IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 86/06

In the matter between:

SCHABIR SHAIK	First Applicant
NKOBI HOLDINGS (PTY) LTD	Second Applicant
NKOBI INVESTMENTS (PTY) LTD	Third Applicant

and

THE STATE	Respondent

THE STATE'S POCA SUBMISSIONS

CONTENTS

INTRODUCTION

1. We shall refer:

   - to the judgment of the SCA in the asset forfeiture proceedings as the "*POCA judgment*";[1]
   - to the applicants as Mr Shaik, Nkobi Holdings and Nkobi Investments;
   - to the Thomson companies as Thomson International, Thomson France, Thomson Mauritius, Thomson Holdings and Thomson SA, and
   - to African Defence Systems (Pty) Ltd as ADS.

The criminal conviction

2. On 2 June 2005, the High Court convicted the applicants of a number of crimes. It is their convictions on count 1 that are material for present purposes. All the applicants were found guilty of contravening s 1(1)(a) of the Corruption Act 94 of 1992 ("the Corruption Act") by making corrupt payments to Mr Jacob Zuma.

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[1] POCA judgment: bundle B volume 5 page 271ff

The POCA application

3. After the applicants had been convicted, the High Court granted a restraint order against them in terms of section 26 of the Prevention of Organised Crime Act 121 of 1998. The purpose of the restraint order was to preserve the applicants' assets pending the finalisation of an application for a confiscation order. A *curator bonis* was appointed in terms of the restraint order.

4. On the application of the state, the High Court initiated an enquiry in terms of section 18(1) of POCA. The purpose of the enquiry was to enquire into whether the first to fifth applicants had benefited from the offences of which they had been convicted, or from any criminal activity which the court found to be sufficiently related to such offences. By agreement between the parties, the NDPP and the applicants filed written statements, answers and replies in terms of s 21 of POCA.

The High Court judgment

5. The High Court granted confiscation orders in terms of section 18 of POCA.[2] They related to three benefits that the first, second and third applicants had received in connection with the crimes of which they had been convicted.

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[2] High Court judgment: bundle B volume 7 pages 525-562.

5.1. The first benefit was an effective shareholding of 20% in ADS acquired on 15 September 1999 by Nkobi Investments.

5.2. The second benefit was the ADS dividends that the applicants received via Thomson SA after 15 September 1999.

5.3. The third benefit was an amount of R499 688 that Thomson International paid to Nkobi Investments on 5 October 1999 for Nkobi's 10% shareholding in Thomson Holdings.

The SCA judgment

6. The first to third applicants appealed to the SCA against the confiscation orders granted by the High Court. The SCA dismissed the appeal in respect of the first and second benefits but upheld it in respect of the third benefit.[3]

Overview of these submissions

7. The applicants seek leave to appeal to this court against paragraphs 1, 3 and 5 of the SCA's POCA judgment[4] in which it dismissed the appeal

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[3] POCA judgment: bundle B volume 5 pages 271 to 287.

[4] Notice of motion: volume 1 page 4 para 4

against the first and second benefits and made a consequential costs order.

8. In accordance with the Chief Justice's directions, these heads of argument address the question "*whether leave to appeal should be granted on any or all of the grounds raised by the applicants in their application for leave to appeal*".[5]

9. If the applicants were to succeed in overturning their criminal convictions on appeal, then it would necessarily follow that the confiscation orders should be set aside. We accordingly accept that, if this court is minded to grant leave to appeal against the criminal convictions, it should also grant leave to appeal against the POCA judgment. For the purposes of our submissions, we shall assume that this court is *not* minded to grant leave to appeal in the criminal case. It is on the basis of this assumption that we address the question whether leave to appeal should be granted in the asset forfeiture proceedings.[6]

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5 Directions of the Chief Justice dated 4 April 2007: page 991, para 3

6 This is the basis on which the application for leave to appeal is drafted: see founding affidavit volume 3 page 232 para 355 (*"… if the applicants succeed in setting aside their convictions in these proceedings, the confiscation orders will fall away. Notwithstanding this, however, the applicants also challenge the constitutionality of the confiscation orders made in the asset forfeiture proceedings conditionally upon their application for leave to appeal … failing*.") Similarly, the replying affidavit states that the applicants seek leave to appeal in the asset forfeiture proceedings "*independently of the application for leave to appeal in the criminal appeals*" (replying affidavit, page 889F para 134.1).

10. We accept that the application for leave to appeal raises a constitutional issue.[7] We submit, however, that it is not in the interests of justice to grant leave to appeal because the applicants do not have reasonable prospects of success. We accordingly submit that this court should dismiss the application for leave to appeal.

11. Our submissions will be organised as follows.

    11.1. We begin by summarising the provisions of POCA that are relevant for present purposes.

    11.2. We address each of the grounds on which the applicants seek leave to appeal in their founding affidavit. We submit that the applicants do not have prospects of success in relation to any of these grounds.

    11.3. We deal with two grounds of appeal that have been advanced for the first time in the applicants' heads of argument. We submit that it is not competent for the applicants to advance grounds of appeal in this manner, but that they are in any event without merit.

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[7] Answering affidavit: page 701 para 47.1

11.4. We conclude with a statement of the relief sought by the NDPP.

CRIMINAL CONFISCATION ORDERS

Introduction

12. Chapter 5 of POCA vests the criminal courts with a discretionary power to make a confiscation order against anybody convicted of any crime who benefited from it.[8] The purpose of such an order is to deprive the defendant of the proceeds of his crime. It in turn serves broader penal and public purposes by ensuring and demonstrating that crime does not pay.

13. A confiscation order is a civil judgment for payment to the state of an amount of money determined by the court.[9] Although its purpose is to deprive the defendant of the proceeds of his crime, it is not an order for the confiscation of the proceeds themselves. It is a civil judgment for payment of an amount of money determined *inter alia* with reference to the value of the defendant's proceeds of his crime.

14. An application for a confiscation order may only be made after conviction of the defendant.[10] An application for a confiscation order follows a

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8 Sections 18(1) and (2)

9 Sections 18(1) and 23

10 Sections 18(1) and (5)

criminal conviction as an adjunct to the criminal proceedings. This is where the confiscation mechanism under chapter 5 of POCA differs from the forfeiture mechanism under chapter 6. The latter provides for forfeiture by a civil process which is separate from any criminal proceedings and may be undertaken even in the absence of any criminal proceedings.

15. When a defendant is convicted of an offence and the prosecutor applies for a confiscation order, the court must first determine whether the defendant derived any benefit from his crime.[11] If it is not already evident from the evidence before the court, then it may undertake an enquiry into the question.[12] The enquiry is not limited to the benefits the defendant derived from the offences of which he has been convicted. It also extends to the benefits he derived from any other "*criminal activity which the court finds to be sufficiently related to those offences"*.[13]

16. The offences concerned need not be of any particular kind. Any offence may underpin a confiscation order as long as the defendant derived a benefit from it.[14] If a court finds that the accused has so benefited, then it

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11 Section 18(1)

12 Section 18(1)

13 Section 18(1)(c); NDPP v Kyriacou 2004 (1) SA 379 (SCA) paras 11, 12 and 49

14 NDPP v Cook Properties 2004 (2) SACR 208 (SCA) paras 64 to 66

may make a confiscation order against him for payment to the state of "*any amount it considers appropriate"*.[15]

17. The court's discretion to determine the amount of a confiscation order is however subject to the lesser of two limitations imposed by s 18(2):

17.1. The first is the value of the defendant's proceeds of the offences or related criminal activity as determined by the court in accordance with the provisions of chapter 5.[16] We shall later deal more fully with the determination of this amount. In this case, it provided the effective upper-limit of the confiscation orders that could be made.

17.2. The second limit is "*the amount which might be realised as contemplated in s 20(1)"*.[17] It is the sum of two amounts namely,

- the value of the defendant's own realisable property less certain secured and preferent claims against his estate[18] plus
- the value of the "*affected gifts"* he made to others.[19]

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15 Section 18(1)

16 Section 18(2)(a)

17 Section 18(2)(b)

18 Section 20(1)(a) read with ss 14 and 20(4)

19 Section 20(1)(b) read with s 12(1) "*affected gift"*

This limit however only comes into play "*if the court is satisfied"* that it is less than the amount of the first limit. It is in other words incumbent upon any party who seeks to rely on this second limit, to satisfy the court of its application. None of the parties sought to do so in this case. It consequently does not come into play in the determination of this case.

The "*benefits"* and "*proceeds"* of crime

18. As appears from our discussion of the requirements for a confiscation order under ss 18(1) and (2), they work with two related concepts. The first is the "*benefit"* the defendant derived from his crimes and the second is the "*proceeds"* of his crimes. The court must first determine whether he derived any "*benefit"* from his crimes. Only if it finds that he has, may it make a confiscation order against him for any amount up to the value of the "*proceeds"* he derived from his crimes.

19. The two concepts of "*benefit"* and "*proceeds"* are interrelated. That is so because s 12(3) provides that a person "*has benefited from unlawful activities"* if he or she has at any time "*received or retained any proceeds of unlawful activities"*. It follows that in both cases the enquiry relates to the proceeds the defendant derived from his crime. If he derived any proceeds from his crime, then he has benefited from it. If he has benefited

from it, a confiscation order may be made against him. It may be made for any amount up to the value of the proceeds he derived from his crime.

20. The enquiry into the value of the proceeds the defendant derived from his crime, brings into play two provisions which are sufficiently important to quote in full:

20.1. The first is s 1(1) which defines the "*proceeds of unlawful activities"* 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."*

20.2. The second is s 19(1) which tells one how to determine the value of a defendant's proceeds of unlawful activities:

> "*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."

21. These two provisions must be read together to determine what benefits may be taken into account in the determination of a defendant's proceeds of his crimes. We shall consider them more closely and identify some of their features.

Any kind of benefit

22. The definition of "*proceeds of unlawful activities"* in s 1(1) and the provisions of s 19(1) make it clear that the kinds of benefit taken into account include any property, service, advantage, benefit or reward. The definition of "*property"* in s 1(1) casts the net even more widely by including "*money or any other movable, immovable, corporeal or incorporeal thing and … any rights, privileges, claims and securities and any interest therein and all proceeds thereof"*.

23. It is probably implied that these benefits must have economic value. It accordingly means that any benefit of any kind is taken into account as long as it has economic value.

Directly or indirectly obtained

24. The SCA held that a confiscation order may be made against a defendant who has not benefited directly from his crime but who has benefited indirectly through the enrichment of the company in which they had an interest.[20] The first and second applicants were in this position.

25. We submit, with respect, that the SCA correctly held that an indirect benefit of this kind can found a confiscation order against the guilty shareholder who benefited indirectly via his company. That is so for two reasons.

    25.1. The first is that the definition of "*proceeds of unlawful activities"* in s 1(1) makes it clear that it includes benefits received "*directly or indirectly"*. The ordinary meaning of that phrase means that the "*proceeds of unlawful activities"* include benefits indirectly obtained through another person or entity.

    25.2. The second is that both the definition in s 1(1) and s 19(1) make it clear that the kinds of benefits that must be taken into account, are so wide as to include the economic benefit a shareholder receives when his company is enriched. Section 19(1) for instance makes it clear that the value of a defendant's proceeds

[20] POCA judgment: bundle B volume 5 page 279 para 24

of unlawful activities includes any "*advantages, benefits or rewards"*. Those concepts are wide enough to include the advantage, benefit or reward a shareholder receives if his company is enriched by his crime.

The connection between the crime and the benefit

26. Both the definition of "*proceeds of unlawful activities"* in s 1(1) and s 19(1) make it clear that the connection between the proceeds and the crime need not be direct:

26.1. The proceeds include everything the defendant "*derived, received or retained"* as a result of or in connection with his offences. It for instance includes benefits which the defendant legitimately acquired but retained by or as a result of his offences.

26.2. The proceeds need not have been derived, received or retained "*as a result of"* the defendant's offences. It suffices if they were derived, received or retained "*in connection with"* the offences. The causal link in other words need not be direct.

26.3. The SCA held in Van Streepen that the phrase "*in connection with"* is one devoid of precise meaning and that its meaning must be determined from the context in which it is used.[21]

26.4. It is consequently significant that in POCA, parliament chose to include in the proceeds of crime subject to confiscation, any benefits received, retained or derived "*in connection with"* the defendant's crimes rather than to confine it to benefits received, retained or derived "*from"* or "*as a result of"* those crimes.

"*Proceeds"* means "*gross proceeds"*

27. The SCA held that "*proceeds*" means gross proceeds rather than nett proceeds.[22] For the reasons that follow, we respectfully submit that this interpretation accords with the language of POCA.

28. Both the definition of "*proceeds of unlawful activities"* in section 1(1) and section 19(1) make it clear that "*proceeds"* means "*gross proceeds"*. It does not mean "*nett proceeds"* or "*profit"*. One must disregard the price or other *quid pro quo* the defendant might have paid or given for the proceeds he received in connection with his crime. The definition of "*proceeds of unlawful activities"* in s 1(1) makes it clear that it includes

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21 Administrator, Transvaal v J van Streepen 1990 (4) SA 644 (A) 656H

22 POCA judgment: bundle B volume 5 page 282 para 28

"*any property or any service advantage, benefit or reward which was derived, received or retained … in connection with or as a result of any unlawful activity"*. It speaks of gross values and does not leave room for the deduction of expenses. Section 19(1) is perhaps even more explicit when it says that the value of a defendant's proceeds of unlawful activities is "*the sum of the values of the property, services, advantages, benefits or rewards received, retained or derived by him"*. It is clearly the value of everything the defendant received in connection with his crime without taking into account what he gave for it in return.

29. This understanding accords with the interpretation adopted by his lordship Mr Justice van der Merwe in Joubert's case.[23] He also undertook a wide-ranging survey of English learning on their confiscation provisions on which ours were modelled.[24] As appears from the survey, all the English authorities make it clear that the value of the proceeds of crime taken into account, is the gross value received by the defendant without regard to the value given for it in return.

30. The most recent and authoritative of the English cases is the judgment of the House of Lords in Smith's case.[25] Lord Roger said that "*the courts have consistently held that 'payments' received in connection with drug*

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23 NDPP v Johannes du Preez Joubert and others, unreported judgment of Van der Merwe J in TPD case 24541/2002 delivered on 2 March 2003

24 Pages 13 to 37

25 R v Smith [2002] 1 All ER 367 (HL)

trafficking means gross payments rather than nett profit and that the 'proceeds' of drug trafficking means the gross sale proceeds, rather than the nett profit after deducting the cost of the drug trafficking operation."[26]

It does not matter what happened to the proceeds

31. It does not matter what happened to the proceeds. It makes no difference if the defendant spent or lost it. What matters is the value of the property, services, advantages, benefits or rewards he "*received, retained or derived"* in connection with his crime. It means that, if the defendant "*received"* a benefit in connection with his crime, then its value constitutes the proceeds of his crime whether he has since then retained it or not. The value of the defendant's proceeds of his crime is determined when he receives or retains it and is not dependent on what he does with it or what happens to it thereafter.

32. This is how the SCA interpreted s 18 of POCA in *Kyriacou*.[27] The defendant was convicted of receiving stolen property found in his possession to the value of R4,5m. The court ordered that the stolen property be returned to its rightful owners. The defendant was in other words deprived of all the proceeds of the crimes for which he was

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[26] Para 23

[27] NDPP v Kyriacou 2004 (1) SA 379 (SCA)

convicted. The SCA nonetheless held that it did not deprive the court of its discretion to make a confiscation order.[28] It went on to say that it would be an improper exercise of the court's discretion to make a confiscation order for the value of proceeds of which the defendant had been wholly deprived. The important point for present purposes however is that the SCA held that it was a factor bearing on the exercise of the court's discretion. The "*value of the defendant's proceeds"* of his crime remained R4,5m despite the fact that he had been deprived of all of it.

33. The TPD and WLD have also adopted this interpretation. His lordship Mr Justice van der Merwe did so in Joubert[29] and his lordship Mr Justice Malan did so in Swanepoel.[30] His lordship Mr Justice van der Merwe for instance concluded in Joubert that

> "*a defendant will be liable to a confiscation order once he has obtained the benefit but has lost it or passed it on to another*".[31]

34. This understanding also accords with the interpretation of similar legislation by the English courts. In Smith's case, Lord Rodger for instance said the following in the House of Lords:

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28 paras 12, 38 and 49

29 NDPP v Johannes du Preez Joubert and others, unreported judgment of Van der Merwe J in TPD case 24541/2002 delivered on 2 March 2003

30 Swanepoel v The State, unreported judgment of Malan J in WLD case A3129/03

31 Page 37

"*These provisions show that, when considering the measure of the benefit obtained by an offender in terms of section 71(4), the court is concerned simply with the value of the property to him at the time when he obtained it or, if it is greater, at the material time …. It therefore makes no difference if, after he 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*."[32]

The same proceeds in different hands

35. The SCA held that the same proceeds, passed through different hands, could amount to the proceeds of criminal activity in the hands of each intermediary and that there could accordingly be a multiplication of confiscation orders against each.[33]

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32 R v Smith [2002] 1 All ER 367 (HL) para 23

33 POCA judgment: bundle B volume 5 page 280 para 25

36. If a benefit is received by X and he passes it on to Y, it may constitute the proceeds of crime in the hands of both X and Y. In other words, if the same proceeds flow through a succession of criminal hands, there may be a multiplicity of confiscation orders against each of them for the same benefit passed from one to the other.

37. The English Court of Appeal recognised as much in the case of Simpson.[34] His lordship Mr Justice van der Merwe quoted it with apparent approval in Joubert's case.[35] Both recognised

> "*that there can be multiple recovery of the same sum which passes through the hands of successive dealers, regardless of the amount of profit made by the dealer or dealers or of whether any profit was made at all"*.

38. There is no anomaly in the potential for a multiplicity of confiscation orders in those circumstances. That is because the purpose of confiscation is *inter alia* to strip criminals of the gross proceeds of their crimes so as to deter others from it.

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34 R v Simpson (1998) 2 Cr. App. R(S) 111

35 NDPP v Johannes du Preez Joubert and others, unreported judgment of Van der Merwe J in TPD case 24541/2002 delivered on 2 March 2003 at p 23

Evidence and procedure

39. Section 13 of POCA makes it clear that these are civil proceedings governed by the civil rules of evidence and the civil burden of proof.

40. The proceedings are inquisitorial in that they take the form of an enquiry undertaken by the court itself in terms of s 18(1). It is the court's enquiry held subject to its control and not the parties' *lis* placed before the court for its determination. The evidence upon which it is based, includes all the evidence before the court adduced in all the phases of the criminal proceedings as well as the evidence adduced as part of the court's own enquiry under s 18(1).

41. The significance of the parties' statements in terms of s 21 is two-fold. The first is that the statements constitute evidence on oath. They constitute additional evidentiary material upon which the court may base its decision. The second is that s 21(2)(b) provides that, insofar as the defendants do not dispute the correctness of any allegation made in the prosecution's statements, "*that allegation shall be deemed to be conclusive proof of the matter to which it relates"*.

42. The state is also aided in these proceedings by the presumption created by s 22(3)(a)(i) of POCA. It provides that, for the purpose of determining the value of the defendant's proceeds of unlawful activities in an enquiry

such as this one, if the court finds that the defendant has benefited from an offence and that "*he or she held property at any time at, or since, his or her conviction"*, then that fact must be accepted "*as prima facie evidence that the property was received by him or her at the earliest time at which he or she held it, as an advantage, payment, service or reward in connection with the offences or related criminal activities referred to in s 18(1)"*.

43. It is common cause from the affidavits forming part of the SCA record[36] that the applicants hold the following assets which they are *prima facie* deemed in terms of s 22(3) to have received as an advantage, payment, service or reward in connection with their offences or related criminal activities:

43.1. Mr Shaik holds an effective interest of 92% in the Nkobi group through Starcorp (Pty) Ltd. The value of this interest is R44 795 424.

43.2. Nkobi Holdings holds 100% of the shares in Nkobi Investments.

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[36] These affidavits do not form part of the record before this Court. Some of the relevant values are however referred to in the applicants' heads of argument in the asset forfeiture proceedings: see for example para 17.

43.3. Nkobi Investments holds 25% of the shares in Thomson SA (now known as Thint (Pty) Ltd) which in turn holds 80% of the shares in ADS. The value of this investment is R21,018m.

THE GROUNDS OF APPEAL RAISED IN THE FOUNDING AFFIDAVIT

Introduction

44. Constitutional Court Rule 19(3)(a) requires an application for leave to appeal to this court to set out "*the grounds upon which the decision is disputed*". The applicants say that their grounds of appeal are set out in paragraphs 356, 357 and 358 of their founding affidavit.[37] We shall consider each of these grounds in turn.

45. Before doing so, we point out that prayer 4 of the notice of motion makes it clear that the applicants seek leave to appeal against the SCA judgment (as opposed to the High Court judgment).[38] More particularly, the applicants seek leave to appeal against those parts of the SCA judgment which upheld the imposition of confiscation orders in respect of the first benefit and the second benefit (together with the ancillary costs orders). It is accordingly not apparent to us why the applicants find it necessary to contend in their founding affidavit that the High Court erred in granting the confiscation orders.[39] Since the applicants seek leave to appeal against the SCA judgment, no purpose is served by their criticisms of the High Court judgment. Curiously, the applicants make this very point when they

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37 Replying affidavit: page 889F, para 134.3

38 Notice of motion: volume 1 page 4 para 4

39 Founding affidavit: volume 3 page 237 para 359

say that "*the High Court granted leave to appeal to the SCA and the SCA's judgment is the only judgment which Applicants may appeal against to this Court*".[40]

The proper interpretation of POCA

46. The applicants argue for a "*constitutionally permissible interpretation of POCA*"[41] in paragraph 356.5 of their founding affidavit. Their argument is based on section 35(3) of the Constitution.[42]

47. We submit however that s 35(3) does not apply to confiscation proceedings under chapter 5 of POCA because the defendant is at that stage no longer an "*accused person"* within the meaning of the section.

48. Section 35(3) does not apply whenever a person faces the prospect of some sanction or other. It for instance does not apply where a sanction is imposed by a domestic disciplinary tribunal.[43]

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40 Replying affidavit: page 889G, para 134.4

41 Replying affidavit: page 889G, para 134.5

42 Founding affidavit: volume 3 page 233 para 356.4
Replying affidavit: page 889G para 134.6

43 Cuppan v Cape Display Supply Chain Services 1995 (4) SA 175 (D); Myburgh v Voorsitter van die Schoemanpark Ontspanningsklub Dissiplinere Verhoor 1995 (9) BCLR 1145 (O)

49. Even where a court of law may impose a sanction, s 35(3) does not necessarily apply. This court has for example held that a recalcitrant witness against whom proceedings are instituted for committal to prison under s 205 read with s 189 of the Criminal Procedure Act 51 of 1977 or under s 66(3) of the Insolvency Act 24 of 1936, is not an "*accused person"* within the meaning of s 35(3) of the Constitution and the committal proceedings against him are not subject to the provisions of that section.[44] The *"simple reason*" for this is that such a witness *"is not an accused facing criminal prosecution*".[45]

50. The text of s 35(3) of the Constitution makes it clear that it is not intended to govern proceedings such as those in s 18 of POCA.

50.1. Section 35(3)(a) indicates that an "*accused person"* is someone called upon to answer a "*charge"*. A person who is a defendant in an application under s 18 of POCA is not called upon to answer a charge.

50.2. Section 35(3)(h) makes it clear that the proceedings subject to the section are proceedings in which the accused person is "*presumed innocent"*. A person who is a defendant in an application under s 18 of POCA cannot be "*presumed innocent"*.

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44 Nel v Le Roux NO 1996 (3) SA 562 (CC) para 11; De Lange v Smuts NO 1998 (3) SA 785 (CC) paras 37 to 38 and 66 to 67

45 Nel v Le Roux NO 1996 (3) SA 562 (CC) para 11

His guilt or innocence is simply no longer in issue in those proceedings.

50.3. Sections 35(3)(l) and (m) make it clear that the proceedings subject to s 35 are proceedings by which an accused person is tried and convicted of an offence. An application in terms of section 18 of POCA does not involve proceedings of that kind. They are not proceedings by which a person is tried and they do not culminate in his conviction.

50.4. Section 35(3)(n) of the Constitution indicates that the proceedings referred to in that section, are proceedings which may culminate in the "*punishment"* of the accused person. Proceedings under section 18 of POCA do not constitute punishment.

51. The fact that an application in terms of section 18 of POCA is made pursuant to a criminal conviction, is not in itself sufficient to justify the conclusion that the proceedings are "*criminal*". Lord Hoffmann made this point in relation to criminal forfeiture in terms of part VI of the Criminal Justice Act of 1988:

> *"Modern legislation, of which part VI of the 1988 Act is a good example, confers powers upon criminal courts to make orders which may affect rights of property, create civil debts or*

disqualify people from pursuing occupations or holding office. Such orders may affect the property or obligations not only of the person against whom they are made but of third parties as well. Thus the consequences of an order in criminal proceedings may be a claim or dispute which is essentially civil in character. There is no reason why the nature of the order which gave rise to the claim or dispute should necessarily determine the nature of the proceedings in which the claim is enforced or the dispute determined".[46]

52. The *dictum* of Lord Hoffmann in *Montgomery* and the judgments of this Court in *Nel*[47] and in *Smuts*[48], make it clear that a confiscation order does not constitute punishment merely because it arises from criminal conduct and culminates in a judgment in favour of the state.[49]

53. Whether a confiscation order constitutes punishment depends on the purpose of such an order. The order will constitute punishment only if its purpose is to punish a person for his crimes.[50] But that is not the purpose

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46 The United States of America v Montgomery [2001] 2 WLR 779 (PC) para 19, emphasis added (quoted with approval in NDPP v Phillips 2002 (4) SA 60 (W) para 39). See also AGOSI v United Kingdom 9 EHRR 1 (1986) paras 65 to 67; Air Canada v UK 20 EHRR 150 (1995) para 52.

47 Nel v Le Roux NO 1996 (3) SA 562 (CC) para 11

48 De Lange v Smuts NO 1998 (3) SA 785 (CC) paras 37 to 38 and 66 to 67

49 See also NDPP v Phillips 2002 (4) SA 60 (W) paras 39 to 41

50 NDPP v Phillips 2002 (4) SA 60 (W) para 42

of a confiscation order. The purpose of such an order is to deprive a person of the ill-gotten gains of his criminal conduct. Its purpose is not to punish anyone.

54. A confiscation order by which a criminal is deprived of the spoils of his crime, merely gives expression to the principle that no one should be allowed to benefit from his own wrongdoing.[51] It is a principle well known to our common law which has spawned a variety of rules such as those expressed by the maxims *nemo ex suo delicto meliorem suam condictionem facere potest, ex turpi causa non oritur actio, in pari delicto potior est conditio defendentis* and *de bloedige hand neemt geen erf*. Chapter 5 of POCA extends this principle to the proceeds of crime. A confiscation order merely deprives the criminal of a benefit to which he was not entitled in the first place. It strips him of the proceeds of his crime and does not punish him for it.[52] As the SCA stated in Rebuzzi, "*the primary object of a confiscation order is not to enrich the State but rather to deprive the convicted person of ill-gotten gains"*.[53]

55. In the leading English textbook on proceedings for the confiscation and forfeiture of the proceeds of crime, the authors characterise those proceedings as follows:

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51 Cf NDPP v Phillips 2002 (4) SA 60 (W) para 43

52 DPP: Cape of Good Hope v Bathgate 2000 (2) BCLR 151 (C) para 89

53 NDPP v Rebuzzi 2002 (2) SA 1 (SCA) para 19

"*Confiscation should not be seen as a form of extra punishment for the convicted defendant but rather as a way of taking away the unjust profits and of ensuring that there will be no pot of gold waiting after any punishment has been served. It is the civil consequences of the criminal wrongdoing, taking away the raison d'etre for the criminal ....*"[54]

56. The High Court held in Phillips that "*an application for a confiscation order is properly characterised as civil proceedings*" and not criminal proceedings.[55] This characterisation is supported by foreign case law.

57. The European Court of Human Rights has considered the nature of forfeiture proceedings in terms of the English Drug Trafficking Act 1994. It provides that a Crown Court should make a confiscation order in respect of a defendant appearing before it for sentencing, if the court finds that he received a benefit in connection with drug trafficking. The European Court of Human Rights held that article 6.2 of the European Convention on Human Rights did not apply to those confiscation proceedings because

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54 Mitchell, Taylor and Talbot *Confiscation and the Proceeds of Crime* 2nd ed (1997) xi to xii. (Quoted with approval in NDPP v Phillips 2002 (4) SA 60 (W) para 44.)

55 NDPP v Phillips 2002 (4) SA 60 (W) para 45. In NDPP v Basson 2002 (1) SA 419 (SCA) para 13, Nugent AJA found it unnecessary to decide whether the imposition of a confiscation order on an accused person in terms of s 18 of POCA constitutes punishment as envisaged in section 35(3)(n) of the Constitution.

the accused was not *"charged with a criminal offence*" in those proceedings.[56]

58. The recent jurisprudence of the Privy Council and the House of Lords indicates unequivocally that an application for forfeiture of the proceeds of crime following a criminal conviction is not regarded as a criminal proceeding.

59. In *McIntosh*,[57] one of the issues before the Privy Council was whether s 3(2) of the Proceeds of Crime (Scotland) Act 1995 was incompatible with article 6(2) of the European Convention on Human Rights. Section 3(2) created a number of presumptions to assist the state in an application for a confiscation order in proceedings similar to those under chapter 5 of our act. The question was whether those presumptions violated the guarantee in article 6(2) of the European Convention which provided that "*everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law"*. The Privy Council had to decide whether a defendant against whom a confiscation order was sought, was someone "*charged with a criminal offence"* within the meaning of article 6(2) of the European Convention. It held that he was not. Lord Bingham expressed its conclusion as follows:

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56 Phillips v United Kingdom (judgment handed down 5 July 2001) paras 28 to 36

57 Her Majesty's Advocate v McIntosh [2001] 2 All ER 638 (PC). Quoted in NDPP v Phillips 2002 (4) SA 60 (W) para 44

> *"None of these authorities, in my opinion, provides substantive support for the respondent's contention. He cannot overcome the problem of showing either that he is 'charged' or that he is accused of any 'criminal offence'. He faces a financial penalty (with a custodial penalty in default of payment) but it is a penalty imposed for the offence of which he has been convicted and involves no accusation of any other offence."*[58]

60. The House of Lords came to the same conclusion in respect of confiscation orders in terms of the Criminal Justice Act 1988 and the Drug Trafficking Act 1994. It held that article 6(2) of the European Convention did not apply to those proceedings, because they did not involve a process by which someone was charged with a criminal offence.[59]

61. We submit that a defendant in an enquiry in terms of section 18 of POCA cannot "*overcome the difficulty of showing either that he is 'charged' or that he is accused of any 'criminal offence*".[60] Simply put, there is nobody accused of an offence who is liable to a fine or imprisonment.[61] On that basis alone, proceedings in terms of s 18 cannot be characterised as being criminal in nature.

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58 Para 25

59 R v Rezvi [2002] 1 All ER 801 (HL) paras 9 to 13; R v Benjafield [2002] 1 All ER 815 (HL) para 7

60 Her Majesty's Advocate v McIntosh [2001] 2 All ER 638 (PC) para 25

61 S v Singo 2002 (4) SA 858 (CC) para 15

62. We accordingly submit that defendants in an application brought in terms of section 18 of POCA are not *"accused persons*" within the meaning of s 35(3) of the Constitution. It follows that s 35(3) of the Constitution is not relevant to the interpretive enquiry that arises in the present circumstances.

63. The applicants advance three specific arguments in support of their interpretation of POCA. Their first argument is that, "*in the case of related criminal activity*" under section 18(1)(c) of POCA, the unlawful conduct must be "*the effective cause of the benefit*".[62] In the replying affidavit, the applicants expand this argument by contending that in all cases under section 18 of POCA "*the defendant should have benefited directly from the offence or criminal activity and that this requires that the offence be the overriding cause or effective cause for the benefit*".[63] For the reasons set out above, we submit that the applicants' interpretation is not supported by the text of POCA and is not required by the Constitution.

64. The applicants' second argument is that a constitutional interpretation of POCA would "*restrict the scope of a confiscation order to the nett proceeds received, retained etc by the defendant*".[64] For the reasons set

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62 Founding affidavit: volume 3 page 234 para 356.5.1

63 Replying affidavit: page 889J para 139.2

64 Founding affidavit: volume 3 page 234 para 356.5.3. See also replying affidavit page 889K para 140

out above, we submit that this interpretation is not supported by the text of POCA and is not required by the Constitution.

65. The applicants' third argument is that "*a confiscation order should not be granted where the proceeds have passed hands, such as to exclude from the interpretation of 'the defendant' a person who may have come into contact with the benefit, but did not directly benefit from the offence or criminal activity*".[65] For the reasons set out above, we submit that this interpretation is not supported by the text of POCA and is not required by the Constitution.

The alleged admission of new evidence

66. The applicants complain that "*the trial court*" erred in permitting the state "*to expand upon the grounds relied upon for the confiscation order and to introduce new facts not traversed in the trial such as the Constitution of the ANC, to make out a case that the interventions of Zuma in relation to the ADS shares amounted to corruption*".[66] For the reasons that follow, we submit that this complaint is without merit.

67. The complaint is manifestly directed at the High Court judgment, not at the SCA judgment. The applicants do not suggest that the SCA permitted the

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65 Replying affidavit: page 889J para 139.2.2

66 Founding affidavit: volume 3 page 235 paragraph 356.7.1

state "*to expand upon the grounds relied upon for the confiscation order and to introduce new facts not traversed in the trial*". On the contrary, this complaint was never raised before the SCA[67] and the SCA accordingly did not deal with the matter in its judgment.

68. We submit that it is not competent for the applicants to dispute *the SCA judgment* on the basis that *the High Court* erred in permitting the state "*to expand upon the grounds relied upon for the confiscation order and to introduce new facts not traversed in the trial*". Since the point was not argued on appeal before the SCA, it is not correct that "*the SCA did not rule to the contrary, and must therefore be taken to have agreed with the trial Court in these respects*".[68] On this ground alone, the complaint is misdirected.

69. Section 18(6) of POCA in any event provides that, when a court considers an application for a confiscation order, it may

- refer to the evidence at the trial;
- "*hear such further oral evidence as the court may deem fit*";
- direct the public prosecutor and the defendant to tender to the court a statement referred to in section 21.

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67 Answering affidavit: page 691 para 24.1

68 Replying affidavit: page 889G, para 134.4

70. In the present case, the parties filed statements, answers and replies in relation to the application for confiscation orders in terms of s 21 of POCA. This was done by agreement between the NDPP and the applicants.

71. There is accordingly no basis for the applicants' complaint that the High Court erred in permitting the state "*to expand upon the grounds relied upon for the confiscation order and to introduce new facts not traversed in the trial*". The High Court was entitled to have regard to the further evidence adduced by affidavit, since this was the procedure that had been agreed to by the applicants.

72. The applicants' complaint rests on the premise that "*section 18(1) of POCA is concerned with the offence that the accused is convicted of, and not other offences that were not tried and did not form the subject matter of the trial*".[69] The applicants contend that "*the interpretation of section 18(1) in relation to the words 'related criminal activity' must thus be confined so as not to permit multiple legal proceedings arising from the same facts*".[70]

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69 Founding affidavit: volume 3 page 235 para 356.7.1

70 Founding affidavit: volume 2 page 234 para 356.4

73. We respectfully submit that the applicants' interpretation is mistaken. In terms of s 18(1) of POCA[71] a confiscation order may be based on the benefits a defendant derived from or in connection with:

- the very offences of which he has been convicted in terms of s 18(1)(a) and
- any other "*criminal activity which the court finds to be sufficiently related to those offences"* in terms of s 18(1)(c).

The phrase "*criminal activity*" in section 18(1)(c) cannot be taken to refer to refer to criminal conduct that has already formed the subject matter of a conviction. The word "*offence*" in subsections 18(1)(a) and (b) is juxtaposed to the phrase "*criminal activity*" in section 18(1)(c). This juxtaposition makes it clear that, in the case of section 18(1)(c) (unlike in the case of sections 18(1)(a) and (b)), a conviction is *not* required; all that is required is that the conduct must be found to be "*criminal activity*" that is "*sufficiently connected*" to the offences for which the defendants have been convicted.

74. The applicants' attack in any event misses the point because the confiscation orders against the applicants were justified in terms of section 18(1)(a) of POCA.

74.1. The applicants were convicted of corruption in terms of s 1(1)(a) of the Corruption Act. This crime includes the making of a

[71] read with ss 12(3) and 19(1) and the definition of "*proceeds of unlawful activities"* in s 1(1)

payment to someone with the intention to influence him in the exercise of his powers or the performance of his duties. It is important to emphasise that the payment need not *in fact* influence the payee. The corrupt intention behind the payment that it should influence the payee, suffices to make it a crime whether or not the payee is in fact influenced by it.

74.2. In contrast, a confiscation order in terms of s 18(1)(a) of POCA can only be made if the defendant in fact derived a benefit from or in connection with the bribe he paid to the payee. This enquiry in other words focuses on the impact of the payment of the bribe rather than the intention behind it. If the payee secures a benefit for the defendant as a result of the bribe, a confiscation order may be made in terms of s 18(1)(a). As long as the benefit was obtained as a result of the bribe, it is immaterial that it might not have been obtained in the way the defendant envisaged it would be done when he paid the bribe.

74.3. In the present case, the applicants derived the first benefit from or in connection with their bribery of Mr Zuma. Mr Shaik used the appellants' corrupt relationship with Mr Zuma to sell himself and his companies to Thomsons, and their stake in ADS was a benefit the applicants derived from their relationship with Mr Zuma. In those circumstances, we submit that the benefits were

derived, received or retained by the applicants in connection with the offences of which they were convicted. The confiscation order was accordingly justified in terms of section 18(1)(a) of POCA.

74.4. Our submission accords with the finding of the SCA. It held that "*Zuma's involvement in July 1998 fell within the scope of Shaik's corrupt intention that Zuma should wield the full weight of the political clout which he carried to bring about the desired result and that such an intention properly fell within the direct scope of the corruption charge on count 1*".[72] It followed, the SCA held, that the High Court erred "*in regarding that particular intervention as 'related criminal activity' which fell to be dealt with pursuant to se 18(1)(c) of POCA and not s 18(1)(a*)".[73]

75. We submit that the applicants do not have reasonable prospects of success when it comes to disturbing the SCA judgment on the basis of the submissions advanced in paragraph 356.7.1 of the founding affidavit. We point out that this ground of appeal is in any event not mentioned in the applicants' heads of argument.

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72 POCA judgment: bundle B volume 5 page 275 lines 12 to 16

73 POCA judgment: bundle B volume 5 page 275 lines 16 to 20. See also page 280 lines 9 to 12.

The findings made against the applicants

76. The applicants seek leave to appeal against the POCA judgment on the basis that "*the SCA should have considered the correctness of the confiscation orders in the light of the trial court's findings, and not by strengthening these findings against the accused*".[74] In other words, the applicants allege that the SCA "*misdirected itself by deciding the confiscation application based on the judgment in the appeal, which was not the basis on which the NDPP brought the application*".[75]

77. The principles which guide an appellate court in an appeal based purely upon fact are set out in the leading case of Dhlumayo.[76] It is apparent from those principles that there is no basis for the applicants' statement that "*the accused were entitled to those findings made by the trial court that favoured its case*".[77] The SCA was fully entitled to make its own findings on the evidence before it, and to have regard to those findings in the context of the asset forfeiture proceedings.

78. We accordingly submit that the applicants do not have any prospect of disturbing the SCA judgment on the basis of the submissions advanced in paragraph 358 of the founding affidavit.

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74 Founding affidavit: volume 3 page 237 para 358

75 Ibid

76 R v Dhlumayo1948 (2) SA 677 (A), especially at 705-706

77 Founding affidavit: volume 3 page 237 para 238

The alleged double-counting

79. The applicants seek leave to appeal against the POCA judgment in relation to the second benefit on the grounds that "*the dividends were absorbed within the value of the shares as part of the transaction and to grant confiscation orders for both would amount to double counting*".[78] They persist with this point in their heads of argument, where they contend that "*as the dividends were rolled into the value of the shares, it was disproportionate to separate them out as a separate benefit"*.[79] For the reasons that follow, we submit that the applicants' contentions are without merit.

80. It is common cause that the applicants acquired *both* their shares in Thomson SA *and* dividends on those shares. The shares and the dividends constitute separate benefits. The fact that the applicants might have chosen to use the one to fund the other, is irrelevant. That is so because a confiscation under ss 18(1) and (2) of POCA is based on the appellants' gross proceeds of his crimes and not on his nett profit. We refer to our earlier submissions in this regard. There is accordingly no "double counting".

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78 Founding affidavit: volume 3 page 236 para 356.7.2

79 Applicants' heads of argument in the asset forfeiture proceedings para 62; see also paras 55 to 57.

81. The SCA pointed out that "*the valuation of the shares which was carried out on 30 June 2005 valued future benefits but left out of account dividends paid before that date*", and held that "*[b]oth shares and dividends were in fact proceeds of the corruption in count 1*". Since the applicants had elected to use the dividends to pay for the shares, the SCA held that it would amount to a "*partial confiscation*" if they were to forfeit only the value of the asset so acquired.[80]

82. The High Court adopted a similar approach. It held that "*the third defendant has actually received both shares and dividends as benefits from the payments to Jacob Zuma*", and that the price paid to acquire tainted proceeds must be left out of account when determining the value of the proceeds.[81] The High Court exercised its discretion to grant the confiscation order in this amount. It is settled law that an appellate tribunal will not interfere with the exercise of a judicial discretion unless it is shown that the discretion was exercised capriciously or upon a wrong principle.[82] The SCA held that there were "*no grounds for interfering with the exercise of what is in any event a very wide discretion*".[83] The applicants have not made out any case to suggest why this Court should interfere with the exercise of discretion by the High Court.

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80 POCA judgment: bundle B volume 5 page 283 para 30

81 High Court judgment: bundle B volume 7 page 556 line 18 to page 557 line 13

82 Benson v SA Mutual Life Assurance Society 1986 (1) SA 776 (A) at 781J; Shepstone & Wylie and Others v Geyser NO 1998 (3) SA 1036 (SCA) at 1044J-1045A

83 POCA judgment: bundle B volume 5 page 284 lines 10 to 12

83. We accordingly submit that the applicants do not have reasonable prospect of success when it comes to disturbing the SCA judgment on the basis of the submissions advanced in paragraph 356.7.2 of the founding affidavit.

Conclusion

84. We submit that the applicants do not have prospect of success when it comes to appealing against the POCA judgment on the grounds anticipated in their founding affidavit.

THE ADDITIONAL GROUNDS RAISED IN THE HEADS

Introduction

85. In their heads of argument, the applicants advance two additional grounds of appeal that were not anticipated in the application for leave to appeal.

86. We submit that it is not competent for the applicants to do so. Constitutional Court rule 19(3)(a) requires an application for leave to appeal to this court to set out "*the grounds upon which the decision is disputed*". It is improper for the applicants to rely in their heads of argument on appeal grounds that were not anticipated in their founding affidavit. This Court is necessarily required to ascertain the relevant facts from the affidavits that have been filed in the application for leave to appeal. By virtue of the fact that the applicants seek to rely on appeal grounds that were not canvassed in their founding affidavits, this court has been deprived of a proper factual basis for assessing the merits of their complaints.

87. If this court finds it necessary to have regard to these new grounds of appeal at all, then we submit that they are without merit for the reasons that follow.

Causation

88. The applicants deal with the question of causation in paragraphs 24 to 44 of their POCA heads of argument. They submit that Mr Zuma's intervention was not the cause of their acquisition of a stake in ADS because they had a prior contractual right to that stake. They say that, even if Mr Zuma had not intervened on their behalf, they would still have acquired a stake in ADS, if needs be by litigation.

89. The applicants say that the question of causation is relevant "*for the purposes of proportionality*"[84] and to "*whether the confiscation order for the value of the entire shareholding was proportionate*".[85] Elsewhere, however, the applicants say that since the shares were not obtained through the two corrupt interventions, "*the confiscation order for the value of the shares ought to be set aside*".[86] It is accordingly not clear whether the applicants rely on the issue of causation for the purpose of seeking a reduction in the value of the confiscation order or for the purpose of having the confiscation orders set aside in toto.

90. We have already dealt with the required connection between a crime and its benefit in terms of POCA. In terms of the definition of "*proceeds of unlawful activities"* in s 1(1) and in terms of s 19(1), the benefit need

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84 Applicants' heads of argument in the asset forfeiture proceedings para 27

85 Applicants' heads of argument in the asset forfeiture proceedings para 44

86 Applicants' heads of argument in the asset forfeiture proceedings para 60

merely be one derived, received or retained "*in connection with"* the crime. The question in the present circumstances is whether there was such a connection between the applicants' corrupt relationship with Mr Zuma on the one hand and their acquisition of a stake in ADS on the other.

91. We submit on two different bases that there was indeed such a connection:

91.1. The first is that Mr Shaik used the appellants' corrupt relationship with Mr Zuma to sell himself and his companies to Thomsons. They were persuaded to go into partnership with Mr Shaik and his companies because of their relationship with Mr Zuma. In this way, the stake in ADS was a benefit that the applicants derived from their relationship with Mr Zuma.

91.2. The second is that Mr Zuma intervened on the applicants' behalf and persuaded Thomsons to go into partnership with them at a critical point when Thomsons seemed to veer the other way.

92. The applicants do not dispute this. Their only point is that the Nkobi group had a prior contractual right to acquire the indirect interest in ADS. They submit that the reasoning of the SCA "*does not exclude the matter being*

decided on the basis that the Nkobi Group had an enforceable agreement to acquire a share in the ADS benefits".[87]

93. We have already indicated that this ground of appeal was not raised by the applicants in their founding affidavit seeking leave to appeal to this court. Because the point was not raised, it was not dealt with in the NDPP's answering affidavit. The inevitable consequence of this is that the relevant facts are not before this court. Although we shall rely below upon facts that are supported by the SCA record, we are unable to give page references since the SCA record is not before this court.

94. We submit that the applicants' contention is unfounded for the following reasons:

- First, the applicants did not have an enforceable contractual right to a stake in ADS.
- Secondly, whether they had such a contractual right or not, the fact of the matter is that they acquired their stake in ADS by Mr Zuma's intervention and not by the enforcement of their contractual rights.
- Thirdly, as we have already demonstrated, the applicants in any event acquired a stake in ADS through their partnership with Thomsons by selling the "*political connectivity"* of their relationship with Mr Zuma. There was a close connection between their

[87] Applicants' heads of argument in the asset forfeiture proceedings para 25

corrupt payments to Mr Zuma on the one hand and their acquisition of a stake in ADS on the other, quite independently of Mr Zuma's interventions on their behalf.

95. The applicants do not identify the contract on which they rely when they say that they had a prior contractual right to a stake in ADS. We submit that the applicants had no such contractual right:

95.1. Nkobi and Thomsons signed a letter of understanding on 10 August 1995. It was however no more than a letter of understanding and was clearly not intended to be a binding and enforceable contract. It merely envisaged a joint venture for which they would incorporate a company jointly held by both parties. It was recorded that the object of the company "*would be primarily to participate in a number of civilian and military projects that are due to be implemented in the Republic of South Africa"*. It did however not begin to promise Nkobi a stake in all the projects that Thomsons might undertake in South Africa.

95.2. The shareholders' agreement of 17 July 1996 also did not create such a contractual right. It was in the first place merely an agreement between the shareholders in Thomson SA, that is, between Thomson Holdings and Nkobi Investments. It did not bind any other entity in the Thomson group. It secondly merely

regulated the relationship between the two shareholders as between the two of them and gave neither a right to participate in any other projects that Thomson might undertake in South Africa.

95.3. The applicants presumably rely on the understandings reached at the meetings of the shareholders and directors of Thomson SA and Thomson Holdings on 25 August 1997. It is clear that both the Thomson shareholders and directors and the Nkobi shareholders and directors were *ad idem* that Thomson SA should attempt to acquire a stake in ADS. But an agreement reached at a meeting of the shareholders and directors of a company who are merely present and merely act in that capacity and no other, can never create binding rights against and obligations to outside parties. Mr Shaik and his Nkobi group could justifiably feel betrayed when Thomsons decided to acquire ADS for themselves but the fact of the matter is that they did not have any contract binding and enforceable against Thomsons not to do so.

95.4. The same goes for Mr Moynot's letter to Mr Shaik of 22 September 1997. It was no more than an expression of intention or perhaps even an agreement in principle but clearly did not

create a valid and enforceable contractual right to participate in the acquisition of an interest in ADS.

95.5. We accordingly submit that Mr Shaik and the Nkobi companies had no contractual right to a stake in ADS.

96. But even if they had such a contractual right, the sequence of events that ultimately led to their acquisition of a stake in ADS, was that Mr Zuma successfully intervened on their behalf and persuaded Thomsons to go into partnership with them. They did not acquire their stake in ADS by the enforcement of any contractual right they might have had. In other words, as a matter of historical fact, Mr Zuma's intervention on the appellants' behalf was one of the links in the chain which ultimately led to their acquisition of a stake in ADS. This actual chain of causation which exists as an historical fact, does not disappear merely because it might have been possible for the appellants to acquire the same benefit in a different way. The fact is that they did not acquire it in a different way. They acquired it by Mr Zuma's intervention. He in turn intervened because it was the kind of protection and support for which they had made the corrupt payments to him. We accordingly submit that the SCA correctly held that "*Zuma's mediation was intended to and did have the direct effect of ensuring that when the tender was awarded the third appellant would*

benefit from the ADS involvement, as it would not have benefited without such intervention".[88]

97. In any event, the applicants' relationship with Mr Zuma was a material consideration in the creation of their partnership with Thomson and thus in their acquisition of a stake in ADS. The connection between the corrupt payments to Mr Zuma on the one hand and the applicants' acquisition of the first benefit on the other, in other words exists quite independently of Mr Zuma's intervention on their behalf at the critical stage. Even if he had never intervened, their acquisition of a stake in ADS would still have been a product of their corrupt payments to Mr Zuma. The connection between the two was in other words not only established by his intervention and accordingly also not depends on it.

98. We accordingly submit that the applicants do not have prospects of success on appeal in relation to their arguments regarding causation.

No connection to organised crime

99. The applicants contend that the confiscation orders are disproportionate because "*the convictions did not relate to organized crime, money laundering, criminal gang activities and racketeering*"[89] and "*the offence of*

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88 POCA judgment: bundle B page 282 lines 5-8

89 Applicants' heads of argument in the asset forfeiture proceedings para 48

corruption is not close to the prevention of organized crime".[90] In support of their contention, the applicants rely extensively on the judgment of this court in Mohunram.[91]

100. Mohunram dealt with the forfeiture of the instrumentalities of crime in civil proceedings under chapter 6 of POCA. A majority of this court held that, when it comes to exercising a discretion to grant such a forfeiture order, it is relevant to consider to what extent forfeiture would serve the objects of POCA. One of these objects was identified as the prevention of "*organised crime offences*" (i.e. the offences created by POCA, being racketeering under chapter 2, money laundering under chapter 3 and criminal gang activities under chapter 4).

101. We submit that the offences of which the applicants were convicted on count one were indeed crimes under chapters 2 and 3 of POCA (or, at a minimum, were closely connected to such crimes). We make this submission for the following reasons:

101.1. Section 2 of POCA creates various offences which pivot around the concept of "*a pattern of racketeering activity*". This is defined as "*the planned, ongoing*, *continuous or repeated participation in any offence referred to in Schedule 1 and includes at least two*

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90 Applicants' heads of argument in the asset forfeiture proceedings para 61

91 Mohunram v NDPP (CCT 109/06)

offences referred to in Schedule 1, *of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years ... after the commission of such prior offence referred to in Schedule 1*".[92]

101.2. The offences listed in schedule 1 to POCA include "*any offence contemplated in section 1(1) of the Corruption Act, 1992 (Act No. 94 of 1992*)".[93]

101.3. On count one, all of the applicants were convicted of a contravention of section 1(1) of the Corruption Act. Their offences did not involve the performance of a once-off act. On the contrary, their offences involved the making of some 238 payments "*during the period 1 October 1995 to 30 September 2002*".[94] It was for this reason that the SCA described the applicants' criminal conduct as involving a "*sustained corrupt relationship over the years*".[95] We submit that their conduct involved "*the planned, ongoing, continuous or repeated participation or involvement*" in an offence listed in Schedule 1 to POCA. It accordingly amounts to a "*pattern of racketeering activity"*, within the meaning of POCA.

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92 Section 1

93 Item 12

94 Indictment: bundle B volume 1 page 17 lines 14-15

95 Main SCA judgment: bundle B volume 5 page 379 para 219

101.4. Since the applicants were involved in a "*pattern of racketeering activity*", their conduct constituted an offence in terms of chapter 2 of POCA. In particular, their conduct contravened section 2(1)(d) and section 2(1)(e) of POCA since they acquired their indirect interest in ADS and participated indirectly in the affairs of ADS through a pattern of racketeering activity.

101.5. Furthermore, Mr Shaik and Nkobi Holdings acquired an indirect interest in ADS in circumstances where they knew or ought reasonably to have known that this formed part of the proceeds of unlawful activities of Nkobi Investments. Such conduct contravened section 6 of POCA.

102. We accordingly submit that the offences of which the applicants were convicted on count one involved (or were closely connected to) "*organised crime*". If this Court were to take a different view of the matter, then we submit that Mohunram is in any event distinguishable for the reasons that follow.

103. Mohunram was concerned with the forfeiture of instrumentalities of crime in "*civil proceedings*" under chapter 6 of POCA. In contrast, the present case concerns the confiscation of proceeds of crime pursuant to a criminal conviction under chapter 5.

104. Subject to the limitations imposed by s 18(2), a court that makes a confiscation order in terms of s 18(1) exercises a wide discretion in its determination of the amount of the order. It "*may"* make a confiscation order in "*any amount it considers appropriate"*. We accept that the court will in the exercise of its discretion seek to strike a balance between means and ends (that is, between the impact of its confiscation order on the one hand and the purposes sought to be achieved by it on the other). The question that arises is what purposes are sought to be achieved by chapter 5 of POCA.

105. We submit that the objects of chapter 5 are manifestly not limited to "*organised crime offences*".

105.1. The long title states that one of the objects of POCA is "*to provide for the recovery of the proceeds of unlawful activities*". This object is not limited to organised crime offences.

105.2. The preamble formulates one of the objectives of POCA as follows:

> *"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".

Again, this objective is not limited to organised crime offences.

105.3. POCA provides that a person 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*".[96] It is therefore apparent that the legislature intended to target (inter alia) offences committed *before* the commencement of POCA. In the nature of things, "organised crime offences" could only be committed *after* POCA came into operation. Since it is not possible to derive a benefit from organised crime offences committed before POCA commenced operation, it is clear that the legislature did not only intend to catch organised crime offences in the chapter 5 net.

106. The applicants submit that the only object of chapter 5 of POCA is "*to deprive the accused convicted of a crime of the benefits he derived from the unlawful activity*".[97] We submit that this is too narrow. POCA does not merely have a "*backward-looking justification"* of stripping criminals of the

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96 Section 12(3)

97 Applicants' heads of argument in the asset forfeiture proceedings, para 45

proceeds of their crimes. It also has a "*forward-looking justification"* that seeks to reduce the levels of crime by creating a deterrent.

106.1. Lord Steyn made this point in Rezvi's case under the English Criminal Justice Act of 1988:

> "*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. 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*."[98]

106.2. The European Court of Human Rights made the same point in the case of Phillips in relation to the confiscation provisions in the English Drug Trafficking Act of 1994:

> "*the making of a confiscation order operates in the way of a deterrent to those considering engaging in drug trafficking, and also to deprive a person of profits received from drug*

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98 R v Rezvi [2002] 1 All ER 801 (HL) para 14

trafficking and to remove the value of the proceeds from possible future use in the drugs trade".[99]

106.3. We accordingly submit that the SCA correctly held that chapter 5 of POCA is directed not only at "*incapacitation*" but also at "*deterrence*".[100]

107. In Mohunram, Sachs J held that "*[d]eterrence as a law enforcement objective is constrained by the principle that individuals may not be used in an instrumental manner as examples to others if the deterrence is set at levels beyond what is fair and just to those individuals*".[101] We submit that the confiscation orders in this case were not set at levels "*beyond what was fair and just*" to the applicants.

108. A court of appeal may not set aside a decision of a lower court made in the exercise of such a discretion merely because it might have exercised it differently. It may interfere only

> "*when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made*

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99 Phillips v United Kingdom, judgment of the European Court of Human Rights in case 41087/98 handed down on 5 July 2001, para 52

100 POCA judgment: bundle B page 284 line4

101 Para 146

by a court properly directing itself to all the relevant facts and principles".[102]

109. We submit that it cannot be said that the SCA erred in not reducing the confiscation orders on the grounds that the applicants were not involved in "*organised crime offences*". It must be borne in mind that proportionality in cases of this kind cannot and should not be "*measured with fine legal callipers"*. The approach should be more robust, as the SCA emphasized in Prophet's case:

> "*The introduction of the forfeiture procedures by the Act was brought about because of the realisation by the Legislature that there was rapid growth, both nationally and internationally, of organised criminal activity and the desire to combat these criminal activities by, inter alia, depriving those who use property for the commission of an offence of such property. The consequences may be harsh, but as Willis J said in NDPP v Cole, forfeiture may play an important role in the prevention and punishment of drug offences. In my view, courts should thus guard against the danger of frustrating the lawmaker's purpose for introducing the forfeiture procedure in the Act. A mere sense of disproportionality should not lead to a refusal of the order sought. To ensure that the purpose of the law is not undermined, a standard of 'significant*

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[102] National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC) para 11. Also see Benson v SA Mutual Life Assurance Society 1986 (1) SA 776 (A) 781J; Shepstone & Wylie v Geyser 1998 (3) SA 1036 (SCA) 1044J to 1045A

disproportionality' ought to be applied for a court to hold that a deprivation of property is 'arbitrary' and thus unconstitutional, and consequently refused to grant a forfeiture order. And it is for the owner to place the necessary material for a proportionality analysis before the court."[103]

Conclusion

110. We submit that the applicants do not have reasonable prospect of success when it comes to appealing against the POCA judgment on the additional grounds set out in their heads of argument.

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103 Prophet v NDPP 2006 (1) SA 38 (SCA) para 37

PRAYER

111. The NDPP asks that the application for leave to appeal be dismissed with costs including the costs of two counsel.

Wim Trengove SC

Alfred Cockrell

Chambers
Johannesburg
11 May 2007

LIST OF AUTHORITIES

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Benson v SA Mutual Life Assurance Society 1986 (1) SA 776 (A)

Cuppan v Cape Display Supply Chain Services 1995 (4) SA 175 (D)

De Lange v Smuts NO 1998 (3) SA 785 (CC)

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Myburgh v Voorsitter van die Schoemanpark Ontspanningsklub Dissiplinere Verhoor 1995 (9) BCLR 1145 (O)

National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC) para 11.

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