THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case 86/06

In the matter between:

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

and

THE STATE	Respondent

THE STATE'S MAIN SUBMISSIONS

CONTENTS

INTRODUCTION

1. Schabir Shaik and ten companies in his Nkobi group apply for leave to appeal to this court against the judgment of the Supreme Court of Appeal in S v Shaik 2007 (1) SA 240 (SCA). It dismissed their appeals and applications for leave to appeal against their convictions and sentence by the High Court on charges of corruption (count 1), fraud (count 2) and corruption and money laundering (count 3). The High Court judgment of Squires J is reported as S v Shaik and others [2005] 3 All SA 211 (D).

2. Mr Shaik and two of his companies also apply for leave to appeal to this court against the judgment of the SCA in Shaik v S [2007] 2 All SA 150 (SCA) dismissing their appeals against two of three confiscation orders made by the High Court in terms of section 18(1) of the Prevention of Organised Crime Act 121 of 1998.[1]

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[1] Squires J POCA judgment Bundle B 7:525 to 562. We use the following method of citation for documents:
- If it is in either of the Applicants' bundles of additional documents: (a) we describe the document; (b) we describe the bundle (i.e. "Bundle A" or "Bundle B"); (c) the number before the first colon is the volume number; (d) the number after the first colon is the printed page number in the middle at the top of each page; and (e) the number after the second colon, if applicable, is the paragraph number
- If it is part of the paginated Record comprising the application for leave to appeal, the application for leave to adduce evidence and the application leave to amend: (a) we describe the document; (b) we indicate that it forms part of the "Record"; (c) the number before the first colon is the page number; and (d) the number after the second colon, if applicable, is the paragraph number

3. These submissions are confined to the criminal proceedings. Like the applicants the National Director of Public Prosecutions is filing separate submissions in the POCA proceedings.

4. The state opposes the application for leave to appeal. We submit that Mr Shaik and his companies are precluded from raising most of their grounds of appeal and adducing the evidence on which they are based. All of their grounds of appeal are in any event manifestly without merit. None of them raise constitutional issues of substance.

THE COURSE OF THE CRIMINAL PROCEEDINGS

The indictment

5. On 2 February 2004 Mr Shaik and ten companies were indicted for trial in the Durban High Court on three main charges and several alternatives. At the request of the defence, the trial was enrolled for 11 October 2004 to give them sufficient time to prepare.

6. Nine of the companies formed part of Mr Shaik's Nkobi group of companies. Accused 11 was Thomson-CSF (Pty) Ltd. It has since been renamed Thint (Pty) Ltd). Mr Shaik was a director of all the companies and was cited as their representative in terms of s 332 of the Criminal Procedure Act 51 of 1977. Accused 12 was Chartley Investments (Pty) Ltd a company also represented by Mr Shaik as director.[2]

7. At the commencement of the trial on 11 October 2004, the state withdrew all charges against Thint. The remaining accused did not raise any objection to the withdrawal against Thint.

8. The trial proceeded against the remaining 11 accused who are the applicants in this matter.

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[2] Application to add Chartley Investments (Pty) Ltd as Accused No. 12 Bundle A 13:1187 to 1188

9. The charges are set out in the indictment[3] as amplified by the summary of substantial facts[4] and further particulars.[5] In essence they were as follows:

9.1. The first count was a contravention of s 1(1)(a)(i) and (ii) of the Corruption Act 94 of 1992. It was alleged that Mr Shaik and one or other of the corporate accused had, over a period of nearly seven years, made some 238 payments either directly to, or for the benefit of, Mr Jacob Zuma. He was at the time of the trial the Deputy President of South Africa. The payments were made as inducement to Mr Zuma to use his name and political influence for the benefit of the Nkobi group or as an ongoing reward for having done so.

9.2. The second count was one of fraud. It was alleged that an amount in excess of R1,2 million had been written off irregularly in the 1999 financial statements of the Nkobi group on the false pretext that it represented expenses incurred on a card-form driver's-licence project. The true purpose of the writing-off was to extinguish debts owed chiefly by Mr Shaik. They included

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3 Indictment Bundle B 1:1 to 24

4 Summary of substantial facts Bundle A 13:1151 to 1186

5 State's reply to request for further particulars Bundle B 4:210 to 267

most of the payments made to or on behalf of Mr Zuma. This fact had been withheld from shareholders, directors, accountants, accounting staff of the Nkobi group, creditors, the bank that provided overdraft facilities, and from the South African Revenue Service.

9.3. The third count was of a contravention of s 1(1)(a)(i) of the Corruption Act. It was alleged that Mr Shaik and certain of the corporate accused had participated with the French Thint group in a consortium that, through the local company African Defence Systems, had acquired a stake in the provision of an armaments suite for naval corvettes, which formed part of the South African government's arms acquisition programme. When it appeared that an enquiry would be held into aspects of the arms deal, Mr Shaik, acting on his own behalf and that of the corporate accused, arranged for the payment of a bribe of some R500 000 by the Thint group to Mr Zuma in return for which he would shield them from the enquiry and thereafter would promote the French Thint group's interests in South Africa.

The trial in the High Court

10. The trial commenced formally on 13 October 2004 before Squires J and two assessors. The accused pleaded not guilty to all counts and handed

in a detailed plea explanation in terms of s 115 of the CPA.[6] They did not object to the fact that Mr Zuma and Thint, who were alleged to be co-conspirators in the indictment, summary of substantial facts and further particulars, were not joined as co-accused.

11. During the course of the state's case, the defence objected to the admissibility of several documents. These included the so-called "encrypted fax" written by Thint's then managing director Alain Thétard to his superior in Mauritius and copied to his superior in Paris, and certain documents obtained from Mauritius. By agreement, the documents were provisionally admitted subject to a ruling on their admissibility at the end of the state's case. After hearing argument from both sides, the trial court ruled most of the documents admissible.[7]

12. In the course of the trial the defence made a range of formal admissions in terms of s 220 of the CPA.[8]

13. After the state had closed its case Mr Shaik testified in his own defence and on behalf of the corporate accused. The defence also called several witnesses, including Pierre Moynot, who was then the chief executive officer of Thales International (Africa) (Mauritius) Ltd (Thint's holding

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6 Not included in the record

7 Squires J judgment on admissibility Bundle B 8:563 to 606

8 Formal admissions JDP1 Record 525 to 543

company in Mauritius), Deputy Chairman of the Board of ADS and the former managing director of Thint.

14. At no stage did the accused complain of any difficulty obtaining the testimony of any witnesses whose evidence they deemed relevant to the case, request the assistance of the state to subpoena any witnesses, or approach the court to call any witnesses in terms of s 186 of the CPA. They also did not make any application to take the evidence of any overseas witnesses (in particular Mr Thétard, Mr Perrier and Mr De Jomaron) on commission, or tender their evidence by way of affidavit or even unsworn statement.

15. The matter was adjourned for written argument and oral argument. None of the constitutional issues now sought to be raised by the accused were advanced before the trial court.

The High Court's judgments

16. Judgment was handed down on 30 May to 2 June 2005.[9] The accused were all convicted as follows:[10]

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9 Squires J judgment on the criminal charges Bundle B 2:35 to 3:134.98; see also S v Shaik and others [2005] 3 All SA 211 (D)

10 Squires J judgment on the criminal charges Bundle B 3:134.97 to 98

16.1. On count 1, all of the accused were convicted on the main charge of corruption.

16.2. On count 2, accused 1, 4, 7, 9 and 10 were convicted on the main charge of fraud.

16.3. On count 3, accused 1 was convicted on the main charge of corruption and accused 4 and 5 were convicted on the first alternative charge of money laundering.

17. On 8 June 2005, after hearing evidence and argument in aggravation and mitigation of sentence, the court handed down its judgment on sentence.[11]

18. In respect of Mr Shaik, the court found no substantial and compelling reasons to depart from the prescribed minimum sentence of 15 years' imprisonment on counts 1 and 3. On count 2 he was sentenced to 3 years' imprisonment. The sentences on all three counts were ordered to run concurrently, resulting in an effective sentence of 15 years' imprisonment.[12]

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11 Squires J judgment on sentence Bundle B 3:136 to 151

12 Squires J judgment on sentence Bundle B 3:149

19. The corporate accused were sentenced to fines of varying magnitudes, some of which were suspended.[13]

The applications for leave to appeal to the SCA

20. All the accused applied to the trial court for leave to appeal to the SCA.[14] On 29 July 2005 the trial court:[15]

    20.1. on count 1, refused leave to appeal against conviction and sentence in respect of all of the accused with the exception of accused 3 which was granted leave to appeal against its conviction on limited grounds;

    20.2. on count 2, refused all of the accused who had been convicted (accused 1, 4, 7, 9 and 10) leave to appeal against their sentences and granted all of them leave to appeal against their convictions on limited grounds; and

    20.3. on count 3, refused all of the accused who had been convicted (accused 1, 4 and 5) leave to appeal against their sentences and

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13 Squires J judgment on sentence Bundle B 3:150 to 151, namely:
Count 1: accused 2, R125 000 fine; accused 3, R 1 million fine; accused 4, R125 000 fine; accused 5, R125 000 fine; accused 6, R25 000 fine, suspended for 5 years; accused 7, R25 000 fine, suspended for 5 years; accused 8, R125 000 fine; accused 9, R25 000 fine, suspended for 5 years; accused 10, R25 000 fine, suspended for 5 years; and accused 12, R25 000 fine, suspended for 5 years.
Count 2: accused 4, R1,4 million fine; accused 7, R33 000 fine, suspended for 5 years; accused 9, R33 000 fine, suspended for 5 years; and accused 10, R33 000 fine, suspended for 5 years.
Count 3: accused 4, R500 000 fine; and accused 5, R500 000 fine.

14 The application to the trial court for leave to appeal is not in the record

15 Squires J order on application for leave to appeal Bundle B 3:152 to 4

granted all of them leave to appeal against their convictions on limited grounds relating to the admissibility and probative value of the encrypted fax.

21. The accused applied to the President of the SCA for general leave to appeal against their convictions and sentences on substantially the same grounds raised before Squires J.[16]

22. On 15 November 2005 the SCA ordered that the scope of the appeal be extended by granting the application for leave to appeal in part, refusing it in part, and referring it in part to oral argument.[17]

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16 The application to the SCA for leave to appeal is not in the record

17 SCA order of 15 November 2005 Bundle B 4:156 to 157. More specifically:
Count 1 convictions: Application for leave to appeal by accused 1, 2, 4, 5, 6, 7, 8, 9 and 12 (applicant 11) against their convictions, referred for oral argument; and accused 3's application for unlimited leave to appeal against its conviction, referred for oral argument.
Count 1 sentences: accused 1's application for leave to appeal against his sentence, referred for oral argument; leave to appeal by accused 2, 3, 4, 5 and 8 against their sentences, granted; and applications for leave to appeal by accused 6, 7, 9, 10 and 12 against their sentences, refused.
Count 2 convictions: unlimited leave to appeal by accused 1, 4, 7, 9 and 10 against their convictions, granted.
Count 2 sentences: applications for leave to appeal by accused 1, 4, 7, 9 and 10 against their sentences, refused.
Count 3 convictions: unlimited leave to appeal by accused 1, 4, and 5 against their convictions, granted; and accused 1's application for leave to appeal against his sentence, referred for oral argument.
Count 3 sentences: applications for leave to appeal by accused 4 and 5 against their sentences, refused.

The proceedings in the SCA

23. The appeal was initially set down for argument before the SCA on 21 to 25 August 2006, but on 7 August 2006 it was postponed to 25 to 27 September 2007 due to the illness of one of the SCA judges.[18] The argument on behalf of the accused, although somewhat wider than that presented to the trial court, still made no reference to any of the constitutional issues they now seek to raise.

24. Counsel for the accused did, however, make a remark to the effect that the accused "*reserved their rights*"[19] arising from matters brought to light in the Zuma case. As no particulars were given and it did not relate to any of the matters with which the court was seized, this remark did not call for any reply by the state.

25. On 6 November the SCA handed down its judgment dismissing the appeals against both conviction and sentence.[20]

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18 Du Plooy answering affidavit Record 429:94.4.2

19 Du Plooy answering affidavit Record 430:94.4.6

20 S v Shaik and Others 2007 (1) SA 240 (SCA)

THE PROCEEDINGS IN THIS COURT

26. In mid December 2006 the applicants launched the present application for leave to appeal to this court against the SCA's judgments and orders in both the criminal appeal and the asset forfeiture appeal.[21] The application was accompanied by an affidavit and approximately 35 volumes of evidence which was not in the High Court or the SCA records.

27. On 31 January 2007 the applicants delivered an interlocutory application for leave to adduce new evidence lodged with their application for leave to appeal.[22]

28. On the same day the applicants delivered a supplementary founding affidavit.[23] They have not applied for condonation for the late filing of this affidavit. It was accompanied by yet further evidence not in the trial and appeal records.

29. On 15 February 2007 the state delivered its answering papers in the application for leave to appeal.[24]

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21 Application for leave to appeal Record 1 to 6

22 Interlocutory application for leave to adduce evidence Record 339 to 349

23 Supplementary founding affidavit Record 276 to 338

24 Respondent's answering affidavits Record 352 to 706

30. On 23 February 2007 the applicants delivered a second interlocutory application, this time for leave to reply to the state's answering affidavit.[25]

31. On the same date they delivered a notice of intention to amend the relief sought in their main application for leave to appeal.[26] This notice was prompted by passages in the state's answering affidavit pointing out that the relief sought was flawed in certain respects.

32. On the same day they delivered a notice of their intention to amend their interlocutory application for leave to adduce new evidence to include a prayer for leave to adduce the new evidence filed with their supplementary founding affidavit.[27]

33. On the same date the applicants delivered a replying affidavit in their application for leave to adduce new evidence,[28] adopting the attitude that this court's leave was not required for a replying affidavit in that application.

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25 Interlocutory application for leave to reply Record 707 to 721

26 Notice of intention to amend (main application) Record 722 to 726 and affidavit supporting notice of intention to amend (main application) Record 727 to 733

27 Notice of intention to amend (interlocutory application for leave to adduce new evidence) Record 733 to 736

28 Replying affidavit (interlocutory application for leave to adduce new evidence) Record 737 to 768

34. On 8 March 2007 the state delivered a notice of objection to (a) the applicants' proposed amendment of the relief sought in their original notice of motion and (b) their proposed amendment of the relief sought in their application for leave to adduce evidence.[29]

35. On 20 March 2007 the applicants delivered their replying affidavit in the main application for leave to appeal,[30] pursuant to directions from the Chief Justice dated 6 March 2007 permitting them to do so.[31]

36. On 22 March 2007 the applicants delivered a third interlocutory application, this time for leave to amend the relief sought in their main application and in their interlocutory application for leave to adduce new evidence.[32]

37. On 26 March 2007 the applicants delivered four supplementary replying affidavits in the main application for leave to appeal.[33] They were accompanied by an affidavit by the applicants' attorney explaining why these were not filed together with the main replying affidavit. The applicants have not formally applied for condonation for their late filing.

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29 Respondent's notice of objection Record 775 to 778

30 Replying affidavit (main application) Record 781 to 931

31 Chief Justice's Directions 6 March 2007 Record 772 to 774

32 Applicants' (third) interlocutory application for leave to amend Record 935 to 972

33 Applicants' supplementary affidavits (main application) by Parsee, Shaik, Lechman and Hulley Record 972 to 985

38. On 28 March 2007 the state delivered a notice of its intention to oppose the application for leave to amend of 22 March 2007.[34]

39. On 4 April 2007 the Chief Justice gave further directions which included a direction that "*The record shall consist of all the documents thus far lodged in the application for leave to appeal in this Court*".[35] In the light of this direction, the state did not deliver any answering affidavits in the application for leave to amend.

40. On 20 April and 23 April 2007 the applicants provided the state with electronic copies of their argument in the POCA proceedings and the criminal proceedings. They filed those arguments on 24 April 2007.

41. On 25 April 2007 the applicants delivered an application for condonation for the late filing of their written argument.[36] The state does not oppose this application.

42. On the afternoon of Thursday 26 April 2007, on the eve of the Freedom Day long weekend, the applicants delivered supplementary written argument raising a novel point relating to their sentencing.

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34 Notice of opposition (interlocutory application for leave to amend) Record 986 to 988

35 Chief Justice's Directions 4 April 2007 989 to 991

36 This application has not been paginated and included in the index

43. On 2 May 2007, following an objection by the state for the late delivery of this supplementary written argument, the applicants delivered a further application for condonation. The state has opposed that application and delivered an affidavit in response to it.[37]

[37] Neither the application nor the State's response has been paginated or included in the index

THE APPLICATION TO ADDUCE NEW EVIDENCE

The principle of finality

44. The reason why fresh evidence is generally not allowed on appeal is that litigation must come to an end as a matter of public policy. This principle is found not only in South African law, but also in many foreign legal systems, including English law, Canadian law and Australian law.

English law

45. The general principle is stated by Lord Wilberforce in The Ampthill Peerage Case:

> "*English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or to reopen disputes. The principle … is the same principle as that which requires judgments in the courts to be binding, and that which prohibits litigation after the expiry of limitation periods. Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that*

> *sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved.*"[38]

46. The same point was made by the Court of Appeal in Taylor v Lawrence:

> "*The rule in Ladd v Marshall*[39] *is an example of a fundamental principle of our common law – that the outcome of litigation should be final. Where an issue has been determined by a decision of the court, that decision should definitively determine the issue as*

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38 The Ampthill Peerage Case [1976] 2 All ER 411 (HL) 417h to 418c

39 Ladd v Marshal [1954] 3 All ER 745 (CA), discussed below

between those who were party to the litigation. Furthermore, parties who are involved in litigation are expected to put before the court all the issues relevant to that litigation. If they do not, they will not normally be permitted to have a second bite at the cherry ….".[40]

47. The principle was recently affirmed by the Court of Appeal in Uddin:

"*However if the discovery of fresh evidence is ever to justify reopening a concluded appeal, the case must at least have this in common with the instances of corrupted process: the injustice that would be perpetrated if the appeal is not reopened must be so grave as to overbear the pressing claims of finality in litigation – especially pressing where what is contemplated is a second appeal. Finality is itself a function of justice, and one of great importance.*"[41]

48. One reason for not allowing fresh evidence on appeal, is that it would require the appeal court to decide the matter in circumstances where it has not had the benefit of a judgment of the lower court. The point was made as follows in North Staffordshire Railway Company:

"*The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods. The issues*

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[40] Taylor v Lawrence [2002] 2 All ER 353 (CA) para 6

[41] Re Uddin [2005] 3 All ER 550 (CA) para 21

of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of appellate tribunals to require that the judgments of the judges in the Courts below shall be read. The efficiency and the authority of a Court of Appeal, and especially of a final Court of Appeal, are increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the Courts below."[42]

49. The requirements for adducing fresh evidence on appeal are set out in the leading case of Ladd v Marshall:

"In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the outcome of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in

[42] North Staffordshire Railway Company v Edge [1920] AC 254 263-264

other words, it must be apparently credible, although it need not be incontrovertible."[43]

These rules are commonly called "*the Ladd v Marshall principles*".

50. The Ladd v Marshall principles have been endorsed in many cases. The judgment of the Court of Appeal in Bruce[44] indicates that fresh evidence should not be allowed on appeal where the point was abandoned before the court *a quo* on the advice of counsel.

Canadian law

51. In her dissenting judgment in Brown, L'Heureux-Dubé J explained the general principle of finality as follows in relation to the raising of new arguments on appeal:

"… the general prohibition against new arguments on appeal supports the overarching societal interest in the finality of litigation in criminal matters. Were there to be no limits on the issues that may be raised on appeal, such finality would become an illusion. Both the Crown and the defence would face uncertainty, as counsel for both sides, having discovered that the strategy adopted at trial did not result in the desired or expected verdict, devised new approaches. Costs would escalate and the resolution

43 Ladd v Marshall [1954] 3 All ER 745 (CA) 748A-B

44 R v Civil Service Appeal Board, ex parte Bruce [1989] 2 All ER 907 (CA)

of criminal matters could be spread out over years in the most routine cases. Moreover, society's expectation that criminal matters will be disposed of fairly and fully at the first instance and its respect for the administration of justice would be undermined. Juries would rightfully be uncertain if they were fulfilling an important societal function or merely wasting their time. For these reasons, courts have always adhered closely to the rule that such tactics will not be permitted."[45]

52. The Ontario Court of Appeal made the same point in Leduc:

"*Appellate courts are always reluctant to permit one party to raise on appeal an issue that was not raised at trial. This reluctance is grounded in several valid concerns: possible prejudice to the other party, who may not have had a fair opportunity to respond to the issue; an incomplete trial record and the absence of factual findings on the issue; and society's interest in the finality of criminal litigation.*"[46]

53. There are four requirements for adducing fresh evidence on appeal. The Supreme Court summarised them in Palmer:

"(1) the evidence should generally not be admitted if, by due diligence, is could have been adduced at trial provided that

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45 Brown v The Queen [1993] 16 CRR (2d) 290 (SC) 293-294

46 R v Leduc [2004] 108 CRR (2d) 337 (Ontario CA) para 80

this general principle will not be applied as strictly in a criminal case as in civil cases …;

(2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;

(3) the evidence must be credible in the sense that it is reasonably capable of belief; and

(4) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result."[47]

54. These requirements are not applied as strictly in criminal cases as in civil cases.[48]

Australian law

55. In its recent judgment in Ekenaike, the High Court of Australia explained the general principle of finality of which the prohibition on leading fresh evidence on appeal forms a part:

"*A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a*

47 Palmer v The Queen 106 DLR (3d) 212 (SC) 224

48 Morin v Board of Trustees of Regional Administration Unit # 3 [2002] 93 CRR (2d) 75; Public Schools Board Association of Alberta v Alberta (Attorney General) 2000 SCC 2 para 9; R v GDB 2000 SCC 22. See however Olbey v The Queen 105 DLR (3d) 385 (SC), as an example of a case where the Supreme Court of Canada refused to allow fresh evidence on appeal in a criminal case

few, narrowly defined, circumstances. That tenet finds reflection in the restriction upon the reopening of final orders after entry and in the rules concerning the bringing of an action to set aside a final judgment on the ground that it was procured by fraud. The tenet also finds reflection in the doctrines of res judicata and issue estoppel. Those doctrines prevent a party to a proceeding raising, in a new proceeding against a party to the original proceeding, a cause of action or issue that was finally decided in the original proceeding. It is a tenet that underpins the extension of principles of preclusion to some circumstances where the issues raised in the later proceeding could have been raised in an earlier proceeding.

The principal qualification to the general principle that controversies, once quelled, may not be reopened is provided by the appellate system. But even there, the importance of finality pervades the law. Restraints on the nature and availability of appeals, rules about what points may be taken on appeal and rules about when further evidence may be called in an appeal (in particular, the so-called "fresh evidence rule") are all rules based on the need for finality".[49]

56. Dixon CJ summarised the requirements for the admission of fresh evidence in Greater Wollongong Corporation:

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[49] Ekenaike v Victoria Legal Aid [2005] HCA 12

> *"If cases are put aside where a trial has miscarried through misdirection, misreception of evidence, wrongful rejection of evidence or other error and if cases of surprise, malpractice or fraud are put on one side, it is essential to give effect to the rule that the verdict, regularly obtained, must not be disturbed without some insistent demand of justice. The discovery of fresh evidence in such circumstances could rarely, if ever, be a ground for a new trial unless certain well-known conditions are fulfilled. It must be reasonably clear that if the evidence had been available at the first trial and had been adduced, an opposite result would have been produced or, if it is not reasonably clear that it would have been produced, it must have been so highly likely as to make it unreasonable to suppose the contrary. Again, reasonable diligence must have been exercised to procure the evidence which the defeated party failed to adduce at the first trial."*[50]

South African law

57. In South Africa too "*public policy demands that the principle of finality in litigation should generally be preserved rather than eroded*".[51] Consequently this court, like the SCA and other Southern African superior

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50 Greater Wollongong Corporation v Cowan (1955) CLR 435 (HCA)

51 Trollip JA in Firestone SA (Pty) Ltd v Gentiruco AG 1977 (4) SA 298 (A) 309A-B, approved by this Court in Minister of Justice v Ntuli 1997 (3) SA 772 (CC) para 23, both cases dealing with the courts' powers to vary their orders

courts[52], has held that new evidence may only be admitted in exceptional circumstances.

58. As in the foreign jurisdictions, the application of the principle of finality is not limited to the introduction of new evidence on appeal. It governs the courts' approach in a range of analogous situations, such as the variation of orders[53], extensions of periods of time prescribed for further steps in litigation[54] and attempts to re-litigate issues decided in earlier cases between the same parties.[55]

59. In criminal matters, parliament has made specific provision in the CPA for applications for leave to adduce further evidence in appeals to the SCA or a full bench of a High Court by accused convicted in High Court criminal trials. Section 316(5)(a) provides that an application for leave to appeal may be accompanied by an application to adduce further evidence in the appeal. Section 316(5)(b) adds that such an application must be supported by an affidavit stating the following:

> *"(i) further evidence which would presumably be accepted as true, is available;*

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52 Many of the authorities are collected by Erasmus Superior Court Practice, Revision Service 27, A1-55 to A1-56 note 11

53 Firestone SA, supra; Ntuli, supra

54 South African Forestry Co Ltd v York Timbers Ltd 2003 (1) SA 331 (SCA) para 15

55 The doctrines of *res judicata* and issue estoppel

(ii) if accepted the evidence could reasonably lead to a different verdict or sentence; and

(iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial."

60. Section 316 of the CPA does not govern applications for leave to adduce further evidence in appeals to this court. It is respectfully submitted, however, that where a matter reaches this court by way of an application for leave to appeal against an unsuccessful appeal to the SCA, this court must carefully examine the reasons why the applicant did not introduce new evidence in the SCA in terms of section 316.

New evidence on appeal to this court

61. This court explained in Prophet[56] that material that does not appear from the record of the court *a quo* may only be admitted in terms of rule 31[57] or section 22 of the Supreme Court Act 59 of 1959 which is incorporated by rule 30.

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56 Prophet v National Director of Public Prosecutions 2006 (2) SACR 525 (CC)

57 Government Notice R1675, Government Gazette 25726, 31 October 2003

Rule 31

62. Rule 31 provides, insofar as it is relevant to this matter:

> "*(1) Any party to any proceeding before the Court … shall be entitled, in documents lodged with the Registrar in terms of these Rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts -*
>
> *(a) are common cause or otherwise incontrovertible; or*
>
> *(b) are of an official, scientific, technical or statistical nature capable of easy verification."*

63. Rule 31 is substantially the same as rule 34 of the previous rules of this court.[58] This court said in Lawrence[59] that "*It makes provision for the admission of "legislative facts"*[60] *and other material that may be common cause*".[61] It added that "*The Rule has no application to disputed facts*".[62]

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58 Government Notice R757, Government Gazette 18944, 29 May 1998

59 S v Lawrence; S v Negal; S v Solberg 1997 (4) SA 1176 (CC) ("Lawrence") paras 22 to 23

60 In Lawrence, supra, para 52, Chaskalson P explains the meaning of "*legislative facts'* by quoting Hogg "*Proof of Facts in Constitutional Cases*" (1976) 26 University of Toronto Law Journal 386 395: "*The US literature draws a distinction between "adjudicative" facts and "legislative" facts, terminology originally coined by Professor Kenneth Culp Davis, the author of the major US treatise on administrative law. Adjudicative facts are facts about the immediate parties to the litigation - "who did what, where, when, how, and with what motive or intent"; legislative facts are facts of a more general character concerning the social or economic milieu which gave rise to the litigation."*

61 Lawrence, supra, para 25 note 26

64. In Prince 2,[63] this court elaborated on the principle that the rule has no application where the facts are disputed:

> "*A dispute as to the facts may, and if genuine usually will, demonstrate that they are not "incontrovertible" or "capable of easy verification". Where that is so, and it is in the present matter, the material will be inadmissible. Ultimately, admissibility depends on the nature and substance of the dispute. It is in this sense that the dictum in S v Lawrence; S v Negal; S v Solberg to the effect that the rule has no application to disputed facts, should be understood*".[64]

65. In Rail Commuters[65] this court applied the disputed evidence principle as follows:

> "*None of the evidence tendered late, in my view, falls within Rule 31. It is all put in issue by the respondents. The affidavits lodged at the time of the application for leave to appeal therefore fall to be excluded on that basis alone."*[66]

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62 Lawrence, supra, para 23

63 Prince v President, Cape Law Society and Others 2002 (2) SA 794 (CC) ("Prince 2")

64 Prince 2, supra, para 98 (the majority). See also Prince 2, supra, para 10 (Ngcobo J)

65 Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others 2005 (2) SA 359 (CC)

66 Rail Commuters, supra, para 38

66. Disputed evidence was excluded on the same ground in Fose[67], Treatment Action Campaign[68] and Mabaso.[69]

67. It is accordingly clear that where the new evidence is genuinely disputed, then it cannot be admitted under Rule 31.

Section 22

68. If the admission of new evidence is sought on appeal and the evidence is controversial, its admission must be determined in terms of s 22 of the Supreme Court Act. It provides:

> "*The Appellate Division or a Provincial Division, or a Local Division having appeal jurisdiction, shall have power -*
>
> *(a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such Division, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the Division concerned seems necessary; and*

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67 Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) para 6

68 In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 713 (CC) para 8

69 Mabaso v Law Society, Northern Provinces and Another 2005 (2) SA 117 (CC) paras 44 to 46

(b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require."

69. In Lawrence, this court held that it is only in exceptional circumstances that evidence may be admitted on appeal:

"*This Court has power under its Rules to admit new evidence on appeal. The question is whether that power should be exercised in the circumstances of the present case. For the reasons already given this Court should not, save in exceptional circumstances, permit disputes of fact or expert opinion to be raised for the first time on appeal. Such circumstances have not been established in the present case*".[70]

70. Prince 1[71] was an exceptional case in which this court allowed additional evidence on appeal. The issue was whether the failure to provide an exception for the use of cannabis for religious purposes by adherents of the Rastafari religion in two statutory provisions prohibiting the possession and use of cannabis, infringed their religious rights under the Constitution. At a relatively late stage during the case the focus shifted to this question. As a result of this shift, there was insufficient information on record for the

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70 Lawrence, supra, para 24

71 Prince v President, Cape Law Society and Others 2001 (2) SA 388 (CC) ("Prince 1")

issue to be properly canvassed. This court admitted new evidence amongst other things because,

> "*the validity of Acts of Parliament that serve an important public interest is in issue; the constitutional right asserted is of fundamental importance and it goes beyond the narrow interest of the appellant; the validity of the impugned provisions has been fully canvassed by a Full Bench of the High Court and that of five Judges of the SCA; the course which the litigation took in the High Court and the SCA; and the appellant is a person of limited resources*".[72]

The court also stressed that there could be no prejudice to the parties if they were granted leave to adduce further evidence (affidavit evidence, not oral testimony).[73]

71. In Rail Commuters this court referred to the Appellate Division judgments of Colman[74] and Louw,[75] and the Cape High Court judgment of Van Eeden[76] and described its approach to applications to admit new evidence on appeal, as follows:

> "*The Court should exercise the powers conferred by s 22 "sparingly" and further evidence on appeal (which does not fall*

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72 Prince 1, supra, para 23

73 Prince 1, supra, para 29

74 Colman v Dunbar 1933 AD 141 161 to 3

75 S v Louw 1990 (3) SA 116 (A) 123 to 4

76 Van Eeden v Van Eeden 1999 (2) SA 448 (C) 450 to 453

within the terms of Rule 31) should only be admitted in exceptional circumstances. Such evidence must be weighty, material and to be believed. In addition, whether there is a reasonable explanation for its late filing is an important factor. The existence of a substantial dispute of fact in relation to it will militate against its being admitted".[77]

72. The court explained that the reason for the exceptional circumstances requirement is that,

"*on appeal, a court is ordinarily determining the correctness or otherwise of an order made by another court, and the record from the lower court should determine the answer to that question*".[78]

73. The court also mentioned several criteria for assessing whether the circumstances were exceptional:

"*Relevant criteria include the need for finality, the undesirability of permitting a litigant who has been remiss in bringing forth evidence to produce it late in the day, and the need to avoid prejudice. One of the most important criteria was the following:*

"The evidence tendered must be weighty and material and presumably to be believed, and must be such that if adduced it would be practically conclusive, for if not, it

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77 Rail Commuters, supra, para 43

78 Rail Commuters, supra, para 41

would still leave the issue in doubt and the matter would still lack finality."[79]

In S v Louw, the Appellate Division held also that for new evidence to be admitted on appeal, some reasonably sufficient explanation must be offered to account for the failure to tender the evidence earlier in the proceedings".[80]

74. We submit that following the decisions in Prince 1 and Rail Commuters, it is now settled[81] that this court will admit new evidence on appeal only in exceptional circumstances. The factors relevant to determine whether or not the circumstances are indeed exceptional, are amongst others,

- the evidence must be weighty, material and to be believed, and must be such that if adduced it would be practically conclusive;
- conversely, the existence of a substantial dispute of fact in relation to the evidence will militate against its admission;
- whether the validity of a statute that serves an important public interest is in issue;
- whether the constitutional right asserted is of fundamental importance and goes beyond the narrow interest of the applicant;

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79 Colman, supra, 162. In a footnote this Court pointed out that this criterion was recently approved by the Appellate Division in Knox D"Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348 (A) 378B

80 Rail Commuters, supra, para 41

81 Compare Bel Porto School Governing Body and Others v Premier, Western Cape, and Another 2002 (3) SA 265 (CC) para 119 in which this Court held that it may have greater flexibility than the Supreme Court of Appeal in allowing additional evidence on appeal, but added that it is a power which should not be exercised unless the circumstances are such that compelling reasons exist to do so

- whether the issue to which the evidence relates has been canvassed in the courts below, albeit in the absence of the evidence;
- the course which the litigation took in the courts below;
- the explanation for its late production, which must be reasonable;
- the need for finality; and
- any prejudice to the other parties must be avoided or capable of being avoided.

The new evidence in this case

75. The bulk of the new material comprises the papers in an application in the Natal Provincial Division of the High Court by the state for a postponement of the prosecution of Mr Zuma and Thint and their counter-application for a stay of prosecution. This material is in Bundle A. It comprises 33 volumes and runs to 2 979 pages.

76. The second component of the new materials is the documentation in Bundle B. It comprises 8 volumes running to 656 pages. The applicants say that these documents *"are not part of the trial and appeal record*".[82] But this description is largely incorrect. With the exception of

[82] Application for leave to adduce evidence Record 340:1

8 documents,[83] these documents were all part of the appeal record in the SCA with the addition of the SCA's judgments.

77. The last component of the new materials is Part D of the applicants' supplementary founding affidavit and the annexures referred to in that part.[84]

The application should fail

78. The state opposes the introduction of all the new evidence. Insofar as it is a duplication of evidence which already forms part of the record of this case, the new evidence is superfluous and unnecessary. Insofar as the new evidence is truly new, the application for its introduction should fail for the reasons that follow.

79. The applicants rely on both Rule 31 and section 22.[85] We submit that the application should be refused, for the reasons that follow.

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83 Namely: (1) Brief chronology of material events Bundle B 4:158 to 167; (2) Newspaper article November 11-12 2006 Bundle B 5:288; (3) Media statement by Chief Justice Pius Langa Bundle B 5:288A to 288B; (4) Media statement by Registrar of the SCA Bundle B 5:289 to 290; (5) Msimang J judgment in Zuma proceedings Bundle B 6:383 to 407; (6) National Prosecuting Authority of South Africa Policy Manual Bundle B 6:408 to 438; (7) Hurt J judgment in DCLD case number 14117/05 Bundle B 6:439 to 486; (8) Letter from applicants' attorneys to NDPP 22 November 2006 Bundle B 8:655 to 656

84 Supplementary founding affidavit Record 283 to 286.17 to 27 and Annexures A to G Record 294 to 338

85 Applicants' affidavit in application for leave to adduce new evidence Record 345:6

80. Much of the new evidence is hotly disputed and not to be believed.

81. None of the new arguments based on the new evidence will have an important impact on the outcome of the case. They do not come close to being so strong that the injustice that would ensue if the case were not re-opened, would be so grave as to overbear the societal interest in the finality in litigation in criminal matters.

82. Most of the issues now raised were not canvassed in the courts below, even though they could have been. For instance, as the applicants themselves have said repeatedly,[86] the indictment and further particulars made it abundantly clear that Mr Zuma and Thint were participants in the corruption. The applicants could have challenged the "non-joinder" of Mr Zuma and Thint at the start of their trial or at the very latest during the course of it.

83. The course of the litigation was not the result of any uncertainty about the correct procedure in litigation involving constitutional issues. It was the result of decisions deliberately taken by the applicants on the basis of legal advice. For instance, well before the criminal trial the applicants considered challenging the validity of one of the October 2001 searches

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86 As to the indictment, see e.g. Applicants' founding affidavit Record 94:135.4, 108 to 113:168 to 169.9 and 190 to 191:285. As to the further particulars, see especially the lengthy quotations in the Applicants' founding affidavit Record 113 to 136:170 to 184 as well as the conclusion in the Applicants' founding affidavit Record 136:185

and seizures of documents.[87] But acting on legal advice, they decided to raise their challenges by objections in the trial to the admissibility of the documents seized during those operations.[88] Later still, again acting on legal advice, they decided formally to admit the legality of some of those searches and to accept the admissibility of many of the documents seized.[89]

84. As a result of the applicants' stance, the trial court and the SCA were not asked to consider, and did not consider, the "non-joinder" of Mr Zuma and Thint, the legality of the October 2001 searches in South Africa and the "dual role" of Downer SC. Nor were they asked to consider the admissibility of the Mauritian documents on the grounds raised before this court.

85. The re-opening of the case at this late stage would undoubtedly cause prejudice to the public represented by the state and would be inimical to the principle of finality. It is the culmination of a long and demanding trial which ran from October 2004 to June 2005 and a comprehensive appeal to the SCA argued over three days on a record comprising 12 598 pages. What the applicants are now seeking is a second trial on a range of issues, some of which are entirely new and others which entail the

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87 Applicants' supplementary founding affidavit Record 285:26

88 Applicants' founding affidavit 208 to 209:308; Applicants' supplementary founding affidavit Record 285:26

89 Formal admissions JDP1 Record 525 to 543, specifically 533 to 538:9 to 15.4 and 539 to 540:20

withdrawal of admissions formally made during the trial. Yet others could and should have been raised at the trial. If the new issues had been placed in dispute at the trial, the state could have dealt with them. It was denied that opportunity for no good reason.

86. This application is inimical to the interests of justice, to the role of the SCA as the final court of appeal in all cases except constitutional ones and to the role of this court as the apex court but only in constitutional cases. Having discovered that the strategy adopted at trial and in the SCA did not yield the desired verdict, the applicants engaged new counsel who in turn devised new approaches and raised new "*constitutional issues*".[90] This court knows that this is a high-profile matter which has generated intense media interest.[91] Society's expectation that criminal matters will be disposed of fairly and fully at the first instance and in any permitted appeals based on the trial record, and society's respect for the administration of justice and the division of responsibilities between this court and the SCA, would be undermined if an appeal based on the new evidence were permitted.

87. Finally, the nature of the material which the applicants seek to admit and the basis on which it is sought to be admitted are such that this court would not be able to decide the issues now raised on the strength of this

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90 Applicants' founding affidavit Record 166:242 and 241:367.3

91 South African Broadcasting Corp Ltd v National Director of Public Prosecution and Others 2007 (1) SA 523 (CC)

evidence alone. The applicants themselves seek to dispute the veracity of some of the very evidence they now tender (such as the NDPP's reasons for declining to prosecute Mr Zuma). This would invariably entail either this court being subjected to potentially lengthy and controversial oral evidence, alternatively the referral of the matter back to the trial court to hear this evidence and such evidence in rebuttal as the state would be constrained to lead.

THE APPLICATION FOR LEAVE TO APPEAL

The governing principles

88. Section 167(3)(b) of the Constitution provides that this court may decide only constitutional matters and issues connected with decisions on constitutional matters. In considering an application such as this one for leave to appeal against a decision of the SCA in terms of rule 19, the first question that has to be answered therefore is whether the application concerns a constitutional matter.[92]

89. If an application is concerned with one or more constitutional matters, then s 167(6)(b) of the Constitution provides that the criterion for determining whether to grant leave or not is whether this court is satisfied that it is in the interests of justice to do so. The decision to grant or refuse leave is a matter for the discretion of this court.[93] In determining what is in the interests of justice, each case has to be considered in the light of its own facts and circumstances.[94]

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92 S v Boesak 2001 (1) SA 912 (CC) paras 11 and 13 to 15

93 Boesak, supra, para 12

94 S v Basson 2005 (1) SA 171 (CC) para 39, citing Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others 1998 (4) SA 1157 (CC) para 32 and Ingledew v Financial Services Board: In re Financial Services Board v Van der Merwe and Another 2003 (4) SA 584 (CC) para 30; see also Prophet, supra, para 48

90. In a case such as this one the important considerations are the following:

- The applicants' prospects of success, more specifically "*[a]n applicant who seeks leave to appeal must ordinarily show that there are reasonable prospects that this Court will reverse or materially alter the decision of the SCA*".[95]
- The implications of the fact that the constitutional issues were not raised in the High Court or the Supreme Court of Appeal.
- The implications of the fact that many of the constitutional issues are based on a large quantity of new evidence, much of which is contentious.
- The importance of the constitutional issues raised and the public interest in their determination by this court in this case.[96]

This application must fail

91. In the ensuing chapters of these submissions we deal with the characterisation of the applicants' contentions and their prospects of success on the "merits" of each of them. For present purposes suffice it to say that in our submission none of the applicants' contentions are

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95 Boesak, supra, para 12, citing S v Pennington and Another 1997 (4) SA 1076 (CC) para 52

96 Basson, supra, para 39, citing Khumalo and Others v Holomisa 2002 (5) SA 401 (CC) para 14

constitutional matters of substance or issues connected with decisions on such constitutional matters[97], and all of their contentions are without any merit whatsoever. These features alone should lead to the dismissal of this application for leave to appeal.

92. We submit that the fact that many of the "constitutional issues" are based on contested new evidence and the fact that they were not raised in the trial court or the SCA, militate strongly against the applicants being permitted to do so for the first time in an appeal to this court. Aside from the problems dealt with above in the chapter on the application for leave to adduce the new evidence, we emphasize the factors that follow.

93. The applicants seek to raise for decision, at a late stage in litigation which has already proceeded through the High Court and the SCA, entirely new constitutional attacks on fundamental elements or features of the case which hitherto they have either in fact (the legality of the searches and seizures) or apparently (the "non-joinder" of Zuma and Thint, the "dual role" of Downer SC and the joinder of charges) accepted as being constitutional and valid.[98]

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97 In Fraser v Absa Bank Ltd 2007 (3) SA 219 (CC) para 40 this Court said: "*… this Court will not assume jurisdiction over a non-constitutional matter only because an application for leave to appeal is couched in constitutional terms. It is incumbent upon an applicant to demonstrate the existence of a bona fide constitutional question. An issue does not become a constitutional matter merely because an applicant calls it one.*"

98 Compare Lane and Fey NNO v Dabelstein and Others 2001 (2) SA 1187 (CC) ("Dabelstein") para 5

94. It undesirable to allow such a fundamental change of front at this late stage of the proceedings.[99]

95. This court has been deprived of the benefit of judgments dealing with the attacks by the High Court and the SCA.[100]

96. The litigants have also been disadvantaged because they have not had the opportunity of reconsidering or refining their respective arguments in the light of the prior judgments, which in turn impacts negatively on this court's ability to determine the matter properly.[101]

97. In effect, the applicants ask that this court be the court of first and last instance in a matter in which other courts have jurisdiction, something which, as this court has said time and again, is undesirable.[102]

98. We submit that none of the contentions which the applicants raise are important and, for the reasons given in paragraph 86 above in relation to the application for leave to adduce new evidence, we submit that the

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99 Dabelstein para 6

100 Bruce and Another v Fleecytex Johannesburg CC and Others 1998 (2) SA 1143 (CC) para 4; Minister of Safety and Security v Luiters 2007 (2) SA 106 (CC) para 31

101 Prophet, supra, para 53; Bruce, supra, para 8; Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC) para 59;

102 See the authorities cited in Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd 2007 (5) BCLR 453 (CC) para 5 note 2 and Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC) para 13 note 18; see also Dormehl v Minister of Justice and Others 2000 (2) SA 987 (CC) para 5; S v Bequinot 1997 (2) SA 887 (CC) para 15; Dabelstein para 5

public interest militates against their determination by this court in this case.

THE NON-JOINDER OF ZUMA AND THINT

Introduction

99. The applicants' main ground of appeal is that the state committed a material irregularity by prosecuting them alone and not with Mr Zuma and Thint. They devote more than 60 pages of their submissions to it.[103]

100. Despite their exhaustive submissions, the logic of their complaint remains obscure. We will at the outset submit that it is illogical and unfounded even in its own terms.

101. We will deal with the NDPP's decisions not to charge Mr Zuma and to withdraw the charges against Thint. We submit in relation to both decisions,

- that they were taken in good faith;
- that they were taken for good and sufficient reason and were accordingly not irrational or arbitrary, and
- that the applicants have in any event been aware all along of both decisions and the reasons for which they were taken and cannot now complain about them for the first time.

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[103] Applicants' main heads 66 to 129

102. We submit in any event that there is no basis in law for the complaint of non-joinder. The NDPP decided not to prosecute Mr Zuma and to withdraw the charges against Thint. The applicants did not have any right to demand that Mr Zuma and Thint be prosecuted with them. The NDPP's decision not to do so, for whatever reason, did not violate any right of the applicants. No accused has a right to demand that other people be joined in their prosecution. The applicants have been unable to point to any precedent and we have found none either locally or internationally, in which an objection such as theirs has been upheld.

103. The applicants in any event did not suffer prejudice. They were, if anything, better off because Mr Zuma and the available Thint witnesses remained compellable witnesses which they would not have been if they were joined in the prosecution.

104. Such prejudice as the applicants might have suffered, was in any event entirely unforeseeable. There was no way that the NDPP could have divined from the outset that the applicants would be better off if Mr Zuma and Thint were joined in their prosecution. The NDPP cannot be blamed for not designing and structuring the prosecution to afford them that benefit.

The logic of the complaint

105. The applicants' ultimate complaint is that Mr Zuma and Thint were not prosecuted together with them. They say that if they had been prosecuted with them, Mr Zuma and Thint would have given exculpatory evidence in their own defence which would have assisted the applicants as well. As a result of the state's decision not to prosecute Mr Zuma and Thint with the applicants however, they were deprived of the benefit of their exculpatory evidence. The applicants say that this deprivation violated their right to a fair trial.

106. But the applicants have known since long before their trial, that Mr Zuma and Thint would not be prosecuted with them and that they would consequently not have the benefit of their evidence in self defence. They did not complain then and consequently cannot do so now.

107. The applicants seek to overcome this problem by explaining that they only recently learnt from the state's evidence in the Zuma case, that the NDPP's decisions not to prosecute Mr Zuma and to withdraw the charges against Thint were flawed in that they were taken without good and sufficient reason.

108. We will later show that both legs of this contention are unfounded. The NDPP's decisions not to prosecute Mr Zuma and to withdraw against Thint

were taken for good and sufficient reason. The applicants have in any event known all along what those reasons were. Their protestations to the contrary are simply not true.

109. But for purposes of considering the logic of their complaint, we assume the truth of the applicants' assertions that, unbeknown to them, the NDPP's decisions not to prosecute Mr Zuma and to withdraw against Thint, were taken for no good reason and were indeed irrational and arbitrary. Even on this assumption the applicants' complaint remains illogical for the reasons that follow.

110. Implicit in the complaint, is that the applicants' trial would have been fair if the NDPP's decisions not to prosecute Mr Zuma and to withdraw against Thint had been taken for good and sufficient reason. It is only because they were not taken for good and sufficient reason, that the applicants' trial was rendered unfair. But the fairness of their trial could not depend on whether the NDPP's reasons for not prosecuting Mr Zuma and for withdrawing against Thint, were good or bad. It was the **results** of the NDPP's decisions that impacted on their trial and not the **reasons** for them. The applicants' trial was affected by the NDPP's decisions not to prosecute Mr Zuma and to withdraw against Thint. It was not affected by the NDPP's reasons for those decisions, whether good or bad. It simply does not make sense to say that their trial would have been fair if the

NDPP's reasons were good but was rendered unfair because his reasons were bad.

111. The applicants' logic necessarily implies that the NDPP owed them a duty to exercise care when he decided whether to prosecute Mr Zuma and whether to proceed with the charges against Thint. He should have warned himself that, if he decided not to prosecute Mr Zuma and to withdraw against Thint, he will or might deprive the applicants of beneficial evidence and so violate their right to a fair trial. But this suggestion is far-fetched:

111.1. When the NDPP decided whether to prosecute Mr Zuma and whether to withdraw against Thint, he was not required to tailor his decision to serve the applicants' best interests or even to take them into account. It would on the contrary have been improper for him to prosecute Mr Zuma and to persist in the charges against Thint for the sake of the exculpatory evidence they would then be forced to give for the applicants' benefit.

111.2. The applicants also never explain how the NDPP was meant to know that their interests would be best served by the joinder of Mr Zuma and Thint. We will later submit that the applicants did not suffer any prejudice as a result of the NDPP's decisions. One can in any event not say, even with the benefit of hindsight,

that they would have been better off if Mr Zuma and Thint had been joined in their prosecution. But even if one assumes in their favour that it would have been so, it is not something that the NDPP could possibly have predicted. He could not have divined,

- that, if Mr Zuma and Thint were prosecuted with the applicants, they would give evidence in their own defence;
- that their evidence would be exculpatory of the applicants, and
- that, if they were not prosecuted with the applicants, they would refuse to give evidence in the applicants' defence even if they were summonsed to do so.

112. The applicants say that Mr Zuma and Thint would have given exculpatory evidence but they do not tell us whether their evidence would have been true. They carefully refrain from telling us whether Mr Zuma and Thint are in fact innocent or guilty of participation in the crimes of which the applicants have been convicted. One is left to speculate what the applicants' case is on this score. But whatever it might be, their contention that Mr Zuma and Thint ought to have been prosecuted with them for the sake of the exculpatory evidence they would have given, is untenable:

112.1. If the applicants' case is that Mr Zuma and Thint are in fact innocent, then they are saying in effect that their own trial was

unfair because two innocent parties should have been prosecuted with them despite their innocence, for the sake of the exculpatory evidence they would then have been forced to give against their will. The NDPP of course did not know at the time that Mr Zuma and Thint were innocent. But if the applicants want us to believe that they are indeed innocent, then it is outrageous to suggest that they should nonetheless have been prosecuted despite their innocence merely for the sake of the exculpatory evidence they would then have given for the applicants' benefit. The applicants' right to a fair trial cannot conceivably entitle them to demand the prosecution of people who are in fact innocent.

112.2. If Mr Zuma and Thint are guilty on the other hand, then their exculpatory evidence would have been false. The applicants can obviously not complain that their trial was unfair because they were wrongly deprived of evidence which would have been exculpatory but false. Their right to a fair trial does not entitle them to the benefit of false evidence.

112.3. The applicants' complaint is in other words untenable, whatever their case might be on the guilt or innocence of Mr Zuma and Thint.

113. These absurdities illustrate that the very foundation of the applicants' complaint is bad. When the NDPP suspects that three people A, B and C committed a crime together, he is not required to take A's best interests into account when he decides whether to prosecute B and C. He may for instance say to himself that he will first prosecute A against whom he has a strong case and then, depending on the outcome, decide whether to prosecute B and C against whom his case is weaker. A cannot demand that B and C be prosecuted with him. A can in any event not demand that B and C be prosecuted with him for the ulterior purpose of benefiting A.

114. We accordingly submit that the applicants' complaint of non-joinder is flawed and lacking in logic even in its own terms.

The decision not to charge Zuma

115. The applicants have abandoned any reliance on the allegations in the Zuma application that the NDPP's decision not to prosecute Mr Zuma was part of a political conspiracy against him. There is no longer any reason to doubt the good faith of the NDPP's decision. The applicants nevertheless persist with their attack on his decision on the basis of rationality and arbitrariness. There is however simply no basis for their attack in the evidence before the court.

116. The NDPP decided not to prosecute Mr Zuma because he had concluded in good faith that there was no reasonable prospect of a successful prosecution against him. This was the explanation the NDPP himself gave in his affidavit in the Zuma application[104] and it is borne out by his contemporaneous media statement of 23 August 2003.[105]

117. The applicants' only attack on the NDPP's explanation, is their suggestion that it appears from his media statement that he had decided not to prosecute Mr Zuma because he did not have a "*winnable case"*. They say it was the wrong test.

118. But this attack is unfounded for two reasons. The first is that it flies in the face of the NDPP's affidavit and is not supported by any admissible evidence before the court. The second is that it is in any event based on a misconstruction of the NDPP's media statement of 23 August 2003:

118.1. The NDPP began at paragraphs 5 and 6 by setting out the appropriate test as follows:

> "*5 The investigation was a complex one, which at the end of it required the exercise of a discretion whether to prosecute any person or persons. In deciding whether to prosecute, members of the*

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104 Ngcuka Bundle A 27:2472:30

105 Media statement Bundle A 6:499

Prosecuting Authority are guided by the Prosecution Policy and Policy Directives determined and issued in terms of section 24(1) of the (NPA) Act.

6 *Part 4 of the Prosecution Policy is particularly relevant and reads as follows:*

'In deciding whether or not to institute criminal proceedings against an accused, prosecutors should assess <u>whether there is sufficient admissible evidence to provide a reasonable prospect of a successful prosecution</u>. <u>There must indeed be a reasonable prospect of a conviction</u>, otherwise a prosecution should not be commenced or continued. This test of a reasonable prospect must be applied objectively and after careful deliberation …'". (our emphasis)

118.2. Against this background, the NDPP said in paragraph 32 that,

"*After careful consideration in which we looked at all the evidence and facts dispassionately, we have concluded that, while there is a prima facie case of corruption against the Deputy President, <u>our prospects of success are not strong enough</u>. <u>That means</u> that we are not sure that we have a winnable case."* (our emphasis)

118.3. Against the background of the NDPP's recital of the test "*whether there is sufficient admissible evidence to provide a reasonable prospect of a successful prosecution"*, his conclusion that "*our prospects of success are not strong enough"* and that it meant "*that we are not sure that we have a winnable case"* clearly meant that he was not satisfied that there was sufficient admissible evidence to provide a reasonable prospect of a successful prosecution. He merely expressed himself in lay terms because he was speaking to a lay audience.

118.4. The applicants suggest that the NDPP's statement that "*we are not sure that we have a winnable case"* meant that the NDPP had concluded that victory was not certain. But this interpretation is in the first place inconsistent with the NDPP's language, even if it were read in isolation. His statement that "*we are not sure that we have a winnable case"* means that "*we are not sure that we have a case that can be won"*. It does not mean that "*we are not sure that we will win"*. Read in the context of the statement as a whole, it is in any event abundantly clear that the NDPP was saying at the end of the statement that he had concluded that the case did not meet the test for prosecution he had quoted in the beginning of the statement.

119. The applicants argue that the NDPP could not rationally have concluded that there was a sufficiently strong case to prosecute them but not to prosecute Mr Zuma. But this contention is both illogical and impermissible:

119.1. It is illogical because the prospects of a successful prosecution of the applicants and Mr Zuma respectively, depended on the available evidence admissible against them. The state's case relied heavily on the books and records including books of account, minutes of meetings and correspondence of the applicants and Thint to which Mr Zuma was not a party. Much of the evidence was clearly admissible against the applicants and Thint because it was their documents. But their admissibility against Mr Zuma was uncertain. There was accordingly nothing illogical about the NDPP's conclusion that there were reasonable prospects of success against the applicants and Thint but not against Mr Zuma.

119.2. The applicants' contention is in any event impermissible because it is flatly contradicted by the NDPP himself and is not supported by any other evidence before the court. The evidence the applicants themselves seek to introduce in this court on the basis that it is true and uncontradicted, is the very evidence which refutes their accusation of irrationality on the part of the NDPP.

120. The applicants seek to bolster their attack on the NDPP's August 2003 decision not to prosecute Mr Zuma, by suggesting that it was contradicted by his successor's June 2005 decision to proceed with the prosecution of Mr Zuma. But the later decision did not in any way contradict or reflect on the earlier one:

120.1. Almost two years had passed and much had happened in the meantime. Circumstances had dramatically changed. Mr McCarthy described some of them in the Zuma case.[106] The applicants had been tried and convicted. The state's evidence had been presented and severely tested but had prevailed with flying colours. The defence case on the other hand had been revealed for the first time, put forward in evidence and emphatically refuted. The trial court's judgment was a resounding vindication of the state's case. No experienced litigator would in these circumstances suggest that a more bullish reappraisal of the state's case against Mr Zuma implied that the NDPP's original assessment was irrational in the circumstances in which it was made.

120.2. The two decisions were also taken by two different people. There were from the outset differences of opinion in the state's

106 McCarthy Bundle A 19:1709

camp about the prospects of a successful prosecution of Mr Zuma. These differences do not begin to suggest that the NDPP's conclusion in August 2003 was not one made reasonably and in good faith. Any experienced litigator knows that it is commonplace for lawyers including those of the highest skill and experience, to differ in their views about the prospects of litigation. The fact that one NDPP came to one conclusion in August 2003 and another NDPP came to another conclusion almost two years later in June 2005, does not begin to suggest that the one was right and the other wrong, and even less that either of them acted irrationality or in bad faith.

121. We submit in conclusion as follows:

121.1. The NDPP's decision not to prosecute Mr Zuma was taken in good faith. This much is clear from the evidence and there is no evidence to the contrary.

121.2. The decision was taken for good and sufficient reason. There is in any event no evidence to the contrary. The accusation that he acted irrationally and in bad faith, has no grounding in the evidence whatsoever.

121.3. The applicants have been aware of all the material facts relating to this issue since August 2003 and in any event since well before the commencement of their trial on 11 October 2004. They made nothing of it then. They seek to invoke it now only because all else has failed. They are not allowed to do so.

The decision to withdraw against Thint

122. The history of the NDPP's decision to withdraw the charges against Thint was told in some detail in the Zuma case[107] and is again told in the state's answer in these proceedings.[108] We will merely address the applicants' main contentions. We submit that they are not supported by the evidence and are comprehensively contradicted by the only evidence before the court.

123. It must be borne in mind that the NDPP's ultimate decision to withdraw the charges against Thint, was not a single decision but the culmination of a process. After receiving representations on behalf of Thint, the NDPP decided to withdraw the charges against them in return for an affidavit from Mr Thétard in which he admitted that he was the author of the encrypted fax.

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107 McCarthy Bundle A 19:1692:60 to 68 and 19:1734:135 to 139; Maduna Bundle A 27:2443 to 2458; Ngcuka Bundle A 27:2476 to 2485

108 Du Plooy answering affidavit Record 409:63 to 66 and 452:120 to 124

124. This was however not meant to be the end of the road. The NDPP hoped on the one hand to persuade Mr Thétard and Thint to be more forthcoming and to provide the state with further assistance. He kept open the possibility on the other hand of prosecuting them afresh if they should not be forthcoming. His agreement with Thint to withdraw the charges against them was in other words the first step in a process which, it was hoped, might ultimately secure important evidence for the state on the one hand and an indemnity from prosecution for Thint on the other.

125. This was the "*strategic advantage"* the NDPP hoped to achieve by withdrawing the charges against Thint. This is made quite clear by the NDPP himself and by the Minister in their affidavits in the Zuma case[109] and is again made clear in the respondent's answer in this application.[110] The applicants' suggestion that the NDPP sought to obtain some improper strategic advantage by prosecuting them first and Thint later, is not supported by any of the evidence before the court.

126. The NDPP's decision to withdraw the charges against Thint was followed by further negotiations in which the state sought to interview Mr Thétard and others with a view to securing their co-operation. These negotiations however ultimately broke down and came to nought as a result of the bad

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109 Ngcuka Bundle A 27:2483:68 and 69 read with Maduna Bundle A 27:2443 to 2458

110 Du Plooy answering affidavit Record 452:120

faith of Mr Thétard and Thint. This was finally made clear in Mr Steynberg's letter to them of 26 July 2004.[111]

127. As appears from the letter, the state made it clear at the time that Thint and its officials were not being given any indemnity from prosecution. The NDPP kept open the option to prosecute them in due course. It is wrong to say however as the applicants do, that the state "*resolved (at that time) to prosecute Thint separately from the applicants."* It did no more than to keep open the option of prosecuting Thint and its officials in due course. It did not take any decision about such a prosecution. The NDPP makes it clear in his affidavit in the Zuma case that it was only after the conviction of the applicants and the overwhelming vindication of the state's case in the High Court that he reviewed the matter and decided to prosecute Thint.[112]

128. The applicants suggest that there was something sinister or untoward about the NDPP's decision to implement the agreement to withdraw the charges against Thint despite the fact that it had reneged on the agreement. But it must be borne in mind that the final breakdown in negotiations only came late in the day. Mr Steynberg's letter confirming the breakdown was only written on 26 July 2004, less than three months before the trial which was due to commence on 11 October 2004. If the

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111 Steynberg letter Bundle A 16:1366

112 Pikoli Bundle A 27:2424:21 to 24

state reinstituted the charges against Thint, it would undoubtedly have required more time to prepare for trial which would have delayed the proceedings. There was also a high risk of a dispute with Thint about the question whether it had indeed reneged on its agreement with the state. Such a dispute would have caused further complication and delay. The state was anxious to get the trial against the applicants underway and accordingly decided to withdraw the charges against Thint, reserve the right to charge them afresh in due course and defer the decision whether to do so.

129. The applicants were at all times aware of all the material developments in the saga. The first applicant Mr Shaik was cited in the prosecution as the nominal representative of Thint because he was a director of that company. The other officials who had been more directly involved in the matter from Thint's side, were no longer in the country. There is accordingly little doubt that the applicants must have known of the material features of the agreement and understanding between the state and Thint in terms of which the former withdrew the charges against the latter. The state disclosed in open court at the time of the withdrawal of the charges that it was being done in terms of an agreement it had made with Thint. The applicants did not raise any complaint about this decision at the time and did not seek any further particulars about it. They should accordingly not be allowed to raise the issue for the first time in this court of final appeal merely because all their other options have run out.

130. We accordingly submit as follows:

130.1. The NDPP's decision to withdraw against Thint was taken in good faith. There is absolutely no basis for any suggestion to the contrary.

130.2. The decision was taken for good and sufficient reason. There is no basis in the evidence for any suggestion to the contrary.

130.3. The applicants have in any event been aware of the decision and the reasons for it from no later than the date of commencement of their trial. They did not make anything of it at the time and did not even seek further particulars. They are accordingly not entitled to reopen the issue now.

The complaint has no basis in law

131. The joinder of multiple parties in the same prosecution is governed by ss 155 to 157 of the Criminal Procedure Act:

131.1. Sections 155 and 156 describe the circumstances in which two or more people may be charged and tried together. It may broadly be done,

- where they have been involved in the same crimes, or
- where they have been involved in separate crimes at the same place and about the same time if the state's evidence against them overlaps.

131.2. Section 157(2) however vests the court with a discretion, whenever two or more people are tried together, to direct that one or more of them be tried separately from the others.

132. These provisions must be read together with those that vest the National Prosecuting Authority with the discretionary power to institute and conduct criminal proceedings on behalf of the state:

132.1. Section 179 of the Constitution provides for the creation of a single national prosecuting authority and vests it with "*the power to institute criminal proceedings on behalf of the state"*.

132.2. The National Prosecuting Authority Act 32 of 1998 gives effect to s 179 of the Constitution. It provides in s 20(1)(a) that the power contemplated in s 179 of the Constitution to institute and conduct criminal proceedings on behalf of the state, vests in the national prosecuting authority.

133. These provisions read together mean that,

- it is the state's prerogative and more particularly that of the National Prosecuting Authority to institute and conduct criminal proceedings on behalf of the state;
- this power includes the discretion to charge suspects separately or jointly if a joint prosecution is permissible in terms of ss 155 and 156 of the CPA, and
- where the state exercises its discretion to charge people jointly, the court retains an overriding discretion to order in terms of s 157(2) that one or more of them be tried separately.

134. The cases on which the applicants base their complaint of non-joinder, are not cases on non-joinder at all. They are cases on the exercise of the court's discretionary power under s 157(2) or its equivalent in foreign jurisdictions, to order a separation of trials where the state has chosen to charge people together. Their effect may be summarised as follows:

134.1. The court's discretionary power under s 157(2) only arises "*Where two or more people are charged jointly"*, that is, where the state has chosen to charge people together. It does not confer any power on the court to order a joinder of the trials of people whom the state has chosen to charge separately.

134.2. When the court is asked to order a separation of trials in terms of s 157(2), it exercises a judicial discretion. It bears in mind that

the state is normally entitled to prosecute jointly all the people accused of participation in the same crimes because the truth is more likely to be revealed if they are tried together.

134.3. The court orders separation only if a joint trial will cause injustice to one or more of the accused. It does not mean that an accused is entitled to demand separation whenever they can show that they will enjoy some advantage or other if they are separately tried. The court will only order separation if the accused demonstrates that,

> "*the dice were loaded against him by reason of the joint trial; that he suffered, or probably suffered prejudice to which he should not have been made subject"*.[113]

134.4. Trollip JA made it clear in Ntuli that the court exercises its discretion by weighing up the likelihood of prejudice to both the accused and the state and that "*prejudice"* in this sense means injustice and not mere disadvantage:

> "*In exercising its discretion the trial court has to weigh up the likelihood of prejudice to the applicant accused resulting from a joint trial against the likelihood of prejudice to the other accused or the state if their trials are separated, and decide whether or not, in the interests of justice, a*

[113] Rex v Bagas 1952 (1) SA 437 (A) 441G

separation of trials should be granted. 'Prejudice' there means prejudice in the sense that no injustice should be caused to the party concerned, including the state".[114]

134.5. Greenberg JA similarly made the point in Nzuza that "*prejudice"* in this context means "*injustice"* and does not include any closing up of a loophole for escape of which the accused could be lawfully deprived:

"*(I)t must be pointed out that prejudice does not consist of closing up a loop-hole for escape which might lawfully be rendered unavailable to an accused person through a joint trial …. It means that injustice must not be done to him, and in a case where each of the two accused seeks to cast the blame on the other, there is much to be said for the view that it is in the interests of justice that they should be tried together to enable the court to have all the evidence before it before deciding the disputed question as to who is the guilty person."*[115]

135. The cases on which the applicants rely do not begin to lay a basis for their contention that they were entitled in law to the joinder of Mr Zuma and Thint and that the state's failure to join them was unlawful. The cases

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[114] S v Ntuli 1978 (2) SA 69 (A) 73F to G

[115] R v Nzuza 1952 (4) SA 376 (A) 380G to H

have three material features in common which this case lacks. The first is that the state decided to prosecute two or more people involved in the same crime. The second is that the state decided to prosecute them together. The third is that one or more of the accused applied to the trial court at the outset for a separation of trials. They are in other words cases where the court was asked to exercise its discretionary power in terms of s 157(2) of the CPA to order a separation of trials.

136. This is not such a case:

136.1. When the applicants' trial commenced, the state had decided in good faith and for good and sufficient reason not to prosecute Mr Zuma and Thint but to defer its decision on the prosecution of the latter. It was in other words not a case in which the state decided to charge two or more parties for the same crime.

136.2. This is also not a case in which the state decided to charge people together. It is one in which the applicants complain, not about joinder, but about separation. They do not offer any authority for such a complaint and we have not been able to find any, whether of South African or foreign origin. The applicants' complaint that they had a right to have Mr Zuma and Thint joined in their prosecution and that their trial was rendered unfair by the

state's failure to do so, seems to be a unique complaint for which there is no precedent anywhere in the world.

136.3. This case in any event also differs materially from those upon which the applicants rely, in that the joinder complaint is raised for the first time in the final court of appeal. In all the cases on which they rely to found their complaint, the accused had at the outset objected to a joint trial. The accused had in other words applied for separation in terms of s 157(2). The applicants failed to do so in this case. It would be grossly unfair to the state to allow them to do so now. If they had raised their complaint at the outset, it would have been possible in the first place to undertake a proper investigation of their suggestion of prejudice as a result of their separate prosecution. If their complaint was justified, it could moreover have been remedied by the joinder of Mr Zuma and Thint.

137. The applicants invoke statements made by courts in England, Canada and the US to the effect that there are strong policy reasons for the joint prosecution of people accused of participation in the same crimes.[116] These statements are entirely correct as far as they go but the applicants have taken them out of context. All of them were made in cases where the prosecution had charged people together and where one or more of

[116] Applicants' main heads 112:179 to 183

them then sought separation. The courts emphasized the importance of joint trials of people accused of participation in the same crimes as a weighty factor in support of the prosecution's opposition to the accused's application for separation. The Supreme Court of Canada for instance made the point in Crawford that these policy considerations were sufficiently weighty to outweigh any prejudice to an accused even where his or her co-accused was "*waging a cut-throat defence*".[117]

138. But these courts went no further than to make the point that the prosecution was entitled to resort to joint trials of people accused of participation in the same crimes despite the fact that it might sometimes cause prejudice to the accused concerned. None of the courts have ever suggested that an accused might be entitled to demand a joint trial if it would hold some benefit or other for the defence. None of them have ever suggested that it might be unfair to an accused to prosecute them separately if it deprived them of some benefit or other they would have enjoyed in a joint trial with others. The foreign authorities upon which the applicants rely afford no basis whatever for the far-fetched contentions they advance in this case.

139. The applicants contend that a comment made by Lord Goddard in Grondkowski's case[118] meant that "*prejudice can also arise to an*

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117 R v Crawford [1995] 1 SCR 858 (SCC) paras 30 to 32

118 R v Marian Grondkowski [1946] 1 All ER 559 (CCA)

individual accused if he was prosecuted separately from his alleged co-conspirators, in which event (the court) would interfere".[119] But they take Lord Goddard's statement out of context:

139.1. The case was an appeal against a criminal conviction. One of the grounds of appeal was that the trial court had wrongly refused a defence application for a separation of trials. The issue in the case was the conventional one whether the trial court should have ordered the separation of the trials of accused whom the prosecution had chosen to prosecute together.

139.2. Early in his judgment, Lord Goddard described the factors the court should take into account in the exercise of its discretion whether to order a separation of trials or not. He said that it was ordinarily right and proper for people accused of participation in a common enterprise to be jointly tried and added that "*in some cases it would be as much in the interest of the accused as of the prosecution that they should be"*.[120] He went on to mention two examples. They make it clear that the only point he was making was that a joint trial not only served the interests of the prosecution but was sometimes in the interests of one of the

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119 Applicants' main heads 122:179

120 Grondkowski, supra, 560

accused despite the fact that another accused might seek separation.

139.3. At the end of his judgment Lord Goddard said that a court of appeal would only interfere with the trial court's exercise of its discretion if it resulted in a miscarriage of justice. He then went on to make the statement on which the applicants rely:

> "*If improper prejudice has been created whether by a separate or by a joint trial, for as we have showed at an earlier stage of this judgment prejudice might be caused to one prisoner by ordering a separate trial on the application of the other, this court will interfere but not otherwise.*"[121]

139.4. It is clear from the context that this statement does not bear out the applicants' interpretation of it. The only point Lord Goddard made was that, in an application for separation, the court should take into account, not only the interests of the applicant for separation, but also the interests of the state and the interests of the co-accused which might run the other way. He did not suggest that an accused might sometimes be entitled to demand the joinder of others where the prosecution has opted for separate trials.

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121 Grondkowski, supra, 562

139.5. Lord Goddard's statement that "*this court will interfere"* also did not mean that the court will interfere with the prosecution's decision to prosecute people separately rather than jointly. The interference he was speaking about, was the interference by a court of appeal with the exercise of the trial court's discretion to order a separation of trials.

140. The applicants concede that the case of Xolo is the only reported judgment in which the accused applied for the joinder of the trials of people charged separately and that it was unsuccessful "*on the grounds that the court doubted that it could interfere with the Attorney-General's decision"*.[122] The applicants criticise the judgment and say that it no longer constitutes good law under the Constitution.[123] The following features should however be emphasized:

140.1. The applicants are correct when they say that there is no precedent for their complaint of non-joinder, whether in South Africa or anywhere else.

140.2. The applicants are also correct in saying that Williamson AJ said that he was "*very doubtful whether I have any power to interfere with the admitted discretion of the Attorney-General to decide*

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122 Applicants' main heads 83:136 which refers to Xolo v Attorney-General of the Transvaal 1952 (3) SA 764 (W)

123 Applicants' main heads 84:139

that two or more accused should be indicted and tried separately".[124]

140.3. He was more emphatic later in his judgment however when he said that "*In my view, I cannot assume the right to tell the Attorney-General that he must conduct a joint trial"*.[125]

141. The question whether it is competent for a court to hold a joint trial of people whom the state has charged separately, has also come up in other cases and on each occasion the courts have firmly rejected the notion that such a trial was competent.[126] Miller J reviewed the cases in Sithole and concluded "*that the joinder of several separately indicted persons in one trial was not merely an irregularity but that there was a failure of jurisdiction"*.[127]

142. The applicants' suggestion that this judicial respect for prosecutorial autonomy is inconsistent with s 35(3) of the Constitution, is not correct. It is on the contrary a fundamental requirement of the rule of law that the courts respect the autonomy of the National Prosecuting Authority in the exercise of its power under s 179 of the Constitution to institute criminal

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124 Xolo, supra, 770B to C

125 Xolo, supra, 770E

126 Rex v Ngwatya 1949 (1) SA 556 (E); S v Gumede 1964(1) SA 413 (N); S v Sithole 1966 (2) SA 335 (N)

127 S v Sithole 1966 (2) SA 335 (N) 337G

proceedings on behalf of the state. The Supreme Court of Canada has on more than one occasion emphasized the importance for the rule of law that the judiciary respect prosecutorial autonomy:

- "*It is manifest that, as a matter of principle and policy, courts should not interfere with prosecutorial discretion. This appears clearly to stem from the respect of separation of powers and the rule of law".*[128]
- "*It is fundamental to our system of justice that criminal proceedings be conducted in public before an independent and impartial tribunal. If the court is to review the prosecutor's exercise of his discretion the court becomes a supervising prosecutor. It ceases to be an independent tribunal."*[129]
- *"The court's acknowledgment of the Attorney-General's independence from judicial review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution. Subject to the abuse of process doctrine, supervising one litigant's decision-making process – rather than the conduct of litigants before the court – is beyond the legitimate reach of the court."*[130]

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128 R v Power [1994] 1 SCR 601 (SCC) 621; Krieger v Law Society of Alberta [2002] 3 SCR 372 (SCC) para 31

129 Power, supra, 623; Krieger, supra, para 31

130 Krieger, supra, para 32

143. We submit for these reasons that the applicants' complaint of non-joinder is unfounded in law.

The applicants did not suffer prejudice

144. The high-watermark of the applicants' complaint of prejudice, is that they were deprived of the exculpatory evidence which they say Mr Zuma and Thint would have given if they had been prosecuted jointly with them. We submit that they have not established prejudice of this kind.

145. We emphasize at the outset however that even if they have, it would not avail them for a variety of reasons:

145.1. We have already pointed to the incongruity of the applicants' case which would have it,

- either that Mr Zuma and Thint are innocent but should nonetheless have been prosecuted for the sake of the exculpatory evidence they would have given for the benefit of the applicants,
- or that they are guilty but that the applicants were entitled to their exculpatory evidence albeit that it would have been false.

145.2. The NDPP's decisions not to prosecute Mr Zuma and to withdraw against Thint were taken in good faith and for good and sufficient reason. They were lawful decisions which did not violate any rights of the applicants even if they suffered some prejudice in the result.

145.3. The applicants' right to a fair trial did not entitle them to demand a trial designed and structured so as to serve their best advantage. Even if a joint trial would have held some benefit for them of which they were deprived as a result of their separate prosecution, the resultant disadvantage does not constitute prejudice of the kind which impairs their right to a fair trial.

146. But the applicants were in any event no worse off in their separate trial than they would have been in a joint trial with Mr Zuma and Thint. The state dealt with this issue in paragraph 109 from page 444 of their answer. We do not repeat the evidence and merely highlight its essence:

146.1. It is impossible to tell whether Mr Zuma would have given evidence in his own defence if he had been prosecuted jointly with the applicants. Nobody can say today how he would have conducted his defence. It would *inter alia* have depended on the nature and strength of the case against him. If he chose not to give evidence, then he would also not have been a compellable

witness at the applicants' behest. They would have been powerless to compel him to give evidence.

146.2. In the event, the applicants remained at liberty to summons Mr Zuma to give evidence in their defence or to ask the trial court to do so in terms of s 186 of the CPA. He would have been entitled to refuse to give self-incriminating answers. But that is not the evidence the applicants mind losing. They complain about the loss of his exculpatory evidence. Insofar as his evidence would have been exculpatory, he would have been obliged to give it. His protection against self-incrimination would not have entitled him to refuse to give it. He was not an "*accused person"* and accordingly did not enjoy a broader right to remain silent in terms of s 35(3) of the Constitution.

146.3. It follows that the applicants were indeed better off in relation to Mr Zuma's evidence than they would have been if he had been prosecuted with them.

146.4. In relation to Thint, a joint prosecution would have made no difference. The first applicant Mr Shaik was charged as the nominal representative of Thint. His prosecution in that capacity would obviously not have made any difference. Neither Mr Shaik nor Thint could have insisted that any other Thint official should

represent Thint as an accused person – it is the State that has the prerogative to summons any director or servant of a company in terms of section 332(2) of the CPA. Mr Shaik was also the director of Thint in the country who was best placed to answer the allegations against Thint, because Mr Thétard had left the country and refused to return.[131]

146.5. The two Thint officials whose version the applicants suggest would have been relevant and helpful to them, namely Messrs Thétard and Perrier, were at all material times in France and beyond the reach of the state and the court. France does not extradite its nationals for trial in foreign countries.[132] The attempts by the state to obtain the assistance of the French authorities to question them and other senior Thint employees met with no success.[133] There is no reason whatever to believe that, if Thint represented by the first applicant Mr Shaik, had been prosecuted jointly with the applicants, Messrs Thétard and Perrier would have ventured to give evidence in their defence. It remains entirely speculative whether they would have done so

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131 In the Replying affidavit (main application) Record 848 to 849:73.2.3 to 73.2.4, the applicants allege that the State agreed that Mr Moynot would replace Mr Shaik as the Thint representative for the prosecution, had it continued. The State could not answer this remarkable allegation, made as it was in the applicants' replying papers for the first time. It is not true. It would have been absurd to replace Mr Shaik as the Thint representative when he was the person most closely associated with the alleged offences

132 Du Plooy answering affidavit Record 443:109.4

133 Du Plooy answering affidavit Record 443:109.4

and, if they had done so, whether their evidence would have been helpful or harmful to the applicants.

The prejudice was not foreseeable

147. The ultimate complaint is that the NDPP unlawfully deprived the applicants of the exculpatory evidence of Mr Zuma and Thint by not prosecuting them together with the applicants. The complaint assumes that the NDPP was under a duty to design and construct the prosecution in a way most advantageous to the applicants.

148. The assumption is far-fetched but, even if it were to be made, it would still have been impossible for the NDPP to predict that in this case a joint trial rather than separate trials would be to the best advantage of the applicants. In the overwhelming majority of cases where a multiplicity of accused are charged with complicity in the same crime, they are better off in separate trials which minimise the risk of incrimination by their co-accused. Even if this case were different, there was no way in which the NDPP could predict it.

Conclusion

149. We submit that the complaint of non-joinder is unfounded both in law and in fact.

THE ADMISSIBILITY OF EVIDENCE

The encrypted fax

150. The applicants contend that the High Court and the SCA both wrongly admitted the encrypted fax in evidence despite its hearsay nature.[134] We submit with respect however that neither court erred. The SCA ultimately admitted the fax under s 3 of the Law of Evidence Amendment Act 45 of 1988. The applicants appear to question the constitutionality of this provision but there is no challenge to its validity before the court. But even if the SCA erred, the fax was in any event admissible on other grounds.

151. Most of the applicants' contentions about the admissibility of the encrypted fax are tied up with their overarching argument about the unfairness of their not being tried together with Thint. We understand the essence of these contentions to be the following:

151.1. If Thint had been joined as a co-accused, Thint "*would have tendered exculpatory evidence in regard to the service provider agreement and the encrypted fax and on the alleged connection that the State sought to draw between the two*".[135]

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134 Applicants' main heads 131:220.5 to 220.6; 133:222.2 to 222.3 and 135:226 to 244

135 Applicants' main heads 127 to 128:212; see also 18:24.2

151.2. If Thint had been joined as a co-accused Thétard would have testified and could have been cross-examined by the Applicants' counsel about the encrypted fax.[136]

151.3. Thint is a co-conspirator and the source of vital evidence (the encrypted fax) that was to be tendered as hearsay.[137]

151.4. For these reasons, it was unfair of the state not to join Thint as a co-accused.[138]

151.5. An accused person's right to challenge evidence in s 35(3)(i) of the Constitution, includes the right to cross-examine the witnesses for the state.[139]

151.6. When admitting the encrypted fax as an executive statement made in the furtherance of a common purpose (the trial court) and as hearsay evidence under s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 (the SCA):

151.6.1. the trial court and the SCA did not consider the unfairness of doing so in circumstances where Thint

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136 We infer this from Applicants' main heads 136:226, 137:231, 141:240

137 Applicants' main heads 141:241; see also 141:242

138 Applicants' main heads 141:241; see also 141:242

139 Applicants' main heads 141:240

was not a co-accused and consequently Thétard would not testify for Thint and be cross-examined by the Applicants;[140]

151.6.2. they also did not consider the resulting infringement of the applicants' right to challenge evidence in s 35(3)(i);[141] and

151.6.3. consequently, they failed, respectively "*to interpret and apply the common law relating to the admission of executive declarations through the protections afforded by the Bill of Rights*" (the trial court)[142] and "*to interpret the provisions of the Law of Evidence Amendment Act with due regard to spirit, purport and objects of the Bill of Rights*" (the SCA).[143]

152. The applicants did not raise this or a similar constitutional argument before the trial court or the SCA. They have also not explained to this court why they did not do so, or why this court should allow them to raise this argument for the first time in a last ditch appeal to this court.

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140 See e.g. Applicants' main heads 137:229, 137:231, 141:240

141 Applicants' main heads 136:227

142 Applicants' main heads 132 to 133:220.5

143 Applicants' main heads 134:222.2; see also 137:229

153. The applicants' contentions are in any event speculative.

153.1. They have adduced no evidence to show that Mr Thétard would have testified if Thint had been prosecuted. On the contrary, as the Applicants themselves imply, it is unlikely that Mr Thétard would ever have testified because he was a suspect and "*beyond the borders of the Republic and the jurisdiction of the Durban Court*".[144] Mr Thétard was at all material times in France and beyond the reach of the NPA and the jurisdiction of the court. France did not and still does not extradite its nationals for trial in foreign countries. The attempts by the NPA to obtain the assistance of the French authorities to question them and other senior Thint employees had met with no success. Mr Thétard had said in an affidavit that he refused to come to South Africa to testify.[145]

153.2. The applicants have adduced no evidence to show, and have no plausible basis for now suggesting, that Mr Thétard's testimony would have assisted them in proving their innocence. Their inability to cross-examine Mr Thétard could prejudice them only if there was a reasonable possibility that such cross-examination would strengthen their defence. At the trial the applicants'

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144 Applicants' founding affidavit Record 193:285.8

145 Du Plooy answering affidavit Record 514:217.3, referring to Thétard Bundle A 16:1409a lines 19 to 21

attitude was that Mr Thétard was an unreliable and dishonest person.[146]

153.3. Then there are the difficulties for the applicants presented by the wording of the fax and the circumstances in which was made, referred to by the SCA in its judgment.[147]

153.4. Finally, apropos the meeting of 11 March 2000 in Durban between Mr Shaik, Mr Zuma and Mr Thétard, at which the state alleges the agreement for the annual bribe of R500 000 was agreed, the applicants' version at the trial was that the purpose of the meeting was for Mr Zuma to confirm to Mr Thétard that he (Mr Zuma) did indeed desire Thint to make a donation to the Jacob Zuma Educational Trust, a charitable trust of which Mr Zuma was the patron.[148] Mr Thétard however had given a different version.[149] In a letter to his superior Mr Perrier he confirms that he met Mr Zuma in Durban "*during the first quarter of 2000 (I cannot recall the exact date) at his official residence, in the company of our local partner, Shabir Sheik* (*sic*)", but says that the aim of this meeting was "*to establish the credibility of our*

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146 Du Plooy answering affidavit Record 455:122.4.7

147 SCA main judgment paras 174 to 176

148 Du Plooy answering affidavit Record 444:109.6.1

149 Du Plooy answering affidavit Record 444 to 445:109.6.3

setting up in Durban, and only dealt with general subjects relating to this business".[150]

154. We have dealt in the chapter on the non-joinder of Mr Zuma and Thint with the contention that it was unfair not to join Thint in the prosecution. For the reasons given there and because the unfairness on which the applicants rely is entirely based on speculation about Thint's evidence, we submit that there is no basis for saying that it was unfair of the state not to join Thint as a co-accused. In any event, as the SCA found, substantial corroboration for the evidence contained in the fax is to be found in the other evidence adduced by the state and in Mr Shaik's own evidence.[151] In their application for leave to appeal the applicants have not challenged any of this corroboration, or indicated how they intend doing so if granted leave to appeal.

155. We accept that an accused's right to challenge evidence in s 35(3)(i) of the Constitution normally includes the right to cross-examine the witnesses for the state. However, for the reasons given by the SCA in Ndhlovu,[152] it does not follow that the admission of hearsay evidence in the interests of justice and in accordance with s 3(1)(c) of the Law of Evidence Amendment Act, infringes that right: "*where the interests of*

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150 Letter Thétard to Perrier 25/6/2003 Bundle A 6:523

151 SCA main judgment paras 182 to 203

152 S v Ndhlovu and Others 2002 (6) SA 305 (SCA)

justice require that the hearsay statement be admitted, the right to 'challenge evidence' does not encompass the right to cross-examine the original declarant".[153]

156. With reference to the trial court's decision to admit the encrypted fax as an executive statement made in the furtherance of a common purpose, the applicants also allege that the court "*used the document itself to prove the conspiracy, which was a material misdirection*".[154] We submit that this rather cryptic contention (which we have difficulty in understanding because it is never developed in the applicants' argument) does not raise a constitutional issue on the face of things, and in any event it is academic because the state did not rely on this ground in argument before the SCA and the SCA admitted the encrypted fax under s 3(1)(c) of the Law of Evidence Amendment Act. The SCA also indicated that, *prima facie*, all the requirements had been satisfied for its admission as a statement by a person who was outside the country, under s 34 of the Civil Proceedings Evidence Act 25 of 1965, read with s 222 of the CPA.[155]

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153 S v Ndhlovu and Others 2002 (6) SA 305 (SCA) para 24

154 Applicants' main heads 133:220.6

155 SCA main judgment para 181. In its judgment on admissibility the trial court moreover indicated that it was arguable that the encrypted fax could be admitted against Shaik (a director of Thint the time) as a company document under s 332(3) and (6) of the CPA. The Applicants formally admitted that the documents obtained from Nkobi and Thint premises, which comprised the bulk of the documentary evidence, "*were in the custody or under the control of the directors, servants and/or agents of Nkobi/Thomson-CSF within the scope of his/her/their activities as such*" (Formal admissions JDP1 Record 534:10.3 and 536:13.3). This reflects the wording of ss 332(3), (4) and (6)(b) of the CPA

The 2001 searches and seizures

157. The applicants contend that the searches of their premises in 2001 and the documents seized in the course of those searches, were unlawful. They were undertaken under search warrants issued by the High Court in Durban. The applicants contend that the warrants were technically defective in a variety of respects.[156] We submit with respect that this contention is unconscionable and in any event unfounded.

158. The applicants formally admitted at the trial that the searches of their premises in 2001, bar one, had been lawful and that the documents seized in the course of those searches were admissible in evidence.[157] As a result of their formal admission,

- there was never any inquiry into the lawfulness of the searches and seizures, and
- there was never any inquiry into the question whether the documents should be admitted into evidence under s 35(5) of the Constitution even if they had been unlawfully seized.

159. The idea that the lawfulness of the searches and seizures might have been challenged, only occurred to the applicants when Mr Zuma and Thint and their associates challenged the lawfulness of the searches of their

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156 Applicants' main heads 142 to 144:253 to 267

157 Formal admissions JDP1 Record 524 at 533:9 to 12. In the case where no admission of legality was made (Mr Shaik's penthouse) the applicants nevertheless admitted the two key documents obtained during the search

premises in August 2005, some four years after the searches of the applicants' premises. The challenges met with mixed success. Mr Zuma's challenge was upheld by Hurt J in Durban while Thint's challenge was dismissed by Du Plessis J in Pretoria. All of the challenges are on their way to the SCA.

160. In their founding affidavits, the applicants claim to be entitled to challenge the lawfulness of the searches and seizures because their earlier failure to do so had been based on erroneous legal advice which "*has caused the applicants to suffer substantial prejudice and an unfair trial*".[158] The applicants in other words blamed their lawyers who were ironically enough a senior advocate and the very attorney who deposed to the applicants' founding affidavit.[159]

161. The applicants changed tack in reply. They said that the state "*entirely misunderstands the nature and effect of the point raised in relation to the South African searches and seizures"* but that the applicants "*have resolved not to persist with that argument."*[160]

162. In their heads of argument however, the applicants change tack yet again. They resurrect their argument about the searches and seizures, albeit that

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158 Founding affidavit Record 208:308

159 Du Plooy answering affidavit Record 481:149.3 and 149.4

160 Replying affidavit (main application) Record 883:106

they "*no longer assert an infringement of their constitutional right to a fair trial 'based on ineffective counsel*".[161]

163. We submit with respect that the applicants should not be allowed to reopen this issue. Their attempts to do so are unconscionable. They are in any event doomed to failure because they have no prospect of overcoming the following hurdles:

163.1. The applicants do not show any legitimate basis upon which they should be permitted to withdraw their admission of the lawfulness of the searches and of the admissibility of the documents seized.[162]

163.2. There is no evidence on the record as it stands to support their contention that the searches were unlawful.

163.3. They do not disclose any basis upon which they should be allowed to adduce new evidence to show that the searches were unlawful. They have had knowledge of the underlying facts since the searches were done in 2001. There is no basis upon which they should be allowed to reopen the issue now.

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161 Applicants' main heads 143:248 to 268

162 S v Malebo 1979 (2) 636 (B) 644C; S v Mbelo 2003 (1) SACR 84 (NC) 85c to e

163.4. Even if they were allowed to do so, they do not offer any persuasive evidence of the unlawfulness of the searches.

163.5. If the searches were unlawful, the court would have to undertake an inquiry to determine the admissibility of the documents in terms of s 35(5) of the Constitution. There is no evidence before the court on this issue and both sides would have to be afforded an opportunity to adduce evidence on it. It is of course impossible to predict the outcome of such an inquiry. The fact of the matter is however that the searches were done in good faith because there is no evidence to the contrary. The overwhelming likelihood is accordingly that the documents seized in good faith would be admitted into evidence even if they were unlawfully seized on some technical ground or other.

163.6. The applicants do not begin to show that, if the documents were to be excluded, it would make a difference to the outcome of their case.

The Mauritius documents

164. The applicants argue that the court wrongly admitted certain documents obtained in Mauritius into evidence at the trial.[163] The state fully addressed this complaint in their answering affidavit from page 373 in paragraphs 35 to 45. It shows the complaint to be utterly unfounded. We will merely highlight its main points.

165. The applicants formally admitted at the trial that the Mauritius documents had all been lawfully seized in Mauritius. They merely contended copies of the documents had been unlawfully removed from Mauritius to be brought to South Africa.[164]

166. The High Court undertook a full investigation of this issue. The parties adduced evidence and made submissions on it. That evidence included a detailed affidavit from Mr Downer, which the applicants formally admitted.[165] The High Court delivered a careful judgment holding that the copies of the documents brought to South Africa had been lawfully removed from Mauritius. Its judgment is included in the evidence the applicants seek to place before this court.[166] The applicants do not

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163 Applicants' main heads 131:220.3 and 220.4

164 Du Plooy answering affidavit Record 373:35.2 and 35.3 read with Formal admissions JDP1 Record 524 at 533:9 and 536:14

165 Formal admissions JDP1 Record 524 at 538:17

166 Du Plooy answering affidavit Record 374:35.4 and 35.5; High Court judgment on the admissibility of the Mauritius documents Bundle B 8:563 at 591 to 601

suggest that this judgment was wrong in any way. It was in any event one which turned on the facts.

167. Having concluded that the documents were lawfully obtained, the High Court considered their admissibility. It ultimately admitted only three of the Mauritius documents into evidence and disallowed others on the basis that they constituted inadmissible hearsay.[167]

168. Even if the High Court had erred in its conclusion that the documents had been lawfully removed from Mauritius, they would in any event have been admissible in evidence in terms of s 35(5) of the Constitution.[168]

169. Even if the Mauritius documents were to be ruled inadmissible however, it would not make any difference to the outcome of the case. That is because the facts sought to be proved by the Mauritius documents, were ultimately common cause or proved beyond reasonable doubt by other evidence before the court. This much is now common cause.[169]

170. It is presumably for all these reasons that the applicants did not challenge the admissibility of the Mauritius documents in the SCA.[170] They insist that

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167 Du Plooy answering affidavit Record 376:35.6

168 Du Plooy answering affidavit Record 379:35.8.5

169 Du Plooy answering affidavit Record 376:35.6 read with the Replying affidavit (main application) Record 804:29.1

170 Du Plooy answering affidavit Record 378:35.7 and 35.8

they should be allowed to raise the issue now because "*additional information has only been revealed in an affidavit that was filed on or about 5 March 2007"*. They do not say what this information is, why it should render the Mauritius documents inadmissible or why it would make a difference to the outcome of the case even if they were ruled inadmissible.[171]

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171 Replying affidavit (main application) Record 805:29.4

"*A GENERALLY CORRUPT RELATIONSHIP"*

171. The SCA said in its POCA judgment that the High Court had appropriately called the relationship between Mr Shaik and Mr Zuma "*a generally corrupt relationship"*.[172] The substance of this statement was correct. It was indeed the effect of the High Court's judgment. The SCA was mistaken however in its impression that the High Court had used the phrase attributed to it. It had used similar phrases, but not "*a generally corrupt relationship"*. The SCA's mistake was purely one of form and not substance.

172. The SCA's impression that the High Court had used the phrase was understandable because just about everybody else used it. The state deals with this issue at some length from page 420 in paragraphs 76 to 82 of their answer.

    172.1. Both sides in the litigation from time to time referred to the charge of a generally corrupt relationship in count 1.[173] Senior counsel for the applicants for instance referred to "*the general corrupt relationship charge"* and to the "*so-called general corrupt relationship"*.[174]

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172 SCA POCA judgment para 8

173 Du Plooy answering affidavit Record 422:80

174 Du Plooy answering affidavit Record 422:80.1 and 80.2

172.2. The trial court in fact made findings which may aptly be described as findings of a generally corrupt relationship between the first applicant Mr Shaik and Mr Zuma.[175] It merely used other words to say the same thing.

172.3. In the state's replying affidavit in the POCA application, it said that the High Court had found "*that a generally corrupt relationship existed between Mr Shaik and Mr Zuma"*.[176] This statement was uncontroversial and correct. The SCA's apparent adoption of it was mistaken only in its attribution of the phrase to the High Court.

173. It is in the circumstances regrettable that the applicants still persist in their attempt to exploit the SCA's innocent and trivial mistake.[177] We submit that there is no substance to the complaint whatever. The high-watermark of the complaint is that the SCA's mistake "*creates the perception that justice has not been done to the applicants"*.[178] But the applicants must know better. They know that it was an innocent and trivial mistake of no consequence whatever.

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175 Du Plooy answering affidavit Record 420:77

176 Du Plooy answering affidavit Record 425:80.5

177 Applicants' main heads 133:222.4

178 Applicants' main heads 133:222.4

THE ROLE OF DOWNER SC

174. The applicants now contend that lead counsel for the state compromised his independence by becoming too closely involved in the investigation of the case.[179]

175. There is no justification for their attempt to raise this issue only now. They have always known of the facts upon which they now seek to do so. We submit that they should not be allowed to raise this very fundamental issue only at this late stage.

176. The applicants assert that it is "*either common cause or not seriously disputed"* that Mr Downer was also "*investigator or detective"* in this case. But nothing can be further from the truth. The state's deponent Mr Du Plooy was at all times the lead investigator. He describes Mr Downer's limited role in the investigation.[180] Mr Downer's own comprehensive description of his role in the Mauritius searches and seizures, is uncontradicted[181] and was formally admitted by the applicants at the trial.[182]

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179 Applicants' main heads 154:279 to 290

180 Du Plooy answering affidavit Record 382:37.5.2 and 490:161

181 Downer affidavit JDP10 Record 599

182 Formal admissions JDP1 Record 524 at 538:17

177. The applicants' argument is no more than a series of assertions without any reference to the evidence upon which they rely. They make the following assertions in their submissions to this court:

177.1. They say that it is either common cause or not seriously disputed that Mr Downer "*was also an investigator or detective"* in this case. They do not offer any evidence in support of this assertion.

177.2. They say that he "*oversaw or participated substantially in the search and seizure operations in Mauritius"*.[183] But the handful of facts they offer in support of this contention, like Mr Downer's affidavit, do not bear it out. They suggest on the contrary that Mr Downer adhered to his role as prosecutor and did not become detective on the case.

177.3. They say that Mr Downer conducted interrogations of employees of the corporate applicants in terms of s 28 of the NPA Act.[184] It is correct that he participated in s 28 interviews with witnesses but that is a role frequently and properly played by lawyers in the preparation of a case. None of the accused was interviewed

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183 Applicants' main heads 154:279

184 Applicants' main heads 154:279

under s 28 and Mr Downer accordingly also did not participate in any interviews of that kind.[185]

178. The applicants rely on the Cape High Court judgment in Killian in which a conviction was set aside because the prosecutor had interrogated the accused in terms of s 28 of the NPA Act.[186] We understand that the judgment is on appeal to the SCA. We submit with respect that it was wrongly decided. It is unnecessary however to determine the issue because the judgment is clearly not applicable to this case. It overturned a conviction because the prosecutor had interrogated the accused. That did not happen in this case.

179. Mr Downer's role was in any event one contemplated and provided for by the NPA Act.

179.1. The Act records in its preamble that one of its purposes is to provide for the establishment of an Investigating Directorate with limited investigative capacity to prioritise and to investigate particularly serious criminal or unlawful conduct committed in organised fashion or certain offences or unlawful conduct, with

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185 Du Plooy answering affidavit Record 491:161.3 and 161.4

186 Killian v Immelman, Regional Magistrate Paarl [2007] 1 All SA 497 (C). The applicants make it clear on page 157 of their main heads that this was a judgment of the High Court but the citation in footnote 144 incorrectly suggests otherwise

the object of prosecuting those offences or unlawful conduct in the most efficient and effective manner.

179.2. Section 7(1) establishes an investigating directorate known as the Directorate of Special Operations or DSO. Section 7(1)(a) provides that its aim is *inter alia* both to investigate and to prosecute crime. Section 7(4) goes on to provide for the appointment of Deputy Directors, prosecutors and special investigators to the DSO for the performance of these functions.

179.3. The DSO was in other words created with the specific objective of pursuing a multi-disciplinary approach to the investigation and prosecution of serious crime. This approach requires the co-operation of a variety of professional skills including those of,

- investigators, whose main function is to investigate suspected offences and to gather evidence about them;
- crime analysts and forensic accountants, whose main functions are to analyse the information and evidence obtained, and
- prosecutors whose main functions are, where appropriate, to institute criminal proceedings and carry out any necessary functions incidental to them, including the provision of legal oversight over the investigation.

179.4. It must have been apparent that, while certain functions will be exclusive to investigators on the one hand or prosecutors on the other, there will be a wide range of activities in respect of which their functions may legitimately overlap. The interviewing of state witnesses is a good example. It is an activity which is incidental both to the function of investigation as well as that of prosecution.

179.5. One of the primary reasons for the legal oversight over DSO investigations is precisely to ensure that the investigation is conducted within the bounds prescribed by the law in general and the Constitution in particular. If anything, this oversight protected the applicants against investigative abuse and did not in any way jeopardise their rights.

180. We submit that the attack on Mr Downer's conduct is wholly unwarranted both in fact and in law and that the applicants should in any event not be allowed to raise it for the first time at this late stage.

THE JOINDER OF CHARGES

181. The applicants make a remarkable complaint about the fact that they were charged with two counts of corruption and one count of fraud.[187] Not to put too fine a point on it, the complaint is the following. Mr Shaik gave evidence in defence of all the applicants on all the charges. The trial court made adverse credibility findings about his evidence including his evidence on the corruption charges. It is unfair to the remaining applicants that the adverse findings in relation to his corruption evidence should be taken into account against them on the fraud charge as well. They say it violated their right to a fair trial.

182. It means that the applicants claim that they had a constitutional right to a separation of charges so that Mr Shaik could freely give dishonest evidence on the corruption charges without compromising his credibility on the fraud charge. The proposition merely has to be stated to make it obvious how absurd it is.

183. The joinder of charges is regulated by s 81 of the CPA. It allows the state freely to join charges against the same accused but at the same time allows the court to order a separation of charges "*if in its opinion it will be in the interests of justice to do so"*.

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[187] Applicants' main heads 158:291 to 293

184. There was in any event a link between the first count and the second count because the amounts written off (the second count) included most of the payments made by the applicants to or on behalf of Mr Zuma up to that point (the first count).

185. The applicants never sought a separation of charges. They do not explain why not. They do not disclose any reason why they should be permitted to do so now.

SENTENCE

The application of the minimum sentence legislation

186. The applicants seek belatedly to argue that the trial court and the SCA erred by their imposition of the minimum sentence prescribed by s 51(2)(a) read with part II of schedule 2 of the Criminal Law Amendment Act 105 of 1997 on count 1. Their argument is in essence that some of the conduct of which they were convicted occurred before the minimum sentence legislation came into effect.

187. We submit for the reasons that follow however that their argument is not only bad in law but that they should not be allowed to raise it yet again in the belated fashion they attempt to do.

188. The application for leave to raise this argument is factually incorrect and misleading. The applicants say that the legal point "*did not occur either to the state or the defence previously*".[188] They go on to say that the question whether the minimum sentence legislation applied to count 1 "*appears to have been overlooked by both the state and the defence as well as the trial court and the Supreme Court of Appeal*".[189]

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188 Application for condonation Parsee para 6

189 Application for condonation Parsee para 8

189. But these statements are patently incorrect as the state makes plain in its answer to the application for condonation.[190]

189.1. The state expressly and fully addressed the issue in its submissions to the High Court on sentence. It did so orally and in writing. It did so prominently under a heading which read "*Minimum Sentence Legislation Applicable"*. Its submissions are quoted at length in the state's answer to the application for condonation.[191]

189.2. The applicants conceded in argument before the trial court that the minimum sentence legislation was applicable to count 1 because, although it included conduct that went back further than May 1998 when the minimum legislation came into effect, the ongoing conduct since that date involved amounts well in excess of the statutory threshold of R500 000.[192]

189.3. The trial court was thus alive to the question of the application of the minimum sentence legislation in respect of count 1. It correctly found at the commencement of its judgment on

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190 Application for condonation Du Plooy para 6

191 Application for condonation Du Plooy para 6.2

192 Application for condonation Du Plooy para 6.3 read with Bundle B 3:136

sentence that "*all three offences … fall within the ambit of part II of the Second Schedule to Act 105 of 1997*".[193]

189.4. The applicants conceded in their written submissions to the SCA that it was "*common cause between the parties that the offence of which the first appellant was convicted on count 1, fell within the provisions of s 51(2)(a) (of the minimum sentence legislation) as the amount involved during the period 1 May 1998 (when s 51 came into effect) to 30 September 2002 amounts to more than R500 000*".[194]

190. We submit with respect that the applicants' argument in any event has no prospect of success and that they should for that reason also not be allowed to raise it on appeal. The foundation of their argument in relation to count 1 is that "*with the first payment the offence was committed and the subsequent payments simply went to the nature, extent and degree of the corrupt relationship*".[195] But that was not so:

190.1. The indictment alleged that count 1 was a continuing offence, committed "*during the period 1 October 1995 to 30 September 2002*".

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193 High Court judgment on sentence Bundle B 3:136 lines 16 to 19

194 Application for condonation Du Plooy para 6.4 read with JDP3

195 Application for condonation Du Plooy para 7

190.2. The summary of facts stipulated that the applicants "*benefited Zuma in the period 1 October 1995 to 30 September 2002 in the amount of R1 340 078.01"*.

190.3. In their further particulars, the state made it clear that its case was that each of the payments made by the applicants to Mr Zuma "*was one of a series of payments that collectively and in furtherance of an ongoing scheme were intended to continue to secure Zuma's influence"*.

190.4. The applicants were in other words indicted on count 1 for committing corruption on an ongoing basis from 1995 until 2002. They were convicted on this basis although the trial court held that the corrupt payments may only have commenced in 1997.

190.5. The offence was in other words an ongoing one and, in relation to the period after commencement of the minimum sentence legislation, involved amounts well in excess of the statutory threshold of R500 000.

The judgments of the High Court and the SCA on sentence

191. The applicants argue that the trial court and the SCA misdirected themselves on sentence in that they failed to take into account our history of racial discrimination and oppression.[196] The applicants submit more particularly that,

> "*An economic crime committed by a historically disadvantaged person through the very discrimination that denied him the equal opportunities to participate in the economy of the country is not the type of person that the minimum sentence of fifteen years was directed at. He is the victim of an unjust and unfair society."*[197]

192. The applicants have never previously raised this feature of their background as a consideration that has to be taken into account for purposes of sentence. On the contrary, their counsel argued in the SCA that by the time Mr Shaik committed the first crime of corruption (count 1) "*the evidence revealed that the Nkobi group was already a highly successful and prosperous group without any intervention from Zuma in his capacity as MEC or Deputy President of the country*" [198].

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196 Applicants' main heads 160:294 to 311

197 Applicants' main heads 164:303

198 Applicants' SCA heads 145:219. These heads are not before this court, but if requested the state will provide copies of the relevant section

193. It was moreover for obvious reasons always patent to all that Mr Shaik hails from a previously disadvantaged group who were oppressed and suffered oppression and discrimination under apartheid. Nobody could have been unaware of it and nobody could have failed to have regard to it. The only reason it was not mentioned in the High Court and SCA judgments, was that the applicants themselves never raised it.

194. It is in any event clear from their judgments that both the High Court and the SCA considered Mr Shaik's personal circumstances very carefully:

194.1. It was alive to his humble beginnings: "*From humble beginnings he is now a businessman heading a corporate empire"*.[199]

194.2. It recognised his struggle credentials: "*In the present case Squires J took into account all relevant factors including Shaik's 'struggle credentials'"*.[200]

194.3. It mentioned specifically that it was after the advent of democracy that Mr Shaik saw economic opportunities beckon: "*… very soon after the advent of our democracy Shaik saw*

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199 SCA main judgment para 216

200 SCA main judgment para 226

economic opportunities beckon and realised early on that he could use political influence to his financial advantage".[201]

195. It is also not fair to say that the SCA did not have regard to the values underlying the Constitution and their impact on the determination of an appropriate sentence:

195.1. It quoted this court's judgment in the Heath case:

"*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"*.[202]

195.2. It also approved of the High Court's remark that corruption "*… is plainly a pervasive and insidious evil, and the interests of a democratic people and their government require at least its*

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201 SCA main judgment para 219

202 South African Association of Personal Injury Lawyers v Heath 2001 (1) BCLR 77 (CC) 80E to F quoted in SCA main judgment para 222

rigorous suppression, even if total eradication is something of a dream".[203]

196. The SCA took account of the fact that Mr Shaik had come from a background of struggle against oppression but agreed with the High Court,

"*that far from achieving the objects to which the struggle for liberation was directed the situation that Shaik developed and exploited was the very same that the struggle had intended to replace and that this whole saga was a subversion of struggle ideals"*.[204]

197. The SCA also had regard to Mr Shaik's personal circumstances.[205]

198. Although Mr Shaik's background was deserving of empathy, it was outweighed by the aggravating features of his crime:

198.1. He committed corruption because he "*sought money and power, the two things he most sought and strove towards*".[206] We submit with respect that this selfish and materialistic motive is not mitigated by any past discrimination.

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203 SCA main judgment para 223

204 SCA main judgment para 226

205 SCA main judgment para 223

206 SCA main judgment para 216

198.2. His payments were made to Mr Zuma *"a powerful politician, over a period of more than five years"* and were made "*calculatingly"*. He "*subverted his friendship with Zuma into a relationship with patronage designed to achieve power and wealth"*. He was "*brazen and often behaved aggressively and threateningly, using Zuma's name to intimidate people, and particularly potential business partners, into submitting to his will"*. He sought out people "*eager to exploit Zuma's power and influence and colluded with them to achieve mutually beneficial results.*"[207]

198.3. His sustained corrupt relationship with Mr Zuma over the years "*had the effect that Shaik could use one of the most powerful politicians in the country when it suited him"*.[208]

199. We submit that neither the High Court nor the SCA misdirected themselves on the question of sentence.

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207 SCA main judgment para 218

208 SCA main judgment para 219

PRAYER

200. The state asks for an order that the application for leave to appeal and all the applicants' ancillary applications be dismissed.

Wim Trengove SC

William Downer SC

Alfred Cockrell

Andrew Breitenbach

Anton Steynberg

George Baloyi

Counsel for the state

Chambers
Johannesburg, Cape Town, Durban and Pretoria
11 May 2007

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