible. Ultimately, the admissibility depends on the nature and substance of the dispute." (Footnote omitted.)

[27] See *Rail Commuters* above n 25.

[28] Id at para 38.

[29] See *In re Certain* Amicus Curiae *Applications: Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC); 2002 (10) BCLR 1023 (CC) at para 8. See also *Mabaso v Law Society, Northern Provinces and Another* 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) at para 45.

[30] See *Van Eeden v Van Eeden* 1999 (2) SA 448 (C) at 453A-B.

[31] *Prince v President, Cape Law Society and Others* 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) at para 21. See also *Rail Commuters* above n 3 at paras 42-43.

[21] Section 22 has been interpreted as allowing for the admission of new evidence in appeal cases only in exceptional circumstances.[32] In the words of O'Regan J in *Rail Commuters*:[33]

> "The Court should exercise the powers conferred by section 22 'sparingly' and further evidence on appeal (which does not fall within the terms of Rule 31) should only be admitted in exceptional circumstances. Such evidence must be weighty, material and to be believed. In addition, whether there is a reasonable explanation for its late filing is an important factor. The existence of a substantial dispute of fact in relation to it will militate against its being admitted."[34]

[22] In *Prophet*[35] this Court held that—

> "there are two routes for the admission of late evidence on appeal in this Court. The first is Rule 31 of the Rules of this Court which permits parties to adduce relevant material that is common cause or otherwise incontrovertible or is of an official, scientific, technical or statistical nature and capable of easy verification. The second is in terms of section 22 of the Supreme Court Act, which is incorporated into the Rules of this Court by Rule 30. This Court has considered the circumstances in which evidence may be tendered in terms of section 22 on several occasions and concluded that it may only be done in exceptional circumstances where the evidence sought to be submitted is 'weighty, material and to be believed' and there is a reasonable explanation for the late filing of the evidence."[36] (Footnotes omitted.)

[23] The approach to be adopted in an application to introduce new evidence is thus clear. The evidence sought to be admitted on appeal must meet the requirements of

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[32] See *S v Lawrence* above n 25 at para 24; *Rail Commuters* above n 25 at para 43; *S v Louw* 1990 (3) SA 116 (A) at 123H.

[33] Above n 25.

[34] Id at para 43.

[35] *Prophet v National Director of Public Prosecutions* 2006 (2) SACR 525 (CC); 2007 (2) BCLR 140 (CC).

[36] Id at para 33.

Rules 31 or 30. The introduction of evidence referred to in the said bundles will accordingly be determined on the basis of the above principles.

The evidence contained in Bundle A

[24] Bundle A contains the papers filed in the matter of *S v Zuma*[37] (Zuma proceedings) and comprises 33 volumes with nearly 3 000 pages. The bundle includes the application by the State for a postponement in the Zuma proceedings and contains a number of affidavits connected with that application. The affidavits included those deposed to by Mr Downer;[38] Mr Du Plooy;[39] Mr Zuma; Mr Moynot;[40] Ms Parsee;[41] Mr McCarthy[42] and affidavits of the counsel of certain parties. These papers did not form part of the record before the trial court or the Supreme Court of Appeal, nor did the applicants apply to have them introduced in their appeal in that Court in terms of section 316 of the Criminal Procedure Act (CPA).[43]

[25] The applicants contend that the information contained in the affidavits of Mr Du Plooy and of Mr McCarthy is of direct relevance to the constitutional challenge based on the non-joinder of Mr Zuma and Thint in their criminal trial and to claims

[37] *S v Zuma and Others* CC358/05, 20 September 2006, unreported. This case entailed an application in the Natal Provincial Division by the State for postponement of the prosecution of Mr Zuma and Thint and their counter-application for a stay of prosecution.

[38] The lead prosecutor in the Shaik proceedings.

[39] The Senior Special Investigator for the Directorate of Special Operations in the Shaik and Zuma proceedings.

[40] The Managing Director of Thint Holdings (Southern Africa) (Pty) Ltd (accused two in the Zuma proceedings) and a Director of Thint (Pty) Ltd (accused three in the Zuma proceedings).

[41] Attorney of record to Mr Shaik.

[42] A Deputy National Director of Public Prosecutions and Head of the Directorate of Special Operations of the National Prosecuting Authority.

[43] Act 51 of 1977. Sections 316(5) and (6) provide that the evidence sought to be adduced on appeal may be received if it could reasonably lead to a different verdict or sentence.

based on Mr Downer's alleged prosecutorial misconduct. This evidence is said to contain facts which show that the State did not have a sufficiently strong case against Mr Zuma and had concluded an agreement with Thint in terms of which that company would not be prosecuted with the applicants.

[26] The affidavit of Mr Du Plooy sets out the reasons for the postponement sought by the State in the Zuma proceedings. The affidavit relies on two factors that arose out of the Shaik criminal proceedings in the High Court. The first is that Mr Shaik testified that the payments made to Mr Zuma, which the State believed to have ended on 30 September 2002, actually continued beyond that date and were, at the material time relevant to the deposition, still continuing. The second factor is the admission by Mr Shaik that a meeting took place on 11 March 2000, as reflected in the encrypted fax, between himself, Mr Zuma and Mr Thétard. This meeting has been denied by Mr Zuma in his papers. The affidavit also sets out the background to the withdrawal of charges against Thint. The applicants suggest that insight into the agreement entered into between Thint and the NDPP is vital to the argument regarding the non-joinder issue.

[27] Mr McCarthy's affidavit, read with that of Mr Ngcuka, is used to respond to the application by Mr Zuma for a permanent stay of prosecution. It gives information on the negotiations and the agreement entered into with Thint.[44] It also describes

[44] The applicants allege that had they been aware of the agreement with Thint, they could have evaluated whether their rights stood to be prejudiced in any material respect and whether the conduct of the prosecution was unlawful.

certain aspects of the applicants' trial in the High Court, the re-appraisal of the admissible evidence against Mr Zuma and how that led to the decision that he should be prosecuted.[45] It is on the basis of this information, that the applicants argue, that their trial constituted a "dry run" for the subsequent trial against Mr Zuma and that the State used their case to test the prospects of success against Mr Zuma. The applicants contend that the separate prosecutions resulted in a mistrial and a violation of their constitutional rights to a fair trial and equality because a different standard to prosecute them applied to that in the prosecution of Mr Zuma.

[28] The applicants further seek to adduce the evidence contained in the affidavit of Mr Zuma and that filed on behalf of Thint in the Zuma proceedings because they claimed it would exculpate them in the corruption charges and show unconstitutional conduct on the part of the prosecution. They attempt to demonstrate that they could not reasonably be expected to have raised the new facts before the trial court or the Supreme Court of Appeal because the affidavits were only filed mere months prior to the hearing of the criminal appeal before the Supreme Court of Appeal[46] and their legal representatives did not have sufficient time to thoroughly examine the papers filed in the Zuma proceedings and make appropriate representations before that Court.

[45] Also allegedly important in this regard is the affidavit of the current head of the National Director of Public Prosecutions, Mr Pikoli, where he allegedly purports to justify his reversal of his predecessor's decision (Mr Ngcuka) not to prosecute Mr Zuma. The applicants submit that these explanations cannot reasonably be true, showing further that the decision not to prosecute Mr Zuma was allegedly unconstitutional.

[46] Argument in the Zuma trial was heard on 5 September 2006 and judgment was delivered on 20 September 2006, while the hearing of the Shaik appeal in the SCA took place on 25-27 September 2006.

[29] The applicants conceded at the hearing that it was not the decision of the National Prosecuting Authority (NPA) to prosecute them separately from Mr Zuma and Thint that rendered the trial unfair, but the effects of the decision. Accordingly, to the extent that the affidavits of Mr Du Plooy and Mr McCarthy purport to give reasons for the failure to prosecute Mr Zuma jointly with the applicants, they have no relevance to the issues before us.

[30] We may add also that the facts upon which the applicants rely are not only strenuously disputed by the State but the applicants themselves also seek to dispute the veracity of some of the evidence they applied to tender – such as the NDPP's reason for declining to prosecute Mr Zuma. Since the evidence the applicants are trying to adduce is irrelevant and controvertible, neither the requirements of rule 30 nor of rule 31 have been met. Accordingly, the application to admit new evidence contained in Bundle A must fail.

The evidence in Bundle B

[31] Bundle B comprises eight volumes and contains two classes of documents. In the first category are documents which are already in the public domain. They include High Court judgments and exhibits which were admitted in the trial court. These documents are part of the trial record and, to the extent that it is sought to have them admitted as part of the appeal record, they are superfluous and therefore irrelevant. The second class of documents, eight in number, did not form part of the record before the trial court or the Supreme Court of Appeal. They include: (i) a document

containing a brief chronology of events; (ii) some newspaper articles; (iii) a media statement by the Chief Justice; (iv) a media statement by the Registrar of the Supreme Court of Appeal; (v) a judgment of Msimang J in the Zuma proceedings; (vi) a National Prosecuting Authority of South Africa Policy Manual (Policy Manual); (vii) a judgment of Hurt J in the Durban High Court;[47] and (viii) a letter from the applicants' attorneys addressed to the NDPP dated 22 November 2006.

[32] The media statements and newspaper articles are sought to be introduced to demonstrate the contention by the applicants that the Supreme Court of Appeal was influenced by the media, and not only by the evidence before it when, in its judgment in the POCA proceedings, it incorrectly attributed the phrase "a generally corrupt relationship" to the High Court. It is true that this evidence could not be brought earlier as it only became available upon the delivery of the judgment of the Supreme Court of Appeal. This evidence is, however, neither relevant nor material to the issues before us as the applicants expressly disavowed any reliance on this matter in their argument in the oral hearing. The application to admit this evidence must accordingly be refused.

[33] The Policy Manual was published under the authority of the NPA in October 1999 and sets out the prosecution policy, the policy directives and the code of conduct by which prosecutors are bound. The introduction of the manual would, it was claimed, assist the Court in assessing the lawfulness of the involvement of Mr Downer

[47] 2006 (1) SACR 468 (D).

in the criminal trial. The policy manual is a public government document and leave of this Court to introduce the document as evidence is not required. Furthermore, the fact that the manual is an internal policy document which constitutes mere guidelines means it would have little weight in this application.

[34] The High Court judgments sought to be admitted do not require formal leave for admission into evidence. The application is only necessary in so far as it attempts to introduce as evidence the factual material in the judgments. The relevance of facts in the said judgments has not been demonstrated. Hurt J's judgment related to the unlawfulness of search and seizure operations conducted in relation to Mr Zuma, Thint and their legal representatives. The searches involved in these operations are unrelated to the searches on the premises of the applicants and their legal representatives, except in so far as the material seized may tend to show a link between Mr Zuma and the applicants. Material relevance of the evidence in the judgment of Hurt J to the constitutional challenges in this case has not been shown. The judgment of Msimang J focused on the postponement of the hearing in the Zuma proceedings and the manner in which the conduct of the prosecution contributed to the postponement. Again, its relevance to any of the constitutional challenges raised in this application has not been shown. The application to introduce the evidence contained in Bundle B must therefore be refused.

The introduction of part D of the applicants' supplementary founding affidavit

[35] Part D to the applicants' supplementary affidavit deals with documents involved in separate charges instituted against Mr Shaik. They were apparently found as a result of a search and seizure operation conducted at his premises on 9 October 2001. The documents include: an annexure to the charge sheet[48]; correspondence between the applicants' attorney and Mr Downer regarding the first applicant's challenge to the search warrant issued to the NPA; a copy of heads of argument in the Magistrates' Court; and a copy of the judgment in the said proceedings.

[36] The applicants seek to introduce this evidence to substantiate the appeal against the search and seizure operations that took place on 9 October 2001. They contend that the evidence is important in relation to the unlawfulness of the search and seizure operations. It seems that the applicants had at some stage contemplated a challenge to the lawfulness of the search before the trial court but subsequently chose to formally accept the legality of the searches and the admissibility of a number of documents seized during the searches. Once again, this challenge was abandoned at the hearing and the evidence supporting it is therefore immaterial and should not be admitted under rule 31 or 31.

[37] The factual material canvassed by the evidence sought to be introduced in this Court will not have any bearing on the challenges relating to the fairness of the trial or any other constitutional challenge raised by the applicants. In the circumstances, the

[48] This change to the charge sheet had taken place when the first applicant was first brought before the Durban Regional Court on various charges in relation to the documents obtained during the search and seizure operations.

application for the admission of the new evidence contained in the Bundles marked A and B and part D of the supplementary affidavit must be refused.

[38] Before embarking on an enquiry whether the applicants have reasonable prospects of success on the question whether the trial was unfair, it will be convenient to deal with the failure by the applicants to raise the issues of unfairness timeously, in particular before the High Court or the Supreme Court of Appeal.

The failure to raise issues in the High Court or the Supreme Court of Appeal

[39] The applicants did not raise the two grounds on which they rely to show the unfairness of the trial at any stage before bringing the matter to this Court. They request that their failure to do so be condoned on two grounds. First they claim that the information necessary for them to make the complaints was not available to them. And second, they argue that this Court should not let technical or procedural rules permit a failure of justice to occur.

[40] We do not agree that the applicants did not have the information necessary to enable them to raise their constitutional complaints in the High Court and in the Supreme Court of Appeal. They were aware that Mr Zuma, Thint and Mr Thétard were not going to be tried with them. Mr Zuma had declined their invitation to testify on their behalf and Mr Thétard was overseas. The available information was therefore sufficient for them to foresee any potential prejudice there might have been to their trial and they should have been in a position to take appropriate action. The same is

true of the issue of prosecutorial misconduct. All the necessary information was contained in an affidavit deposed to by Mr Downer which was formally admitted by the applicants. The Court is satisfied that the applicants had knowledge of the extent of the prosecutor's involvement in the case and chose not to challenge it earlier.

[41] Turning to the second ground, while it is true that the Constitution does not envisage a legal system that places form before substance, procedural rules are there to ensure the fair conduct of a trial by all the parties. There may well be cases where strict adherence to formal rules may lead to an unjust result; that will depend on the facts of each case. The ultimate question is whether it is in the interests of justice to condone dilatory conduct and, in a given case, entertain a constitutional complaint. In determining whether, in this case, it is in the interests of justice to deal with the issue raised, it is necessary to consider whether or not the applicants have reasonable prospects of success on the issue of the fairness of the trial. It is to that question that we now turn.

The fairness of the criminal trial

[42] The applicants contend that their criminal trial was unfair. As section 35(3) of the Constitution guarantees for every accused the right to a fair trial, the applicants' complaint clearly raises a constitutional issue. As earlier stated,[49] the applicants base their contention on two legs, the first being the failure by the State to join Mr Zuma and/or Thint and/or Mr Thétard as co-accused with the applicants. The second leg of

[49] See above para 9.

the fair trial challenge concerned their allegation that Mr Downer's conduct amounted to prosecutorial misconduct. It was contended that the two grounds together rendered the trial unfair.

[43] It will be convenient to restate the principles employed by a court in determining the fairness of a trial. The applicants stress that they place their reliance on the general right to a fair trial, which, as this Court has held,[50] extends beyond those specific rights enumerated in subsections 35(3)(a)-(o) of the Constitution.[51] The right to a fair trial requires a substantive, rather than a formal or textual approach.[52] It is clear also that fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment. A fair trial also requires—

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[50] *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 16. See also *S v Jaipal* 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC) at para 27.

[51] Section 35(3) reads:

> "(3) Every accused person has a right to a fair trial, which includes the right—
> (a) to be informed of the charge with sufficient detail to answer it;
> (b) to have adequate time and facilities to prepare a defence;
> (c) to a public trial before an ordinary court;
> (d) to have their trial begin and conclude without unreasonable delay;
> (e) to be present when being tried;
> (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
> (g) to have a legal practitioner assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
> (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
> (i) to adduce and challenge evidence;
> (j) not to be compelled to give self-incriminating evidence;
> (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
> (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
> (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
> (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
> (o) of appeal to, or review by, a higher court."

[52] *Zuma* above n 50 at para 16. See also *Jaipal* above n 50 at paras 27-28.

> "fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime."[53]

[44] Our courts have recognised that some irregularities result in a failure of justice, in the words of section 322(1) of the CPA. A failure of justice must be understood within the context of section 35(3) of the Constitution as an unfair trial.[54] However, not every irregularity has this result.[55] According to the applicants, the failure to charge Mr Zuma, Thint or Mr Thétard without more resulted in the trial being unfair, and they need not show that they were actually prejudiced by the failure. They also argue that the public interest necessitated a joint trial. The question is therefore firstly, whether an irregularity did indeed occur, and then, if so, whether it was of the kind to render the trial unfair.

(a) Non-joinder of Mr Zuma

[45] Counsel for the applicants argued that since the trial concerned corruption, which is a reciprocal crime, a joint trial should have been held, unless there were good reasons not to. Amplifying on their argument, the applicants contend that if Mr Zuma, Thint and Mr Thétard had been co-accused, they would have found it in their interest to testify and hence provide evidence that would have exculpated both themselves and the applicants. Since they were not facing trial, there was no incentive for them to

[53] *Jaipal* above n 50 at para 29. See also *S v Shuma and Another* 1994 (4) SA 583 (E) at 586I-J; *Shikunga* 2000 (1) SA 616 (NmS) at 629H; 1997 (9) BCLR 1321 (NmS) at 1333A-B.

[54] *Jaipal* above n 50 at para 39.

[55] Id at paras 44 and 51

give evidence in the applicants' trial; furthermore, they ran the risk of having their testimony used against them in future investigations or a future trial against them. The applicants point out that Mr Zuma in fact refused the first applicant's request to testify on his behalf. If Mr Zuma had been subpoenaed, as he could have been, he would have testified under compulsion; such a witness was unlikely to be helpful.

[46] In *S v Shuma and Another*,[56] in the context of the interests of society, the following was stated:

> "It is in the interests of society as well as of justice that alleged perpetrators of the same crimes be tried jointly. The alternative, namely separate trials as a matter of course, will be cumbersome and lead to huge wastage of State resources. It will, too, inevitably bring about delay, which will be to the benefit of no-one – least of all the accused. . . . [T]here is much to be said for the view that it is in the interests of justice that accused should be tried together to enable the Court to have all the evidence before it, before deciding the disputed question as to who is the guilty person. These are cogent reasons for the holding of joint trials."[57]

[47] The fact that there might often be cogent reasons for the holding of joint trials, does not of course mean that a specific trial would be unfair because other possible perpetrators are not charged together with an accused. The ultimate question is whether a particular trial was unfair; this was conceded by counsel on behalf of the applicants.

[56] Above n 53.

[57] Id at 586J-587C. See also *R v Nzuza* 1952 (4) SA 376 (A) at 380G-H.

[48] Counsel for the applicants argued that Mr Zuma might well have given evidence to the advantage of the applicants. He could for example have explained the very unique and wholly innocent relationship between himself and Mr Shaik. All of this is highly speculative, however. If Mr Zuma were charged with the applicants, he might have requested a separation of trials, as co-accused often do. Furthermore, he might have exercised his right to remain silent (guaranteed in section 35(3)(h) of the Constitution) and not testified at all. Had he testified, his evidence might have attempted to lay blame at the applicants' door, rather than to exonerate them. It must be remembered that the applicants could subpoena and compel Mr Zuma to testify in their trial, which they would not have been able to do if he were a co-accused. There is thus no indication that the applicants suffered any prejudice whatsoever as a result of the failure to charge Mr Zuma, Thint or Mr Thétard, or even that they would have gained any advantage from their presence as co-accused.

[49] While it is possible that a particular accused is disadvantaged by the fact that someone else is not charged in the same trial, this does not render the trial unfair. In *Xolo and Others v Attorney-General of the Transvaal*[58] Williams AJ stated:

> "I fully appreciate that it is possible that separate trials may redound to the disadvantage of the accused both financially and in the sense that they may be exposed to a greater danger of conviction in the second trial; I can, however, see no danger to them of their being prejudiced by any unfairness creeping into their trials as a result of separate trials."[59]

[58] 1952 (3) SA 764 (N).

[59] Id at 770F-H.

[50] In conclusion, the proposition cannot be upheld that the failure to charge another party, who may be suspected to be involved in the same offence, in the same trial together with an accused amounts to a breach of any established rules of criminal procedure and thus to an irregularity of the kind that would result without more in a failure of justice, render a trial unfair and require a conviction to be set aside on appeal. In the circumstances of this case in particular, the trial cannot be said to have been unfair for the reasons advanced by the applicants. It is not entirely insignificant that the absence of Mr Zuma and others as co-accused was not raised by the applicants in the High Court or Supreme Court of Appeal as a threat to the fairness of the trial. Whether a court may or should under different circumstances refuse to proceed with a separate trial of an accused, need not be answered conclusively here.

(b) Alleged prosecutorial misconduct

[51] The second leg to the applicants' complaint that their right to a fair trial was infringed concerns the alleged dual role played by the prosecutor, Mr Downer, before and during the proceedings in the High Court and the Supreme Court of Appeal. It was argued that Mr Downer had overstepped the line between prosecutor and investigator by: overseeing the search and seizure operations in Mauritius;[60] assisting the Mauritian officials to prepare the application to the Supreme Court of Mauritius; assisting police officials in Mauritius in the identification of material documents that should be seized; and conducting interrogations of employees of the corporate accused

[60] These operations were conducted on 9 October 2001 at the premises of Thales International Africa Ltd (Mauritius) and Mutual Trust Management (Maurititus) Ltd with the aim of obtaining evidence to be used in the Shaik proceedings.

in terms of section 28 of the NPA Act. The applicants argue that the conflation of the two roles carried the inherent danger of subordinating the prosecutorial duties to the investigative zeal of securing convictions. They rely on *Killian v Immelman, Regional Magistrate Paarl & Others*[61] as authority for finding a trial unfair based on prosecutorial misconduct. In that case, the investigator, who had also interrogated the accused in terms of section 28 of the NPA Act, took on the role of prosecutor at the commencement of the trial.

[52] The State points out that Mr Downer's role in the investigation was no more than what is contemplated by the NPA Act. It denies that Mr Downer had crossed the line of authority of investigator during the search and seizure operations in Mauritius. At all relevant times the lead investigator was Mr Du Plooy. It was common cause that Mr Downer did not interview any of the accused but had questioned certain witnesses in line with the provisions of section 28 of the NPA Act.

[53] In order to determine whether the applicants' complaint, based on Mr Downer's alleged dual roles, has reasonable prospects of success, it is necessary to examine the relevant legislative provisions. The starting point is the Constitution, which makes provision for the establishment of the prosecuting authority in section 179(2) which reads:

[61] [2007] 1 All SA 497 (C).

> "The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings."

Section 179(4) also makes provision for the enactment of national legislation that ensures that the prosecuting authority exercises its functions "without fear, favour or prejudice." This legislation came in the form of the National Prosecuting Authority Act.[62]

[54] The NPA Act makes provision for the overlapping of certain functions and envisions the necessity to give prosecutors more authority than just to institute cases. The preamble the NPA Act makes provision for the establishment of an Investigating Directorate—

> "with limited investigative capacity, to prioritise and to investigate particularly serious criminal or unlawful conduct committed in an organised fashion . . . with the object of prosecuting such offences or unlawful conduct in the most effective manner".

[55] Section 7(1)(a) of the NPA Act describes the aim of the Investigating Directorate as being to—

> "(i) investigate, and to carry out any functions incidental to investigations;
> (ii) gather, keep and analyse information; and
> (iii) where appropriate, institute criminal proceedings and carry out any necessary functions incidental to instituting criminal proceedings,
>
> Relating to—

[62] Act 32 of 1998.

(aa) offences or any criminal or unlawful activities committed in an organised fashion . . . ."

[56] This section gives the Investigating Directorate specific investigative functions. Section 7(4)(a)(ii) makes provision for prosecutors to assist the Directorate.[63] It is these provisions that create a framework in which functions of the investigators and prosecutors will sometimes overlap and it is within this context that Mr Downer performed his functions.

[57] There is no direct challenge to the constitutionality of the NPA Act. Therefore, as long as the prosecutor has acted within her or his bounds, the trial cannot be said to be unfair. The only question therefore is whether Mr Downer exceeded the limits placed on him by the Act.

Specific objections made to Mr Downer's conduct

[58] Some of the objections made to Mr Downer's conduct were not raised in the papers and only brought to the attention of the Court and the respondent in oral argument.[64] This places the respondent and the Court in the unwanted position where they are called on to respond to a case that they did not prepare to meet or hear. There might be good reason why time should be spent on objections only raised in oral argument, but no such reason was shown in this case, and like the rest of the objections, the applicant knew about the facts that gave rise to the objections at the

[63] Section 7(4)(a)(ii) reads: "The head of an Investigating Directorate shall be assisted in the exercise of his or her powers and the performance of his or her functions by prosecutors".

[64] The allegations were that Mr Downer elicited search warrants that were "manifestly overbroad" and proffered himself as a witness in the Shaik and Zuma trials.

time of the trial in the High Court. The Court will thus not take into account any of the objections that were raised in oral argument for the first time. Even if they were to be taken into account, they would not alter the finding.

The allegation that Mr Downer oversaw the search and seizure in Mauritius

[59] Mr Downer's account of his involvement in the search and seizure is uncontradicted and was formally admitted by the applicants at the trial. In his affidavit, Mr Downer makes it clear that he "took no part in the search on the premises". Mr Du Plooy's affidavit in this Court also disputes the allegation that Mr Downer oversaw the search and seizure in Mauritius and states that they were carried out entirely by and under the authority and control of the Mauritian officials. From this it emerges that Mr Downer did not take over the functions of the investigators and kept his distance during the proceedings.

[60] The applicants assert that one of the ways in which Mr Downer "oversaw" the search and seizure procedure was by assisting police officials in Mauritius in identifying material documents that should be seized. Once again the picture drawn by the applicants is given new light when looking at Mr Downer's affidavit:

> "Detective Chief Inspector Jugoo periodically spoke to me as I waited outside and asked me to confirm the relevance or otherwise of documentation that was found. At a stage, I enquired whether he had found Mr Thétard's diary for the year 2000 and I suggested that he ask Mr Thétard for it. I regarded the diary as a particularly important document and it was specifically mentioned in the application and the order. DCI Jugoo went back inside and returned to me shortly afterwards with the diary."

[61] Mr Downer's role can at most be regarded as being one of assistance. By staying outside and informing the Mauritian officials which documents are of importance he created the space for them to do their job. The person who oversaw the search and seizure was DCI Jugoo. Once again in compliance with the NPA Act, there was an investigator and a prosecutor, each staying on their side of the fence.

Allegation that Mr Downer conducted section 28 interrogations in terms of the NPA Act

[62] The applicants give no factual basis for this averment. What is relevant is that Mr Downer never interrogated the accused. Furthermore, he interviewed only the people he was permitted to in terms of the NPA Act (employees of some of the companies). As noted above, section 7(1)(a) of the Act establishes the Investigating Directorates, and in subsection 7(4)(a)(ii) provision is made that the Investigating Directorate can be assisted by prosecutors in its functions. One of these functions is to conduct inquiries as provided for in section 28. The NPA Act therefore makes provision for a prosecutor to assist in section 28 inquiries.

[63] The facts of this case are distinguishable from *Killian*,[65] a decision relied upon by the applicants, where the investigator, who had interrogated the accused in terms of section 28 of the NPA Act, took on the role of prosecutor at the commencement of the

[65] Above n 61.

trial. In this case, there is no allegation that any of the accused was interrogated by Mr Downer.

The claim that Mr Downer acted both as detective and investigator

[64] No evidence has been placed before us in support of the assertion by the applicants that Mr Downer performed the functions of a detective and an investigator. No clear indication has been given of the examples where Mr Downer overstepped the line between investigator and detective. Furthermore, we have already held that the NPA Act makes specific provision for an overlap. There is nothing before us that indicates that Mr Downer acted outside this overlap.

Challenge to impartiality

[65] The applicants argue that Mr Downer did not adhere to his constitutional duty to remain impartial and to execute his functions without fear, favour or prejudice. They do not however show the basis or proof of any bias. What they aver is that Mr Downer, while wearing the hat of investigator, came into possession of knowledge that would not be available to him as prosecutor.

[66] Additional knowledge and understanding of the facts does not amount to bias or prejudice. It is not alleged, for instance, that the prosecutor waged a personal vendetta,[66] impaired the conduct of the proceedings and the dignity of the court,[67] or

[66] *Smyth v Ushewokunze and Another* 1998 (2) BCLR 170 (ZS) at 174E-F.

[67] *Jesse v Pratt NO and Others* 2001 (8) BCLR 810 (Z) at 816F-I.

used the same office as the assessors.[68] In fact, the applicants placed it on record when they opened their case that they are not attacking the ethics of Mr Downer's conduct.

[67] Furthermore, it is unclear what the purpose of an investigator is if not to hand over as much evidence as can be lawfully obtained to the prosecutor. It is in the best interest of all, even that of the accused, for the prosecutor to have as much evidence available as possible in her or his position as truth-seeker. It is relevant here to note that the role of the prosecutor is not to ensure convictions,[69] but as Rand J stated in *Boucher v The Queen*:[70]

> "It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings."[71]

[68] None of Mr Downer's actions fell foul of his role as prosecutor as set out in the NPA Act or the Constitution. The applicants' submissions on the alleged unfairness

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[68] *Jaipal* above n 50 at para 5.

[69] *S v Jija and Others* 1991 (2) SA 52 (E) at 67J-68B, quoted with approval in *Reuters Group PLC and Others v Viljoen and Others NNO* 2001 (12) BCLR 1265 (C) at para 45.

[70] [1955] SCR 16; (1955) 110 CCC 263.

[71] Id at 23-24 and 270 respectively. This passage has been quoted with approval in *Phato v Attorney-General, Eastern Cape and Another; Commissioner of South African Police Services v Attorney-General, Eastern Cape and Others* 1994 (5) BCLR 99 (E) at 117G-I; *Shabalala and Others v The Attorney-General of Transvaal and Others* 1994 (6) BCLR 85 (T) at 113D-F; *S v Scholtz* 1997 (1) BCLR 103 (NmS) at 119G-I.

of the trial, based on the failure to charge other parties and on the alleged prosecutorial misconduct, thus reveal no prospects of a successful appeal. It would not be in the interests of justice to grant leave to appeal and the application for leave has to be dismissed.

Sentencing

[69] As stated above, the High Court sentenced Mr Shaik to an effective 15 years' imprisonment, this being the minimum sentence in terms of the Amendment Act.[72] The second to eleventh applicants were sentenced to the payment of fines in varying amounts.[73] As described above,[74] the applicants applied first to the High Court and then to the Supreme Court of Appeal for leave to appeal against the sentences, with limited success. Ultimately, the Supreme Court of Appeal dismissed all their appeals. Although all the applicants apply for leave to appeal against their sentences, their submissions in this Court specifically focus on the sentence of 15 years' imprisonment imposed on Mr Shaik.

[70] The applicants advance two main contentions in regard to sentencing. The first is that the High Court and Supreme Court of Appeal failed to consider the socio-economic and personal background of Mr Shaik. The second relates to the interpretation and alleged retrospective application of minimum sentence legislation.

[72] See n 2 above.

[73] See n 4 above.

[74] See paras 3-4 above.

[71] The first question is whether a constitutional issue is raised. A sentence involving imprisonment is a potentially drastic infringement of the right to freedom in section 12(1) of Constitution.[75] Furthermore, any sentencing process must be part of a criminal trial that is fair in terms of section 35(3). However, this Court does not ordinarily hear appeals against sentences, based on a trial court's alleged incorrect evaluation of facts. A complaint against the alleged retrospective application of minimum sentence legislation, on the other hand, clearly raises a constitutional issue. Even when a constitutional issue is indeed raised, it must be in the interests of justice for this Court to hear the appeal. This requires a consideration of the prospects of success.

[72] The function of any court adjudicating an appeal against a sentence must be kept in mind, for it is relevant to whether there are prospects of success. It has been stated repeatedly by courts that an appeal court would not easily interfere with a sentence imposed by a trial court exercising its discretion. The question is not which sentence the appeal court would have imposed, but rather whether the sentence is shockingly inappropriate, or whether an irregularity or misdirection occurred.[76]

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[75] Section 12(1) reads:

> "Everyone has the right to freedom and security of the person, which includes the right—
> (a) not to be deprived of freedom arbitrarily or without just cause;
> (b) not to be detained without trial;
> (c) to be free from all forms of violence from either public or private sources;
> (d) not to be tortured in any way; and
> (e) not be treated or punished in a cruel, inhuman or degrading way."

[76] See for example *S v Kibido* 1998 (2) SACR 213 (SCA) at 216g-j; *S v Brand* 1998 (1) SACR 296 (C) at 303c-e; *S v Pillay* 1977 (4) SA 531 (A) at 535A-G; *S v Rabie* 1975 (4) SA 855 (A) at 857C-F; *S v Sibiya* 1973 (2) SA 51 (A) at 56A-B and 57B-C; *S v Berliner* 1967 (2) SA 193 (A) at 200G; *S v Fazzie and Others* 1964 (4) 673 (A) at 683A and 684A-C; *S v Anderson* 1964 (3) SA 494 (A) at 495C-H; *R v Zulu and Others* 1950 (1) SA 489 (N) at 494A-G and 497A-D; *R v Reece* 1939 TPD 242 at 243-244; *R v Taljaard* 1924 TPD 581 at 582 and 583; *R v Mapumulo and Others* 1919 AD 56 at 57.

[73] Expanding on the alleged failure of the High Court and the Supreme Court of Appeal to consider the socio-economic context of discrimination that prevailed at the time of the commission of the offences, the applicants claim that this discrimination denied Mr Shaik equal opportunities and caused him to commit "economic crimes". They describe him as a victim of an unjust and unfair society and see his sentence as being grossly disproportionate. It is argued that if the minimum sentence legislation is interpreted in the light of the Constitution, the sentences would be found to be unjustified.[77]

[74] The State's response to the applicants' first contention is that it is obvious from the judgments of both the High Court and the Supreme Court of Appeal that the first applicant's personal circumstances have been considered very carefully. It is specifically pointed out that the Supreme Court of Appeal did have regard to constitutional values and their impact on sentencing. The State points out further that the submission that South Africa's history of racial discrimination and oppression must be taken into account when sentencing the applicants was new and had not been raised as a sentencing consideration in the High Court or the Supreme Court of Appeal. On the contrary, counsel for the applicants had submitted in argument in the Supreme Court of Appeal that Mr Shaik's group of businesses was successful and prosperous, and had had no need for intervention by Mr Zuma.

[77] It was submitted in the applicants' written argument that the new constitutional order "must be reflected in the way we view the seriousness of offences committed by people of disadvantaged backgrounds seeking to unshackle their oppression."

[75] A proper approach to sentencing does of course require that the historical context of all the relevant circumstances before the court be considered. This is obvious and requires no elaboration from this Court. It is however clear that the High Court and the Supreme Court of Appeal had due regard to the first applicant's personal circumstances, with particular reference being made to his "struggle credentials".

[76] Mr Shaik's crimes commenced after the dawn of democracy and continued after legislation had been enacted that furthered the interests of parties who had suffered discrimination.[78] Furthermore, the oppressive discriminatory past of this country cannot be used as an excuse for the commission of crime, or to justify a reduction in an otherwise appropriate sentence, except perhaps under rare and exceptional circumstances. Mr Shaik was in no way compelled or forced to engage in corrupt activities by virtue of the social context that he found himself in. He cannot be said to have been a "victim" in these offences. Whereas it is clear that poverty, a lack of education, or an unhappy childhood, for example, or years of humiliation and ill-treatment by one or more persons, could be taken into account as relevant personal circumstances of an offender, one must never lose sight of the fact that millions of people who suffered severely under apartheid have chosen to lead honest lives and to avoid crime, often against many odds. Any message by sentencing courts that the sad

[78] The Broad-Based Black Economic Empowerment Act 53 of 2003, the Preferential Procurement Policy Framework Act 5 of 2000 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

and brutal past of our country is a general excuse or mitigating factor for crime would degrade the noble efforts of millions of previously and presently deprived people to live law-abiding lives under difficult circumstances.

[77] Accordingly, we find that it would not be in the interests of justice for the appeal to be heard on this ground as there are no prospects of success.

[78] The applicants' second contention regarding minimum sentencing proceeds from the premise that section 51 of the Amendment Act, which imposes minimum sentences, came into operation on 1 May 1998 and does not provide for retrospective application of those provisions. The High Court held that the offence of corruption was committed when the first payment was made to Mr Zuma in January 1997, and the rest of the payments went to the nature, extent and degree of the corrupt relationship. On this reasoning, it is argued that the offence occurred prior to section 51 coming into force.

[79] The applicants' further contentions in this context are general and go something like this: Mr Shaik's constitutional rights have been violated and constitutional issues are accordingly raised for several reasons. Firstly, it is contended that the sentencing was irregular, which is a violation of the right to freedom and a fair trial. Secondly, section 35(3)(n) of the Constitution[79] entitles the first applicant to the

[79] Section 35(3)(n) provides:

> "Every accused person has the right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing".

benefit of the least severe of prescribed punishments since the punishment changed after the date on which the offence was committed. Thirdly, the rule of law was violated by the retrospective application of the Amendment Act. Fourthly, there was an erroneous application of the law. Finally, there is a perception that justice has not been done to the first applicant as regards sentence.

[80] In response, it was pointed out by the State that the applicants' contentions are not only bad in law but contain averments that are factually incorrect. More specifically, the applicability of the minimum sentence legislation had, according to the State, been addressed in argument before the High Court on sentence. Further, the indictment quite clearly alleged that count one was a continuous offence that had been committed between 1 October 1995 and 30 September 2002. Furthermore, in the Supreme Court of Appeal the applicants conceded that the corruption conviction fell within the provisions of section 51(2)(a) of the Amendment Act, as the payments made during the period 1 May 1998[80] to 30 September 2002 amounted to more than the statutory threshold of R500 000.

[81] It is clear that the charge of corruption concerned the giving of benefits to Mr Zuma over a period of time that extended both before and after commencement of the Amendment Act.[81] The corruption was an ongoing offence. The acts of corruption

[80] This is the date on which section 51 came into force.

[81] The indictment in respect of Count 1 reads as follows:

> "NOW THEREFORE the accused are guilty of the crime of corruption in contravention of section 1(1)(a) of the Corruption Act, No 94 of 1992

that followed the first cannot be said to have gone to the nature and extent of the offence; each act constituted an offence of corruption and together they resulted in the first charge of corruption. It is not in dispute that the offences that were committed after the commencement of the Amendment Act amount to the statutory threshold of R500 000. In this light it is not of material significance that there were acts of corruption committed prior to the Amendment Act that are included in the same charge. If anything, these other offences provide additional reasons for not invoking section 51(3)(a) of the Amendment Act.[82] There is therefore no logical reason why the minimum sentence legislation should not apply to the first applicant. We accordingly find that the applicants' contentions on this ground also bear no prospects of success.

[82] As far as the fines imposed on the rest of the applicants are concerned, there is nothing to warrant any interference with the sentences imposed. There is therefore no prospect of success on appeal. Accordingly, it is not in the interests of justice for the appeal on sentence to be heard by this Court. The application for leave to appeal against the sentences must be dismissed.

> IN THAT during the period 1 October 1995 to 30 September 2002 and at or near Durban in the district of Durban, the accused unlawfully and corruptly gave the abovementioned schedule benefits, which were not legally due, to Zuma, upon whom the powers had been conferred and/or who had the duties as set out in the preamble, with the intention to influence Zuma to commit and/or omit any act in relation to his powers and/or duties to further the interest of the accused and/or the entities associated with the accused as set out in the preamble and/or with the intention to reward Zuma because he so acted in excess of such powers or any neglect of such duties, as set out in the preamble".

[82] Section 51(3)(a) provides:

> "If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence."

The POCA proceedings

[83] The application for leave to appeal against the confiscation orders raises a constitutional matter in that section 25 of the Constitution provides that no one may be arbitrarily deprived of his or her property. The issues raised in the application involve the interpretation of legislation in conformity with the Constitution and this is always a constitutional issue.[83] This aspect of the appeal was not in dispute, and was acknowledged by the State as raising a constitutional issue. The only issue would therefore be the question whether it is in the interests of justice for this part of the application to be granted.

[84] As indicated above,[84] the applicants raise three issues in relation to the POCA proceedings. First, they seek to introduce new facts that had not been raised before; second, they raise the question whether Mr Zuma's intervention was the cause of the acquisition of certain benefits or assets and third, they raise a challenge against the decisions of the Supreme Court of Appeal and the High Court based on considerations of proportionality between the offence and the value of the property that was confiscated.

[83] Section 39(2) of the Constitution provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[84] Above para 11.

[85] We have considered the submissions before us and find that they cannot be said to bear no reasonable prospects of success. We therefore deem it to be in the interests of justice for the application for leave to appeal against the confiscation orders made by the Supreme Court of Appeal to be granted. It is inappropriate at this stage to expand further on the Court's approach to these questions. The factual background to the confiscation orders and the reasons for our decision will be furnished in our judgment following the hearing of the appeal.

Conclusion

[86] To sum up, we find that the application for leave to appeal against the applicants' criminal convictions and the sentences imposed must fail. The application for leave to appeal against the confiscation orders must succeed.

Order

[87] The following order is made:

(a) The application for leave to appeal against the criminal convictions and sentences is dismissed.

(b) The application for leave to appeal against the order in terms of the Prevention of Organised Crime Act 121 of 1998 is upheld and leave to appeal is granted.

(c) Further directions will be issued for the hearing of the appeal.

Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, Ngcobo J, Nkabinde J, O'Regan J, Sachs J, Skweyiya J and Van der Westhuizen J.

In the Criminal Proceedings

For the Applicants:	Advocate M Brassey SC and Advocate H Gani instructed by Hassan Parsee & Poovalingham Attorneys.
For the Respondent:	Advocate W Trengove SC, Advocate W Downer SC, Advocate A Cockrell, Advocate A Breitenbach, Advocate A Steynberg and Advocate G Baloyi instructed by the State Attorney, Johannesburg.

In the POCA Proceedings

For the Applicants:	Advocate N Singh SC and Advocate H Gani instructed by Hassan Parsee & Poovalingham Attorneys.
For the Respondent:	Advocate W Trengove SC and Advocate A Cockrell instructed by the State Attorney, Johannesburg.