CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 86/06
[2008] ZACC 7

| | |
|---|---|
| SCHABIR SHAIK | First Appellant |
| NKOBI HOLDINGS (PTY) LTD | Second Appellant |
| NKOBI INVESTMENTS (PTY) LTD | Third Appellant |
| versus | |
| THE STATE | Respondent |

Heard on : 26 February 2008

Decided on : 29 May 2008

---

JUDGMENT

---

O'REGAN ADCJ:

[1] On 2 June 2005, the three appellants[1] were convicted of corruption as defined by sections 1(1)(a)(i) and (ii) of the Corruption Act 94 of 1992.[2] Following from

[1] There were eleven accused persons in the trial: Mr Shaik (the first appellant in this matter) and ten companies. Only two of those companies, Nkobi Holdings (Pty) Ltd (second appellant) and Nkobi Investments (Pty) Ltd (third appellant) are parties to this appeal. Mr Shaik was found guilty on another charge of corruption and also on a charge of fraud, and the two corporate appellants were also found guilty on other charges, but these other charges are not relevant to this appeal. See *S v Shaik and Others* 2007 (1) SACR 142 (D); [2005] 3 All SA 211 (D) (High Court criminal judgment). See also *S v Shaik and Others* [2007] ZACC 19; 2008 (2) SA 208 (CC); 2007 (12) BCLR 1360 (CC) (Constitutional Court criminal appeal judgment) dismissing Mr Shaik's and the other corporate applicants' applications for leave to appeal against their convictions and sentence.

[2] Section 1(1)(a) of the Corruption Act 94 of 1992 has since been repealed and replaced by the Prevention and Combating of Corrupt Activities Act 12 of 2004 (see section 36(1) of that Act, read with the Schedule to the Act). Section 1(1)(a) provided as follows:

those convictions the state obtained an order from the Durban High Court on 31 January 2006 requiring the appellants to pay to the state the value of three benefits which the High Court held to constitute proceeds of crime, as contemplated by the Prevention of Organised Crime Act 121 of 1998 (the Act or POCA). The agreed value of these benefits at the time was over R34 million. It is this order which forms the subject matter of the present appeal.

*Brief history of the litigation*

[2] The appellants' corruption convictions were based on the High Court's finding that from October 1995 to September 2002 they corruptly made a series of payments to Mr Jacob Zuma. Mr Zuma was, from October 1995 till mid-1999, the Member of the Executive Council for Economic Affairs and Tourism in the province of KwaZulu-Natal. Then, from mid-1999 till June 2005, he was the Deputy President of the Republic of South Africa and Leader of Government Business in the national Parliament. He was also the National Chairperson of the African National Congress from 1994 until 1997; and its Deputy President thereafter. The purpose of the

---

"1(1) Any person—

(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—

(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

(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 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;

. . . .

shall be guilty of an offence."

payments made by the appellants was to influence Mr Zuma to use his name and political influence for the benefit of Mr Shaik and his business enterprises. The payments amounted to over R1 million.

[3] After the appellants' convictions in June 2005, the state initiated proceedings for a restraint order against them and two other companies, Kobifin (Pty) Ltd and Kobitech (Pty) Ltd,[3] in terms of section 26 of the Act.[4] By agreement between the parties, an order was made on 3 June 2005 restraining the appellants from dealing with certain property which was placed under the control of a curator bonis. The purpose of the restraint order was to preserve the assets pending an application to be brought by the prosecution for the confiscation of proceeds of crime in terms of section 18 of the Act. In brief, that section provides that after convicting a person of an offence, a court may, on the application of the public prosecutor, enquire into whether a benefit has been derived from that offence or from related criminal activity;

[3] No confiscation order was made against these two companies. They are therefore not parties to the present appeal.

[4] Section 26 states:

> "(1) The National Director may by way of an ex parte application apply to a competent High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates.
>
> (2) A restraint order may be made—
>
> (a) in respect of such realisable property as may be specified in the restraint order and which is held by the person against whom the restraint order is being made;
>
> (b) in respect of all realisable property held by such person, whether it is specified in the restraint order or not;
>
> (c) in respect of all property which, if it is transferred to such person after the making of the restraint order, would be realisable property.
>
> . . . ."

and if the court finds that a benefit has arisen, may make an order for the payment to the state of any amount it considers appropriate.[5]

[5] Section 18 states:

> "(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—
>
> (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,
>
> 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.
>
> (2) The amount which a court may order the defendant to pay to the State under subsection (1)—
>
> (a) shall not exceed the value of the defendant's proceeds of the offences or related criminal activities referred to in that subsection, as determined by the court in accordance with the provisions of this Chapter; or
>
> (b) if the court is satisfied that the amount which might be realised as contemplated in section 20(1) is less than the value referred to in paragraph (a), shall not exceed an amount which in the opinion of the court might be so realised.
>
> (3) A court convicting a defendant may, when passing sentence, indicate that it will hold an enquiry contemplated in subsection (1) at a later stage if—
>
> (a) it is satisfied that such enquiry will unreasonably delay the proceedings in sentencing the defendant; or
>
> (b) the public prosecutor applies to the court to first sentence the defendant and the court is satisfied that it is reasonable and justifiable to do so in the circumstances.
>
> (4) If the judicial officer who convicted the defendant is absent or for any other reason not available, any judicial officer of the same court may consider an application referred to in subsection (1) and hold an enquiry referred to in that subsection and he or she may in such proceedings take such steps as the judicial officer who is absent or not available could lawfully have taken.
>
> (5) No application referred to in subsection (1) shall be made without the written authority of the National Director.
>
> (6) A court before which proceedings under this section are pending, may—
>
> (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;
>
> (b) subject to subsection (1)(b) or (3)(b) of section 21, adjourn such proceedings to any day on such conditions not inconsistent with a provision of the Criminal Procedure Act, 1977 (Act 51 of 1977), as the court may deem fit."

[4] The National Director of Public Prosecutions (NDPP) then applied for a confiscation order in terms of section 18, and the High Court initiated an enquiry into the question whether the appellants had received a benefit from the offence of which they had been convicted, as contemplated by that section. Written statements, answers and replies were filed by the parties in terms of section 21 of the Act. These statements formed part of the record before this Court.

[5] At the conclusion of the section 18 enquiry, the High Court granted a confiscation order in respect of three benefits which the appellants had received in connection with the crimes of which they had been convicted. It should be noted in passing that the NDPP had applied for the confiscation of four benefits, but the High Court refused to grant the confiscation of the fourth benefit, and nothing further will be said about that benefit in this judgment.

[6] The three benefits in respect of which a confiscation order was made were the following. The first benefit was the value of a 25% shareholding owned by Nkobi Investments (Pty) Ltd (the third appellant) in Thint (Pty) Ltd (formerly known as Thomson-CSF (Pty) Ltd[6]). Nkobi Holdings (Pty) Ltd (the second appellant) is the sole shareholder in the third appellant and consequently has the same 25% interest in Thint. Thint, in turn, holds 80% of the shares in African Defence Systems (Pty) Ltd (ADS), a company forming part of the consortium that received government contracts

[6] Throughout this judgment this company shall ordinarily be referred to as Thint to avoid confusion with the other Thomson-CSF companies under discussion. For a fuller description see below at paras 14-5.

to provide the combat munitions suites for the South African Navy's new corvettes, which were purchased in what can loosely be referred to as "the arms deal".

[7] Nkobi Investments therefore holds an effective 20% share in ADS, as does Nkobi Holdings as the holding company of Nkobi Investments. The agreed value of this benefit to both Nkobi Investments and Nkobi Holdings, as at the time of the restraint order, was R21 018 000. Mr Shaik holds 92% of the shares in Nkobi Holdings and his interest in Thint through that shareholding was thus valued at R19 336 560.

[8] Nkobi Investments raised the R7 464 000 purchase price for its shares in Thint by borrowing the money from Thomson-CSF International Africa Ltd (Mauritius). The loan was secured by a pledge of all Nkobi Investments' shares in Thint to the Mauritian company as well as a pledge of all dividends to be declared by Thint and accruing to Nkobi Investments. An escrow agreement was entered into in terms of which the shares and dividends were to be retained by an escrow agent until Nkobi Investments had repaid the capital and interest due to the Mauritian company.

[9] The second benefit was the accumulated dividends received by Nkobi Investments from its shareholding in Thint and received in turn by Thint from ADS between 18 June 2001 and 31 January 2006 (when the High Court issued the confiscation order). The total amount of the dividends so declared was agreed by the parties to be R12 797 331 (made up of at least six separate dividends declared

between 2001 and 2006). This sum is the full value of the second benefit as accrued to Nkobi Investments and Nkobi Holdings, with Mr Shaik's share being 92% of that total and amounting to R11 773 544. The parties agree that the full amount of the dividends declared was used by Nkobi Investments to repay the Mauritian company from which it had borrowed the money to pay for the Thint shares in the first place. It is also common cause that the loan has now been fully repaid.

[10] The third benefit was the value of Nkobi Investments' sale of 10% of its shareholding in Thint Holding. This shareholding was valued at R499 568. Although the High Court ordered the confiscation of the third benefit as well, that order was overturned on appeal by the Supreme Court of Appeal and there has been no cross-appeal against that decision. Accordingly, the third benefit has no further relevance to this judgment.

[11] The High Court made joint and several orders for payment of the value of the three benefits against each of the appellants, the one paying, the others to be absolved. In this regard, of course, it should be noted that the joint and several liability of Mr Shaik in each case was limited to 92% of the total liability, as follows from the facts set out above. The NDPP had originally sought individual confiscation orders against each of the appellants separately in the full amount of the benefit, but they abandoned those claims and sought an order on the basis of joint and several liability.

[12] The appellants were granted leave to appeal to the Supreme Court of Appeal against the grant of the confiscation order. They simultaneously applied for leave to appeal against their convictions and sentences. The Supreme Court of Appeal, as stated above, upheld the appeal relating to the confiscation order in respect of the third benefit, but otherwise dismissed the appeals relating to the confiscation order.[7] It also dismissed the appeals against convictions and sentences (in some cases dismissing the further applications for leave to appeal in respect of those issues).[8]

[13] The appellants then approached this Court for leave to appeal both against their convictions and sentences and against the confiscation order made by the Durban High Court. However, on 2 October 2007, this Court dismissed the application for leave to appeal against the convictions and sentences on the grounds that it did not bear prospects of success.[9] Leave to appeal against the confiscation order was granted,[10] the Court having found that the application for leave to appeal did raise constitutional issues and that it was in the interests of justice that leave be granted.

*The facts relating to the acquisition of the two benefits*

[14] As set out above, the two benefits at issue in this case relate to Nkobi Investments' shareholding in Thint, and through that shareholding, its interest in ADS. From the early 1990s, the arms company Thomson-CSF (France), sought to invest in

[7] See *Shaik and Others v S* [2006] ZASCA 106; [2007] 2 All SA 150 (SCA) (SCA POCA judgment).

[8] The judgment is reported as *S v Shaik and Others* [2006] ZASCA 105; 2007 (1) SA 240 (SCA); 2007 (1) SACR 247 (SCA) (SCA criminal appeal judgment).

[9] See the Constitutional Court criminal appeal judgment, above n 1.

[10] Id at paras 83-5 and 87(b).

South Africa. It appointed as its local representative, Mr Pierre Moynot. Early on, Mr Moynot met Mr Shaik, and on 6 August 1995, Mr Moynot (Vice President of Thomson-CSF in South Africa) wrote to Mr Shaik and to Nkobi Holdings proposing that Nkobi Holdings take a 30-35% share in a company which Thomson-CSF intended to establish in South Africa. The new company would enter into agreements with existing South African defence companies.[11] The letter stated that if Mr Shaik

[11] The text of the letter reads as follows:

> "Dear Sir,
>
> I would like to confirm hereby the content of our previous discussions related to a cooperation between Thomson-CSF and NKOBI Holdings primarily in the Republic of South-Africa and possibly abroad in any country where we could decide together to cooperate further.
>
> The following has been discussed and agreed in principle pending the final approval by Thomson-CSF general management:
>
> 1. Thomson CSF agrees to let NKOBI take a share in the company they are decided to set in South-Africa, which share may vary from 30 to 35% pending a final agreement with the other potential shareholders. Furthermore, Thomson-CSF would be ready to consider letting Malaysian investors take an equity into the share capital of the said company, thus reducing its share to under 50%.
>
> 2. The company's name would have to be decided in common and would reflect the link with the two main shareholders; i.e. Thomson CSF and NKOBI.
>
> 3. The two main shareholders would have a joint management control of the company as per a scheme to be agreed upon mutually.
>
> 4. With regard to the capitalization of the company, Thomson-CSF would be ready to find an agreement with NKOBI allowing for an initial capital brought in by Thomson-CSF alone with a clause providing the refund by NKOBI to Thomson-CSF of the value of NKOBI's share as per a scheme to be agreed upon mutually. In case Malaysian investors enter the share capital of the company a new funding scheme would have to be set up and agreed in common.
>
> 5. The company would then enter into agreements with existing South-African companies such as, but not limited to, Altech/UEC, Plessey, Reutech, ATE, etc…in as for as needed for the incoming programmes as already initiated by Thomson-CSF in the past two years.
>
> 6. This provisional agreement would stay confidential until when a final agreement is formally signed between both parties. No mention of it should be made by either party without the previous consent of the other party.
>
> Should you agree that the above is a true reflection of our discussions, I would suggest that we go together to Thomson-CSF Paris head office to finalize our agreement and from there to Malaysia. As per our today's telephone conversation, we could fly to Paris on Tuesday night.
>
> Awaiting for your possible comments, I remain
> yours sincerely

was in agreement with the proposal, he should travel to Paris to finalise an agreement with Thomson-CSF. This letter was followed by a further letter on 10 August 1995 which repeated the arrangements proposed in the letter of 6 August subject to the qualification that:

> "It is understood that . . . the transactions contemplated in this letter are entirely subject to the satisfactory negotiation, execution and delivery by both parties of all necessary detailed and definitive agreements providing for the legal and financial terms of such transactions, which we foresee to take place within 5 weeks."

[15] Then, during 1996, two Thomson-CSF subsidiaries were incorporated. Thomson-CSF Holding Southern Africa (Pty) Ltd was incorporated on 21 May 1996. To avoid confusion, this company shall be referred to as "Thint Holding", to which its name was subsequently changed. Nkobi Investments had a 10% shareholding in Thint Holding. Thomson-CSF (Pty) Ltd was incorporated on 16 July 1996 in which Thint Holding had a 70% shareholding and Nkobi Investments a 30% direct shareholding. Again to avoid confusion, Thomson-CSF (Pty) Ltd shall be referred to as "Thint", its current name. The two subsidiary companies were initially involved in a drivers' licence project which came to be known as Prodiba.

[16] At a shareholders' meeting on 25 August 1997, the possible acquisition of ADS by one of the Thint companies was discussed. At that stage, ADS fell within the Altech group of companies and was known as Altech Defence Systems. The reason for the proposed acquisition of ADS was that it was perceived to be well-placed to

---

Pierre Moynot
Southern-Africa Vice-President".

succeed in the tender process surrounding the arms deal.[12] The minutes of that meeting establish that the directors and shareholders agreed that, subject to the consent of Nkobi Investments and to reaching a satisfactory agreement with Altech, Thint would proceed with its investment in the business of ADS. It was also resolved that Nkobi Investments would participate in the investment and would employ its best endeavours to self-finance its participation in the project but that if there were a shortfall it would be financed by Thomson-CSF (France) subject to a side agreement between Nkobi Investments and Thomson-CSF (France).[13]

[17] That meeting was followed by a letter from Mr Moynot to Mr Shaik dated 22 September 1997.[14] The letter made it plain that an agreement in principle had been

---

[12] See above at para 6.

[13] Resolution 7.1 from the minutes of the meeting reads as follows:

> "7.1. ACQUISITION OF AN INTEREST IN ALTECH DEFENCE SYSTEMS RESOLVED THAT, subject to the
>
> 7.1.1. Consent of Nkobi Investments (Proprietary) Limited;
> 7.1.2. Reaching of a satisfactory agreement with the Altech Group; and
> 7.1.3. Registration of a new company with the said Altech Group as a vehicle therefor;
>
> Thomson-CSF (Proprietary) Limited proceeds with its investment in the business known as Altech Defence Systems.
>
> RESOLVED FURTHER THAT Nkobi Investments (Proprietary) Limited will employ its best endeavors to obtain self-financing and/or self-financing as far as possible, of its share of the Altech investment and, in the event of any shortfall therein, such shortfall shall be financed by the Thomson-CSF companies subject to the entry into a side agreement between them and Nkobi Investments (Proprietary) Limited."

[14] The text of the letter reads as follows:

> "Dear Schabir,
>
> I am glad to announce that a principle agreement has been reached with Altech with regard to the sale of 50% of their ADS business to Thomson-CSF (Pty) Ltd. You will find attached copy of the initialled JV agreement that has been negotiated and agreed upon. We shall receive, in the coming weeks, separate documents, i.e. share sale agreement, shareholders' agreement and sale of business agreement, that will be drafted by lawyers and based upon the attached JV agreement. You will also find attached a proposed timetable of the events to take place before the closing date which is scheduled for 19/12.

reached between Altech (the shareholders of ADS) and Thint for the acquisition of 50% of the shares in ADS. It further stated that Nkobi Holdings would have to provide R7 863 000 by 15 December 1997 to make the purchase possible. The balance of the R21 250 000 purchase price would be paid by the other shareholders of Thint.

[18] However, despite these events, in March 1998 Thomson-CSF (France) concluded a written sale agreement (amended in April 1998) with Altech to the effect that Thomson-CSF (France) acquired 50% + 1 of the shares in ADS. Nkobi Holdings was therefore left out of the shareholding arrangement. After Mr Shaik became aware of the fact that Thomson-CSF (France) had purchased a 50% stake in ADS directly, he wrote to Mr Perrier, the chief executive officer of Thomson-CSF (France) stating that "the Honourable Minister Jacob Zuma . . . [was] extremely concerned with the conduct of the Thomsons-CSF group operating in South Africa" and requesting a meeting to be held between Mr Perrier and Mr Zuma in Durban.[15] On 13 May 1998

---

> This means that latest by the 15/12/97, we must have R21.25 million available on Thomson-CSF (Pty) Ltd.'s bank account. Can you confirm as soon as possible whether your share, i.e. R1.488 million through Thomson-CSF Holding (Southern Africa) (Pty) Ltd. and R6.375 million direct, will be available or please contact me on this topic.
>
> In the meantime, I will need your possible comments on the JV agreement, by latest on 3/10, so that we are able to keep with this proposed timetable, and by 20/10 I will need a power by the shareholders of Thomson-CSF (Pty) Ltd., i.e. Nkobi and Thomson-CSF Holding (Southern Africa) (Pty) Ltd., to sign the final agreements. I must also, for formal record reasons, recall you that the content of this JV agreement is covered by the NDA signed with Altech which binds Nkobi as well.
>
> Yours very sincerely,
>
> Pierre Moynot".

[15] The letter, dated 17 March 1998, reads as follows:

> "In my recent discussion with the Honourable Minister Jacob Zuma Vice President of the African National Congress (ANC), he is extremely concerned with the conduct of the Thomsons-CSF group operating in South Africa, and in particular the allegations made to me

Mr Shaik wrote again to Mr Perrier, and at a joint meeting of shareholders of Thint and Thint Holding on 9 June 1998, he raised the issue of the failure to involve the Nkobi group in the acquisition of ADS and threatened legal action.

[19] On 2 July 1998 a meeting was held in London attended by Mr Zuma, Mr Shaik, Mr Perrier and a Mr de Bollardiere, also of Thomson-CSF (France). During the criminal trial, Mr Moynot testified that following this meeting, Thomson-CSF (France) decided to rearrange its corporate affairs so as to locate the holding of the ADS shares in one of its South African subsidiaries and to give the Nkobi group a share in the ADS shareholding. Importantly, this was confirmed in the appellants' section 21 affidavit, in which the appellants' attorney, Mr Parsee, stated that:

> "follow[ing] the meeting of 2 July 1998 during which Mr Zuma met with Mr Perrier and at which meeting Mr Zuma explained that the rumour Perrier had heard . . . was false . . . [t]he matter regarding the shareholding in ADS . . . was, as a result, resolved."

---

by yourself and other representatives of your group attributed to our Honourable President Thabo Mbeki, with regards to our South African business affairs.

Accordingly, the Vice President, the Honourable Minister Jacob Zuma requests an urgent meeting with yourself in Durban, South Africa to address these concerns.

Kindly communicate with the writer, to arrange a mutually convenient date for this meeting.

Your urgent response would be appreciated.

Yours Sincerely

Schabir Shaik
Executive Chairman".

It is thus common cause that the consequence of the meeting held in London between Mr Zuma, Mr Shaik and Mr Perrier was that Thomson-CSF (France) undertook to give the Nkobi group a share in the acquisition of ADS.

[20] Thereafter, in February 1999, Thomson-CSF (France) acquired the remaining 50% of the shares in ADS, so that ADS became its wholly-owned subsidiary. The value of ADS at the time was calculated as R18 672 000. The rearrangement of the corporate structure was completed by September 1999. Nkobi Investments' 10% shareholding in Thint Holding was sold to Thomson-CSF (France). Thomson-CSF (France) sold 80% of the ADS shares to Thint. The restructuring left Nkobi Investments holding 25% of the shares in Thint and Thint Holding with the remaining 75%. The result was that Thint came to hold 80% of the shares in ADS, giving Nkobi Investments an effective 20% of the shares (as described in paragraphs 6 and 7 above). As set out in paragraph 8 above, Nkobi Investments' shareholding was financed by a loan from Thomson-CSF International Africa Ltd (Mauritius) at an interest rate of prime plus 0,5%.

[21] It follows that it is Nkobi Investments' shareholding in Thint, as well as the dividends declared by Thint that arose from its acquisition of ADS, which form the subject matter of the confiscation order in this case.

*Criminal confiscation orders: the scheme of the Act*

[22] It will be useful at this stage briefly to describe the scheme of criminal confiscation contemplated by the Act. Chapter 5 of the Act confers a power on a criminal court to make a confiscation order against a person who has been convicted of a crime where the court has found that the person has benefited from the crime.

[23] Once a person has been convicted, the prosecutor may apply for a confiscation order.[16] In order for a confiscation order to be made, the court must find that the person convicted of the offence has derived a benefit from the offence of which he or she has been convicted or of any "criminal activity which the court finds to be sufficiently related" to that offence.[17] The court may then make an order that the person pay to the state "any amount it considers appropriate".[18]

[24] A confiscation order is a civil judgment for payment to the state of an amount of money determined by the court and is made by the court in addition to a criminal sentence. Before going further, it is important to emphasise that the order that a court may make in terms of chapter 5 is not for the confiscation of a specific object, but an order for the payment of an amount of money to the state, even though it is ordinarily referred to as a "confiscation order" and shall be throughout this judgment. The mechanism of a civil judgment sounding in money may well have been selected by the

[16] This procedure may be contrasted with the procedure under chapter 6 of the Act, which provides for forfeiture of proceeds of crime or instrumentalities of an offence by way of civil proceedings that are not dependent on the existence of criminal proceedings. The chapter 6 procedure was considered by this Court in *Prophet v NDPP* [2006] ZACC 17; 2007 (6) SA 169 (CC); 2007 (2) BCLR 140 (CC) (*Prophet*) and *Mohunram and Another v NDPP and Another (Law Review Project as* amicus curiae*)* [2007] ZACC 4; 2007 (4) SA 222 (CC); 2007 (6) BCLR 575 (CC) (*Mohunram*).

[17] See section 18(1)(c) of the Act above n 5.

[18] Id. The court also has the power, in terms of the same section, to "make any further orders as it may deem fit to ensure the effectiveness and fairness of the order."

legislature to avoid the difficulty of tracing particular assets which may have been the proceeds of crime and so to facilitate the recovery of the value of the proceeds.

[25] Section 12(3) of the Act provides that for the purposes of chapter 5, "a person has benefited from unlawful activities if he or she has at any time, whether before or after the commencement of this Act, received or retained any proceeds of unlawful activities." "Proceeds of unlawful activities" are in turn broadly defined in section 1 of the Act as:

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

The section is thus widely cast, something which becomes even more evident when the definition of "property" contained in section 1 of the Act is considered. "Property" is defined as:

> ". . . money or other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof."

One of the reasons for the wide ambit of the definition of "proceeds of crime" is, as the Supreme Court of Appeal noted, that sophisticated criminals will seek to avoid proceeds being confiscated by creating complex systems of "camouflage".[19]

[19] SCA POCA judgment, above n 7 at para 24. See also the comments of Lord Steyn in *R v Rezvi* [2002] 1 All ER 801 (HL) at para 14 where he stated:

[26] Similarly, the definition makes clear that proceeds of crime will constitute proceeds even if "indirectly obtained". The Supreme Court of Appeal held that a person who has benefited through the enrichment of a company as a result of a crime in which that person has an interest will have indirectly benefited from that crime.[20] As counsel for the NDPP pointed out, when a shareholder commits a crime by which his or her company is enriched, the shareholder may well benefit from the crime in two ways. The value of his or her shares will increase, as will the dividends generated by those shares, because the company is now more profitable. Finally, it should be noted that "proceeds", as defined, include anything "derived, received or retained" in connection with or as a result of the offences.

[27] Section 18(2) sets two bases for calculating the upper limit of the amount that may be confiscated.[21] For the purposes of this case, only the first is relevant: the amount ordered to be confiscated may not exceed the value of the proceeds of the offences or related criminal activities as calculated in accordance with chapter 5 of the Act.[22] That calculation will, of course, be based on the definition of the proceeds of unlawful activities as set out in the Act.

---

> "It is a notorious fact that professional and habitual criminals frequently take steps to conceal their profits from crime. Effective but fair powers of confiscating the proceeds of crime are therefore essential."

[20] SCA POCA judgment, id at para 24.

[21] The text of section 18 is set out above at n 5.

[22] The second limit stipulates that if it is shown that the proceeds of crime as calculated in terms of section 18(2)(a) exceed the "realisable amount" determined by section 20(1) of the Act, only the realisable amount may be confiscated. It was not suggested that this provision had any application in this case.

[28] Section 19(1) of the Act is also relevant in calculating the value. It provides:

> "Subject to the provisions of subsection (2), the value of a defendant's proceeds of unlawful activities shall be the sum of the values of the property, services, advantages, benefits or rewards received, retained or derived by him or her at any time, whether before or after the commencement of this Act, in connection with the unlawful activity carried on by him or her or any other person."

[29] Later in this judgment, I shall return to the confiscation scheme in the Act in order to consider the arguments raised by the appellants as to its proper interpretation.

*The appellants' arguments*

[30] The appellants argue that the confiscation order should not have been made. Their arguments can be divided into two categories: the first are factual arguments relating to whether the Supreme Court of Appeal was correct when it found that the two benefits in issue constitute the proceeds of crime; the second are legal arguments relating to the proper interpretation of chapter 5 of the Act.

[31] The appellants proffered three factual arguments. First, they argued that the two benefits did not flow from Mr Shaik's criminal activity but resulted instead from a prior joint venture agreement entered into between Mr Shaik and/or the Nkobi Group and Thomson-CSF (France). Their second argument was that the state had not established that when Mr Zuma intervened on Mr Shaik's behalf in July 1998 to secure Nkobi Investments' involvement in the acquisition of ADS, he did so because of the bribes he had received from Mr Shaik. The third argument was that the state had not shown that Thomson-CSF (France) changed its course of action in relation to

Nkobi Investments' participation in the ADS shareholding because of Mr Zuma's intervention.

[32] The legal arguments raised by the appellants are the following. They argue, first, that the Act properly interpreted does not permit the confiscation of both the full value of Nkobi Investments' shareholding in Thint and the full value of the dividends declared by Thint, given that the appellants purchased the shares with a loan which was repaid with the proceeds of the dividends. Their argument is that the definition of "proceeds of crime" in the Act may not relate to what can loosely be referred to as the "gross proceeds" but only to "nett proceeds". Their second argument is that even if the Act does permit the confiscation of both the shareholding and the dividends, the High Court's order was disproportionate and should be set aside on appeal. I will address each of these factual and legal arguments in turn.

*Did the shareholding and dividends arise from the joint venture agreement between the appellants and Thomson-CSF (France)?*

[33] In the appellants' written submissions, their key factual argument was that Nkobi Investments' shareholding in ADS did not arise from Mr Zuma's interventions on behalf of Mr Shaik, but resulted instead from a prior joint venture agreement between Nkobi Investments and Thomson-CSF (France). As I have set out in paragraph 15 above, in 1996 Thomson-CSF (France) established two subsidiary companies in South Africa (Thint and Thint Holding), and originally Nkobi Investments had a shareholding in both these companies.

[34] As I have stated above, at a shareholders' meeting in August 1997, a resolution was adopted concerning the acquisition of ADS by Thint.[23] Also, on 22 September 1997, Mr Moynot wrote to Mr Shaik stating that an agreement in principle had been reached between Thint and Altech regarding Thint's acquisition of 50% of the shares in ADS and stating that Nkobi would need to present its share of the purchase price (R1 488 000 through Thint Holding and R6 375 000 through Thint) to participate in the acquisition.[24]

[35] However, it is common cause that subsequent to these events Thomson-CSF (France) received certain communications from sources close to the South African government suggesting that Mr Shaik was not a suitable partner for the acquisition of ADS. Thomson-CSF (France) acted on these communications by purchasing ADS directly and not in partnership with Mr Shaik. That purchase happened on 3 March 1998. At that time 50% + 1 share was purchased by Thomson-CSF (France) with the balance continuing to be held by Altech. In February 1999 the balance of the shares was sold by Altech to Thomson-CSF (France).

[36] After Mr Shaik became aware of the initial purchase of ADS shares by Thomson-CSF (France), he sent a fax to Mr Perrier stating that Mr Zuma was concerned at the conduct of Thomson-CSF (France) and requesting a meeting. He sent a further letter on 13 May 1998, and on 9 June 1998 he raised the matter at a joint

[23] See above para 16 and n 13.

[24] See above para 17 and n 14.

meeting of Thint Holding and Thint and threatened legal action against Mr Moynot and Thomson-CSF (France) on the basis of their failure to act in a bona fide manner and on the basis of the shareholder agreements.

[37] The meeting in London on 2 July 1998, however, resolved the problem as I have set out above. The meeting was attended by Mr Zuma, Mr Shaik, Mr Perrier and another. It is clear from the evidence of the appellants that, as a result of this meeting, Thomson-CSF (France) changed its mind and agreed to transfer its shareholding in ADS to one of its South African subsidiaries in which the Nkobi group would be given a shareholding.

[38] It is also important to note the following: Mr Moynot suggested in his evidence in the criminal trial that Mr Shaik may have had a claim against Thomson-CSF (France), although he did not make clear what he thought the legal basis for that claim was.[25] Yet Mr Moynot also made it quite clear that Thomson-CSF (France) would have resisted any legal action that Mr Shaik initiated. He made it clear that if Thomson-CSF (France) decided that Mr Shaik "was not the right guy or he was so badly seen by the decision-maker", they would not have entered into a joint venture agreement regarding the acquisition of ADS and "that's it". He added "we are big enough to be able to resist such a threat".

[25] In his evidence he stated that "normally his claim is correct or was correct".

[39] The Supreme Court of Appeal agreed with the High Court that the appellants had not established that they were possessed of contractual rights to have the ADS shares held by the Thint companies; or alternatively, if there was an agreement to that effect, that Thomson-CSF (France) was a party to that agreement. The appellants argued that the Supreme Court of Appeal had erred in suggesting that the appellants bore the burden of establishing that the acquisition of the shareholding arose from pre-existing contractual obligations and that it was instead for the state to establish that the acquisition of the shareholding constituted proceeds of criminal activity. As will become apparent from what follows, this case does not turn on the incidence of the onus and it is therefore not necessary for it to be considered further here.

[40] In relation to the question of whether a joint venture agreement was in existence, the question is whether the parties intended to be bound (ie acted *animo contrahendi*) before the agreements were actually signed[26] and whether there was sufficient substance in the agreement in principle to give rise to an enforceable obligation.[27] Whatever else, it is certain that no written contracts had been signed giving Nkobi Investments any rights. Moreover, the letter of 22 September 1997

[26] See, for example, *Pitout v North Cape Livestock Co-operative Ltd* 1977 (4) SA 842 (A) at 850C-D in which Corbett JA formulated the question as follows:

> "The question which arises accordingly is whether the undertaking, given as it was during the course of uncompleted negotiations, had, or has been shown to have had, contractual force. Was the undertaking an offer made, *animo contrahendi*, which upon acceptance would give rise to an enforceable contract, or was it merely a proposal made by the appellant while the parties were in the process of negotiating and were feeling their way towards a more precise and comprehensive agreement? This is essentially a question to be decided upon the facts of the particular case."

See also *CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A) at 92A-F; and *OK Bazaars v Bloch* 1929 WLD 37 at 44 (relating to a sale of shares).

[27] See *Titaco Projects (Pty) Ltd v AA Alloy Foundry (Pty) Ltd* 1996 (3) SA 320 (W) at 335-8.

made clear that contracts were yet to be drafted setting out the full details of the arrangement and the indications are strong that no binding agreement would come into effect until its final terms were embodied in written instruments signed by the contracting parties. In the absence of a clear agreement, the question of whether Nkobi Investments would have been able to establish a legally enforceable agreement must be open to some significant doubt.

[41] The Supreme Court of Appeal held (in addition to its conclusion that no joint venture agreement had been established by the appellants) that even if the appellants had a pre-existing contractual right to participate in the acquisition of ADS, Mr Zuma's intervention on 2 July 1998 had nevertheless had the direct effect of benefiting the appellants in that the appellants were put in possession of the ADS shareholding without having to litigate with Thomson-CSF (France) over it.[28] There can be no doubt from the evidence given by Mr Moynot that whether or not the appellants are correct in asserting that a legally binding agreement had been concluded by Thomson-CSF (France), the South African subsidiaries of Thomson-CSF, and the Nkobi group of companies, Thomson-CSF (France) would not have accepted that they were bound without being forced to do so. At the very least, therefore, the intervention of Mr Zuma resulted in the appellants not needing to engage in that legal battle. Indeed, in argument, Mr Brassey (for the appellants) correctly conceded that to the extent that the intervention removed the need for costly litigation, and facilitated

[28] SCA POCA judgment, above n 7 at para 27.

the acquisition of the shareholding, it constituted a benefit within the contemplation of the Act.

[42] For this reason it is not necessary to come to a firm view as to whether there was a binding joint venture agreement, for even if there was, it would have been costly and difficult to enforce (particularly in the light of Mr Moynot's evidence that Thomson-CSF (France) would have fought it, if it thought it appropriate to do so, and the fact that it would have to have been before an arbitrator in Geneva). Mr Shaik did not choose to litigate. Instead he called on Mr Zuma for assistance (see the letter of 17 March 1998)[29] and that assistance was furnished in July. The effect of that intervention is clear and not disputed on the record: Thomson-CSF (France) changed its mind and set in train a process whereby the Nkobi group gained a significant share in the ADS initiative. What is clear is that the appellants did not have to litigate because Mr Zuma's intervention made that unnecessary. Accordingly, in my view, the joint venture argument cannot assist Mr Shaik because even if it did exist – something I do not decide in this judgment – the subsequent conduct of Thomson-CSF (France) meant that Mr Shaik nevertheless required Mr Zuma's assistance to ensure that his group of companies obtained a share in the ADS acquisition. The first factual argument made by the appellants is therefore of no assistance to them. I turn now to the other two factual issues raised by the appellants.

[29] Above n 15.

*Was it necessary for the state to establish that Mr Zuma intervened on Mr Shaik's behalf because of the bribe and that Thomson-CSF (France) changed its mind after that meeting because of Mr Zuma's intervention? If so, have these facts been shown?*

[43] For the first time, in oral argument in this Court, it was submitted by Mr Brassey that to succeed under section 18 of the Act, it is necessary for the state to show not only that: (a) Mr Shaik, with the intention to corrupt, bribed Mr Zuma in order to perform such acts as the act of intervention that took place on 2 July 1998 for the purpose of promoting Mr Shaik's business interests (which he admitted had been established on the record); but also (b) that Mr Zuma intervened on behalf of Mr Shaik in consequence of the bribe and not because of friendship or some other reason (which Mr Brassey submitted had not been shown); and (c) that Thomson-CSF (France) must be proved to have recanted in respect of the ADS deal in consequence of Mr Zuma's intervention (which Mr Brassey also submitted had not been shown). Mr Brassey rightly accepted that (a) has been established on the record, and it is thus the latter two submissions, (b) and (c), which now need to be considered.

[44] These submissions were new, and Mr Trengove, for the state, was entitled, as he did, to object to their being made. Mr Trengove's response was fourfold: (i) these were new matters of which the state had not had notice and for which the truncated record had not been prepared; (ii) they raised questions of fact not for the Constitutional Court to decide on the principles set out in *S v Boesak*;[30] (iii) the arguments were conceptually flawed; and (iv) in any event, the necessary facts had

[30] [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 15.

been demonstrated. In my view, although there can be no doubt that these are new arguments, they can and should be dealt with on their merits as this can be done without unfairness to the respondent and on the record before us. One must start by recognising that the Act, properly construed, requires that the state establish on a balance of probabilities that the benefits it seeks to confiscate (the shareholding and dividends) flowed from the bribes paid by Mr Shaik to Mr Zuma. Counsel for the appellants very properly conceded in argument that, given the criminal conviction of Mr Shaik, it must be accepted for the purpose of these proceedings that Mr Shaik did pay bribes to Mr Zuma.

[45] I shall turn in a moment to deal with submission (b) made by Mr Brassey, but I start with submission (c). The submission was that it had not been established on the record that the change of heart by Thomson-CSF (France), which resulted in the restructuring of its companies to enable Nkobi Investments to obtain an interest in ADS, resulted from the intervention of Mr Zuma. This factual proposition is not correct. The High Court found that the decision to include Nkobi Investments in the ADS deal flowed directly from Mr Zuma's intervention. Mr Parsee, the appellants' attorney, admits as much on the record before this Court.

[46] The concern of Thomson-CSF (France), as candidly admitted by Mr Moynot in his evidence,[31] was to go into partnership with a company that would have as a backer

[31] As the High Court noted:

> "Mr Moynot, with charming Gallic candour, said that it was standard practice in the armaments industry to cultivate the services of such people, although the rumours or information they provided always needed careful assessment for their reliability. Moreover,

a person of significant influence in government. It had withdrawn from the proposed joint venture with Nkobi Investments when doubts had been raised as to whether it was such a company. At the meeting of 2 July 1998, Mr Zuma put that doubt to rest. And what is more, it is clear from Mr Shaik's letters (and from the minutes of the shareholders and directors meeting of Thint Holding and Thint in June 1998) that he wanted the meeting between Thomson-CSF (France) and Mr Zuma because he knew that the French company needed to understand from Mr Zuma that he supported Mr Shaik and would afford the influence that it sought.

[47] With regard to point (b) of Mr Brassey's submissions, it is neither necessary nor appropriate in these proceedings to traverse Mr Zuma's subjective state of mind. Mr Brassey sought to suggest that, regardless of Mr Shaik's purpose in seeking to have Mr Zuma attend the meeting, Mr Zuma may have attended the meeting in London for reasons other than those related to the payments he had received from Mr Shaik. He cited as possibilities friendship or collegiality or the fact that Mr Shaik was Mr Zuma's financial adviser. The subjective state of mind of Mr Zuma is not a matter with which this Court should concern itself. It is, after all, not Mr Zuma against whom the confiscation order was made by the High Court. The only question in this Court is whether on a balance of probabilities the state has established that the benefits flowed to the appellants as a result of the appellants' criminal conduct. In this regard, the following conclusion of the Supreme Court of Appeal is pertinent:

---

> he said, notwithstanding the existence of apparently impartial institutions like tender boards, the ultimate choice in competitions of this sort was always made at a political level."

High Court criminal judgment, above n 1 at 167c-d; 230f-g.

> "On a conspectus of all the evidence there is, in our view, only one reasonable inference to be drawn. It is that, in making the payments in issue (whether as inducement or reward), Shaik intended to influence Zuma, in furtherance of the business interests of Shaik and his companies, to act in conflict with the duties imposed upon Zuma by the terms of ss 96(2) and 136(2) of the Constitution."[32]

This finding of the Supreme Court of Appeal is conclusive of the issue before us. The payments were made by Mr Shaik in order to influence Mr Zuma to promote Mr Shaik's business interests and, in attending the meeting in London in July 1998, Mr Zuma did as a matter of fact promote Mr Shaik's interests.

[48] I conclude therefore that the state has established as a matter of fact that both benefits in issue in this case flowed from Mr Zuma's support for Mr Shaik and the Nkobi group of companies as evidenced at least by his intervention on 2 July 1998 in support of the appellants' claim to participate in the acquisition of ADS.

[49] I must now consider the appellants' arguments based on the interpretation of the Act. Before turning to do so, I think it might be helpful to consider briefly the purposes of chapter 5 of the Act.

*The purposes of chapter 5 of the Act*

[32] SCA criminal appeal judgment, above n 8 at para 131.

[50] This is the first time that the purposes of chapter 5 of the Act have been considered by this Court.[33] As described above, chapter 5 deals with the making of confiscation orders by a criminal court at the end of a criminal trial. Its structure and process is therefore different to that contemplated by chapter 6. The preamble to the Act is lengthy but it is useful to set it out, as it captures the overall purposes of the Act very clearly:

> "WHEREAS the Bill of Rights in the Constitution of the Republic of South Africa, 1996 . . . enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom;
>
> AND WHEREAS the Constitution places a duty on the State to respect, protect, promote and fulfil the rights in the Bill of Rights;
>
> AND WHEREAS there is a rapid growth of organised crime, money laundering and criminal gang activities nationally and internationally and since organised crime has internationally been identified as an international security threat;
>
> AND WHEREAS organised crime, money laundering and criminal gang activities infringe on the rights of the people as enshrined in the Bill of Rights;
>
> AND WHEREAS it is the right of every person to be protected from fear, intimidation and physical harm caused by the criminal activities of violent gangs and individuals;
>
> AND WHEREAS organised crime, money laundering and criminal gang activities, both individually and collectively, present a danger to public order and safety and economic stability, and have the potential to inflict social damage;
>
> AND WHEREAS the South African common law and statutory law fail to deal effectively with organised crime, money laundering and criminal gang activities, and

[33] We have on previous occasions been called upon to consider chapter 6 of the Act. See *Prophet* and *Mohunram*, above n 16.

also fail to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities;

AND BEARING IN MIND that it is usually very difficult to prove the direct involvement of organised crime leaders in particular cases, because they do not perform the actual criminal activities themselves, it is necessary to criminalise the management of, and related conduct in connection with enterprises which are involved in a pattern of racketeering activity;

AND WHEREAS no person convicted of an offence should benefit from the fruits of that or any related offence, whether such offence took place before or after the commencement of this Act, legislation is necessary to provide for a civil remedy for the restraint and seizure, and confiscation of property which forms the benefits derived from such offence;

AND WHEREAS no person should benefit from the fruits of unlawful activities, nor is any person entitled to use property for the commission of an offence, whether such activities or offence took place before or after the commencement of this Act, legislation is necessary to provide for a civil remedy for the preservation and seizure, and forfeiture of property which is derived from unlawful activities or is concerned in the commission or suspected commission of an offence;

AND WHEREAS effective legislative measures are necessary to prevent and combat the financing of terrorist and related activities and to effect the preservation, seizure and forfeiture of property owned or controlled by, or on behalf of, an entity involved in terrorist and related activities;

AND WHEREAS there is a need to devote such forfeited assets and proceeds to the combating of organised crime, money laundering and the financing of terrorist and related activities;

AND WHEREAS the pervasive presence of criminal gangs in many communities is harmful to the well being of those communities, it is necessary to criminalise participation in or promotion of criminal gang activities".

[51] The ninth clause affirms that because:

> "no person convicted of an offence should benefit from the fruits of that or any related offence . . . legislation is necessary to provide for a civil remedy for the restraint and seizure, and confiscation of property which forms the benefits derived from such offence".

In my view, it is this clause in the preamble which points most directly to the key purpose of chapter 5: to ensure that no person can benefit from his or her wrongdoing. That this is the primary purpose of chapter 5 has also been recognised by the Supreme Court of Appeal, which held in *NDPP v Rebuzzi* that "[t]he primary object of a confiscation order is not to enrich the State but rather to deprive the convicted person of ill-gotten gains."[34]

[52] From this primary purpose, two secondary purposes flow. The first is general deterrence: to ensure that people are deterred in general from joining the ranks of criminals by the realisation that they will be prevented from enjoying the proceeds of the crimes they may commit. And the second is prevention: the scheme seeks to remove from the hands of criminals the financial wherewithal to commit further crimes. These purposes are entirely legitimate in our constitutional order.

[53] Counsel for the NDPP argued that punishment is one of the purposes of chapter 5. In so arguing, he relied on jurisprudence in the United Kingdom based on similar legislation. In the United Kingdom, there have been a range of statutes that have afforded the power to a court convicting a person of a criminal offence to make an

[34] [2001] ZASCA 127; 2002 (2) SA 1 (SCA) at para 19.

order for the confiscation of proceeds of that offence.[35] One of the questions that has arisen in relation to the procedure has been whether it falls within the ambit of article 6(2) of the European Convention on Human Rights which provides that "[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

[54] In an early case dealing with the UK Drug Trafficking Act, the European Court of Human Rights held, by a majority, that article 6(2) was not applicable to the confiscation proceedings.[36] Although there was a difference between the majority and the minority on this question, the Court was unanimous in holding that the procedure did not infringe the rights entrenched in the Convention.

[55] In *R v Rezvi*, Lord Steyn described the purposes of the United Kingdom Criminal Justice Act, 1988 as follows:

> "The provisions of the 1988 Act are aimed at depriving such offenders of the proceeds of their criminal conduct. Its purposes are to punish convicted offenders, to deter the commission of further offences and to reduce the profits available to fund further criminal enterprises. These objectives reflect not only national but also international policy."[37]

[35] See Part VI of the Criminal Justice Act, 1988; sections 42-43 of the Drug Trafficking Act, 1994; part III of the Terrorism Act, 2000. See also Part 2 of the Proceeds of Crime Act, 2002 which replaced the earlier provisions.

[36] *Phillips v The United Kingdom* case no. 41087/98, European Court of Human Rights, final judgment (12 December 2001), http://cmiskp.echr.coe.int////tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=2139&sessionId=7936765&skin=hudoc-en&attachment=true, last accessed 22 May 2008.

[37] *R v Rezvi*, above n 19 at para 14.

Lord Steyn thus held that one of the purposes of the 1988 legislation was to punish offenders. This dictum was relied upon by counsel for the NDPP, as was the dictum of Lord Rodger of Earlsferry in the subsequent case of *R v Smith (David)* where, in determining what constitutes a benefit for confiscation, he remarked:

> "It therefore makes no difference if, after [an offender] obtains it, the property is destroyed or damaged in a fire or is seized by customs officers: for confiscation order purposes the relevant value is still the value of the property to the offender when he obtained it. Subsequent events are to be ignored . . . . Such a scheme has the merit of simplicity. If in some circumstances it can operate in a penal or even a draconian manner, then that may not be out of place in a scheme for stripping criminals of the benefits of their crimes. That is a matter for the judgment of the legislature, which has adopted a similar approach in enacting legislation for the confiscation of the proceeds of drug trafficking."[38]

[56] The English and European jurisprudence is instructive at least to the extent that it makes plain that the legislation here under consideration has a counterpart in another open democracy.[39] Yet the formulation of the rights to fairness in criminal and civil procedure as entrenched in the European Convention on Human Rights is different to the formulation of the rights in our own Bill of Rights.[40] Although the

[38] [2002] 1 All ER 366 at para 23.

[39] See section 36(1) and section 39(1) of the Constitution.

[40] Section 34 of the Constitution protects the right of access to courts in the following terms:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

And section 35(3) of the Constitution protects the right of an accused to a fair trial in the following terms:

> "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;

provisions of the English legislation are similar to those of our legislation, the constitutional framework is different; and for this reason, I do not think that the interpretation by the English courts of their legislation is directly applicable to the proper interpretation of our legislation in the light of the spirit, purport and objects of our Bill of Rights.[41]

[57] In my view, understanding the purposes of chapter 5 of the Act is best done on the terms of chapter 2 of our Constitution and our own legislation. Upon a proper construction of the Act, I am not persuaded that a primary purpose of chapter 5 is the punishment of offenders. Its primary purpose seems rather to be to ensure that criminals cannot enjoy the fruits of their crimes. It may well be that the achievement of this purpose might at times have a punitive effect, but that is not to say that the primary purpose is punitive.

---

(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."

[41] See section 39(2) of the Constitution, which requires a court, when interpreting legislation, to "promote the spirit, purport and objects of the Bill of Rights."

[58] I turn now to consider the two legal arguments raised by the appellants.

*Did the Act permit the confiscation of the value of both benefits?*

[59] The appellants argue that the Act, properly construed, did not permit the confiscation of both the shareholding in Thint and the dividends declared by Thint. This argument is based on the following reasoning. The appellants had to give value to purchase the shareholding. To purchase the shares, they raised a loan which was secured by an escrow agreement. The loan was ultimately repaid by the dividends as and when they were declared. The appellants argue that accordingly the Act did not permit the confiscation of both the shareholding *and* the dividends. Their argument is based on the construction they contend should be placed on section 18(1) of the Act.[42] They submit that the word "benefit" in section 18(1) must be read to limit the broad language of the definition of "proceeds of crime" in section 1 to apply only to nett proceeds of a crime.

[60] In my view, this submission is based on a misconception of the section. As described in paragraph 25 above, section 12(3) provides that a person will have benefited from unlawful activities if he or she has received or retained any proceeds of unlawful activities. What constitutes a benefit, therefore, is defined by reference to what constitutes "proceeds of unlawful activities". It is not possible in the light of this definition to give a narrower meaning to the concept of benefit in section 18, for that concept is based on the definition of the "proceeds of unlawful activities". That

[42] Section 18(1) is set out above at n 5.

definition goes far beyond the limited definition proposed by the appellants. "Proceeds" is broadly defined to include any property, advantage or reward derived, received or retained directly or indirectly in connection with or as a result of any unlawful activity.[43] A further difficulty with the appellants' argument is to be found in section 18(2). That section expressly contemplates that a confiscation order may be made in respect of any property that falls within the broader definition, and is not limited to a nett amount. The narrow interpretation of "benefit" proposed by the appellants cannot thus fit with the clear language of section 18 and the definition of "proceeds of unlawful activities". To interpret the section as suggested by the appellants would require giving a meaning to the section which its ordinary wording cannot sustain. In any event, both the dividends and the shares amounted to proceeds that flowed directly from the crime.

[61] The NDPP relied heavily on British jurisprudence in rebutting the appellants' arguments in this regard, particularly *R v Smith (David)*,[44] but as I have made clear in paragraph 56 above, in my view that jurisprudence is not directly helpful or relevant in determining the proper constitutional construction of our own legislation.

[62] For these reasons, I conclude that the appellants are not correct in their assertion that the Act does not permit the confiscation of the value of both the benefits.

[43] The definition of "proceeds of unlawful activities" is set out above at para 25.

[44] Above n 38.

[63] I turn now to consider the second argument raised by the appellants and that is whether this Court should interfere with the confiscation order made by the High Court. This question, in turn, resolves itself into two enquiries. The first is the proper approach on appeal to the exercise of the discretion by the High Court; the second is the proper application of that approach to the exercise of the discretion in this case.

*What is the proper approach on appeal to the exercise of discretion by a trial court in terms of section 18 of the Act?*

[64] The first question that arises concerns the circumstances in which a court will interfere with the exercise of discretion by the court making the confiscation order. This Court has previously held that in order to determine the approach of an appellate court to the exercise of a discretionary power by another court, the court must determine the nature of the discretion concerned.[45] In this case, the discretion conferred upon a court by section 18 is the discretion to determine the "appropriate" amount that it should order a defendant to pay. That determination is made once the court has convicted the defendant of a criminal offence and at approximately the same time as it imposes a sentence upon the person.

[65] In considering the nature of the discretion, it must be borne in mind that the judge upon whom the discretion is conferred by the statute is the judge who has presided over the criminal trial and is the judge who sentences the accused. As a

[45] See *Giddey NO v JC Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) at paras 19-23; *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC) at para 110; *Mabaso v Law Society of Northern Provinces and Another* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) at para 20.

result of having heard all the evidence and argument in the criminal trial, the judge has a full understanding of all the issues in the case. It seems to me therefore that when the European Court of Human Rights considered a similar procedure in terms of the United Kingdom Drug Trafficking Act, it was correct to characterise the equivalent discretion conferred upon the domestic court in that case as being analogous to the discretion to determine the proper sentence to be imposed in criminal proceedings.[46]

[66] In our law, sentencing has always been considered to be "pre-eminently a matter for the discretion of the trial Court"[47] which must be exercised in a judicial manner.[48] Ordinarily, therefore, a criminal sentence is not set aside on appeal unless the sentence can be shown to have been vitiated by irregularity or misdirection or the sentence itself is disturbingly inappropriate.[49]

[67] In my view, given the close connection between the criminal conviction and the confiscation order, it is apt that the discretion conferred upon the sentencing court by section 18 be considered for the purposes of appellate jurisdiction in the same light as the imposition of sentence. It is peculiarly a matter for the court which has convicted the relevant person; that is no doubt the reason why the legislature sought to ensure

[46] See *Phillips v The United Kingdom*, above n 36 at para 34 where the Court held:

> "[T]he purpose of the procedure . . . was to enable the national court to assess the amount at which the confiscation order should properly be fixed. The Court considers that this procedure was analogous to the determination by a court of the amount of a fine or the length of a period of imprisonment to be imposed on a properly convicted offender."

[47] See *R v Mapumulo and Others* 1920 AD 56 at 57.

[48] See *S v Rabie* 1975 (4) SA 855 (A) at 857D-E; *S v Letsolo* 1970 (3) SA 476 (A) at 476-7; and *R v Myburgh* 1922 AD 249 at 253.

[49] See *S v Rabie* id; *R v Mapumulo*, above n 47.

that it would be that court which, in the first instance, would determine the appropriate amount to be confiscated. It will only be interfered with by an appellate court where that court is satisfied that the court which determined the amount acted unjudicially or misdirected itself or where the appellate court is of the view that the amount confiscated is disturbingly inappropriate.

*Considerations relevant to the exercise of the section 18 discretion*

[68] Before turning to consider whether there are grounds for interference with the High Court judgment in this case, it will be helpful to set out some considerations relevant to the exercise of the section 18 discretion. I should emphasise that the following considerations are not comprehensive. In approaching this question, a court will bear in mind that the enquiry as to whether proceeds of crime should be confiscated is not the same enquiry as that to be undertaken to determine whether an instrumentality of an offence should be confiscated. The purpose of confiscating proceeds of crime is primarily to ensure that criminals do not benefit from their crimes. Instrumentalities of crime are confiscated for different reasons and the considerations are therefore not the same. [50]

[69] First, a court considering what will constitute an appropriate amount as contemplated by section 18 will have regard to all the circumstances of the criminal activity concerned. Secondly, in considering what will be appropriate, a court will bear in mind that the definition of "proceeds of unlawful activities" in the Act makes

[50] For a consideration of the circumstances in which instrumentalities of a crime will be confiscated, see *Mohunram* and *Prophet*, above at n 16.

it possible to confiscate property that has not been directly acquired through the commission of crimes. It also makes it possible to confiscate property that has been acquired not through crimes of which the defendant has been convicted, but through related criminal activity. One of the key considerations a court will take into account will be the extent to which the property to be confiscated derived directly from the criminal activities. In most circumstances it will be entirely appropriate that all direct profits of crimes of which the defendant has been convicted be confiscated. So, a bank robber caught red-handed in possession of R50 million which he or she has just stolen from the bank may quite appropriately be required to pay that money back. In these circumstances, the primary purpose of the Act – to ensure that a criminal does not enjoy the fruits of his or her crime – will be directly served.

[70] On the other hand, the more removed the derivation of the property from the commission of the offence, the less likely it may be that it will be appropriate to order the full confiscation of the property. In taking this consideration into account, however, a court must take care to remember that often criminals do seek to disguise the profits of their crime. One of the purposes of the broad definition of "proceeds of unlawful activities" is to ensure that wily criminals do not evade the purposes of the Act by a clever restructuring of their affairs.

[71] A third consideration relevant to determining what constitutes an "appropriate" amount will be the nature of the crimes that fall within the express contemplation of the Act. The closer the crimes or criminal activity concerned to the ambit of

organised crime, the more likely it will be that the appropriate amount will constitute all the proceeds of the unlawful activities as defined in the Act. The reason for this is that the larger the value of the confiscation order, the greater the deterrent effect of such an order. The Act clearly seeks to impose its greatest deterrent effect in the area of organised crime; and so where organised crime is involved, the purpose of general deterrence will often be best achieved by a maximum confiscation order, although of course that will always be subject to a full consideration of all the relevant circumstances. In asserting this principle, too, it is important to bear in mind the difficulty of prosecuting organised crime successfully as is noted in the preamble to the Act. The difficulties are many. To name just one, crime syndicates are often organised in a manner that makes it possible for senior members of the syndicate to evade prosecution, because many of the crimes committed are committed by junior members of the syndicate.

*The offence of corruption*

[72] Pursuant to the third consideration just mentioned, it is necessary now to consider the nature of the offence of corruption as it relates to the purposes of the Act. Corruption is a very serious offence and is regarded as such not only in South Africa but internationally. Indeed, the World Bank estimates that corrupt governments and their business partners take over $1 trillion in bribes each year.[51] It is hard to assess the effect of corruption on the political and economic life of a nation, yet it is clearly

[51] Kaufmann "Myths and Realities of Governance and Corruption" in Lopez-Carlos *World Economic Forum Global Competitiveness Report 2005–2006* at 83, http://www.worldbank.org/wbi/governance/pdf/2-1_GCR_Kaufmann.pdf, last accessed 22 May 2008. For more information on the extent of corruption in the world and Africa, see Snider and Kidane "Combating Corruption Through International Law in Africa: A Comparative Analysis" (2007) 40 *Cornell International Law Journal* 691 at 692-6.

very harmful. As the preamble to the recent South African legislation on corruption, the Prevention and Combating of Corrupt Activities Act 12 of 2004 recognises, corruption undermines the "institutions and values of democracy and ethical values and morality" and jeopardises development and the rule of law.[52] Corruption is therefore antithetical to the founding values of our constitutional order. Indeed, as this Court held in *South African Association of Personal Injury Lawyers v Heath and Others*:

> "Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state."[53]

[73] Moreover, corruption is often closely associated with organised crime. The preamble to the Prevention and Combating of Corrupt Activities Act also recognises that "there are links between corrupt activities and other forms of crime, in particular organised crime and economic crime, including money-laundering . . .". The United Nations Convention Against Corruption points to the close relationship between corruption and organised crime in identical terms.[54] South Africa has ratified the United Nations Convention Against Corruption and thus bears international law

[52] For a discussion of this Act, see Williams and Quinot "Public Procurement and Corruption: The South African Response" (2007) 124 *South African Law Journal* 339.

[53] [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC) at para 4.

[54] 43 ILM 37 (2004). The second paragraph of the preamble to the United Nations Convention recognises "the links between corruption and other forms of crime, in particular organised crime and economic crime, including money-laundering".

obligations under it.[55] The Convention entered into force on 14 December 2005. Article 31 of that Convention[56] requires States Parties to legislate to provide for confiscation of the proceeds of crime or property the value of which corresponds to that of such proceeds "to the greatest extent possible", and "proceeds" is also defined broadly in the Convention to include "property derived from or obtained, directly or indirectly, through the commission of an offence".[57]

[74] Article 16 of the African Union Convention on Preventing and Combating Corruption[58] requires States Parties to enact legislation to enable the confiscation of the proceeds of offences of corruption. South Africa has ratified this Convention as well,[59] and it entered into force on 5 August 2006.

[75] In the light of the above, it is clear that corruption is a serious crime which is potentially harmful to our most important constitutional values. Moreover, it is clear

---

[55] The Convention was ratified by South Africa on 22 November 2004. See http://www.unodc.org/unodc/en/treaties/CAC/signatories.html, last accessed 22 May 2008.

[56] Article 31(1) of the Convention provides:

> "Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:
>
> (a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;
>
> (b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention."

[57] Article 2 of the Convention provides the following definitions of "property" and "proceeds of crime":

> "(d) 'Property' shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets;
>
> (e) 'Proceeds of crime' shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence".

[58] 43 ILM 5 (2004).

[59] On 11 November 2005. See http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/List/African%20Convention%20on%20Combating%20Corruption.pdf, last accessed 22 May 2008.

that both our Parliament and the international community recognise the close links between corruption and organised crime. In the circumstances, it seems to me that corruption is one of the offences closely related to the purposes of the Act and a court should bear this in mind when determining the "appropriate" amount contemplated in section 18 of the Act.

*Did the High Court misdirect itself in ordering the confiscation of both the shareholding and the dividends?*

[76] The High Court approached the task of determining the appropriate amount by considering the nature and extent of the power conferred upon it by section 18.[60] Squires J noted in particular the maximum limit on the amount as stipulated by section 18(2)(a) of the Act. He then noted that the Court enjoyed a discretion, which he discussed briefly in the following terms:

> "And finally, in setting the parameters of a confiscation order, it should also be noted that subject to the limitations of section 18(2) a Court that makes such an order under section 18(1) exercises a discretion in its determination in the amount of such order. It 'may' make a confiscation order 'in any amount it considers appropriate'. That is not to say there is any room for maudlin sentiment about adding to an accused's punishment woes. The object of the Act being to reduce crime by deterring people from engaging in it, full deprivation of the original proceeds, must robustly remain a primary consideration."[61]

[77] In determining what would be an appropriate order, the High Court took into account its factual conclusion that the shareholding and dividends did constitute

[60] *National Director of Public Prosecutions v Schabir Shaik and Others* CC 27/04 Durban and Coast Local Division, 31 January 2006, unreported at 6.

[61] Id at 10.

"proceeds of unlawful activities" within the meaning of section 18(1). In relation to the shareholding and dividends, Squires J made it clear that both the shareholding and dividends had derived from the intervention of Mr Zuma. In this, its conclusion cannot be faulted. It then considered the "double counting" argument as follows:

> "So far as the 'double counting' of the ADS dividends towards the present value of Thint shares owned by third defendant [Nkobi Investments] is concerned, it is difficult not to feel some sympathetic attraction for the argument advanced by Mr Singh [counsel for the appellants]. But the essence of the situation is that the dividends received are, in effect, the purchase price that third defendant had to pay for the shares, that is, to repay the loan it raised from the holding company plus interest. To accept such exclusion of the purchase price as a valid reduction of the value of the shares seems to me to overlook the fact that the third defendant has actually received both shares and dividends as benefits from the payments to Jacob Zuma. If it chose to use the shares to pay the loan that it had to raise to pay for the shares, that does not affect the fact that it received both as the object of acquiring an interest in ADS."[62]

[78] Squires J thus concluded that the full value of both the dividends and the shareholding should be the subject of the confiscation order. This conclusion can only be subject to interference by this Court if it constituted a misdirection or on the ground that the amount provided for in the confiscation order is disturbingly inappropriate.

[79] The main argument of the appellants was that the resulting confiscation order was disproportionate. Section 18 requires a court to determine an appropriate amount. This exercise requires a court to determine an amount in the light of the direct relationship between the proceeds and the criminal activity concerned, as well as the

[62] Id at 32-3.

nature of the criminal activity and its closeness to the purposes of the Act. The question on appeal, as I have described above, is whether the amount confiscated by the court is disturbingly inappropriate.[63] Clearly an amount that is disturbingly inappropriate would be disproportionate and an appeal court would therefore interfere with such an order. It must be emphasised that care must be taken by an appellate court, when applying this test, not to invade the legitimate area of discretion of the court that made the original confiscation order. In considering whether the award in the lower court should be interfered with on appeal, it is necessary to consider first whether the shareholding and dividends flowed directly from the crime of which the appellants were convicted.

[80] I have found that the benefits of the shareholding and the dividends did result from Mr Zuma's interventions on behalf of the appellants. It is true that it is the third appellant, Nkobi Investments, that has the direct interest in the ADS shareholding as a result of its shareholding in Thint; but the indirect value of that shareholding for reasons given above was a benefit both to Mr Shaik and to Nkobi Holdings. And although the benefit may be indirectly held, its acquisition was clearly derived from the criminal activity of which the appellants were convicted.

[81] Secondly, for the reasons I have outlined, there can be no doubt that corruption is a crime that is closely related to the purposes of the Act. Both our own Parliament and international law have recognised the devastating effects of corruption on

[63] Above para 66.

democratic values and have also recognised the close relationship between corruption and organised crime. These considerations suggest that the general deterrence purposes of the Act will be well served by the order made by the High Court, as indeed the Supreme Court of Appeal also noted.[64] The close relationship between the acquisition of the shares and the dividends and the criminal conduct of Mr Shaik does not suggest that it was disturbingly inappropriate for the High Court to have ruled that the full value of the shares and the dividends should be confiscated. Nor can any cavil be directed at the manner in which the High Court reached its conclusion.

[82] For these reasons, I am of the view that it has not been shown either that the High Court acted unjudicially or that the order it made was disturbingly inappropriate.

*Costs*

[83] This application is closely related to the criminal proceedings. Although the appellants have failed, it does not seem appropriate to order them to pay the costs of the state. I therefore make no order as to costs.

*Order*

[84] The following order is made:

The appeal fails.

[64] See SCA POCA judgment above n 7 at para 30.

Langa CJ, Jafta AJ, Kroon AJ, Madala J, Mokgoro J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of O'Regan ADCJ.[*]

[*] Although Ngcobo J sat in the case, ill health prevented him from participating in the judgment.

| | |
|---|---|
| For the Appellants: | Advocate M Brassey SC, Advocate N Singh SC and Advocate H Gani instructed by Hassan Parsee & Poovalingam Attorneys. |
| For the Respondent: | Advocate W Trengove SC and Advocate A Cockrell instructed by the State Attorney. |