

Following the conviction of all the instant defendants in the preceding criminal trial, on one charge of contravening section 1(1)(a) of the Corruption Act, 92 of 1994, of Acc No 1 only on a second count of contravening section 1(1)(a)(i) of that same statute, and of Acc No 4 and 5 respectively, on an alternative charge of money laundering in contravention of sections 4(a) and 4(b) of Act 121 of 1998, the prosecutor applied at the end of the trial for the holding of the enquiry provided for in section 18(1) of that latter Act, the Prevention of Organized Crime Act.

That was not immediately possible but a restraint order under section 26 was issued by consent on 3rd June 2005, interdicting property of the accuseds to the value of R30 000 000. That property under the control of a curator *bonis*, now comprises all the 7 464 shares held by Nkobi Investments (Pty) Limited (the present third defendant) in Thint (Pty) Limited valued at R21 018 000, cash in the sum of R250 000, further cash being the current surplus from an escrow account securing the Thint dividends against repayment of its loan to Nkobi Investments to purchase the 7 464 shares, and 250 shares in Cellsaf, valued at R7 250 000 – a total of R28 825 984. The shortfall is explained by a discrepancy in the valuation of the shares in Thint (Pty) Limited. The defendants value these at R22 500 000, whereas a local accountant acting for the curator *bonis* appointed under the restraint order values them at R21 018 000. Nothing turns on this difference.

The parties thereafter agreed that each would file statements setting out their respective cases as provided in section 21(1)(a) of the Act.

The applicant's case did not, at the first attempt, set out the full conspectus of evidence upon which the applicant intended to rely, and only did so in reply to the defendants' answer lodged under section 21(3)(a). That omission necessitated the second of the two postponements referred to earlier while the defendants were understandably afforded a further opportunity of answering the applicant's real case. By that protracted and occasionally bumpy road, the present lines of battle have been reached.

They are as follows. The applicant asks for confiscation orders to be made against the first, second, third, fourth and fifth defendants in respect of four identified benefits which, it is claimed, they received directly or indirectly, from or in connection with, the offences of which they were convicted, or from other criminal activity intimately related to those offences.

The first of these benefits is the shareholding of Nkobi Investments in the private company now called Thint (Pty) Limited, formerly named Thomson CSF (Pty) Limited, and the erstwhile accused no 1 in the criminal trial. For the sake of consistency in the present exercise I have used the original name as was used in the criminal trial and the main judgment.

Nkobi Investments holds 25% of the shares in Thomson CSF (Pty) Limited, and Thomson CSF (Pty) Limited in turn holds 80% of the shares in ADS (Pty) Limited which was awarded, as part of the Thomson consortium, the contract by the government to provide the combat munitions suite for the navy's new corvettes in the arms acquisition programme of 1998 to 1999.

So effectively, the third defendant has a 20% interest in ADS (Pty) Limited and consequently receives 20% of the profits that are payments from that contract and which are available for distribution to shareholders as dividends. The present, and accepted, market value of these shares — and the third defendant's concomitant interest in them — is R21 018 000. Nkobi Holdings, the second defendant, holds 100% of the shares in Nkobi Investments, and Schabir Shaik has an effective interest of 92% of Nkobi Holdings. The value of these two latter interests is accordingly R21 018 000 and R19 336 560, respectively, and it is the value of these shares that the applicant says I should now order to be confiscated because they are the proceeds of the criminal activity that the Act seeks to discourage.

The second such benefit is the accumulated dividends received up to the present by Nkobi Investments from its shareholding in Thomson CSF (Pty) Limited and received in turn by Thomsons from ADS of its share of the R450 000 000 contract for the corvette munitions suite. The aggregate amount of these dividends is now R12 797 331. The applicant's argument is that the proceeds of the shareholding of the third defendant in Thomsons CSF (Pty) Limited, and therefore of the underlying unlawful activity, is R12

797 331, that the value to the second defendant - which holds 100% of the third defendant - is also R12 797 331, and to the first defendant, who has a 92% interest in the second defendant, the value of these proceeds is R11 773 544.

The third benefit to which applicant now lays claim is the sum of R499 568 (which should have been R500 000) that Nkobi Investments received for the sale of its 10% shareholding in Thomson CSF Holdings (Southern Africa) (Pty) Limited, the original holding company of Thomson's interests in this country. It is common cause in the present enquiry that this purchase, which was by Thomson CSF International, was an integral part of the arrangement concluded on 30th July 1999, by which Nkobi Investments eventually acquired 25% of the restructured shareholding of Thomsons CSF (Pty) Limited for a purchase price of R7 464 000. The receipt of this sum of money, so the applicant says, is also tainted by the same criminal activity related to the offences of corruption, being the result of the intervention by Mr Jacob Zuma that secured for the Nkobi group, a share in the corticopia of the Arms Acquisition Programme.

The fourth and last such benefit now sought to be so confiscated, is the sum of R250 000 received by Kobitech for the account of Kobifin, defendants no 5 and 4 respectively, from Thomson CSF International in Mauritius, as being the first instalment of the money to be paid by Thomsons to Jacob Zuma for his protection from any enquiry into the bidding process of the Arms Acquisition Programme as recorded in the encrypted fax. This was the first in an extended series of payments paid in the guise of the Service Provider Agreement fees. The sum was received successively by both defendants 5 and

4, and because receipt or retention of the proceeds of a crime is an offence, they both committed an offence by doing so, which qualifies this amount in the hands of both of them, for forfeiture. It does not matter, says the applicant, that the sum was not retained by either and was soon paid on to Development Africa.

Before embarking on consideration of the merits of the application, it should be noted first that although the Act speaks, in terms, of "Confiscation Orders", and its purpose is to deprive a defendant of the proceeds of his crime, it does not do so by way of an order for confiscation of such proceeds. The enquiry is a civil proceeding, governed by the rules of civil procedure; and at the end — if the applicant's claim is upheld — a civil judgment is entered against the defendant for a sum of money determined, *inter alia* with reference to the value of the proceeds of the defendant's offence. That judgment, in favour of the State, is the equivalent of a confiscation order.

The amount of such judgment is what the Court considers to be "appropriate". So the Legislature has imported a measure of discretion in determining the sum that must be so paid. That discretion is limited, in the first place, by section 18(2)(a) which places a ceiling on any sum that a defendant may be ordered to pay. It may not exceed the value of the proceeds of the offence, or related criminal activities. If the defendant no longer has the proceeds because he has converted them into other assets, or given some away, and what he still has is less than the original value, then other criteria in calculating any realizable property he may have against which a judgment may be executed, are applicable. But that does not arise in this case.

Bearing in mind that section 12(1) provides for an enquiry as to whether the defendant has acquired "any benefit" from the commission of a criminal offence, and section 18(2) provides that an order or judgment is to be paid from "the proceeds" of the offence or related criminal activity, there are unavoidably two stages of the enquiry. The first is whether the defendant derives any "benefit" from his crime and that plainly means something of economic value. Only if it does so find, is the next stage embarked on, which is to decide what is "the value of the ... proceeds of the offences or related criminal activity". Although separate and successive in approach, the two enquiries are unavoidably inter-related because section 12(2) of the Act provides that a person "has benefitted from unlawful activities if he or she has at any time received or retained any proceeds of unlawful activity". So, notwithstanding this split level approach, the result is that if a defendant has derived any proceeds from a crime, then he has benefitted from it whether he has kept them all or not; and if he has benefitted from it, then a confiscation order may be made against him up to the value of the proceeds so derived.

Then secondly, it should also be noted that the enquiry into the value of such "proceeds" as a defendant may have derived from his crime involves consideration of two other provisions of the Act. The first is that found in section 1(1) being the definition section of the words "proceeds of unlawful activities". These are defined as :

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

There are two aspects of this definition that have a bearing on the instant situation. The first is that a benefit derived or received from a crime qualifies as "proceeds" for confiscation even if received or retained "indirectly"; that is, not immediately in the possession of the effective recipient but inuring to his benefit. So dividends accruing to a company in which a convicted person has shares will be "proceeds" if possession or ownership of those shares by the company was the result of criminal activity. And secondly, even if the offender has none of the proceeds left, if he has derived, received or retained a benefit from the offence, then he qualifies for a confiscation order. If he has other property that can be realized then, depending on the discretion of the Court duly exercised as a matter of proportion having regard to what he has, the severity of his offence and the limits prescribed in the Act, a confiscation order can still be made. But that does not arise here, save in regard to the fourth benefit.

This definition of "proceeds of unlawful activities" is relevant to the present enquiry because of the indirect benefit to the Nkobi defendants and Thomsons CSF (Pty) Limited as the majority shareholder, of the 80% shares in ADS (Pty) Limited. Of the 80% of these ADS shares held by Thomsons CSF (Pty) Limited, 25% is held by the third defendant with a knock-on interest going through the second defendant up to the first defendant. In each defendant that is an advantage "indirectly derived, received or retained in the Republic." And the same applies to the R499 568. That sum of money was actually due to the third defendant, but by reason of the same chain of interest going up to Schabir Shaik himself, it is a benefit that accrued to all of them.

But in any event, where the same proceeds of a criminal offence have passed through a succession of criminal hands there may be a multiplicity of confiscation orders against each set of hands for the same benefit. This is because the Act provides that every time the proceeds of a criminal act come into the hands of a recipient, he has received or retained or derived them, and that fact makes him *prima facie* liable to a confiscation order even if he may have passed them on. Moreover the "proceeds of unlawful activities" do not have to be derived only "from" a criminal offence. They are also unlawful if they are derived "in connection with" such a source. That is plainly a wider concept. And as indicated earlier, if such a recipient has parted with, or lost, the original benefit, but nevertheless has any realizable property, it may also be the subject of a confiscation order because the offender may then be able to pay for any benefit he may have gained by his offence, even though he no longer has the proceeds.

I did not understand Mr Singh to dispute this aspect but he drew the line at the effect of the second of those two provisions claimed by the applicant, namely that section 19(1) had the result of equating "the proceeds" of illicit activities to the gross amount of the receipt. Section 19(1) reads as follows :

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

Mr Trengove argued that by use of the words in section 19(1) that it is "the sum of the values of the property, services, advantages, benefits or rewards received, retained or derived" that constitutes "the value of the defendant's proceeds of unlawful activities",

the Legislature means the gross or total proceeds, without regard to any cost there might have been to the defendant in acquiring them. That is the meaning given to similar wording in comparable British legislation on which our statute was apparently modeled, and has been the meaning accepted and applied in decisions of our own Courts. Moreover, said Mr Trengove, such an interpretation accords with the plain intention of the Act which is to ensure, as far as possible, that crime cannot be allowed to pay the criminal.

And finally, in setting the parameters of a confiscation order, it should also be noted that subject to the limitations of section 18(2) a Court that makes such an order under section 18(1) exercises a discretion in its determination in the amount of such order. It "may" make a confiscation order "in any amount it considers appropriate". That is not to say there is any room for maudlin sentiment about adding to an accused's punishment woes.

[REDACTED]

[REDACTED] But between the extremes of the impact on the defendant on the one hand, and making the deterrent effect of forfeiture a realistic one, there may be room for balancing the relevant factors to achieve an order that is "appropriate" if the basis of such an balancing is placed before the Court -- bearing in mind that the onus to do so would be on the defendants and that the Court is not expected to measure the result "with fine legal calipers".

① Turning then to the [REDACTED] -- indeed the first three, because their receipt and retention in the defendants' hands can all be traced back to the same event, namely the

acquisition by Nkobi Investments of its present 25% shareholding in Thomsons CSF (Pty) Limited and that company's acquisition of 80% of the shares in ADS (Pty) Limited, the following emerges. That acquisition, and payment of the R499 568 to Nkobi Holdings (the third benefit) and the dividends that have accumulated to Nkobi Investments since the year 2000 (the second benefit), all stem from the decision by the Thomsons CSF parent company to reverse its original decision to exclude Nkobi from its bid for the corvettes munitions suite which exclusion it had achieved by acquiring from Altech, all the first tranche of the restructured available shares in ADS which, it will be recalled was 50% plus one share, and then subsequently, all the shares in that company.

It is the applicant's case that that decision by Thomsons CSF (France) to restore Nkobi, and through Nkobi, Schabir Shaik, to a position in which Nkobi would be a beneficiary of the profit stream from the munitions suite contract that would be earned by ADS, was the result of Jacob Zuma's meeting with Perrier in London on 2nd July 1998, cemented by the subsequent meeting at the Nkobi offices in Durban on 18th November 1998. The argument is that Jacob Zuma's assistance in achieving this was the result of the defendants' payments of money to him or for his benefit, that had been going on ever since January 1997 and which was done to influence the exercise of Zuma's political offices for the defendants' benefit. So all these acquisitions, the applicant, says, are tainted by that series of corrupt payments and are therefore eligible for confiscation.

It is not necessary to repeat the series of events that resulted in the acquisition, by Nkobi and Schabir Shaik of an effective interest of 20% on ADS. The process has been

described again in the case filed by the applicant, and there is no material dispute of the objective facts. What is disputed is the inference that the applicant seeks to draw from them namely, that something was said or suggested at the meeting of Jacob Zuma, Schabir Shaik and Perrier on the 2nd July 1998, that persuaded Thomsons to change its corporate mind about excluding Nkobi from its ADS purchase, and agreeing to accept instead not only 20% less of the corvette contract profits to a government approved BEE partner to which it would be committed, but in addition, to share the remaining balance with Nkobi on an 80 - 20 basis. Moreover, judging by subsequent events, it was a decision that was intended and designed to please Jacob Zuma.

Mr Singh says there are two answers to this argument. First, as a matter of causation, the admission of Nkobi to a joint venture with Thomsons to a benefit from the ADS contract for the munitions suite, was the result of contractual obligations incurred by Thomsons CSF to Nkobi and Shaik as long ago as 1995 and well before any payments were made to Mr Zuma. So it cannot be said that these benefits were the result of any corrupt influences applied by the first defendant to the beneficiary.

And secondly, he argues that in any event it is not open to the applicant to now advance this contention because the original trial Court held that the two interventions by Zuma on behalf of the defendants on which the applicant now relies, did not amount to contraventions of the Corruption Act. The argument now urged by the applicant was tantamount, said Mr Singh, to advancing a cause on facts that contradict the findings of

the trial Court, and that could not be accepted because it disregarded the principle of *autrefois acquit* or issue estoppel.

To succeed in this regard, the defendant said, the applicant had to show that whatever transpired between Perrier, Zuma and Shaik at the London meeting on 2nd July 1998 – and there was no reliable evidence about this – Zuma's intervention was the effective cause, or the "*causa causans*" in causation-speak, of Thomsons' subsequent change of mind : and that the subsequent decision by Thomsons to accommodate Nkobi in the ADS participation was not the result of Nkobi's pre-existing right to take part in any Thomsons enterprise in South Africa on a joint venture basis.

It was the defendants' contention that there was such a contractual obligation on Thomsons to admit Nkobi to the ADS acquisition; and it could not be discounted as the reason why that company eventually included Nkobi in that exercise. There was such an obligation said Mr Singh, right from the start of the association between the two. But even if that could not be spelled out from the contemporary documents that preceded the establishment of the Thomson's South African companies, it was clearly Thomsons intention over the acquisition of ADS, to benefit from the defence force arms acquisition contracts on a joint venture basis with Nkobi. Thomsons and Nkobi were going into the exercise together and even one joint venture was enough to constitute a partnership if there was an intention to make a profit; and this would found a contractual obligation quite apart from the original letter of mutual interest and shareholder's agreements.

An exhaustive examination of the only documents that are available in this respect does not, it seems to me, achieve any such commitment on the part of Thomsons CSF (France) to pursue every business interest it might perceive in South Africa as a joint venture with Nkobi. The original letters agreeing in principle to co-operate in South Africa, and possibly elsewhere, go no further than acceptance of a share by Nkobi in the company that Thomsons intended to set up in South Africa. In due course that was incorporated as the original holding company, and the hope, or even expectation, was that this company, when incorporated, would enter agreements with existing South African companies like Altech and the rewards of those would be shared as dividends. That is the content of the first letter of 6th August 1995, which in any case was subject to review by the Thomsons board in Paris, and was superseded by the letter of the 10th August 1995 from that Paris parent, announcing agreement only to enter "a co-operative process". The second letter did no more than confirm the intention to establish a company in South Africa and to discuss the terms and conditions under which Nkobi could take an interest in it. Paragraph 2 simply indicates the object of such company as being to participate in the civilian and military projects that were due to be implemented in this country.

If there was any joint venture agreement here, it was limited to a share in the company that was incorporated as Thomsons CSF Holding (Southern Africa) (Pty) Limited. No more was contemplated once this company was formed than that it would expand its activities in joint ventures with South African partners, as appears from the shareholders' agreement. And the shareholders' agreement for Thomsons CSF (Pty) Limited between Thomsons Holdings and Nkobi Investments in turn, merely provided that this second

company was to be the vehicle through which the holding company would expand its activities in South Africa. Manifestly none of that is the same thing as promising a joint venture separately with Nkobi as two different partners; nor is there any mention of any joint venture with Thomsons CSF (France). That might have been Shaik's hope, or even belief. But it was not a contractual obligation on the part of Thomsons.

But as an alternative Mr Singh said that such a joint venture could be implied from the conduct of the parties, and that such implication could be identified in the meetings and exchanges of the local Thomsons companies prior to the purchase of the first half of the Altech shares.

The meeting in question, of shareholders and directors of both the local Thomsons companies that was held on 29 August 1997, did indeed raise and discuss the proposal that an investment be made in the then division of Altech, called ADS. Preliminary discussion with Altech had established a total purchase price to do so of R50 000 000, of which approximately half would be paid by Thomsons CSF (Pty) Limited, and the other half by Thomsons Holdings (Southern Africa) (Pty) Limited, since the financing of the purchase was to come from both the local Thomsons companies. It is also clear that the purchaser of the share of Altech's business that represented ADS was going to be Thomsons CSF (Pty) Limited, and that Thomsons CSF (France) was behind the exercise. It is also noteworthy from the minutes of that meeting that Nkobi's response to the proposal was not noticeably enthusiastic, being obviously concerned about the cost and offering some criticisms of the quality of what ADS had become as a business enterprise.

Messrs Shaik and Ramsumer, the then Nkobi accountant, were recorded as stating that for the time being Nkobi would preserve its position and keep its options open while trying to raise its capital contribution locally. If it could not do so, it needed to be sure that it could look to Thomsons CSF (Finance) for the balance of what could not be found locally by way of its contribution to the purchase price. And the whole meeting and proposal was eventually completed subject, *inter alia*, to Nkobi's consent. Up till then, it did not sound like a firm agreement even to take part in the purchase by Thomsons CSF (Pty) Limited, much less a joint venture with it to do so.

Then the sequel to this meeting, which is the letter of 22nd September 1997 written by Moynot to Schabir Shaik, does no more than report that agreement in principle had been reached for the purchase of 10% of Altech's ADS business by Thomsons CSF (Pty) Limited, and advising of the amount of Nkobi's share of the purchase price. The author enclosed a copy of joint venture agreement that had been negotiated and agreed upon. That agreement is not available, but must have been an agreement between the Thomsons company and Altech. It plainly could not have been one with Nkobi.

It was the minutes of the meeting of the 25th August 1997 that I understood Mr Singh to argue represented an agreement to the effect that Nkobi was to be entitled to a share of ADS. Try as I might, I can see no sign of any such agreement in this exercise as he urged. It reflects no more than the debated intention of Thomsons to use one of its local companies to acquire the interest in ADS that would help sharpen its chances of securing the corvette munitions suite contract in the rearmament programme. It is true that Nkobi

was a shareholder in that company and to that extent would certainly benefit from such an interest in ADS if all came to fruition in the bidding process; and at that stage only if its concerns about the purchase price could be met. But I am also unable to see how a minority shareholder in any limited liability subsidiary company can claim a breach of agreement if the holding company of the majority shareholder changes its mind and makes an unanticipated purchase in its own name instead of through its subsidiary.

Objectively speaking it may seem unfair. But that is occasionally the lot of minority shareholders and unless it amounts to oppression beyond the limits of what the company law allows or is in breach of a shareholder agreement, there is nothing a minority shareholder can do about it. Even then it was not Thomsons CSF Holdings (Pty) Limited - the majority shareholder in Thomson CSF (Pty) Limited - that breached any such agreement. The proposed purchase of ADS by Thomsons CSF (Pty) Limited was effectively usurped by a different *persona*. How that situation could give rise to any action against Thomsons CSF (France), I am unable to see. It is perhaps not surprising that Shaik's threat of seeking an interdict to prevent this happening did not seem to be taken very seriously by Thomsons.

In the result, I think Mr Trengrove is correct when he submits that there was no existing right in Nkobi to a participation in ADS that it could enforce against Thomsons CSF (France). But even if there was, it is surprising that Jacob Zuma's help was enlisted to enforce such agreement. And in any event, Thomsons plainly changed its mind because of the meeting with Zuma, not because of any pre-existing agreement.

Turning to the second leg of the defendant's case, it is to the effect that because the trial Court held that the State could not rely on the two alleged interventions by Jacob Zuma as Deputy President of the ANC - which are now said to have resulted in the first benefit - as a basis for a conviction of the defendants on a charge of corruption, the applicant cannot now revisit this situation and rely on it as a reason for claiming that the proceeds of any such intervention - if there was one - are the result of criminal activity. The applicant cannot do so, as stated earlier, because this question was resolved against it at the trial and to rely on it now would contravene the principle of *autrefois acquit*.

This argument seems to me to be based on an erroneous reading or a misconception of the judgment. The trial Court did not hold that the two interventions by Jacob Zuma did not amount to a contravention of the Corruption Act. It is not correct to say that. There was no finding of fact to that effect. The trial Court held only that the State, having not alleged in the charge that interventions by Jacob Zuma as Deputy President of the ANC as distinct from Deputy President of the national government, were also the intended result of the corrupt payments made by the defendants to Jacob Zuma, could not at the end of the case argue that his interventions on behalf of Nkobi as member of the Executive Council in KwaZulu-Natal and Deputy President of the national government should also include those as Deputy President of the governing political party. There was no question of the accused being acquitted on this basis since he was not charged with it. The principle of *autrefois acquit* therefore, does not arise since the defendants were never in any jeopardy on that score.

Mr Singh called in aid to support this argument the decision of the Constitutional Court at the end of the marathon trial of the State v Basson, reported in 2005(1) SA 171 (CC) and the passage in the judgment of Ackerman J at page 199 paragraph 65, where the learned Judge said that if a charge (in a criminal trial) did not disclose an offence, it did not mean that the accused was not in jeopardy because a conviction might have been validly obtained by invoking section 86(4) and section 88 of the Criminal Procedure Act. But that decision referred to a criminal trial at which the original Court had held that certain charges under the Riotous Assemblies Act did not disclose an offence and had discharged the accused on those counts before the trial actually began.

The question arose at the level of the Constitutional Court as to whether, if those discharges were erroneously granted and invalid, as the State claimed they were, the accused could be tried a second time on them. Obviously he could not if he had been in jeopardy of a conviction at the original trial. To decide whether that was so, one had to examine the charge to see if it could support a valid conviction. If it did not in fact disclose an offence for lack of an essential averment as the trial Court held, it did not mean that the accused was not in jeopardy because that could have been cured and a conviction could still be obtained by virtue of the operation of section 86(4) and section 88 of the Criminal Procedure Act, which allowed the amendment of defective charges at any time up to judgment if the evidence led cured the defect.

But that is not the situation here. In the instant trial there was nothing defective about the charge. All that happened was an attempt by the Public Prosecutor to extend in argument, the ambit of the charge to a wider range than the particulars furnished to the accused. He was not allowed to do so nor would he have been allowed to amend at that stage because of prejudice to the accuseds which meant that having not charged the accused with intending to subvert the beneficiary's duty as Deputy President of the ANC, the accused could not be found guilty of an offence not charged on that particular basis.

As in the first argument then, I am eventually of the view that there is no substance in this point either.

However, that is by no means the end of the matter. As important, if not more so, is the need for the applicant to satisfy me that the receipt or retention of the several benefits by the various defendants falls within the ambit of section 18(1) of the Act. The defendants were not charged at the criminal trial with paying money to Jacob Zuma to influence the exercise of any duties that may have rested on him as Deputy President of the ANC, and they were consequently not convicted of corruption in that respect. The essential question now is, were these proceeds received from "any criminal activity the Court finds to be sufficiently related to the offences of which the defendants were found guilty" in terms of section 18(1)(c)?

There are two issues involved in this aspect of the application. First, were the corrupt payments that constituted the bribery limited to the exercise by Jacob Zuma of his offices

as member of the Executive Council for Economic Affairs and Tourism in the KwaZulu-Natal provincial legislature and subsequently of Deputy President of the national government, or were they of a more general intent? And I turn then to consider the facts which seem to me to have a bearing on this aspect.

By January 1997, when Schabir Shaik began his systematic financial support of Jacob Zuma, the latter already enjoyed a high political profile. He was then the Chairman of the ANC, the third most important office bearer in that organization; and as early as 1996 was generally believed and accepted, to be destined for even higher things, both in the party, and because the ANC looked like being the party of government for the foreseeable future, then sooner or later also in the national government.

The fact that he was also a member of the Executive Council in the KwaZulu-Natal provincial legislature involved no diminution of this political eminence. Tenure of that ministerial office was incidental to his general political standing. It was in no way a demotion or down-sizing of that standing. It really showed the importance the ANC attached to a foothold in the political control of this province, and provided a high level link from the ANC to the government of national unity in KwaZulu-Natal, in which the Inkatha party then held the electoral majority - though not without some argument. Indeed, it was Schabir Shaik's view, which may well have been shared by others, that Zuma was the only high ranking member of the ANC who was acceptable to the Inkatha dominated executive council, and who could best restrain the inter-party violence which had wracked the province up till then. So it was not because he was a member of the

Executive Council for Economic Affairs and Tourism in KwaZulu-Natal that his patronage was sought.

It was, in my view, Zuma's standing in the ANC, both present and anticipated in the future, that made his career an attractive investment for a businessman who needed or could use political favours. It seems to me to be flying in the face of common sense to argue that Shaik would have done the same if Zuma held no other office than as a member of a provincial executive council.

That view of the matter finds support in the emphasis that Shaik attached to Zuma's party political office when he sought a meeting of Zuma with Perrier in his letter of 17th March 1998. It was Zuma's standing in the ANC that was highlighted in this letter, and while he was referred to as "minister", it was not only as minister at a provincial level. It was "Minister Jacob Zuma Vice President of the ANC (sic)". But the inclusion of the title "Minister" shows, as well as anything else, that it did not matter to Shaik what political hat Jacob Zuma wore, as long as it was for the benefit of Nkobi's interests.

It was clear from the criminal trial, that Schabir Shaik paid money to Jacob Zuma and met his expenses, because of Zuma's perceived ability to use his political influence to assist the Nkobi interests. That influence stemmed from Zuma's high standing in the governing party, particularly after his expected ascent to the office of its Deputy President, where his influence could be well nigh irresistible particularly to someone who owed any allegiance to the ANC. The defendant did not distinguish between Zuma's

different offices in making these payments. His investment was in the overall political stature of his patron.

Would it be "criminal activity" sufficiently related to a charge of corrupt payments to Jacob Zuma as an MEC in a provincial legislature and Deputy President of the national government of which the defendants were found guilty, also to pay that money because the recipient was, at the same time, the Deputy President of the ANC?

It is, or was, an offence under the Corruption Act of 1994 before its repeal last year, to offer or give a benefit not legally due, amongst others to any person to whom any power was conferred or who was charged with any duty by virtue of the holding of any office. Would that include the holding of office in a political party that was in control of the government?

The Constitution of the ANC is now before me as part of the applicant's case in these proceedings. That the ambit of evidence for an application like the present can be wider than the evidence led at the criminal trial, seems plain from the wording of section 18(1) and section 18(1)(c), and under section 18(6) in particular. Under this latter provision I am specifically empowered to have regard to more evidence than just the criminal trial. It necessarily includes evidence of conduct associated with the charges on which the accused were found guilty but which conduct was not the subject of any charge or verdict in the criminal trial. It is properly part of the applicant's case in these proceedings which

is to be considered on an enlarged and wider matrix of evidence than that put before the criminal Court.

To the extent that the defendants argued that this was not properly admissible at an enquiry of this nature, I conclude that that argument cannot be accepted.

The Constitution of the ANC clearly provides for the office of Deputy President of the organization as the second highest office in the organisation. Rule 16.2 of the document provides that such office bearer is charged with a defined measure of duty. That duty is to assist the President, deputize for him or her when necessary and carry out whatever functions are entrusted to him by the national conference, the President or the national executive committee, and by implication he would have the necessary power to do all those things. I would have thought and so held, had it been necessary to decide, that offering a benefit or bribing the holder of such office would *prima facie* at any rate, contravene the Corruption Act.

While not decisive of the question, because it is Shaik's intention that is relevant and not Zuma's, the ANC itself also takes that view since Rule 26.3.2(c) of its Constitution regards as "a serious offence"

"(c) behaving corruptly in seeking or accepting any bribe for performing or not performing any task."

And sub-rule (e) regards :

"(A) abuse of elected or employed office in the organization or in the State to obtain any direct or indirect undue advantage or enrichment."

in a similar light.

By any standard then, in my judgment, bribing the Deputy President of the ANC, whether he also held other offices of State or not, would be criminal activity; particularly having regard to the realities of the overwhelming political control of the country's affairs which that party enjoys. That he may hold other offices of State as well as in this case, makes the conclusion *a fortiori*

That was the person that Schabir Shaik asked to intervene with Thomsons to restore Nkobi to the benefit of acquiring a benefit in ADS. It must follow therefore, that payments to Jacob Zuma as Deputy President of the ANC were not only related to the payments alleged in the charge but were part and parcel of the same criminal activity on the part of Shaik.

So the next issue is whether it has been shown that it was Jacob Zuma's intervention that achieved such restoration.

The only evidence available of what was said or suggested or agreed at the meeting of the 2nd July 1998 between Zuma, Perrier and Shaik, was that of Shaik himself, which was plainly not the whole truth. Again the answer must depend upon the inferences if any, that can be properly drawn from the objective facts.

What are those facts?

In no particular order, save perhaps chronological sequence, they seem to me to be at least these. Thomsons - and I speak of its directing mind as a plural entity - were anxious to be awarded the contract for the corvette combat and munitions suite that was one of those available under the proposed Arms Acquisition Programme. They realized that their prospects of doing so would be considerably enhanced by presenting their bid through ADS, that being a South African company - which had its own attraction for the South African government - and which had already done electronic work for the South African navy. Hence the steps taken to acquire control of ADS. As has already been said before, they set out to do so through their local operating subsidiary, Thomsons CSF (Pty) Limited, of which Nkobi Investments and Shaik was a 30% shareholder, and *pro tanto* Thomsons BEE partner for the desired government contract.

In the course of the bidding evaluation process, the intelligence came to Thomsons' attention that some highly placed person or persons at the decision making level that would award these contracts, was or were, antipathetically inclined towards Shaik and his companies; and that for Thomsons to persist in their bid with Shaik as a participant might well jeopardize their chances of obtaining the desired munitions suite contract.

Arms dealers are not usually in the business for philanthropic reasons, and when Thomsons realized Shaik's participation in their bid might endanger its success, they cut him out of it. That meant presenting ADS as the bidder, had to be done without Shaik. And the best, if not the only, way to do so since he had an interest in both local

companies, was to acquire the ADS shares itself and seek another BEE partner that was acceptable to the government. The reason for dropping Shaik, as stated by Moynot, was eminently self-interest. Thomsons only customer in South Africa, and a good potential customer at that, was the government, and it could not afford to antagonize that customer. So it excluded Shaik and Nkomo from its bid by acquiring the ADS shares from Altech entirely for itself and in its own name and not through its local subsidiary. In the process, the requirement for a local BEE partner was resolved by enlisting the company called Futuristic Business Solutions (Pty) Limited (FBS) headed by General Moloï - who Thomsons had, ascertained was acceptable to the government as the necessary local empowerment partner.

That exclusion of Shaik led to his seeking Zuma's help, allegedly to explain that the policy of black economic empowerment did not mean indigenous black South Africans only. That can be dismissed as the reason, because Thomsons already knew that. It was something more than that. That help was invoked on the basis of Zuma's standing in South African political affairs as was prominently urged in the letter of 17th March 1998. That emphasis was plainly intended to impress Thomsons with the importance of the person who wished to intercede on Shaik's behalf. If the only office held by Zuma at the time had been that of an MEC in a provincial legislature, it would certainly not have had the same impact, indeed if it had been sent at all.

Moreover, Zuma's presence at, and obvious interest in, the bidding process of the Arms Acquisition Programme, had been observed and noted by the local Thomsons directors; and he was reported to Paris as being "the rising man" in the political firmament in this country - although the subject of some problem that was not disclosed. If he could be persuaded to use his perceived influence to assist the French company's bid in particular, or its South African business interests in general, he would clearly be a person whose goodwill was worth cultivating and obtaining, if possible.

Against that background then and after a few unsuccessful attempts, the meeting of Perrier and Zuma, with Shaik in attendance, took place in London on 2nd July 1998, and it certainly produced a favourable result. Something was said or suggested in that encounter which persuaded Perrier and ultimately the Thomsons board, to change their mind and re-admit Nkobi and Shaik to the benefits of the corvette munitions-suite contract. The meeting ended, so it was said at the trial, with a promise by Perrier to repatriate the ADS shares to this country. What was it then that caused him to do that and thereafter, together with Moynot and the other directors, work out "the strategy" by which this was to be done, and by which Nkobi ended up as a 25% shareholder in the restructured shareholding of Thomsons CSF (Pty) Limited, when, but for that meeting, Nkobi would have had nothing with the Thomson parent company in possession of 80% of the shares in ADS? It was a strategy that needed considerable re-arrangement of its affairs. But by doing so Thomsons managed to straddle the two requirements of not displeasing the government but at the same time accommodating the Nkobi interests.

Then finally there is the evidence that on Perrier's subsequent visit to this country in November 1998 he was anxious to see not just Shaik to explain what had happened, but Zuma and Shaik : and when he did so at the meeting at the Nkobi offices on 18th November 1998, when Zuma did arrive at the meeting, the plan was explained to him which explanation according to Moynot, left Zuma "happy" with the result.

The question must arise then as to why it would be necessary or even desirable, to explain this strategy to Zuma of restoring Nkobi to the ADS prosperity unless he had an interest in it. Had his intervention been undertaken, as Shaik insisted, just because he, Shaik, was a fellow member of the ANC or out of friendship, there would be no reason to have to explain anything to Zuma personally. It would have sufficed if he was eventually told that his friendly intervention had borne fruit and that news could have been just as well conveyed to him by the person who benefitted from it. The probability seems to me to be at least substantial, that Zuma also had an interest in the restoration of the profit stream to Nkobi because Shaik and Nkobi were funding his enhanced lifestyle.

I can see no other reason whatever for Shaik seeking Zuma's assistance to persuade Thomsons to restore the ADS shares to Thomsons CSF (Pty) Limited other than to lend the weight of Zuma's political office to the request or protest that was put to Perrier. That was achieved and it is highly improbable, if it is conceivable at all, that this result would have been achieved without Zuma's help

By that route then and for those reasons, I come to the conclusion on a balance of probabilities, that Jacob Zuma's intervention was the effective cause of the Thomsons CSF plan that resulted in the third defendant's 20% interest in ADS in the form of its 7 646 shares in Thomsons CSF (Pty) Limited, of the dividends that have since been paid and received, either by third defendant or for its benefit and of the R499 568 that was also paid to it as part of the strategy that was achieved by the intervention and influence of Zuma on Thomsons.

That intervention was not just related to Shaik's corrupt payments to Jacob Zuma in contravention of section 1(1)(a) of the Corruption Act, but was part and parcel of it; and if it resulted, as I find on the probabilities that it did, in the identified benefits flowing to the defendants, then they are vulnerable to a confiscation order. They are the very proceeds of criminal conduct at which this Act is aimed.

The next question is what order should be made in respect of these three benefits?

The amended order set out in the applicant's heads of argument claims, in respect of the first benefit, the value of the 20% interest of third defendant in ADS which it enjoys by reason of its 25% shareholding in Thomsons CSF (Pty) Limited) which amounts for present purposes, is R21 018 000. While the applicant says it would be competent for me to make confiscation orders against all three of the defendants Nos 1, 2 and 3 in that sum – slightly less in Shaik's case because of the 8% of the total that he could not claim – the applicant accepts that in exercising my discretion I should not make a confiscation order

for more than the total benefit. I think that is a proper concession to make. The total proceeds from this benefit is the present value of the interest represented by those shares. That is all that has benefitted the defendants. It is only one benefit and the fact that two other different defendants have a notional right to it, does not mean that the benefit should be regarded as trebled. As has been pointed out before, the object of the Act is to strip offenders of their ill-gotten gains, not to enrich the State.

The total proceeds received from this particular unlawful activity is the R21 018 000 referred to above, and one or other or all of the three defendants have benefitted even indirectly to that extent, so one or other or all should have to pay that sum over as representing the benefit that has inured to them from this criminal activity. That can be achieved by an order on the basis of a joint and several liability such as the applicant has indicated I should make in this matter, with a cap on the sum payable by the first defendant to reflect his lesser benefit.

The second benefit claimed by the applicant, also by his amended order, is the present value of the dividends accrued to, or received by, third defendant from its 7 646 shares in Thomsons CSF (Pty) Limited. These accrued dividends amount at present to R12 797 331, and this represents, of course, the aggregate returns on the third defendant's 20% stake in ADS. Again, the applicant does not seek judgment in the total of these proceeds against each of the first second and third defendants. Subject to the total proceeds being taken from all the possible beneficiaries, it is not sought that all three should each be

liable for the amount of the proceeds. One or more or all should pay it over, but only to the extent of the total proceeds.

Mr Singh however, resisted the grant of an order for forfeiture of the value of the dividends because he said, to do so amounts to what he called "double counting". Because of the arrangement that the third defendant had to enter into to take up the opportunity of acquiring 25% of the restructured share capital of Thomsons CSF (Pty) Limited and thence the 20% interest, it had to borrow R7 746 00 at interest. These dividends were, by the same arrangement, earmarked to repay that loan indebtedness before any could be made over to the third defendant or its shareholders; and to that extent they formed part of the value of the shares. If the shares were liable to forfeiture said Mr Singh then the dividends should be spared.

I digress then, to consider this dispute.

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

chose to use the shares to pay the loan that it had to raise to pay for the shares, that does not affect the fact that it received both as the object of acquiring an interest in ADS. So it is really an irrelevant consideration.

But secondly and equally cogent it would also be to fly in the face of the several judicial authorities that have had occasion to consider this aspect of statutory confiscation. From the House of Lords in England pronouncing on similar legislation, to our own Courts in South Africa, it has been consistently held that whatever price had to be paid to acquire the criminally tainted proceeds, must be left out of account in considering the value of the proceeds. It will serve no purpose to repeat the extracts from these decisions that were put before me in argument. They all amount to the conclusion that the Court is concerned simply with the value of the property to the wrongdoer when he obtained it, or if it is greater, its value at the material time, - and so far as this benefit is concerned that means the present. That is what accords with the object of the statute.

However as in the case of the shares, there is only one "proceeds of unlawful activity received", which is the sum of the accumulated dividends. To order each defendant to pay that amount because notionally he or it received such benefit or has an interest in it, would treble that sum and be conspicuously less than appropriate. Payment by one or more or all of the defendants with this interest of the one value only, would properly meet the situation required by the Act.

Turning to the third benefit, this is the sum of R499 568 paid to the third defendant for its ten shares in Thomsons CSF Holdings, and the applicant claims an order in this amount on the same basis as the previous two.

Mr Singh contested this claim on the basis that to do so would be completely disproportionate to any advantage that the third defendant achieved because in the value of those ten shares which third defendant sold, was its one-third interest in Prodiba, the enterprise that produced plastic drivers' licences for the Ministry of Transport; and the acquisition of that interest was not related in any way to the offences that arose out of payments to Jacob Zuma. Nor was the applicant shown what was the proportionate value of the Prodiba interest as compared to the rest of the sum of R500 000 that third defendant was to receive.

But I think Mr Trengove is correct in this respect when he said that this argument misconceives the basis of the applicant's claim. It is not the Nkobi shares in Thomsons Holdings that are the proceeds of any unlawful activity, and it is only if that were so that any question of proportionality would be relevant. It was the receipt of the R500 000 that was so tainted because of the connection of that payment to the corrupt intentions of Jacob Zuma.

On that basis then I think the claim to the third benefit in the terms of the amended order sought by the applicant is well founded, and in those terms meets the requirement of the Act. The applicant seeks an order only for the total proceeds received, derived or

retained by one or more or all of the first three defendants, and not that amount received from each.

Finally there is the fourth benefit, which had its origin in a different but related criminal activity of the third charge. This is the sum of R250 000 received by Kobitech from Thomsons CSF International in Mauritius as, so it was held, the first payment of the R500 000 *per annum* promised by Thomsons to Jacob Zuma in terms of the encrypted fax. It was ostensibly paid as a fee for services allegedly rendered by Kobifin under the Service Provider Agreement, which the trial Court found to be a sham or disguise for the payments to Zuma.

The facts showed that that sum was deposited by the Mauritian subsidiary into the bank account of Kobitech in February 2000. Why that was done is not clear and it seems to have been as much an accident as any design. Then, because it was easier in the Nkobi group's internal arrangements for Kobifin to make the payments, the sum of R250 000 was transferred from Kobitech's account to Kobifin's account, and thence paid to Development Africa which was meeting the costs of Jacob Zuma's rural home.

Mr Trengove argued that because the Nkobi Group regarded Kobifin as the group banker, this initial deposit and subsequent transfer was the result of a banker/customer relationship which created a debtor-creditor situation; so that Kobitech received the money from Mauritius as a principal and not as an agent for Kobifin.

Having regard to the evidence of what actually happened, I think this is a perceptible overstatement of the situation. It is true that within the Nkobi Group Kobifin was regarded as the "bank" in that monies received and monies paid out were normally channeled through its bank account. But to call the situation between any of the groups' companies and Kobifin one of banker-customer is stretching the facts beyond acceptability.

The essence of the matter is that Kobitech and Kobifin were simply the conduit pipe by which the money received from Mauritius went to Development Africa and Zuma's house. To the extent that even that limited contact with the tainted money is a contravention of section 4(a) and 4(b) of the Act, they both committed the offence of money-laundering. And Schabir Shaik himself was found guilty of the main charge which was corruption.

But none of the three defendants received any benefit from this compendium of offences, and it follows that none has any of the proceeds of such unlawful activities in its possession. There is therefore nothing to strip them of. They have been punished for the offences by the sentences imposed at the criminal trial, and unless it is also established that they still have any proceeds of the offence, there is no basis on which I can make an order unless, having committed an offence and having no proceeds from it, they have other property upon which a judgment of the amount of the benefit can be levied. There is no evidence that they have, so I am unable to make that order as claimed by the applicant in this respect.

The orders I make are therefore as follows :

1. In respect of the first benefit, that is the claim for R21 018 000 that represents the interests of 1st, 2nd and 3rd defendants in the 3rd defendant's shares in Thint (Pty) Limited, there will be an order in these terms :

Subject to a combined aggregate liability of R21 018 000

The 1st defendant is ordered to pay the State R19 336 560;

The 2nd Defendant is ordered to pay the State R21 018 000;

The 3rd Defendant is ordered to pay the State R21 018 000

Those payments will be made on a joint and several basis the one defendant paying the other or others to be absolved.

2. In respect of the second benefit, that is the present aggregate amount of the dividends that have accrued to the 3rd defendant and in which 1st and 2nd defendants have the same potential benefit, there will be an order as follows :

Subject to a combined aggregate liability of R12 797 331,

The 1st defendant is to pay the State R11 773 544;

The 2nd defendant is ordered to pay the State R12 797 331; and

The 3rd Defendant is ordered to pay the State R12 797 331.

Payment of this liability will likewise be on a joint and several basis the one defendant paying the other or others are to be absolved.

3. As regards the third benefit, being the sum of R499 688 paid to the 3rd defendant as part of its acquisition of the shares in Thint (Pty) Limited, there will be an order in the following terms :

Subject to a combined aggregate liability of R499 688,

The 1st defendant is ordered to pay the State R459 603

The 2nd defendant is ordered to pay the State R499 568

The 3rd defendant is ordered to pay the State R499 568.

As in the case of the two previous orders liability to pay those amounts will also be on a joint and several basis, the one defendant paying the other or others are to be absolved.

4. There will be no order in respect of the fourth benefit.

So far as the costs are concerned, the following orders are made:

1. The wasted costs occasioned by the postponement of the application on 14th November 2005 will be paid by the applicant.
2. Save as aforesaid and because the applicant has been substantially successful in the application, the 1st, 2nd, and 3rd defendants are ordered to pay on a joint and several basis, the applicant's costs of the application, which are to include the costs of two counsel.

J. P. Squire