THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 62/06

In the matter between:

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

and

THE STATE	Respondent

Coram: *Howie P, Mpati DP, Streicher, Navsa, et Heher JJA*

Date of hearing: **25-26 September 2006**

Date of delivery: **6 November 2006**

Summary: Businessman and several corporate entities paying highly placed public official with significant political influence to intervene in commercial negotiations/transactions for their benefit – held to have contravened s 1(1)(a)(i) or (ii) of the Corruption Act 94 of 1992 – irregular write-offs of loans in annual financial statements – constituting fraud – admissibility of 'encrypted fax' in terms of s 3 of the Law of Evidence Amendment Act 45 of 1988 – together with other evidence proved a conspiracy to bribe public official – sentence – seriousness of offence of corruption discussed – no substantial and compelling circumstances justifying departure from prescribed minimum sentences.

Neutral citation: This judgment may be referred to as *Shaik v The State* (1) [2006] SCA 134 (RSA).

JUDGMENT

THE COURT

THE COURT:

INTRODUCTION

[1] This appeal which was heard together with an application for leave to extend its scope follows on a protracted criminal trial before Squires J and assessors in the Durban High Court.[1] The trial lasted more than six months, generated huge media interest and attracted a great deal of public attention. More than 40 witnesses testified. The record comprises more than 12 000 pages with oral testimony constituting more than 6 000 pages. Although, as will become apparent, some legal issues such as the admissibility of documents will be addressed, the matter is ultimately to be decided within a fairly narrow compass. Conclusions will largely follow upon an analysis of the facts that are common cause in conjunction with an assessment of the merits of the evidence adduced by or on behalf of the appellants and the State. Although the parties are variously applicants for leave or appellants we shall, for convenience, refer to them throughout as appellants.

[2] The first appellant, Mr Schabir Shaik (Shaik), is a businessman. The other appellants are corporate entities which he controlled or in which he had a major interest. It is common cause that between October 1995 and September 2002, Shaik personally, and some of the corporate appellants, made numerous payments totalling a substantial amount of money to or on behalf of Mr Jacob Zuma (Zuma), the erstwhile Deputy President of the Republic of South Africa.

[3] At material times Zuma held high political office. He was a member of the KwaZulu-Natal legislature and the Member of the Executive Council (MEC) for Economic Affairs and Tourism for that province from April 1994 to June 1999.[2] He became a member of the National Assembly of Parliament in June 1999. He was appointed the Deputy President of the Republic of South Africa on 19 June

[1] See paras [60] and [61] *infra*.
[2] Members of the Executive Council of Provinces are generally referred to as provincial Ministers.

1999 and became leader of Government business in Parliament. During the period referred to in para [2] he held high office within the structures of the African National Congress (ANC), the ruling party in Parliament. He was the ANC's National Chairman until 1997, and thereafter became its Deputy President.

THE OFFENCES CHARGED

[4] Discovery of the payments referred to in para [2] ultimately led to the prosecution of the appellants. They were charged with three main counts and in each instance with a number of lesser alternate charges. The main charge on count 1 was that of contravening s 1(1)(a)(i) and (ii) of the Corruption Act 94 of 1992 (the CA).[3] The State alleged that during the period referred to in para [2], Shaik and one or other of the corporate appellants had made 238 separate payments of money either directly to or for the benefit of Zuma. The State alleged that the object of the payments was to influence Zuma to use his name and

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[3] Section 1(1)(a)(ii) and (ii) of the Corruption Act reads as follows:

'**1. Prohibition on offer or acceptance of benefit for commission of act in relation to certain powers or duties** – (1) Any person –

(a) who corruptly gives or offers or agrees to give any benefit of whatever nature which is not legally due, to any person upon whom –

(i) any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any office or any relationship of agency or any law, or to anyone else, with the intention to influence the person upon whom such power has been conferred or who has been charged with such duty to commit or omit to do any act in relation to such power or duty; or

(ii) any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any office or any relationship of agency or any law and who committed or omitted to do any act constituting any excess of such power or any neglect of such duty, with the intention to reward the person upon whom such power has been conferred or who has been charged with such duty because he so acted; or

(b) . . .

shall be guilty of an offence.'

political influence for the benefit of Shaik's business enterprises or as an ongoing reward for having done so.

[5] The second main count was one of fraud. It was common cause that for the financial year ending 28 February 1999 an amount of R1 282 027.63 was irregularly written off in the annual financial statements of the Nkobi group of companies, under the banner of which most of the corporate appellants operated. The amounts that were written-off in the books of the fourth appellant comprised the respective debit loan accounts of Shaik in the amount of R736 700.73 (this included his debit loan account in the amount of R57 668 with the seventh appellant as well as an amount of R171 000 transferred from his director's fees to his loan account), of the ninth appellant in the amount of R198 167.40 and of the tenth appellant in the amount of R347 159.50. It was further common cause that the amounts were written-off on the false pretext that they were expenses incurred in the setting-up of a card-form driver's licence project in which the Nkobi group had an interest. It was alleged that this misrepresentation concealed the true nature of the writing-off which was to extinguish the debts owed by the abovementioned persons to the fourth appellant which debts included R268 775.69 of the money paid to or on behalf of Zuma. This fact, so it was alleged, was concealed from shareholders, creditors, the bank that provided overdraft facilities and from the South African Revenue Services.

[6] The main charge on count 3 was one in terms of s 1(1)(a)(i) of the CA. The circumstances giving rise to this charge were as follows: During September 1999, Ms Patricia de Lille, a member of Parliament, made corruption allegations concerning a lucrative armaments deal (the arms deal) concluded between the Government of the Republic of South Africa and a number of overseas and local contractors. She proposed a motion for the appointment of a judicial commission of enquiry. It was contemplated that for purposes of the enquiry the investigation was to be carried out by the then special investigation

unit headed by the former Mr Justice Heath. Eventually a number of State institutions, including the Auditor-General, the National Prosecution Authority and the Public Protector became involved. Thomson-CSF (Thomson), a French company, with whom Shaik had participated as part of a consortium (the German Frigate Consortium), had acquired a significant stake in the arms deal, in particular, the provision of an armaments suite for corvettes for the South African Navy purchased by the Government. The State alleged that Shaik's participation (as a black empowerment partner) in the consortium, through a local company called African Defence Systems (ADS), in which Thomson acquired a majority stake, was as a result of Zuma's influence. It alleged further, that during September 1999 and at Durban, Shaik, acting for himself and the corporate appellants, met Alain Thétard, a Thomson executive, and that a suggestion was made that in return for payment by Thomson to Zuma of R500 000 per year, until dividends from ADS became payable to Shaik, Zuma would shield Thomson from the anticipated enquiry and thereafter support and promote Thomson's business interests in South Africa. The State alleged that the suggestion was then approved by Thomson's head office in Paris and that a seal was set on this arrangement at a meeting in Durban during March 2000 involving Thétard, Shaik and Zuma. This led to a document described in the evidence as 'the encrypted fax' being sent by Thétard from Pretoria to Thomson's head office. An important issue is the admissibility of Thétard's original hand-written draft of the faxed communication which the State alleges is a record of the conspiracy to corruption involving Thomson, Zuma and Shaik, which is central to this count.

THE ISSUES IN OUTLINE

[7] As regards count 1 the State alleged that the total amount paid by Shaik to or on behalf of Zuma is R1 249 224.91. It is admitted that Shaik or the corporate appellants paid amounts totalling an amount of R888 527 to or on behalf of Zuma. Shaik stated that these payments were intended to assist Zuma, a former comrade in the struggle against apartheid, and were made out of friendship or

alternatively were intended to be loans that would be repaid. Shaik testified that although he had initially intended to make payments gratuitously he later reluctantly agreed when Zuma insisted that they should be repaid. The greater part of the difference between the amounts alleged by the State and admitted by the appellants was contended by the appellants to constitute donations to the ANC. Apart from that difference the appellants contested a few small amounts alleged by the State to have been paid to or on behalf of Zuma.

[8] It is to be noted that the admitted payments made to or on behalf of Zuma included school and university fees for Zuma's children, travel costs, motor vehicle repair costs, new tyres for a motor vehicle, bond arrears, instalment sale arrears for a number of motor vehicles, R15 000 Christmas spending in 1997, clothing costs and telephone accounts.

[9] A substantial part of the amount alleged by Shaik to have been contributions to the ANC was made up of rentals paid for a flat in Durban occupied by Zuma, in a building named Malington Place. The appellants contended that the flat was a 'safe house' and that Zuma was accommodated there as a leader of the ANC during a time when there was political volatility in KwaZulu-Natal.

[10] Other than the question of whether a substantial part of the total allegedly paid truly constituted donations to the ANC, the difference in the amount alleged by the State to have been paid and that admitted by the appellants is not material. What *is* important is the intention with which the payments were made.

[11] On count 2, in respect of the alleged falsification of the accounting records, namely, the Nkobi annual financial statements for the financial year ending 28 February 1999, Shaik contended that he had no knowledge of the false entries and that they were made by auditors without reference to him.

[12] In respect of count 3, the material allegations were denied by the appellants. Although Shaik admitted receiving R250 000 from Thomson, channelled through an associate Thomson company in Mauritius, the appellants relied on a written 'service provider' agreement concluded between one of the corporate appellants and Thomson as justification for accepting the money. This agreement was said by the appellants to flow from the requirements by the South African Government that contractors who were successful in their bids in terms of the arms deal, should invest in development programmes in this country. Nkobi undertook, so it was asserted, in terms of the service provider agreement to research and identify potential investment opportunities. The State on the other hand, contended that the agreement was contrived and designed to conceal the true nature of the payment.

THE TRIAL COURT'S JUDGMENT

[13] The judgment of the court below is extensive, thorough and detailed. The court had regard to Shaik's exposure to the Malaysian business model which permitted Government involvement in commercial activity and its influence on him, particularly in respect of black economic empowerment (BEE) opportunities that arose post-1994. The court dealt with the needs of the South African military establishment post-1994 and set out the process followed for the acquisition of military hardware from overseas and local contractors. It is common cause that at relevant times Shaik's brother, Shamin (Chippy) Shaik, was the Defence Force's chief of acquisitions. The court recorded Shaik's awareness and interest in the South African Government's Defence Programme and that the German Frigate Consortium in which ADS participated became the successful bidder for the provision of the ammunition's suite for corvettes for the South African Navy.

[14] Time in relation to specific incidents is an important element of the State's case. Such details as are material to the present appeal will be dealt with in due course.

[15] In considering the appellants' guilt on count 1, the court below had regard to the alleged interventions by Zuma to protect or further Shaik's business interests as counter performance for the payments made to him. It found for the prosecution in all respects.

[16] The first was Zuma's involvement in ensuring that Shaik was not excluded as one of Thomson's BEE partners after it was rumoured that former president Mandela and the then Deputy President of South Africa, Thabo Mbeki, had expressed their disapproval of Shaik and the Nkobi group's participation in the arms deal. It is common cause that after an agreement in principle for joint participation with Nkobi in the corvette bid, Thomson reneged on that agreement and acquired ADS without Shaik's participation. It is also common cause that Zuma, who at that time was MEC for Economic Affairs in Kwa-Zulu Natal, intervened on Shaik's behalf urging that Nkobi be included as a BEE partner. The appellants contend that Zuma's intervention was merely to explain that the rumour referred to at the beginning of this paragraph was false and that a meeting between one of Thomson's chief executives, Mr Jean-Paul Perrier, and Zuma took place in order for Zuma to dispel this rumour. As a result Perrier undertook to transfer an interest in ADS to Thomson's operating South African subsidiary in which Shaik held a minority interest. This was then done. The court upheld the State's contention that Shaik and Nkobi benefited from the intervention and that it was improper and part of an overriding corrupt relationship that existed between Zuma and Shaik.

[17] The second instance was Zuma's alleged intervention on Shaik's behalf in respect of the redevelopment of the Point area of Durban that had attracted the attention of Renong Berhad (Renong), a Malaysian Company with which Shaik had tentative connections. The evidence led by the State in this regard included two affidavits of Mr David Wilson, a former executive of that company (head of its foreign operations arm). The admissibility of Wilson's affidavits was an issue in the trial and will be mentioned later in this judgment.

[18] According to the State, Zuma intervened after Renong chose to proceed to bid for a construction contract with a BEE partner that excluded Shaik and Nkobi. Renong ultimately became the preferred bidder. Shaik sought to replace Renong's chosen partner, threatening to use political influence through Zuma to obstruct Renong's plans. Delays occurred in the project. According to Wilson he reported to his head office that this was due to Shaik. This led to Renong's senior executives approaching Zuma, at Shaik's urging, to try to find a way forward. Correspondence was produced at the trial on which the State relied to show Zuma's intervention on Shaik's behalf. According to the State this was followed by meetings at which Renong was urged to admit Nkobi as its BEE partner. Eventually, as a result of a subsequent South-East Asia currency crisis, Renong put this project on hold.

[19] The third instance involved Shaik and Nkobi's foray into a possible eco-tourism opportunity in KwaZulu-Natal. Professor John Lennon from Glasgow applied academic learning to commercial enterprises, his field of expertise being in hotel and tourism management. In September 1998 Lennon was part of a United Kingdom trade mission to this country. At that stage he had projects in Mpumalanga and KwaZulu-Natal in mind. He thought he could set up training centres for the tourism industry. He testified that he had met Shaik after a lecture which he had presented. This claim was denied by Shaik. However, it is common cause that correspondence was later exchanged between them. Lennon sought Zuma's written approval for his projects after Zuma had apparently shown enthusiasm about them. Shaik obtained the written approval. It is common cause that Shaik was instrumental in drafting and forwarding a letter signed by Zuma (which contained the approval sought) on the latter's official letterhead and that it was sent by fax from Nkobi's offices. Further correspondence was produced in support of the State's case. In the end Lennon abandoned the envisaged projects.

[20] The fourth instance of Zuma's alleged intervention was Zuma's involvement in arranging for Shaik and one Grant Scriven, a businessman representing an English company, Venson plc, to meet the then Minister of Safety and Security, Mr Steve Tshwete, during October 2000. The basis of the State's case was a letter dated 5 October 2000, from Shaik's office signed on his behalf, addressed to Zuma's secretary, requesting him to arrange a meeting to apprise Tshwete of fleet management services that Venson could provide. The meeting was arranged and took place. Nothing further materialised. The appellants' case is that Zuma did nothing other that to arrange a meeting with a cabinet colleague with a foreign businessman and that this in itself did not constitute criminal wrongdoing.

[21] In weighing up the evidence the trial court made certain credibility findings adverse to Shaik. In respect of all the counts faced by Shaik the court made an assessment of Shaik's credibility in general and in specific instances. The court was of the view that some of the criticisms by the State of Shaik as a witness were overstated. It accepted that many others of substance were well-founded.

[22] The court was forgiving of Shaik's lies (in promotional publications) about his professional qualifications and business achievements and saw them as a form of puffing. It did, however, consider his lack of embarrassment or regret in this regard. It took into account, as part of a pattern of conduct, Shaik's wild overstatement, in a presentation to a bank, of the value of a contract he said had been secured by Nkobi ─ no contract had been secured and the statement was made to impress the bank.

[23] The trial court rejected Shaik's evidence that when (as Zuma's financial adviser ─ a title he milked for all that it was worth) he submitted a list of assets and liabilities to the bank which excluded monies allegedly owing to him by Zuma he did so with the knowledge and possible connivance of the bank manager.

The court saw this too as part of yet another calculated deception on the part of Shaik to achieve his own ends.

[24] The court below considered the preparation by Shaik, through his attorney, of a list of Zuma's debtors for presentation to former President Mandela who was contemplating some form of financial assistance to Zuma. The list included an indebtedness of R200 000 to the Pitzu Trust, which was Shaik's alter ego. This, the court concluded, was done to deliberately conceal the fact that the money was owed by Zuma to Shaik for fear of former President Mandela's reaction. The trial court saw this as yet another confessed falsehood purposely resorted to in order to mislead Mandela and his attorney.

[25] The following passage from the judgement of the court below is important:

'But the assessment of credibility goes further than that. Shaik's performance as a witness was, on the whole, not impressive. His answers in cross-examination, at first glance, were a curious mixture, being mostly long and frequently irrelevant replies to a question, but interspersed with occasional and surprising flashes of candour. The lengthy and irrelevant replies may have been the result of a natural verbosity stimulated perhaps by the stress of cross-examination. But when one scrutinises his replies to some disputed facts of the evidence, no other conclusion can reasonably be reached than that he had no coherent answer to the question.'

[26] The court went on to record that apart from a number of falsehoods there were instances where Shaik contradicted his own evidence. According to the court below Shaik was either quite heedless of what he said or had no truthful answer to give. The court below also considered instances where Shaik sought to answer the evidence of a State witness with evidence or an explanation that was never put to that witness. It also considered that there were a number of instances where witnesses called in support of the appellants' case either contradicted Shaik or gave a different version of events. The court came to the following conclusion:

'In the result, we were not impressed by his performance as a witness, either in content of evidence, or the manner in which he gave it.'

[27] The court below concluded that Zuma was involved in ensuring Shaik's inclusion as part of the consortium which won the bid for the corvettes but held that this was done by Zuma in his capacity as Deputy President of the ANC and would not, in the absence of any alleged and known duty vested in that office, constitute a contravention of the CA. The court held, however, that it clearly showed, as did the other instances, a readiness on the part of Shaik to turn to Zuma for his help and Zuma's readiness to give it.

[28] Squires J admitted the two affidavits by David Wilson in terms of s 222 of the Criminal Procedure Act 51 of 1977 (the CPA). He accepted Wilson's correction, in his second affidavit, of a date of a relevant meeting at Shaik's apartment and took into account that since Wilson no longer worked for Renong he had no incentive to conceal or misrepresent the facts. Much of what is stated by Wilson in the affidavits is accepted by the appellants. What is disputed is Wilson's assertion that during a meeting with Zuma in January 1997 the latter expressed disapproval of Renong's existing BEE partner in the Point Development and stressed that Nkobi would be the ideal partner. That meeting was denied by the appellants. The court had regard to the minutes of a meeting attended by Wilson and Shaik during February 1997, which the latter accepted as correct. Considering the probabilities, the court concluded on the totality of the evidence that Wilson's version of events, namely, that Zuma had intervened to pressure Renong to admit Nkobi as an empowerment partner, was truthful and reliable.

[29] In respect of Lennon's contemplated projects, the trial court, after considering the evidence, including relevant correspondence, concluded that Zuma did in fact intervene to try and assist Shaik's business interests.

[30] In relation to the meeting arranged by Zuma between Shaik, Minister Steve Tshwete and Mr Grant Scriven of Venson Plc the court held that the latter had obtained access in a manner that an 'unconnected' businessman could not

have achieved. The court held that Zuma undoubtedly had the authority and influence to persuade Minister Tshwete to accommodate Shaik's request for the meeting.

[31] In analysing the evidence the court below concluded that Shaik realised the value of political support for his business enterprises. He also always thought, as did many others, that Zuma was destined for the highest political office. The court below considered that Zuma's extravagant lifestyle with concomitant debt was fertile ground for Shaik's patronage and for corruption. The substantial payments were made for and on behalf of Zuma at a time when the Nkobi group was experiencing cash-flow crises and could therefore least afford them ─ notwithstanding substantial underlying assets and potential future income. The court below concluded that no sane or rational businessman would conduct his business on such a basis without expecting some benefit that would make it worthwhile.

[32] The trial court described Shaik as ambitious, far-sighted, brazen, 'if not positively aggressive in pursuit of his interests and discernibly focused on achieving his vision of a large successful multi-corporate empire'.

[33] The following passages from the judgement are central to the conclusion of the court below on count 1, namely, that Shaik was guilty of a contravention of s 1(1)(a)(i) and (ii) of the CA:

'It would be flying in the face of commonsense and ordinary human nature to think that he did not realise the advantages to him of continuing to enjoy Zuma's goodwill to an even greater extent than before 1997; and even if nothing was ever said between them to establish the mutually beneficial symbiosis that the evidence shows existed, the circumstances of the commencement and the sustained continuation thereafter of these payments, can only have generated a sense of obligation in the recipient.

If Zuma could not repay money, how else could he do so than by providing the help of his name and political office as and when it was asked, particularly in the field of government contracted work, which is what Shaik was hoping to benefit from. And Shaik must have foreseen and, by inference, did foresee that if he made these payments, Zuma would respond in that way.

The conclusion that he realised this, even if only after he started the dependency of Zuma upon his contributions, seems to us to be irresistible.'

And later:

'It seems an inescapable conclusion that he embarked on this never ending series of payments when he realised the extent of Zuma's indebtedness . . . and the extent to which Zuma was living beyond his income; and he also realised the possible advantages to his business interests of providing the means to retain Zuma's goodwill by helping him to support a lifestyle beyond what he could afford on his Minister's remuneration.'

[34] The court had regard to a number of letters in which Shaik flaunted his relationship with Zuma suggesting quite obviously that any joint venture with Nkobi would be sure of political favour from that quarter. The court was of the view that genuine friendship would not have resorted to such blatant advertising of the relationship.

[35] The court below rejected Shaik's version that the payments were intended to be loans. He considered that until February 1998 there was no indication that anybody regarded them as such. Shaik himself said so in his evidence and stated further that if they were not repaid he would not have minded. The court rejected the genuineness of two written acknowledgments of debt by Zuma to Shaik, in amounts of R140 000 and R200 000 respectively. These appear to have been completed in February 1998. It considered that in respect of the acknowledgment of debt in the amount of R140 000 the list of payments did not tally with the amount. Furthermore, Shaik testified that the payments were said to be contributions to the ANC, yet Zuma acknowledged a personal indebtedness to Shaik in respect of such payments. The court also took into account that Shaik provided no satisfactory answer as to why there were two acknowledgements of debt rather than a consolidated one.

[36] The court below was equally dismissive of a purported consolidated acknowledgment of debt called a loan agreement and which was dated 16 May 1999. This provided for revolving credit up to a limit of R2m. No consolidated

amount was acknowledged as a debt and since interest was payable this was a strange omission. In addition, Shaik had no idea of the total amount owing and could not say whether it exceeded the limit of the loan agreement. The court held that the acknowledgments of debt and loan agreement were merely for public consumption and in anticipation of legislation which obliged members of Parliament to disclose personal financial details.

[37] The court also rejected Shaik's claim that substantial amounts, including the rent for the flat in Malington Place, were indeed contributions to the ANC. In this regard it considered a letter by Dr Zwelini Mkhize, the then Treasurer-General of the ANC in KwaZulu-Natal in which he listed contributions made by Shaik to the ANC, which did not include the payments in question. In respect of the rental for the flat, the court held that even accepting that there had been a threat to Zuma's security, as was the defence case, it was strange that the National Government itself took no steps to protect Zuma and that there was in any event no justification for a three-year period of rent-free accommodation. The court also took into account that Zuma owned other property in Durban on the Berea and that Dr Mkhize himself was never approached in his capacity as Treasurer-General for financial assistance in respect of secure accommodation. Furthermore, Nkobi's own books of account did not reflect the amounts as contributions to the ANC. The court was of the view that the invitation for Zuma to move into Malington Place was part of Shaik's longer term vision of cultivating and maintaining the goodwill of a patron whose political stature promised to be a source of protection for and promotion of Shaik's commercial interests.

[38] In respect of count 2 the court rightly considered that the only question was whether Shaik knew of the false representations in the financial statements. It will be recalled that the falsity of the representations and the potential prejudice to probable readers were admitted. Mr Ahmed Paruk, an audit partner with David Strachan and Tayler, the auditors in charge of the audit, testified that Shaik knew of the representations as they had been discussed at a meeting with him. As

against the finding that Paruk himself was an unsatisfactory witness, the court had regard to the fact that at the time that the audit was conducted there was a concern about the Nkobi group's cash flow and that a presentation to its bankers was contemplated. It was important from Shaik's point of view that the best possible picture of the group's financial position and its future prospects be presented. There was anxiety that there would be difficulty in certifying that the group was a going concern. The court below took into account that Shaik faced the problem of his growing debit loan account and the tax liability inherent in that. Concurrently Shaik was busy negotiating a joint venture with an American concern, Symbol Technologies, to bid for handheld barcode scanners to verify driving licences. It was important that the fifth appellant, Kobitec (Pty) Limited, the vehicle to be used by the joint venture, be shown to have underlying value. The mechanism used to effect the write-off had this consequence and will be dealt with later when the merits of the conviction are discussed. The court below considered that it was important to take into account that at the time of the write-off there was a public debate about an investigation into corruption in the arms deal.

[39] Seen against that background the court held that the representations in the financial statements were resorted to by Shaik who was the most likely source of information and that he knew about them. It therefore found corroboration for Paruk's version of events in the objective factors referred to earlier. In concluding that Shaik was guilty on the main charge on count 2 the court below also relied on the evidence of Mrs Cecilia Bester, an accounting graduate employed at Nkobi at the relevant time.

[40] In respect of the main charge on count 3 the court below had regard to the evidential foundation which is the hand-written draft and the actual encrypted fax. It was not disputed that the draft fax message was written by Thétard. Nor was it disputed that at the time Thétard and Shaik were directors of Thomson's South African operating subsidiary which controlled ADS. The court accepted that the

plain and obvious meaning of the fax is that a proposed arrangement discussed at two previous meetings by Shaik and Thétard on 30 September 1999 in Durban and by Thétard and Perrier on 10 November 1999 in Paris respectively, was confirmed at a third meeting in Durban on 11 March 2000 involving Shaik, Thétard and Zuma, and agreement was reached on that proposal. It was also accepted that a draft of the fax was composed to be sent in encrypted form to Thétard's two superiors in Paris, including Perrier. What was in dispute was the nature of the proposal upon which agreement was reached.

[41] The content of the fax and our analysis of it appear later in this judgment when the merits on the conviction on this charge are discussed.

[42] The State's case was that the fax spoke for itself and that the arrangement discussed on 30 September 1999 was payment of a sum of money to Zuma in return for his help. That proposal was put by Thétard to Perrier on 30 November 1999 and thereafter at the meeting of 11 March 2000. The State submitted that in return for the sum of money Zuma agreed to protect Thomson in relation to the enquiry into the arms deal and to promote its interests in its bid for Government-driven public contracts in the future.

[43] Shaik's answer to this is that he had no idea why Thétard ever composed the fax and that he was wholly unaware of it until he saw it reproduced in the media. He admitted to meeting Thétard on 30 September 1999 in what was one of a number of meetings to discuss a donation by Thomson to the Jacob Zuma Education Trust, a Government initiated reconstruction and development programme fund for the education of poor rural children and of which Zuma had been elected patron. Thétard was supportive and optimistic of a favourable response from Thomson's head office and undertook to communicate the request to Perrier which he did on his visit to Perrier on 10 November 1999. Shaik subsequently wrote several letters to Thétard protesting and stating that Zuma's unrealised expectations were causing him dismay and embarrassment.

In October 2000 a generous gift of R1m to the Trust was received from former President Mandela which relieved the Trust of a strain on its finances and Thomson's unrealised promises did not bother Shaik any longer.

[44] The court below admitted the fax into evidence as being an executive declaration in the carrying out of an unlawful conspiracy of bribery which 'was no less an executive statement because it mentioned the two historical earlier meetings that led to the third meeting'. The court held that those references were an integral part of the executive statement and explained the basis on which the final arrangement was made. It was admitted on the basis that it was one of the accepted vicarious liability statements that are received as exceptions to the hearsay rule when a charge is brought against a co-conspirator or in support of a conspiracy to commit an offence. The trial court did not consider it necessary to decide whether the document in question could also be received in evidence in terms of s 3 of the Law of Evidence Amendment Act 45 of 1988.

[45] The court addressed the dispute between the State and the appellants on this charge by considering first, that by September 1999 Shaik knew that he had been mentioned in a statement by the Presidency denying corruption in the arms deal involving Zuma. Shaik's concern would have been heightened by approval at Ministerial level of a high risk rating given by the Auditor-General to the arms deal audit which meant a closer look at the arms deal. Media attention was intensifying. Second, Nkobi's finances, especially its cash flow situation were in a critical state. Against this Shaik was struggling to pay Zuma's expenses whilst Zuma's propensity for spending remained unabated and the dividends from ADS were still some time away. Third, the court below considered ensuing correspondence in relation to the fax. Fourth, the court considered that Shaik, who controlled Zuma's bank account had appropriated R900 000 which was part of R2m given by former President Mandela to Zuma and was required to refund the money as it was destined for an entity called Development Africa. A fifth consideration was the service provider agreement referred to earlier in this

judgement which contained a warranty by the service provider (Nkobi) that it would not be party to any bribery of 'the Government concerned'. In the margin Shaik wrote the words 'Conflicts with intention'. The court considered that Shaik had asked for payment purportedly in terms of the service provider agreement before rendering any service. It also considered that reports contemplated by the service provider agreement were backdated to make it look as though Nkobi had complied with its obligations. Shaik's explanation was that Thomson required this to be done to square its accounting records. The court below also took into account the evidence of Ms Bianca Singh, a former employee of Nkobi, that on 6 November 2000 Shaik met with Thomson's officials in Mauritius and after presenting press cuttings relating to the arms deal, spoke of the need for 'damage control'. She also testified that Shaik had remarked that some ANC person (whose name she could not recall) might cause trouble if the true picture emerged. He thereafter said he hoped that she was not taking minutes of the discussion and asked her to leave the meeting.

[46] In considering the language of the fax the trial court found it strange that a discussion of the donation should involve the use of a code for acceptance. The court found it stranger still that, if Thomson had indeed been asked for a donation that it would have responded in this hesitant and cautious manner, when in the circumstances in which it found itself it could easily have used the occasion as a public relations exercise. It considered that the subsequent correspondence was in opaque and cryptic terms and that if Shaik's explanation was true, there would have been no need for that kind of language. The court could find no indication that the Jacob Zuma Education Trust anticipated such a donation from Thomson. It could consequently find no justification for Zuma's embarrassment as referred to by Shaik in his correspondence since there could have been no commitments to students by the Trust or Zuma. Shaik's explanation for the fax was thus rejected.

[47] Considering the totality of the evidence the court below held that Thétard, Shaik and Zuma were parties to the bribe alleged in the indictment. The court held that the service provider agreement was the means whereby the bribe was paid.

[48] The court held that since all the corporate appellants were used at one time or another to pay sums of money to Zuma, as directed by Shaik, all of the appellants were guilty on count 1 of a contravention of s 1(1)(a)(i) or (ii) of the CA. On count 2 the court held that Shaik was party to the representations made and that he used appellants 4, 7, 9 and 10 in so doing and consequently found them guilty on count 2. The remaining appellants were found not guilty on that count. On the main charge on count 3, Shaik was found guilty of contravening s 1(1)(a)(i) of the CA. Appellants 4 and 5 were found guilty on the first alternative charge of contravening s 4(a) and 4(b) of the Prevention of Organised Crime Act 121 of 1998 (POCA).[4] Appellants 2, 3, 6, 7, 8, 9, 10 and 12 were found not guilty on count 3.

[49] On the matter of sentence we shall, for convenience, refer to the corporate appellants' respective numbers in numerals. In sentencing the appellants Squires J considered that insofar as Shaik was concerned all three offences of which he had been convicted fell within the ambit of Part II of the second schedule of the Criminal Law Amendment Act 105 of 1997 which prescribed 15 years imprisonment for those offences, unless there were substantial and compelling circumstances which justified the imposition of a lesser penalty.

[50] Squires J considered corruption in terms of the CA as a phenomenon that can 'truly be likened to a cancer, eating away remorselessly at the fabric of corporate probity and extending its baleful effect into all aspects of administrative functions'. He stated that this manner of corruption had to be checked and

[4] The charge in terms of these subsections was that the corporate accused involved in receiving and further transferring the money for the bribe knew that it was proceeds of unlawful activities.

prevented from becoming systemic as the effects of systemic corruption can quite readily extend to the corrosion of any confidence in the integrity of anyone who had a public duty to discharge, leading unavoidably to a disaffected populace. The learned judge had regard to the evidence of Mr Hendrik van Vuuren of the Institute of Strategic Studies, a student and qualified observer of this phenomenon. Mr Van Vuuren testified about the effects of corruption on human rights and political processes and ultimately on democracy. The court was of the view that it was a 'pervasive and insidious evil' and that the public interest required its 'rigorous' suppression.

[51] The trial judge considered the effect of the conviction on Shaik's business empire. He also took into account against Shaik that the payments he made were not to a low-salaried bureaucrat, who was seduced into temptation. Squires J considered it axiomatic that the higher the status of the beneficiary of corruption, the more serious the offence. Another factor that the trial judge held against Shaik was that the payments which extended over more than five years allowed Zuma to maintain an extravagant lifestyle and constituted an investment in Zuma's political profile from which Shaik could benefit. The learned judge considered that this entire saga represented a subversion of the ideals to which Shaik had subscribed in his involvement in the struggle against apartheid.

[52] In regard to the fraud conviction he took into account in the appellants' favour that the representations had no effect on shareholders and no-one was *actually* prejudiced.

[53] In respect of count 3 the judge held that the object of the bribe was to undermine the law and to further intensify corrupt activity.

[54] In respect of counts 1 and 3 Squires J was unable to see his way clear to finding substantial and compelling reasons to deviate from the prescribed sentences.

[55] In respect of count 2 he took into account that it was not proven that the representations were Shaik's idea to begin with. The learned judge concluded that in this instance a lesser sentence was justified and in the result sentenced Shaik to 15 years' imprisonment on each of counts 1 and 3 and to 3 years' imprisonment on count 2. Considering that the offences were all part of the same sustained course of corruption Squires J ordered that the sentences should run concurrently.

[56] The corporate appellants were sentenced to fines. The court below took into account that appellants 6, 7, 9, 10 and 11 were either dormant or had no assets, or both. Of the appellants that were active the Asset Forfeiture Unit, acting under POCA, had seized part or all of the assets of the successor to Thomson's operating South African subsidiary (Thomson CSF (Pty) Ltd) in which appellant 3 had a 25% share.

[57] Squires J noted that appellants 2, 3, 4, 5 and 8 were able to pay fines. On count 1 the second appellant was sentenced to a fine of R125 000, appellant 3 to a fine of R1m, appellants 4, 5 and 8 to a fine of R125 000 each. In respect of appellants 6, 7, 9, 10 and 11 the court below imposed on each a fine of R25 000 but in each case ordered that the fine be suspended for five years on condition they were not found guilty of any offence involving corruption, fraud or dishonesty, committed during the period of suspension.

[58] Of the corporate appellants convicted on count 2, appellant 4 was the only one that had the ability to pay a fine and was consequently ordered to pay a fine of R1 400 000. Appellants 7, 9 and 10 were sentenced to a fine of R33 000 each suspended for five years on the same conditions set out in the preceding paragraph.

[59] On count 3 appellants 4 and 5 were each sentenced to a fine of R500 000.

THE AMBIT OF THESE PROCEEDINGS

[60] Leave to appeal was sought against conviction and sentence. The court below granted leave to appeal to this court in restricted terms, as follows:

'1. On Count 1, the Third Appellant is given Leave to Appeal against its Conviction on the main charge on the ground that the evidence eventually submitted by the State did not conclusively prove that it had been used in making any payment to or for the benefit of Jacob Zuma or taking any part in a common purpose to do so. Save to this extent, the application in respect of this Count is refused.

2. On Count 2, the First, Fourth, Seventh, Ninth and Tenth Appellants' are given Leave to Appeal against their Convictions on the main charge on the following grounds: whether the trial Court was justified in approaching the issue of the first appellant's presence at the auditor's meeting on the basis it did; and whether the evidence so relied on justified the conclusion reached that the first appellant was present. The Application for Leave to Appeal against the sentences is refused.

3. On Count 3, the First, Fourth and Fifth Appellants' are given leave to appeal against their Conviction on the main charge and the first alternative charge respectively on the following grounds: (i) whether the trial Judge was correct in admitting in evidence the encrypted fax in its several exhibit forms, as evidence against the accused; and (ii) even if the document was properly admitted, whether the trial Court erred in attaching any weight to its contents in view of the subsequent prevarications of the author. Save as aforesaid, the Application for Leave to Appeal against the Convictions and Sentence is refused.'

[61] This court on application to it to extend the scope of the appeal made the following order:

'**Ad Count 1**

(a) The application of the first, second, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants for leave to appeal against their convictions and the application of the first applicant against sentence are referred for oral argument in terms of s 21(3)(c)(ii) of the Supreme Court Act 59 of 1959 at the hearing of the appeal on those counts in respect of which leave to appeal is granted. [The parties must be prepared, if called upon to do so, to address the court on the merits in terms of s 21(3)(c)(ii) of the Act.]

(b) To the extent that the third applicant's application for leave to appeal against its conviction was refused by the court *a quo*, the application is similarly referred for oral argument.

(c) Leave is granted to the second, third, fourth, fifth and eighth applicants to appeal against the sentences imposed by the court *a quo*. Leave to appeal against the sentences imposed on the sixth, seventh, ninth, tenth and eleventh applicant is refused.

Count 2

(i) Leave to appeal is granted to the first, third, fourth, seventh, ninth and tenth applicants against their convictions to the extent that such leave was refused by the court *a quo*.

(ii) The application for leave to appeal against the sentences imposed on this count is refused.

Count 3

(i) Leave to appeal is granted to the first, fourth and fifth applicants against their convictions to the extent that such leave was refused by the court *a quo*.

(ii) The application of the fourth and fifth applicants for leave to appeal against the sentences imposed by the court *a quo* is refused.

(iii) The application of the first applicant for leave to appeal against the sentence imposed by the court *a quo* is referred for oral argument as in count 1.

For this purpose the applicant is to file five additional copies of the application for leave to appeal. Both parties are to comply with all the remaining rules relating to the prosecution of an appeal.'

It must be pointed out that the third appellant was not in fact convicted on count 2. The order relative to it on that count can therefore be ignored.

[62] We turn to deal with the correctness of the rulings, assessments, reasoning and conclusions of the court below in respect of each count, in turn.

COUNT 1:

Section 1(1)(a)(i) of the CA

[63] On this count, in respect of which leave to appeal is sought by all the appellants, it is appropriate to begin by considering the relevant provision of the CA.

[64] Section 1(1)(a)(i) of the CA is quoted in footnote 3. In terms of the section

- the corrupt giving of, offering to give or agreeing to give

- a benefit
- which is not legally due
- to a person
- upon whom any power has been conferred or who has been charged with a duty
- by virtue of any employment or the holding of any office or any law
- or to anyone else
- with the intention to influence the person upon whom such power has been conferred or who has been charged with such duty
- to commit or omit to do any act in relation to such power or duty

constitutes an offence.

[65] It is not in dispute that Shaik gave benefits which were not legally due to Zuma at the time that Zuma held public office, being initially that of MEC for Economic Affairs and Tourism in KwaZulu-Natal and later Deputy President of the Republic of South Africa. It is in dispute that such benefits were given corruptly. In this regard it is contended that they were not given with the intention to influence Zuma to commit or omit to do any act in relation to a power conferred on him or a duty with which he had been charged. It is, therefore, necessary to determine on what powers and duties the State relied.

[66] Reference is made in the indictment to sections 136(2) and 96(2) of the Constitution. It is then alleged that Zuma had the powers and duties attaching to the offices held by him namely: Member of the KwaZulu-Natal legislature and Minister of Economic Affairs and Tourism from May 1994 until 17 June 1999 and Deputy President of the Republic of South Africa, Leader of Government Business in Parliament and a member of the National Assembly of Parliament from 17 June 1999. Sections 136(2) and 96(2) provide, in the case of the former, that a MEC, and in the case of the latter, that a member of the cabinet (which includes the Deputy President[5]), may not –

[5] Section 91(1) of the Constitution.

(i) undertake any other paid work;

(ii) act in any way that is inconsistent with his office or expose himself to any situation involving the risk of a conflict between his official responsibilities and private interests; or

(iii) use his position or any information entrusted to him, to enrich himself or improperly benefit any other person.

In addition, the Constitution provides in s 92(3)(a) that a member of the cabinet and in s 133(3)(a) that a member of an executive committee must act in accordance with the Constitution.

[67] Before us the appellants conceded that Zuma's obligations in terms of these sections of the Constitution qualified as duties within the meaning of 'duty' in the phrase 'charged with a duty' in s 1(1)(a)(i) of the CA. In their heads of argument, however, they contended that 'duty' in terms of the section should be interpreted to mean 'function' and not to include contractual or statutory obligations. They submitted that one does not naturally speak of charging a person with a duty such as the obligation to act in accordance with the provisions of sections 136(2) and 96(2) of the Constitution; that 'power' and 'duty' are to be read *eiusdem generis;* and that to interpret 'duty' so as to include contractual and statutory obligations would expand the reach of corruption further than was ever the case under the common law.

[68] Linguistically there is no reason why one would not speak of a MEC or a member of the cabinet being charged with duties such as the obligations in terms of sections 136(2) and 96(2) respectively. The Shorter Oxford Dictionary describes the chief current sense of 'duty' as follows: 'Action, or an act, that is due by moral or legal obligation; that which one ought or is bound to do.' The word 'duty' can however also be used in the more restrictive connotation of 'function'. The question to be decided is therefore whether the word, as used in s 1(1)(a)(i), should be interpreted restrictively. The common law and the preceding legislation afford assistance in this regard.

[69] In an early edition of Gardiner and Lansdown *South African Criminal Law and Procedure* vol 2, namely the fourth edition published in 1939, at p 985 the common law crime of bribery is defined as follows:

'It is a crime at common law for any person to offer or give to an official of the State, or for any such official to receive from any person, any unauthorised consideration in respect of such official doing, or abstaining from, or having done or abstained from, any act in the exercise of his official functions.'

The definition, in so far as it restricted the crime to 'any act in the exercise of [an official's] official functions' was, however, subsequently held to be incorrect (see *R v Chorle* 1945 AD 487) and in later editions the phrase 'in the exercise of his official functions' was replaced with the phrase 'in his official capacity' which the authors said should be given a wide interpretation.[6]

[70] Chorle gave money to a municipal official to influence him to use his influence as a municipal official to expedite the issuing of a building permit in respect of a dwelling house. The municipal official concerned had no powers or functions in respect of the issuing of such permits but worked in the same department as, and in an office adjoining that of, the official who dealt with these permits. The court held that Chorle committed the common law offence of bribery.

Schreiner JA said in regard to the common law:[7]

'Two Placaats of the States General of the United Netherlands, promulgated respectively in 1651 and 1715, are generally regarded as laying down what constitutes bribery in Roman Dutch Law. It may not be possible to affirm that no conduct that cannot be brought within the language of the Placaats amounts to bribery; but on the other hand it can be affirmed that whatever acts the Placaats penalise are, in the absence of abrogation by disuse or modification by subsequent legislation, crimes to-day and punishable as bribery. . . . They penalise the direct or indirect giving of presents of any kind to State officials in order to obtain, or because the donor has obtained, any of a number of listed advantages . . .'

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[6] See the sixth edition at 1150 to 1151.
[7] At 492.

Referring to the phrase 'in the exercise of his official functions' in Gardiner and Lansdown Schreiner JA said that he could find nothing corresponding to these words in the Placaats and added:[8]

'It may . . . be necessary to read it as applying only to matters relating to some aspect of the administration of the State's affairs. But I can see no reasonable necessity for limiting the operation of the Placaats to cases in which the official's assistance is sought in a matter covered by his official functions, however widely this expression is interpreted.

. . .

The law of bribery is designed to protect the State against those who by gifts tempt its officials to use their opportunities as such to further private interests in State affairs and there is no reason why the law, which in its original form was wide enough to secure that protection, should by restrictive interpretation, be cut down to something less than is necessary to achieve its object.'

Schreiner JA concluded[9] that the municipal official was offered money because he was an official and because Chorle hoped that he 'would take the money and actuated by its receipt, would use the opportunities afforded by his official position to expedite the issue of a building permit. In making that offer the appellant was guilty of bribery and he was rightly convicted.'

[71] Chorle had been charged in the alternative with having contravened s 2(b) of the Prevention of Corruption Act 4 of 1918 ('the 1918 Act'). In terms of that Act the crime of bribery was extended from employees of the State to agents, who by definition, amongst others, included employees in general. Section 2(b) provided as follows:

'If any person corruptly gives or agrees to give, or offers, any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs, or business, . . . he shall be guilty of corruption . . .'

[72] In 1958 the 1918 Act was replaced with the Prevention of Corruption Act 6 of 1958 ('the 1958 Act'). Section 2(b) of this Act provided:

'2 Any person who –

[8] At 496.
[9] At 496.

(a) . . .

(b) Corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do or for having done or forborne to do any act in relation to his principal's affairs or business; or

(c) . . .

shall be guilty of an offence . . .'

As in the case of the common law, neither the 1918 Act nor the 1958 Act required that the matter in respect of which a person's assistance was sought had to be covered by his functions as official or his functions in terms of his employment.

[73] In terms of the CA the 1958 Act as well as common law bribery was repealed. The CA did away with the requirement that the relevant act had to relate to the principal's affairs and replaced it with the requirement that it had to relate to the powers and duties of the person sought to be influenced by the giving or offering or paying of the benefit. In the light of the legislative and common law history and for the reasons that follow 'duty' was in our judgment not intended to be restricted to 'function'. First, the legislature would have been aware of the decision in *Chorle* which was a leading case on the subject of corruption at the time, and if it intended to introduce, contrary to the common law and the 1958 Act, the requirement that, for a conviction, assistance had to be sought only in respect of the functions of the person concerned it would have made that intention clear by using the word 'function' instead of 'duty'. Second, the result of restricting the meaning of 'duty' to 'function' would be that, had the CA applied at the time, Chorle would have been found not guilty in terms s (1)(a) thereof even if, to the knowledge of Chorle, the relevant municipal official's contract of employment provided that he was not allowed to use his position as employee to enrich himself. We find it difficult to conceive that that could have been the intention of the legislature. In our view the legislature intended to restrict the ambit of the 1958 Act and of common law bribery to the extent that it would not be an offence if the act sought to be influenced bore no relationship at all to

the powers and duties of the person concerned but not to the extent which would be brought about by the further restrictive interpretation of 'duty' so as to mean 'function'. Like Schreiner JA in respect of the Placaaten, we can see no reasonable necessity for limiting the operation of the section to cases in which the assistance of the person referred to is sought in respect of matters covered by his official powers and functions. As was said by him[10] the corrupt intent of the offeror would be the same whether the act fell within the sphere of the official's functions or not and so would be the corruptive effect on the official if he accepted the benefit.

[74] It follows that the concession by the appellants was correctly made; if Shaik gave benefits to Zuma with the intention to influence him to commit or omit to do any act in relation to his duties in terms of s 96(2) or s 136(2) of the Constitution Shaik committed an offence in terms of s (1)(a)(i) of the CA.

The facts and conclusions in respect of count 1

[75] Apart from the sum of R888 527 admittedly paid by one or other of the appellants to or on behalf of Zuma, it was conceded by them in argument that the amounts which they had contended at the trial were not paid for Zuma but regarded as donated to the ANC, had in any event benefited him. This concession may appear to render it unnecessary to decide whether those amounts could indeed have been regarded by Shaik as donated to the ANC. However, in addition to our recording our agreement with the conclusion reached by the trial court in this connection, the true purpose of all the payments beneficial to Zuma is relevant to the question whether they were made with the intention alleged in the charge – to influence him to use his name and political standing to benefit Shaik's business.

[76] The amounts which Shaik said he regarded as having been donated to the ANC comprised, firstly, repayment of loans made by a company, AQ Holdings

[10] At 496.

(Pty) Ltd to Zuma and, secondly, payment of the monthly rental of apartment accommodation at Malington Place where Zuma stayed from May 1996 until July 1999.

[77] Evidence for the State concerning the AQ Holdings debt was given by Mr AQ Mangerah. He was also treasurer of the Stanger branch of the ANC and knew Zuma well. They served together on the ANC regional executive for Southern Natal. He said that Zuma had spent a lot of money on ANC activities. In this regard it was Shaik's evidence that Zuma had told him that his debt to AQ Holdings arose from borrowings he spent on ANC causes which he (Zuma) said he intended personally to repay. Shaik said this was why he viewed the payments to settle Zuma's debt to AQ Holdings as contributions to the ANC. Significantly, this was certainly not how Mangerah saw the matter. When Zuma failed to repay him he not only contemplated suing Zuma but even envisaged sequestration proceedings. That attitude was quite inconsistent with Zuma's borrowings having been, in effect, for donations to ANC projects rather than loans for personal expenditure. It was also inconsistent with Zuma having possibly conveyed to Mangerah that the loans were for ANC purposes.

[78] That the AQ Holdings loans were incapable of believably prompting Shaik's professed view of their repayment is borne out by two further features. One was the signature by Zuma of an undated acknowledgement of debt, the sum of which was specifically inclusive of the AQ Holdings repayments. Leaving aside, for the moment, the question whether this instrument was a genuine acknowledgment, both Shaik and Zuma were involved in its creation, which they could not conceivably have been had they truly regarded the appellants' repayments to Mangerah as non-recoverable contributions to the ANC.

[79] The second feature destructive of Shaik's evidence on the present subject is a disclosure made by Mkhize who was called as a defence witness. He was Treasurer-General of the ANC in KwaZulu-Natal during the relevant times. He

said that Shaik was a generous benefactor of the ANC but that none of the recorded payments made or promised by Shaik included those which settled Zuma's indebtedness to AQ Holdings.

[80] As regards the Malington Place rental payments, these were also included in the amount of the acknowledgment of debt just referred to. What we have said about the AQ Holdings repayments in that respect applies equally to the Malington rental payments. Obviously, whatever Shaik and Zuma intended by the acknowledgment of debt, they could not have regarded the rental payments as non-recoverable contributions to the ANC.

[81] In the Nkobi books of account the rental payments were not reflected with consistency. Until January 1997 they were not shown at all. Then, for some months, the payments were shown but without a description or classification, and without indicating the company finally debited. After that the fourth appellant was consistently shown as the party finally debited and the description and classification were respectively reflected as 'Rent paid' and 'Expensed'. From March 1998 however, 'Rent paid' was replaced by 'Loan account – Floryn Investments' (tenth appellant) and the classification now read 'Development Costs'. As will be recounted in relation to Count 2, these so-called development costs falsely described amounts actually debited to Shaik's own loan account in the fourth appellant. The gravamen of the charge in Count 2 is that, having been so misdescribed, the amounts in question were written off as part of a fraudulent scheme.

[82] For the appellants it was argued that the later rental payments having been accounted for in the loan account of the tenth appellant in the books of the fourth appellant, and Mkhize's evidence having been that the tenth appellant was the vehicle by means of which Shaik made contributions to the ANC, it followed that Shaik could believably have regarded the rental payments as payments not to Zuma but to the ANC. This argument cannot be accepted. In the first place,

whatever the Nkobi books did reflect in regard to these payments they never showed them as contributions to the ANC. Secondly, and more importantly, it is simply not open to Shaik to say he regarded these payments as contributions to the ANC. The evidence on Count 2 shows that they were initially reflected as amounts borrowed by him to spend on Zuma and then, by dishonest manipulation, many of them were later represented to be amounts expended on developing his corporate business and which were then written off.

[83] The trial court said it did not believe Shaik's evidence that he regarded the AQ Holdings and Malington payments as contributions to the ANC. In the light of what we have said, we consider the trial court's rejection of that evidence to be unassailable. We shall revert to the question of Shaik's credibility presently but remark at this point that it is, in the circumstances, unnecessary to discuss the evidence, the arguments and the findings of the trial court concerning the reason why Zuma moved to Malington Place and the issue whether his security was a governmental, party or personal issue.

[84] In our view the State successfully proved that Shaik or one or more of the appellant companies made payments to or on behalf of Zuma in the total amount of R1 249 244.91 over the period 1 October 1995 and 30 September 2002.

[85] Before considering the defence evidence that these payments were made purely out of friendship or were loans, it is appropriate to refer to the trial court's conclusions regarding Shaik's credibility. They were not attacked on appeal but something was sought to be made of a passage in the judgment, part of which has been quoted in para [26] above and which in full reads as follows:

'In the result, we were not impressed by his performance as a witness, either in content of evidence, or the manner in which he gave it.

That, of course, does not make him guilty of any offence. It does not even mean he is never to be believed in anything he says. Some of his evidence was plainly truthful. But measured against an otherwise convincing State witness, *it may be something of a disadvantage*.' (Our emphasis.)

[86] Building on the emphasised words, the appellants argued that the trial court did not reject Shaik's evidence, it merely approached his evidence with caution. We disagree with that argument. The passage just quoted was in the form of a concluding general comment which followed upon a careful and detailed discussion of a multitude of criticisms levelled by the prosecution against Shaik's evidence. Not only was that evidence exhaustively examined and weighed by the trial court but it is clear in the overall picture that the underlined words were in the nature of an understatement. One finds elsewhere in the judgment, when specific issues were resolved in favour of the State, passages in which his evidence was unmistakably said to be rejected as false. Obviously there was much in his evidence that was not only believable standing alone but there were parts that were supported by documentary evidence or circumstance. The real issue on this count is whether it is a reasonable inference (not just a possible inference) that the payments made to Zuma or on his behalf were prompted by friendship, or were just loans, and in neither event made with the criminal intent alleged in the charge. In that regard Shaik's credibility is crucial. Having deliberated painstakingly, the trial court rejected Shaik's evidence on that issue and held that the inference referred to was not a reasonable one and could therefore be ruled out.

[87] It is settled law that a court of appeal will not lightly disturb a trial court's factual findings, including conclusions on credibility, where the trial court has been able to hear the evidence being given and observe the witnesses while giving it. This is because a trial court has that peculiar advantage and a court of appeal does not. Nor is the present case one in which we are in just as good a position as the trial court to draw inferences from the facts found proved. And we are certainly in nowhere as good a position to assess the personalities of the witnesses or their apparent propensities for truth or falsehood. What is important in this case is that the trial lasted not just weeks. It was in progress from October 2004 until mid-2005. That was an extensive period in which the trial court was able to immerse itself, as it were, in the evidence and the inherent probabilities.

In particular the court was able to observe Shaik in the witness box for many days, thus acquiring an exceptional opportunity to assess his trustworthiness. The product of its labours is a judgment which subjects the evidence to close analysis before stating its conclusions with care and clarity.

[88] The question, then, is whether the appellants have shown that the trial court overlooked important evidence or materially misconstrued the evidence it did consider. If so, there would be a basis on which we could endeavour to form our own conclusions on credibility, difficult as that exercise might be based purely on the printed record. If not, we would at least defer to the factual findings of the trial court even if not entirely satisfied that all those findings were correct. What is stated in this and the preceding paragraph outlines the long-established approach to appellate adjudication. It is all the more to be borne in mind where the judgment under consideration is as comprehensive, and covers as many issues and as much evidence, as that of the trial court in this matter.

[89] The main basis for the defence contention that the payments in issue were loans comprises two written acknowledgements of debt prepared in about February 1998 and signed by Zuma in favour of Shaik, and a loan agreement signed by Shaik and Zuma on 16 May 1999. Shaik testified that he was prepared to regard the payments as gifts but Zuma insisted that they be regarded as loans. One acknowledgment of debt was in the amount of R140 000.00 and the other in the sum of R200 000.00. The former was said by Shaik specifically to reflect what Zuma owed him for having settled Zuma's debts in respect of AQ Holdings and Malington Place. The contradiction inherent in regarding the self-same amounts as the subject of contributions by Shaik to the ANC and at the same time debts due by Zuma to Shaik has already been pointed out.

[90] The acknowledgments of debt bear the printed date 5 February 1998 which can be accepted as indicative of when they were drafted. However the signatures were neither dated nor witnessed.

[91] Once the version is discarded that the AQ Holdings and Malington Place payments were regarded by Shaik as contributions to the ANC it follows that there was no credible basis for drawing up two separate acknowledgments of debt in respect of Zuma's alleged indebtedness. In addition, as the trial court mentioned, some of those payments post-dated 5 February 1998.

[92] The evidence also shows that there was in existence a third, uncompleted and unsigned acknowledgment of debt form also bearing the compilation date 5 February 1998. Shaik was unable to explain why that document was created. All these forms were drafted by his then attorney.

[93] The appellants sought to argue that notwithstanding their compilation date the acknowledgments reflected Zuma's indebtedness to Shaik as at September – October 1998. That submission overlooks that by then the payments made by the appellants to or on behalf of Zuma totalled approximately R400 000.00 in round figures.

[94] As regards the loan agreement dated 16 May 1999, Shaik testified that it was intended to consolidate all Zuma's alleged indebtedness to him and to supersede the acknowledgments of debt. However, it did not do that. What the agreement referred to was a revolving credit of R2m and although it referred to interest, there was no capital sum stated on which interest could conceivably be calculated.

[95] The forensic accounting evidence of Mr J van der Walt for the State made two things clear that are important in this connection. One is that the Nkobi group was in no financial position to afford at the relevant time to pay its own business expenses and to keep on advancing money to Zuma. True, it was able to obtain bank loans but the situation was one in which the group was having to borrow in order to maintain the flow of payments to Zuma.

[96] The other fact established by Van der Walt's evidence is that the Zuma payments were not consistently treated in the Nkobi accounts. We have referred to this feature already in so far as it affected the Malington rent payments. But the trend was general. Without a reconstruction such as the witness achieved, the accounts could not have been used as a means by which to recover the payments accurately. This must count against it ever having been the intention to treat them as loans.

[97] The cumulative effect of all these considerations concerning the acknowledgments of debt and the loan agreement justify the conclusion that there was never a genuine intention to reflect any specific amount as actually owing by Zuma to Shaik. That, in turn compels the question whether there was a genuine indebtedness at all. A professed debt in no definable amount is in reality no debt.

[98] Obviously the documents would have been drawn up with some objective in mind and the question, then, is whether, as the trial court thought, they were intended for disclosure in terms of contemplated future legislation or perhaps simply to have on hand if the payments to Zuma became publicly known and questions were asked. In either event the documents would have been merely part of a false cover story. Bearing in mind that during the relevant periods of 1998 and 1999 the arms deal and the uncertainty of Nkobi's involvement in it were matters contemporaneously on Shaik and Zuma's minds it is a strong inference that the debt documentation was contrived to be held in readiness in case Shaik's apparent beneficence was queried.

[99] Up to now we have considered the documents in narrow perspective. So seen, we agree with the trial Court's conclusion that they were not genuine.

[100] To recapitulate thus far, Shaik paid over R1.2m to or for Zuma during the period stated in the charge. Occasionally in that time, in exercising control of

Zuma's bank account, he would withdraw amounts from the account and deposit them to one or other Nkobi company. The total he appropriated in this way was about R144 000.00. However he neither sought repayment nor asserted any right to repayment. His case was that he made all the payments to help Zuma and that it was Zuma who insisted that they be regarded as loans.

[101] The forensic accounting evidence shows, as we have mentioned in one respect already, that the Nkobi group did not have surplus funds which could have accommodated Shaik's professed charitable intentions. In fact it was only able to continue making the payments by increasing its substantial debt to its bankers. Zuma, on the other hand, had no realistic prospect of being able to repay the amount by which he was benefiting. The present analysis therefore begins with the stark financial truth that Shaik could not afford to play samaritan and Zuma could not afford to borrow. At the very outset, therefore, the inference presents itself that some ulterior reason moved Shaik to expend on Zuma what he did.

[102] Making full allowance for the personal bonds of friendship there would understandably have been between them arising out of their relationship and their mutual interests prior to 1994, it is nevertheless clear that Shaik was keenly aware of the many business opportunities that the new political era offered and anxious not to miss them. For his part Zuma was seen by Shaik and by others in the know as destined for very high political office and possessed of the potent influence appropriate to that situation. Added to that there was Zuma's almost crippling financial vulnerability. He had heavy family commitments but wanted a smart and publicly visible lifestyle.

[103] An early indicator that Shaik wanted to make commercial capital out of knowing Zuma and out of the latter's political position, was the fact that Shaik initially earmarked him for Nkobi shareholding. In the end that did not materialize

because it was ANC policy that neither the governing party nor its Ministers would become involved in Government-backed commercial enterprises.

[104] Shaik's drive to harness political support for his economic ambitions was described by Professor J Sono, who was a director of the second appellant and involved with Nkobi and Shaik from about April 1996 until early 1997. He testified that Shaik placed heavy and repeated emphasis on what was referred to at the trial as 'political connectivity'. The term conveyed that Nkobi had political connections in government. And that was principally via Shaik's relationship with Zuma. Such connectivity had to be used to procure government contracts for Nkobi. From Sono's evidence it is plain that the purpose of using the Zuma connection was not to advance their friendship. Its purpose was commercial exploitation. It found its most telling expression in Shaik's constant assertion to potential contracting parties that Nkobi was especially well placed for inclusion in joint ventures because of its political connections despite its lack of financial strength.

[105] Two projects in particular that Sono recalled Shaik's eagerness to get Nkobi involved in were the development of the Point area in Durban and the supply of corvettes for the South African Navy as part of the arms acquisition program. This was during the first half of 1996, even before the White Paper on the arms deal was presented.

[106] Bianca Singh, Shaik's receptionist and secretary for some years from mid–1996, enlarged on this picture of Shaik. Apart from confirming his interest in corvettes she recounted Shaik's explicit explanation of how he was ever ready to do things for politicians because they would do things for him in return. As to the use to which he put the Zuma connection she said she overheard what she inferred was an anxious cell phone call to Shaik from his brother Chippy who was Defence Force Chief of Acquisitions and a major figure in the arms procurement program. She then heard Shaik telephone Zuma and tell him that Chippy was

under pressure and 'we really need your help to land this deal'. She deduced that the reference was to the arms program. For present purposes it does not matter if it was not. It illustrates Shaik's easy and immediate access to Zuma to which he resorted without hesitation in order to secure some commercial advantage.

[107] Coming now to the Point development, the documentary evidence (excluding the Wilson affidavits) shows that the Malaysian development company (Renong) which sought to implement this project had included a South African BEE partner in the venture. It had, during 1995, chosen a company subsequently named Vulindlela Investments which it was contemplated would have a 49% share. In mid-1996, however, Shaik met with Renong's Executive Chairman in Malaysia to try to convince him that Nkobi should be included in the venture as well. He followed this up with a letter dated 10 June 1996. In it he said:

'Firstly, I wish to confirm to you in writing, as agreed, my group's interest and willingness to acquire 49% equity in the Point Development, and that this equity to include [Vulindlela] and other meaningful black business in the region.

. . .

In conclusion, I wish to remind you of your letter to be sent to Minister Jacob Zuma. I trust that given your written confirmation and our combined commitment hereof, I would be in a position thereafter to influence and accelerate the much awaited Point Development.'

[108] Nothing in the evidence suggests that a letter from the Chairman to Zuma was anything but Shaik's idea. Such a letter was duly written. (It was actually dated two days before Shaik's above-mentioned letter.) In it the Exectuive Chairman, having referred to Renong's choice of Vulindlela, and Shaik's request for a 49% shareholding, asked Zuma to decide 'the party with whom Renong should form the partnership with'.

[109] A letter from Zuma in response was drafted. An unsigned version was found at Nkobi's offices in pre-trial investigations. The latter requested a meeting in Durban between Zuma and the Executive Chairman or a 'very senior and

trusted member' of Renong and included the following:

'I believe the matters raised by yourself require both careful consideration and deliberation to ensure its eventual success . . .

During this meeting I shall certainly endeavour to provide to you the assistance required to ensure the successful development of the Point . . .'

The letter must have been sent because a meeting between Zuma and the Renong representative, David Wilson, subsequently took place, as appears from the verbatim record of the minutes of a yet later meeting (on 3 February 1997) at Nkobi's offices between Shaik, Wilson and Nkobi personnel.

[110] Those minutes form part of the evidence. They reveal that Zuma had told Wilson (at their own meeting whenever that was) that he was concerned about the make-up of the 49%. The minutes go on to indicate that Renong did not know which empowerment partner to pick and wanted Zuma to decide; but that Shaik rather wanted Renong to broker a relationship with Nkobi. Wilson is recorded as saying that Zuma wanted others to be involved in the development, specifically Nkobi 'and the IFP' (the Inkatha Freedom Party). At a later moment in the meeting Shaik said:

'My instruction from Minister Zuma is to put forward to you a value or percentage and that you are to broker that value and take it to your Chairman. I was hoping to reach such a value out of this meeting so that I would be able to ask Minister Zuma how much goes to the company from the North and how much does Nkobi take on.'

(The identity of 'the company from the North' is not apparent.) The minutes conclude with the wish of both Shaik and Wilson for a meeting with Zuma to resolve the participation percentage.

[111] Renong eventually abandoned the Point development so Nkobi could not become involved after all. The conclusion is inescapable, however, that in pursuit of such involvement Shaik intended Zuma to use his influence to persuade Renong to include Nkobi in the scheme, to Nkobi's obviously anticipated economic advantage. In the light of that conclusion it is unnecessary to decide whether the Wilson affidavits were rightly admitted. It follows that the trial court

nevertheless found correctly, in our view, that the Point aspect provided proof of Shaik's having acted with the intention alleged in the indictment.

[112] To avoid the consequences of that finding the appellants argued that the events concerning the Point occurred before the payments to Zuma really began in earnest and it could not be found, therefore, that they were made to achieve what Zuma did in regard to the Point development. There is no substance in that contention. The indictment clearly charges that the payments were either meant as inducement for the future or reward for the past. In any event the prosecution made it plain that no particular Shaik payment could be linked to a particular Zuma response. In effect, the payments constituted an ongoing retainer. In any event the Point evidence, if nothing else, is proof of the criminal intention alleged in the charge irrespective of whether it is capable of being specifically linked to particular payments.

[113] While events concerning the Point development had been in progress Zuma had moved in May 1996 to Malington Place. By July 1996 his rental had not been paid and so Shaik arranged for payment. It was at about this stage or, on the evidence, conceivably early in 1997, that Zuma confided to Shaik that his financial troubles were too dire for him to stay in politics. He therefore contemplated entering the private sector so that he could afford to maintain his family, in particular so that he could pay for his children's educational needs. Shaik's evidence was that he regarded Zuma's absence from politics as such a set-back for provincial and national interests that he resolved to finance him. Hence the payments in issue. Whether this was truly Shaik's motivation must be decided on a consideration of all the evidence. The alternative inference is that he made the payments to keep Zuma in politics in order to ensure that Nkobi's business had highly-placed political patronage.

[114] The next Zuma involvement found by the trial court to have been an intervention sought and offered in the interests of Nkobi, was in respect of the

ADS shareholding during 1998. The basic facts are not disputed. In August 1995 Thomson CSF (France) and Shaik came to an understanding that the French company would conduct business in South Africa by way of joint ventures with Nkobi. The result was the formation and registration of two South African companies. One was Thomson CSF (Pty) Limited ('Pty'). The third appellant duly acquired 30% of the shareholding in Pty. A major objective of the French-Nkobi co-operation was the acquisition of an interest in ADS which was a South African company in the Altech group and an existing supplier to the South African Navy. A substantial shareholding in ADS would enhance Pty's chances of being awarded the contract for the corvette munitions suite (a segment of the arms acquisition program). The proposal was that Pty should obtain a 40% to 50% share in ADS and in September 1997 Shaik was indeed informed that agreement in principle had been reached with Altech that Pty would buy 50% of ADS. It therefore came as a considerable shock to him when, in April 1998, Thomson CSF (France) acquired the shares directly. It meant that Nkobi could derive no financial benefit from the arms deal at all. Shaik learnt that the cause of the problem was a rumour put about by a confidante of then President Mandela that Shaik was disliked by Mr Mandela and by the then Deputy President, Mr Mbeki. The rumour reached Mr J-P Perrier, executive Vice-President International Business of Thomson CSF (France), hence the ousting of Pty.

[115] These events led Shaik to write to Perrier. The letter was dated 17 March 1998 and written by Shaik in his capacity as Executive Chairman of second appellant. It reads:

'Dear Mr Perrier

In my recent discussion with the Honourable Minister Jacob Zuma Vice President of the African National Congress (ANC), he is extremely concerned with the conduct of Thomsons-CSF group operating in South Africa, and in particular the allegations made to me by yourself and other representatives of your group attributed to our Honourable President Thabo Mbeki, with regards to our South African business affairs.

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

Kindly communicate with the writer, to arrange a mutually convenient date for this meeting. Your urgent response would be appreciated.'

[116] Due to Perrier's being in ill-health no meeting in South Africa was possible. However, while Zuma was on an official visit to the United Kingdom in his capacity as MEC it was arranged that he meet Perrier in London on 2 July 1998. After they met Shaik was informed that the ADS shareholding would be transferred from Thomson CSF (France) to Pty as originally contemplated. Later still, on 18 November 1998 and in Durban, Perrier attended a meeting with Shaik, his attorney and two other Thomson officials. The attorney's notes of that meeting recorded Zuma as also present. The subject matter of the meeting comprised the ADS acquisition and attendant adjustments in the shareholdings of the relevant Nkobi and Thomson companies. One of the French people present, Mr P Moynot, testifying for the defence, said that Zuma only arrived when the business of the meeting was over but stayed to socialize. While present he was told of the restoration of Nkobi's interest in ADS and said he was happy with the result. Soon after that it was announced that the consortium of which ADS was a member had been awarded the contract for the corvette munitions suite.

[117] There can be no other reasonable inference in our view, given the contents of Shaik's letter to Perrier and the subsequent involvement of Zuma, that Shaik intended that Zuma should use his influence to persuade the French, through Perrier, that the rumour about Shaik was false and that Nkobi was acceptable to the South African government as an empowerment partner for Thomson to work with.

[118] The appellants advanced two submissions to try to overcome the consequences of that inference. One was that as a provincial MEC Zuma had no power or duty relative to the arms procurement process, which was a national government and, in fact, a Cabinet matter. The other was that the trial court

found that Zuma's actions in the present instance were not performed in his capacity of MEC but as Deputy President of the ANC.

[119] It is convenient to answer those arguments together. The evidence shows that the French unquestionably saw Zuma as a major force not only in KwaZulu-Natal but nationally. Indeed, they shared Shaik's forecast as to the political heights to which Zuma would rise. In short, he was regarded by both Shaik and the French as someone of considerable political influence as a result, among other considerations, of his being an MEC and Deputy President of the ANC. It was as such a person that Shaik sought his help and that the French accepted his assurances. That was so even although he was not yet a member of the national government. It is clear that what Shaik wanted Zuma to do was to act in conflict with his constitutional duty. He was asked, against the background of the past and ongoing payments made to him or on his behalf, to go and speak to the French to assure them that Nkobi was acceptable to the ANC government and thereby to regain a vital asset for Nkobi. This was something no commercial competitor would have been able to procure. In the language of the constitution Shaik wanted Zuma to undertake paid work; he wanted Zuma to act in conflict between his official responsibilities and his private interests; and he wanted Zuma to use the opportunities of his position as MEC to enrich himself, or improperly to benefit Shaik. The appellants' argument therefore cannot be accepted. The prosecution accordingly succeeded in showing that the ADS instance provided proof of Shaik's having acted with the intention alleged in the charge.

[120] Turning to the instance involving Professor Lennon, this has been outlined in [19] above. Shaik claimed in evidence that it was Lennon who wanted Nkobi's inclusion as the local BEE partner in the proposed eco-tourism project and he simply passed this on to Zuma for approval. It is obvious, however, from the draft letters compiled by Shaik's associate in Britain, Deva Ponnoosami, with Shaik's additions, that it was they who formulated the letter of approval which Zuma

signed as KwaZulu-Natal Tourism Minister. Zuma's letter, dated 4 February 1999, and faxed to Lennon from Nkobi's offices, contains the following:

'I have had discussions with one such company namely Nkobi Holdings, head-quartered in Durban. They are keen to participate in this venture as it fits well with their own leisure plans. I suggested to them to make contact with yourselves directly to speed the process and hopefully together you will both enhance the KwaZulu Natal tourism industry through raising the profile and excellence of the personnel involved in this industry . . . .'

[121] By fax Shaik caused a letter, also dated 4 February 1999, to be written by Martyn Surman, the Business Development Manager of the second appellant to Lennon. The letter said:

'I refer to the letter to you of today's date from Minister Zuma, . . . in which our company . . . was referenced.

I have been asked by Mr Schabir Shaik, executive Chairman & CEO, to affirm our company's interest in participating with you as a joint venture partner and that he would much appreciate it if you will kindly contact him personally, in order that you can discuss with him how Nkobi Holdings can make a positive contribution to this initiative.'

[122] Lennon responded on 9 February 1999 to Shaik:

'Following the fax dated 4 February 1999, I am most keen that we progress discussions on these projects and how we may work together. Please note our local agent in South Africa is Rupert Lorimer who will liaise directly with you as my agent. He will contact you in the next 7 days to progress this matter'.

[123] Plainly, Shaik did not simply direct relevant correspondence to the appropriate quarters as a sort of go-between. He obtained Zuma's intervention in order to advance Nkobi's business. In addition to the correspondence quoted above, if anything emphasises that it was his intention to exploit the Zuma influence for his own advantage it was his remarkable reaction to Lennon. (Again he wrote via Surman.) The letter, dated 15 February 1998 contains the following:

'I have to advise you that he [Shaik] finds your response insulting to say the least and that he considers that it lacks the business ethics which it deserves.

. . .

Having once obtained the support letters for you he now finds himself marginalised to deal with your so-called agents in South Africa ... Indeed he enquires why [they] were not able to assist you in the first place?

What we would have expected from you in your reply is the following:

* a detailed proposal on the objectives of the proposed study.
* proposed work share allocations between Nkobi Holdings and yourselves.
* a business plan attached thereto.

Mr Shaik has asked me to advise you that he is prepared to give you three days in order to come back to him, sketching out the issues referred to above, failing which he will go back to Minister Zuma.'

[124] Discussion of the correspondence in the Lennon matter may be concluded with reference to a letter from Shaik to Ponnoosami on 24 February 1999. He said:

'I shall be meeting with Minister Zuma tomorrow and if I do not receive the information as requested in my letter dated 15 February 1999, I shall move to inform Minister Zuma and seek to do whatever is necessary to stop Professor Lennon's process.'

[125] The attitude exhibited by Shaik in the correspondence reviewed above is completely destructive of his counsel's contention that the Shaik-Zuma interaction was reasonably possibly prompted by nothing more than mutual assistance of close friends.

[126] The fourth and final instance of Zuma's involvement was when, in October 2000, Shaik asked him to arrange a meeting between the then Minister of Safety and Security, the late Mr Steve Tshwete and Mr G Scriven, Chief Executive of an English company, Venson (Plc), which was contracted to the British Government to manage the London police vehicle fleet. The request was made in a letter on a Nkobi Holdings letterhead, the relevant portions of which letter read as follows:

'**Re: Privatisation, PPP - Motor Vehicle Fleet Management**

South African Police Services (SAPS)

In line with our Government's Guidelines on Public Private Partnership (PPP) I wish to introduce to the Department of SAPS a functional PPP Model and concept to its national motor vehicle fleet.

. . .

Through our International Finance & Technology partners, based out of the UK, Venson (Plc) we are indeed confident that our proposal is worth considering in terms of and in line with the PPP benefit accruals.

As the Chairman of Venson, Grant Scriven will be in South Africa next week, I would appreciate you communicating to the Minister of Safety & Security on our behalf to secure a meeting with the intention to fully appraise him accordingly of the Venson PPP UK Model.'

The meeting was arranged and successfully held but nothing materialised as a result.

[127] The appellants argued that it was not out of the ordinary to ask for a meeting between a Cabinet Minister and a foreign businessman and that Zuma's role was minimal. The question, of course, is not what Zuma's contribution was but what Shaik's intention was in making the request. His letter indicates clearly enough that this was not merely a case of putting a foreign businessman in touch with the appropriate Cabinet member. The proposal was one which would involve business advantage not only for Venson but for Nkobi as well and Zuma was asked to communicate on behalf of both of them. We agree with the trial court's view that the requested communication was not one which just any businessman could have expected to procure.

[128] The matter, however, goes further. When Shaik realised that the meeting had been fruitless he wrote Tshwete a letter of stern rebuke. Read in the light of all the other evidence it reveals what confidence Shaik drew from his relationship with Zuma. Effectively, it shows the authority with which Shaik could speak knowing he had Zuma's backing. He said, among other things:

'Despite numerous telephone calls to your offices, by both Mr Scriven from the United Kingdom and myself, as a follow-up to the above meeting, to this date not a single response has been forthcoming from your office.

I would presume that some basic office courtesy should apply at the least. A simple letter of thanks for having met with the Honourable Minister having taken the time to enlighten him of the

global changes taking place in the management of large scale police force moving infrastructure would have been an acknowledgment. Even a simple “no thank you” response would be better than no response surely. Not to respond at all despite our several attempts, is both rude and inefficient. . . .

It has been most embarrassing for me, as an emerging black entrepreneur to try to cover up the inefficiencies of our public offices and its failure to communicate when indeed our country seeks to attract foreign investments, capital and state of the art technologies.

Honourable Minister Tshwete, please do not take the above factual comments personally, but rather as constructive criticism of a small transaction in your department going both unnoticed and unrecognised. . . .

. . . How do we as the previously disadvantaged business sector build our capacities when our attempts to attract foreign and new technology partners are not even . . . recognised by our own Ministers, surely we are doomed from the start, surely our cries cannot go unheard, surely you have a role to play to ensure our growth and development. . . .’

[129] The Scriven matter provides additional proof, in our view, that Shaik’s actions were directed at motivating Zuma to use his influence in the promotion of Shaik’s business.

[130] The record contains a variety of yet further instances when Shaik, in conversation or correspondence, referred to his relationship with Zuma and revealed not only the economic advantage this held for the Nkobi enterprise, but also the disadvantage it held for those whose interests ran counter to Shaik’s. One example will suffice. It relates to a conversation between Shaik and Sono when Renong appeared to be dismissive of Shaik’s attempt to have Nkobi included in the project. Shaik said words to this effect:

‘They can play hard ball but we can play political ball.’

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

[132] It follows that Shaik was correctly convicted on count 1 of corruption as charged.

[133] As to the corporate appellants, all but one played a part at some time or another in effecting the payments. At all relevant times Shaik was their guiding mind. The inference is a necessary one that their respective roles were played with the intention alleged in the indictment and that they were also correctly convicted of corruption on count 1. The one company not involved in making the payments was the third appellant. However, in its case the position was this. Shaik caused the bribes to be paid to Zuma for the advantage of all the Nkobi companies so that whichever company should require the exercise of Zuma's influence would receive it. At all stages prior to and at the time of the ADS intervention the third appellant was the Nkobi shareholder in Pty. It was the entity that stood to gain ─ and did gain ─ directly from Zuma's intervention. The only reasonable inference in our view is that in procuring that intervention Shaik was acting certainly in his own interest and the group's interest generally, but also very definitely in the interest and on behalf of the third appellant. It follows that it, too, was correctly convicted on this count.

[134] In the result the applications for leave to appeal against conviction on count 1 are without merit. They must accordingly fail.

COUNT 2:

[135] As has been mentioned, this count concerns the irregular writing off in the annual financial statements of the Nkobi group of companies (specifically the fourth appellant's) for the year ending 28 February 1999, of an amount of R1 282 027.63. It relates to the first, fourth, seventh, ninth and tenth appellants only. (The collective term 'appellants' must in this section be read as referring to these five appellants.) A very brief introduction to the facts pertaining to this charge is set out in paragraphs [5], [11], [38] and [39] above. It is not in dispute that the amounts making up the total of R1 282 027.63 (see para [5] above) were

treated as debts of Shaik and appellants nine and ten in the accounting records of the Nkobi group of companies before the write-off.

[136] It was alleged in the indictment that the appellants committed fraud in that during the period February 1999 to early 2000 they made a misrepresentation to various persons, such as the shareholders, directors, accountants and creditors of the Nkobi group of companies and the Receiver of Revenue, by giving out that the amount written-off constituted development costs of Prodiba, and that they failed to reveal to these persons and entities, 'when there was a legal duty so to reveal', that the write-off had the nett effect of extinguishing certain of the first appellant's and/or ninth and/or tenth appellant's and/or 'Zuma's supposed debts in the books of the Nkobi group'. To the appellants' request for particulars to the charge the State replied that the misrepresentation was made by Shaik to the accountants Paul Gering and Ahmed Paruk of the firm David Strachan and Tayler, which was responsible for the 1999 audit of the group's books, and to a co-director, Mr Phambile Gama, at a meeting held towards the end of 1999 at which the audit of fourth appellant's books for the 1999 financial year was discussed. It was alleged further that the misrepresentation was made to the accounting staff (of the Nkobi group), by means of instructions by auditors to them to pass journal entries writing off the amounts as development costs of Prodiba.

[137] We should mention that Prodiba, the driver's licence project (referred to in para [5] above), is a joint venture in which each of three entities, Denel (through a small company known as Face Technologies), Idmatics, which was part of Thomson, and the Nkobi group (through the fifth appellant), held an interest. In terms of the agreement between the three entities Nkobi was to provide the manpower for the project. It is this provision of manpower, referred to in the court below as 'a work share right in Prodiba', that was the major source of income for the Nkobi group at the relevant time. It is not necessary to say more about the establishment or incorporation of Prodiba; suffice it to say that it became common cause at the trial that the amounts written off did not represent

development costs for Prodiba. The entry (writing off these amounts as development costs for Prodiba) was corrected as a 'fundamental error' in the 2002 annual financial statements of fourth appellant, this after Shaik had obtained legal advice that it was permissible to do so. He took these steps after the Directorate of Special Operations had commenced with their investigations and had interrogated staff at David Strachan and Tayler about the group's 1999 financial statements.

[138] The write-off was effected against a non-distributable reserve of R3 500 000, created in the group's books of account by the sale, from fourth appellant, of the work share right in Prodiba held by fourth appellant through fifth appellant, to another company within the group, namely Kobi-IT (Pty) Ltd. The creation of the non-distributable reserve is, in bookkeeping terms, in itself not objectionable. However, it is common cause that the write-off was irregular and that it resulted in a misrepresentation as to the financial state of the group.

[139] Shaik denied at the trial that he gave any instruction to the group's auditors to write off the loans. He disavowed any knowledge of an agreement of purchase and sale that may have been required for the sale of the work share right in Prodiba to Kobi-IT and professed a lack of competence in accounting matters as the reason why he did not know anything about the creation of a non-distributable reserve in fourth appellant from such sale. He asserted that he had heard of the write-off for the first time when he received a letter from Cecilia Bester in which the latter expressed her disagreement 'with the way Paul [Gering] has handled your individual income and the so-called development costs which he has written off'. The State's contention, on the other hand, based on the evidence it led, was that the instruction for the write-off originated from Shaik. The issue, then, was formulated by the trial court as follows:

'The falsity of the representations alleged and the potential prejudice to probable readers of the financial statements in question is admitted. The only issue is whether Shaik knew of it and was party to it.'

[140] The field audit at the Nkobi group premises was done by Mr Anthony Gibb, who was at that time serving articles (a requirement to be met prior to qualifying as a chartered accountant) with David Strachan and Tayler. His superiors were Mr Ahmed Paruk and Paul Gering, but the former was his immediate supervisor. He testified that where, during a field audit, he could not resolve an issue he would refer it to his supervisor for the latter's attention. After the field audit he would prepare draft annual financial statements which the partners normally discussed with the client, whereafter he would be instructed, by the partners, to 'process the following journal entries'. Following compliance with those instructions he would 'get the financial statements ready', which would be in accordance with the journal entries he had been instructed to process.

[141] In his testimony Paruk admitted that the loan accounts eventually written off would have appeared in the draft accounts and that the director's (Shaik's) loan account, which was in debit, was a concern that Gibb would have referred to him for resolution. Concerns like these were normally resolved at a meeting held with the client for the purpose of discussing them. In the present case, he said, such a meeting was indeed held towards the end of November 1999, at which Shaik (as sole director of fourth appellant), Colin Isaacs (the group's financial director), Gering and he were in attendance. The purpose of the meeting was to 'look at the draft financials' as the loan accounts needed to be cleared up. The question of their recoverability was of concern and was thus raised with Shaik, whose response as regards his personal loan account was an emphatic denial that he owed any money to the company. Shaik asserted, said Paruk, that the 'drawings' were expenses taken by him for the benefit of the company and that the bulk of the expenses in fact related to the tender for the Prodiba contract. As to the loan accounts in the ninth and tenth appellants, Shaik informed them (the auditors) that there had clearly been a misallocation, errors in the accounting system which he ascribed to his previous and present accountants. According to Paruk the non-distributable reserve of R3 500 000 and the write-off of the loan accounts were also discussed at the meeting. It was Shaik, said Paruk, who

wanted his investment in Prodiba to be reflected at its proper market value of R3 500 000 in the group's balance sheet and it was he who gave the instructions for the write-off. The value of the Prodiba contract had previously been placed in the footnotes to the annual financial statements at a figure of R30 000.

[142] Shaik denied that he attended a meeting towards the end of November 1999 where the write-off was allegedly discussed. He stated that any discussions that may have resulted in the decision to write-off the loan accounts as development costs for Prodiba would have taken place between his accountants, Isaacs and Vinesh Lechman and Paruk. He conceded, however, although he could not recall, that the reduction of his salary could possibly have been discussed with him. Shaik also denied that he was at a meeting where the sale of the Prodiba work share right was allegedly decided upon. He would have left such an issue to his project team of Gering and Isaacs. He said that when he received Cecilia Bester's letter in which the latter expressed disagreement with the write-off he immediately called a meeting with Paruk, Isaacs, Gering and Cecilia Bester, where he 'pleaded' with them to address the concerns raised in the letter. Although he did not take part in the discussions – he said he merely introduced the topic whereafter he went to sit in a back office – he testified that Isaacs and Gering convinced Bester that her arguments were incorrect. He accepted their word, he said, that they (Isaacs and Gering) had addressed her concerns.

[143] Paruk's was the only evidence led by the State on what took place at the meeting. The court *a quo* found him to be an unimpressive witness. A perusal of his testimony confirms this finding. During the investigations leading up to charges being preferred against the appellants, Paruk was interrogated under s 28 of the National Prosecuting Authority Act 32 of 1998 where he gave a different answer in his explanation for the write-off. His response in the interrogation was that the loan account of R57 668 in the seventh appellant and the director's fee of R171 000 were included in Shaik's loan account because of

an oversight, and that he was unaware that the second amount came from Shaik's director's fees. But the trial court found corroboration for Paruk's version from an examination of other objective facts and surrounding circumstances and consequently accepted his version regarding Shaik's attendance and participation at the meeting where the write-off and related issues were discussed.

[144] It was contended on behalf of the appellants in this court that Paruk's evidence that Shaik had informed him and Gering that the amounts in all three loan accounts had been expended on behalf of the group and that the write-off occurred as a result of this misrepresentation should have been rejected by the court *a quo*. Counsel submitted that for an auditor to simply accept a bald statement from Shaik, without any attempt to verify it, that the full amount of each loan account was incorrectly debited was indeed extraordinary. It was argued further, and correctly so, that Paruk conceded that Shaik's director's fee for the relevant year was reduced by R171 000; that this amount was transferred to the latter's loan account; that he explained that this was done 'on the basis of a taxation angle and that because the company had incurred a loss' he considered it pointless to have Shaik taxed on that salary. Counsel accordingly submitted that Paruk clearly knew that at least the respective amounts of R171 000 and R57 688 did not represent development costs for Prodiba and that on the probabilities he also knew that the full total of R1.282m could not have been incorrectly posted, more so with a competent bookkeeper (Bester) in control of the group's accounts. We agree. But knowledge of these facts on the part of Paruk does not necessarily mean that Shaik himself had no knowledge of the write-off before it was brought to his attention by Cecilia Bester, nor does it necessarily lend support for Shaik's contention that he never gave instructions that the write-off be effected.

[145] It is true that in his evidence-in-chief Paruk testified that one of the issues discussed at the meeting with Shaik was the creation of the non-distributable

reserve and that in cross-examination he said the opposite, ie that it was not discussed. In re-examination, though, he testified that the non-distributable reserve was explained to Shaik by Gering during the meeting. It is also correct that Paruk testified that he and Gering decided to phrase the write-off as 'development costs for Prodiba'. It will be recalled that Shaik denied that he told Paruk and others at the meeting that the amounts in the loan accounts represented 'development costs for Prodiba'. But all this and other criticisms, some justified, levelled at Paruk does not mean that his entire evidence should be rejected especially where there are other objective facts and circumstances which serve to corroborate essential parts of it. The crucial question is not whether Shaik gave instructions as to how the amounts concerned were to be written off, but rather whether he gave instructions that they should be written off on the basis that they were monies expended on company business.

[146] We accept the argument by counsel for the appellants that the loan accounts constituted assets in the group's books of account and that writing off assets would not per se have assisted in producing a better financial picture. But it helped to get a good set of financials to erase the shareholder/director's debit loan account ─ see paras [153] and [158] *infra*. We accept too that the problem the auditors were faced with was one of recoverability of the loans and that they overcame that problem by writing off the loan accounts below the line against the non-distributable reserve, without affecting the income figures. We also accept that it is more likely that the method in terms of which the write-off was effected – except the fact of the reflection of the value of the Prodiba project in the annual financial statement, an aspect we deal with later – was indeed the auditors' (Paruk and Gering) invention. As counsel put it, they engaged in creative accounting. But that still does not answer the critical question whether or not Shaik gave the instructions for the write-off.

[147] In addition to their submission that the trial court erred in relying on the evidence of Paruk as proof beyond a reasonable doubt that Shaik knew of, and

was party to, the write-off, counsel argued that the court erred in failing to draw an adverse inference against the State for the latter's failure to call Gering and Isaacs, who were the other two people present during the meeting where the instructions to write off were allegedly given. It was not in dispute in this court that they were available to testify at the trial. The response from counsel for the State was that they were made available to the defence at the end of the State's case and that it was thus open to the defence to call them to testify. For this reason, so the argument continued, no adverse inference should be drawn from the State's failure to call them.

[148] In *S v Texeira*[11] Wessels JA (Joubert JA and Galgut AJA concurring) said: 'In my opinion, therefore, the court *a quo* erred in concluding that the evidence of the single witness, Sarah, was satisfactory in every material respect, and that it was safe to convict appellant of murder on the strength of her uncorroborated evidence, notwithstanding the improbability inherent in her version.'[12] In that case the court agreed with counsel for the appellant that it was justifiable to draw an adverse inference from the State's failure to call an available witness who was clearly in a position to corroborate the evidence of a single witness that had an inherent improbability. It is true that in the present case Isaacs and Gering were present at the meeting according to Paruk and were in a position to corroborate his evidence in light of Shaik's denial that he had any knowledge of the write-off until his attention was drawn to it by Bester's letter. But the court *a quo* declined to draw an adverse inference from the State's failure to call them to testify precisely because it found corroboration for Paruk's evidence elsewhere. We proceed to examine this aspect presently.

[149] It is common cause that David Strachan and Tayler were appointed auditors of the Nkobi group of companies on 29 September 1999 after some unpleasantness had manifested itself between Shaik and his previous auditors,

[11] 1980 (3) SA 755 (A).
[12] At 764B-C.

Desai Jadwat. Up to that stage (and thereafter) the group had not shown any profitability. The trial court observed that the payments made by the group to Zuma up to December 1998 occurred in a loss-making situation and that as at 28 February 1998 both the fourth and sixth appellants were in a technically insolvent situation. Their liabilities exceeded their assets. It is not in dispute that when Bester joined the group in November 1998 as a project accountant – she later became financial manager – the 1998 financial statements had not been produced by Desai Jadwat. In answer to a letter from Shaik of 5 March 1999 to the senior partner of Desai Jadwat complaining about outstanding annual financial statements of the group, Mr Satish Ramsumer, who was the auditor dealing with the group's audit reminded Shaik, in a letter dated 8 March 1999, that when the group's financial statements for the 1998 financial year were discussed in November of that year the financial position of the fourth and seventh appellants, which were then also technically insolvent, had been brought to his attention. Shaik was also told that to avoid an adverse audit report the group's management accounts and projection for the next three years were required. These management accounts and projection, which were to have been provided by Isaacs by 30 January 1999, were not yet ready. If it could be shown that future profitability could make good past losses, then, according to Ramsumer, an adverse report would not be necessary. Minutes of a meeting held consequent to the correspondence between Shaik and Desai Jadwat, the correctness of which was not placed in dispute, reveal that it was made clear by Ramsumer that the February 1998 financial statements depended on substantial profits being shown in fourth appellant, failing which it would be difficult to certify that the group was 'a going concern'.

[150] By the time the financial statements for the 1999 financial year were due, the group's financial position had not improved. It is common cause that during the field audit Gibb worked with Bester, who provided him with summary trial balances for the individual companies. The trial balance of fourth appellant for the period 1 March 1998 to 28 February 1999 showed an accumulated loss of

R1.25m, carried forward from the previous year. Gibb also noted the problem of solvency and 'going concern' from the previous year: the company (fourth appellant) was suffering constant loss.

[151] In going about his function Gibb used a specimen audit programme. One of its headings directed him to obtain certificates from directors or shareholders for their loans, acknowledging their indebtedness to the company being audited. In the case of the group's field audit he left this section blank as there was no certificate acknowledging Shaik's indebtedness to fourth appellant in the total amount of R508 032.73. Gibb was concerned about the size of the loan and its recoverability. There were also loan debits in fourth appellant's books in the names of ninth and tenth appellants amounting to R226 576.44 and R347 159.80 respectively. For these he could find no explanation and Bester could not assist him either. He noted the existence of a debit loan account in Shaik's name in seventh appellant for R57 668. According to Gibb these were problems that he would have left for his superior, Paruk, to sort out with the client (Shaik). He testified, however, that if the loans were not recoverable, then 'technically we have an insolvent company'.

[152] It is common cause that Gibb faxed provisional journal entries for the 1999 audit to Bester for the latter to do the necessary alterations to her journal entries. The journal entries, said Gibb, had been given to him by either Paruk or Gering, but both had gone through them with him. He assumed that when he was handed the journal entries for him to pass, Paruk and Gering would have had a meeting with Shaik to discuss the draft annual financial statements that he would have prepared, as that was normal practice. Gibb also testified that the audit report was the responsibility of the partners (Paruk and Gering). They would normally discuss it with the client, particularly the question whether or not they were going to qualify it. He did not know whether in the instant case such a meeting took place, but it, too, was normal practice. The journal entries he was required to pass showed a transfer of the sum of R171 000 from Shaik's

director's fees in fourth appellant to his loan account, thereby reducing his director's fee to R24 000, and a transfer of Shaik's loan account of R57 668 from seventh to fourth appellant, where they were consolidated together with the debit loans of ninth and tenth appellants and reflected as Shaik's loan account in the total sum of R1 282 027.63. Another journal entry Gibb was required to pass showed that Kobi IT (Pty) Ltd, a hitherto dormant company in the group, had acquired an asset, viz the work share right in Prodiba, valued at R3 500 000. It was against this amount, reflected in the group's annual financial statement as a non-distributable reserve, that the write-off was effected.

[153] The court *a quo* held that 'the instruction given to Gibb and the journal entries he thereafter passed and handed to Mrs [Cecilia] Bester to correct her own accounts fully support Paruk's description of the ambit and nature of the debate that took place' at the meeting where Shaik allegedly gave the instructions for the write-off. Gibb's testimony, in our view, lends some support for Paruk's version that a meeting took place in late November 1999 at which the annual financial statements were discussed. The instructions given to him by Paruk and Gering as to the manner in which he was to pass the journal entries is strong support for Paruk's evidence that the consolidation of the debit loan accounts concerned and their write-off as development costs for Prodiba formed part of the discussions in that meeting. We accept that Shaik may not have been knowledgeable in accounting matters, and that the manner in which the write-off was effected, by establishing a non-distributable reserve, was creative accounting introduced by the auditors, as counsel for appellants contended. But it is highly unlikely that the auditors would have written-off the debit loan accounts on their own initiative without discussing them at all with Shaik. Both Paruk and Gibb were concerned about the recoverability of Shaik's loan account. According to Gibb the draft financial statements that he drew up after the field audit were given to Paruk, who, together with Gering, would have discussed them with Shaik. This was normal practice. There was no certificate acknowledging Shaik's indebtedness to fourth appellant and this Gibb had left to

Paruk to sort out with Shaik. Paruk's testimony is that a meeting did take place where this issue was raised with Shaik. It is in our view highly improbable that Paruk, without raising the question with Shaik, would have gone on a frolic of his own and written off Shaik's loan account as he did. How could he do so without so much as to enquire from Shaik whether or not the loan was recoverable?

[154] We accept, as counsel for appellants submitted, that Paruk clearly knew that the R171 000 which was accounted for as director's fees and the R57 668 that formed Shaik's debit loan account in seventh appellant were not development costs for Prodiba. But rather than these pointing to Shaik's lack of knowledge of the process, they point to the auditor's complicity in the scheme. We accept too that Paruk wrote off the loan accounts as he did so as to avoid having to qualify the accounts. As has been mentioned above, Gibb's testimony was that the question of qualifying an audit report would be discussed with a client. His evidence in this regard was not in dispute. In our view, the probabilities are that that issue would have been discussed with Shaik. And this brings us to another development that points to the fact that Shaik would have wanted to avoid a qualified audit report.

[155] It is common cause that earlier in 1999 Bester was concerned about the financial position of the group. This is clear from an internal memorandum to Shaik dated 7 June 1999 in which she expressed the view that the cash flow of the group was such that in the next six months it would 'not be able to fund itself and its arrear debt'. The group was constantly on overdraft and continuously rolling it. By 6 August 1999 she had become so despondent that she sent a letter of resignation to Shaik. However, she did not leave at the end of August. She decided to work until December 1999 as she wished 'to do the financials for February 1999', which were still outstanding. In another memorandum to Shaik dated 10 November 1999 she advised him that the group's bank (Absa) wanted to see draft accounts signed by the auditors by the end of November 1999, together with a 12 months forecast of the group's income for purposes of

considering the extension of the date of expiry of its overdraft facility. (Paruk and Gibb both testified that the financial statements were required by the bank. They were thus under pressure to finalise them before the end of November 1999.) She also drew Shaik's attention to the fact that the consolidated company was still in an insolvency situation 'as it was last year'; that the finalising of the group's accounts was important and that many decisions were to be required from him (Shaik) and Gering 'to ensure that a good set of accounts was drawn up', since these were 'critical for the extension of the overdraft'.

[156] It is so that there is no evidence to suggest that the 1999 financial statements were given to the bank. The overdraft facility was extended by letter also dated 10 November 1999, reviewable on 31 December 1999. No doubt Shaik would have wanted a good set of financial statements, which, if the bank were to insist on them, he would be able to produce. He conceded in cross-examination that sooner or later the financial statements in question would have had to be shown to the bank. The group, according to Bester's uncontested evidence, depended heavily on overdraft facilities. It is thus inconceivable that Shaik would not have bothered, in the circumstances, to ensure that the auditors produced a good set of financial statements.

[157] The trial court was 'markedly impressed' by Bester as a witness and held that where she was contradicted by Shaik it had 'not the slightest qualm in preferring her evidence as the truth of the matter'. This finding was not challenged on appeal. We can find no reason to differ from it.

[158] Bester testified that as the in-house accountant she could not account for Shaik's loan account which was in debit. In preparing for the audit for 1999 financial year she spoke to Shaik on several occasions about it. She asked him to assist her with it, ie to explain whether there were valid expenses that might have been wrongly posted and told him of the adverse consequences if he had a debit loan account. She was never given any reason, she said, to take the loan

out and to put the amount to expenses. She ultimately handed the books of account to the auditors without having resolved the issue. It is clear from Bester's evidence that Shaik was the only person who could have given her an explanation for his debit loan account and he knew that he could not have a loan account that was in debit. This, in our view, is a powerful indicator that Shaik was the person who would have informed the auditors that the moneys in his debit loan account were moneys expended on the group's business and had been wrongly posted.

[159] We have mentioned that the group's interest in Prodiba was held through the fifth appellant. It is not disputed that while Prodiba produced the drivers' licence cards in the Prodiba project the product which facilitated the reading of the cards was supplied by an American-based company, namely Symbol Technologies (Symbol). Its local branch was Symbol South Africa. The business link between Prodiba and Symbol prompted Mr John Dover, general manager of Symbol South Africa, to seek more business opportunities with Prodiba. His idea was to obtain a lucrative contract to provide 15 000 handheld barcode scanners to the Department of Transport for on the spot verification of drivers' licences. During May 1999 contact was established between Dover and Shaik. This led to Shaik making a bid to purchase a stake in Symbol. When that bid failed due to its rejection by Symbol's management in America agreement was reached between the parties that a joint venture be formed in South Africa involving the Nkobi group and Symbol. The fifth appellant was to be used as a vehicle for the joint venture and as part of the agreement Symbol was to purchase a stake in the fifth appellant. It thus became necessary for the group to show that fifth appellant had an underlying value, a task which fell on Isaacs, who received some advice from Gering in this regard. (The two together with Shaik formed part of the group's delegation in negotiations with Symbol.)

[160] It will be recalled that according to Paruk, Isaacs attended the meeting where the decision to write-off the loan accounts was taken. This much is not in

dispute. At that meeting Isaacs was armed with spreadsheets which he had prepared to facilitate the sale to Symbol of a stake in fifth appellant. These showed, inter alia, a projected gross income from Prodiba for the 2000 financial year of a sum in excess of R3m. Paruk's undisputed evidence was that at the time of the audit, which was towards the end of November 1999, the negotiations for the joint venture had gathered momentum. This, in our view, is one further development that would have driven Shaik to require a good set of financials from the auditors; that his investment in Prodiba be reflected 'at its proper value' and to make sure that a qualified audit report was avoided, although the joint venture eventually did not come to fruition.

[161] We accordingly agree with the court *a quo* that the circumstantial evidence fortifies Paruk's version that Shaik did attend the meeting to which the former testified. We agree with the trial court's rejection of Shaik's denial that he attended the meeting as false. As the court *a quo* found, it is not conceivable that Shaik would not have attended, regard being had 'for the compelling reasons that required his presence'. We also agree with the court's finding that Shaik was a party to the write-off.

[162] In view of this conclusion it is unnecessary to deal with the meeting Shaik called after receipt by him of Bester's letter in which she informed him that she disagreed with the manner in which the auditors had dealt with the loan accounts. It is also unnecessary to deal with counsel's criticisms on other findings by the trial court, such as, for example, the reasoning that the write-off served to conceal payments made to Zuma, especially in view of the public alarm raised by Patricia DeLille in Parliament about alleged corruption in the 'arms deal'.

[163] We have already mentioned that the trial court noted in its judgment that the 'falsity of the representations alleged and the potential prejudice to probable readers of the financial statements in question [were] admitted', and that the only

issue was whether Shaik knew of it or was party to it. In their heads of argument, however, counsel for the appellants submitted that Van der Walt could not find any indication that Absa bank had been presented with the 1999 financial statements; that no evidence was placed on record that the financial statements were presented to the South African Revenue Service, and that there was no evidence on record to show that any shareholder or Workers' College received them. The argument is therefore that there was no communication of the false representation to these entities. In *R v Heyne*[13] it was held that 'the false statement must be such as to involve some risk of harm, which need not be financial or proprietary, but must not be too remote or fanciful, to some person, not necessarily the person to whom it is addressed'.[14] Clearly there was communication of the false representation at least to Bester, the group's accountant – and to Gibb, who was not party to the discussions that led to the write-off – after she had asked Gibb for the financial statements upon seeing the provisional journal entries she received from him for her to 'correct' hers. Communication to Bester is sufficient to cover the crime of fraud alleged even though she herself may not have been prejudiced by the false representation.

[164] The misrepresentation was reflected in the journals and annual financial statements of the group – this is common cause. And once there was communication of it to the group's accounting staff, as indeed happened, there was always a potential danger that these documents, particularly the annual financial statements, might be passed on to the shareholders, the South African Revenue Service and other entities that might have had an interest in the group's business, such as Absa. There was, however, no evidence of any communication beyond the accounting staff. But that does not detract from the fact that the offence was committed upon communication of the misrepresentation to the accounting staff.

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[13] 1956 (3) SA 604 (A).
[14] At 622.

[165] The trial court held that Shaik, in making the false representations, used fourth, seventh, ninth and tenth appellants and convicted these corporate appellants accordingly. It was not suggested on appeal that this approach was in any way flawed. The appeal against the convictions on count 2 must therefore fail.

COUNT 3:

[166] The appeal on this count involves the first, fourth and fifth appellants. The court below convicted Shaik on the main charge and the fourth and fifth appellants on the first alternative charge under count 3. (In this section the references to the appellants should be read as references to these three appellants.) As stated above the main charge was one in terms of s 1(1)(a) of the CA.[15] The first alternative charge was one in terms of s 4(a) and/or (b) of POCA.[16] The convictions were based, in the main, on the content of the encrypted fax which reads as follows:

'AT

J de J

C.R. JP PERRIER

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[15] See footnote 3.

[16] The section reads as follows:

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

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

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

which has or is likely to have the effect –

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

[Para. (i) substituted by s 6 of Act 24 of 1999.]

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

(aa) to avoid prosecution; or

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

shall be guilty of an offence.'

ENCRYPTED FAX

re: JZ / S. SHAIK

Dear Yan,

Following our interview held on 30/9/00 with S. SHAIK in Durban and my conversation held on 10/11/1999 with Mr JP PERRIER in Paris, I have been able (at last) to meet JZ in Durban on 11th of this month, during a private interview, in the presence of S.S.

I had asked S.S. to obtain from J.Z. a clear confirmation or, or failing which an encoded declaration (the code had been defined by me), in order to validate the request by S.S at the end of September 1999. Which was done by JZ (in an encoded form).

May I remind you that the two main objectives of the "effort" requested of THOMSON are

- Protection of THOMSON CSF during the current investigations (SITRON)
- Permanent support of JZ for the future projects

Amount: 500k ZAR per annum (until the first payment of dividends by ADS).

Yours truly,'

It is common cause that

- AT, J de J, JZ and S.S. are the initials of Alain Thétard, Yan de Jomaron, Jacob Zuma and Schabir Shaik respectively;
- Thétard was the chief executive officer of Thomson CSF Holding (Southern Africa) (Pty) Ltd and a director of Thomson-CSF (Pty) Ltd;
- De Jomaron was the chief executive officer of Thomson (Africa) Ltd;
- 'C.R' is the French abbreviation for 'copy to';
- SITRON refers to the corvette acquisition program; and
- 500k ZAR stands for R500 000.

[167] It is also common cause that Thétard was the author of the fax. On the face of it he was saying that Shaik had requested Thomson to pay an amount of R500 000 per annum until the first payment of dividends by ADS; that the payment would be in return for protection of Thomson during the arms deal investigations and in return for the permanent support of Zuma in respect of future projects; that he, Thétard, had asked Shaik to obtain from Zuma confirmation of the request; and that Zuma had done so in encoded form.

[168] The appellants objected to the admission of the fax in evidence but the court below ruled that it constituted an executive statement in furtherance of a common purpose admissible against other *socii criminis*. In *R v Miller* 1939 AD 106 this court had occasion to pronounce on the admissibility of such statements. It was the Crown's case that the accused, Miller, acting in concert with one Roy, committed a fraud on the Union Government by representing to Customs officials, by means of false entries in stock books, that certain material had been manufactured into shirts, collars and pyjamas, whereas in fact that had not been done.[17] Watermeyer JA said:[18]

'When more than two persons are concerned in the commission of a crime, and one is being tried alone as a *socius* of the others, then the independent acts of the others can be proved separately in order to show their share in the crime and inferences can be drawn by the jury from such acts (see *R v Desmond* (11 CCC 146)).'

And later:[19]

'In the present case the writings of Roy on the cutting slips and reconciliation slips were not tendered as evidence to prove the truth of what is asserted by him in them. In fact in these writings he does not make any assertions. But the writings are circumstantial evidence from which the part he was taking in the fraud can be inferred. As such they are admissible.'

In *R v Mayet* 1957 (1) SA 492 (A) Schreiner JA said in regard to such statements:[20]

'Words that are said as part of the carrying out of a purpose stand on the same footing as acts done; they differ from mere narrative.'

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[17] At 111.
[18] At 118.
[19] At 119.
[20] At 494F-G.

[169] In the present case, unlike the position in *R v Miller*, the State tendered the encrypted fax as evidence to prove the truth of what is asserted in the fax and the court below admitted it as such ie it allowed the hearsay evidence contained in the fax on the basis of what it, in terms of the common law, considered to be an exception to the rule against hearsay. Whether or not the common law did recognise such an exception need not be decided by us as it has been held by this court that the reception of hearsay evidence is now regulated by s 3 of the Law of Evidence Act 45 of 1988.[21] However, Squires J said that had he not admitted the fax on the basis that it contained an executive statement he might well have been disposed to admit it in terms of this section. The section provides as follows:

'3 Hearsay evidence

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

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[21] *S v Ramavhale* 1996 (1) SACR 639(A) at 647d-e; *Makhatini v Road Accident Fund* 2002 (1) SA 511 (SCA) para [21]-[22]; and *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA) para [14]-[15]. See also Zeffert, Paizes and Skeen *The South African Law of Evidence* p362 and Schmidt en Rademeyer *Schmidt Bewysreg* 4 ed p474.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

(4) For the purposes of this section-

'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

'party' means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.'

During the oral argument before us the parties only dealt with the admissibility of the fax in terms of this section. For reasons that follow we are of the view that the fax should indeed have been admitted in terms of the section.

[170] Section 3 provides that hearsay evidence is admissible if a court is of the opinion that it should be admitted in the interests of justice. In *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Another* 1997 (1) SA 1 (A)[22] this court held that the admissibility of evidence is, in general, one of law, not discretion and that there was nothing in s 3 which changed this situation. The section enjoins a court in determining whether it is in the interests of justice to admit hearsay evidence to have regard to every factor that should be taken into account, more specifically to have regard to the factors mentioned in s 3(1)(c). Only if, having regard to all these factors cumulatively, it would be in the interests of justice to admit the hearsay evidence, should it be admitted.

[22] At 27D-E.

The nature of the proceedings.

[171] Being criminal proceedings the onus was on the state to prove the appellants' guilt beyond reasonable doubt in a fair trial which, in terms of the Constitution, entailed the right to challenge evidence.[23] Although the right to challenge evidence does not always encompass the right to cross-examine the original declarant,[24] courts do have an 'intuitive reluctance to permit untested evidence to be used against an accused in a criminal case'.[25] In *S v Ramavhale* 1996 (1) SACR 639 (A)[26] Schutz JA said that 'a Judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so'. However, sight should not be lost of the true test for the evidence to be admitted and that is whether the interest of justice demands its reception.[27]

The nature of the evidence.

[172] The evidence consists of Thétard's advice to his superiors as to his understanding of what happened at a meeting between him, Shaik and Zuma on 11 March 2000. It was recorded shortly after the meeting; was of a very sensitive nature in that it, on the face of it, incriminated Thétard, Shaik and Zuma; and it was intended to be acted upon by his superiors. According to Ms Delique, Thétard's secretary at the time, whose evidence was accepted by the court below, it was on the instruction of Thétard conveyed by encrypted fax to Paris. The appellants contended in their heads of argument that it could not be found beyond reasonable doubt that the fax was indeed transmitted but this contention was, correctly in our view, not pressed in argument before us.

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[23] Section 35(3) of the Constitution.
[24] *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA) para 24.
[25] *S v Ramavhale* 1996 (1) SACR 639 (A) at 647j; *S v Ndhlovu supra*.
[26] At 649d-e.
[27] See *Makhatini v Road Accident Fund* 2002 (1) SA 511 (SCA) par 24.

The purpose for which the evidence was tendered.

[173] The evidence was tendered by the state to prove the offence in terms of the main charge under count 3 and was of vital importance to the State's case.

The probative value of the evidence.

[174] The probative value of the hearsay evidence contained in the fax depended on the credibility of Thétard, in respect of what is stated in the fax, at the time he wrote it.[28] It is common cause between the parties that, on the evidence adduced in the court below, Thétard, in general, would seem to be an unreliable and dishonest person. It does, however, not follow that he was also unreliable or dishonest in respect of what he recorded in the fax. The content of the fax, being incriminating, had it fallen into the wrong hands, could have had very serious adverse consequences for Thétard, Shaik and Zuma. A false intimation to his superiors could also have had very serious adverse consequences for them, should they have proceeded to give effect to the requested bribe, wrongly thinking that Zuma was amenable to receiving a bribe. Thétard was alive to these dangers as one could expect him to be and as is demonstrated by the fact that he instructed Delique to transmit the fax in encrypted form. It is for this reason highly unlikely that he would have exposed himself, Shaik, Zuma and his superiors to these dangers had it not been necessary to do so. It is in fact almost inconceivable that he would have advised his superiors that he understood the then Deputy President to have agreed to receive a bribe if that was not his understanding of what had happened at the meeting. Thomson considered a good relationship with influential politicians in this country of importance to them and would not unnecessarily have done something that could sour that relationship. For these reasons it is highly improbable that Thétard would falsely have advised his superiors that Shaik had requested the payment of a bribe in return for the favours mentioned in the fax. No possible motive for doing so was suggested by the appellants. Being a sensitive matter with inherent attendant dangers and a matter that his superiors

[28] *S v Ndhlovu supra* para 33.

were intended to act upon, it is also likely that Thétard would have taken great care accurately to reflect his understanding of what the request by Shaik was. In these circumstances the fax has a high probative value notwithstanding the fact that Thétard would in general appear to be an unreliable person.

[175] The fax has an even higher probative value if regard is had to the extent to which confirmation for its contents is to be found in the other evidence tendered by the State. Thétard and Shaik did meet on 30 September 1999 at a time when there were calls for an investigation into the arms procurement process and shortly after a special audit review of such procurement had been approved by the Minister of Defence; Thétard, Shaik and Zuma did meet in Durban on 10 or 11 March 1999; and on the face of the evidence adduced by the state, the request referred to in the fax gave rise to an agreement in terms of which an amount of R500 000 was payable to the fourth appellant, and to payment of an amount of R249 925 to the fifth appellant, for services which had to be rendered but had in fact not been rendered during the term of the agreement.

The reason why the evidence was not given by the person upon whose credibility the probative value of the evidence depended.

[176] The evidence was not given by Thétard because he refused to come to South Africa to testify and because it was clear that he would deny that the fax correctly reflected his understanding of what happened at the meeting which, according to the fax, took place on 11 March 1999. The appellants submitted that Thétard or Thomson could have been charged with them or that Thétard's evidence could have been obtained on commission or in some other way. In our view it is highly unlikely that the evidence of Thétard or his presence as a co-accused would have strengthened the appellants' case. As stated above the appellants themselves submitted in respect of the admissibility of the fax, albeit in the context of the probative value of the fax, that Thétard had been shown to be a dishonest person. One illustration of such dishonesty is contained in a letter by him to Perrier dated 26 June 2003. In the letter he confirmed that he had met

Zuma in Durban during the first quarter of 2000 at his official residence together with Shaik and stated that they only dealt with general matters regarding Thomson's Durban establishment. He added that he could not recall having written the fax. Subsequently, in an affidavit, he admitted that he was the author of the fax but stated that a bribe had not been discussed with Shaik and Zuma; that the document was merely a rough draft of a document in which he intended to record his thoughts on separate issues in a manner which was not only disjointed but also lacked circumspection; that he crumpled it up after he had written it and threw it in the waste paper basket; that he never gave instructions that the document be typed; and that the amount of R500 000 related to a request for funds by Shaik unrelated to any bribe to Shaik or Zuma. Although he said that he did not agree with the construction placed on the fax he did not suggest any other than the obvious one. The appellants were likewise unable to suggest an interpretation inconsistent with a bribe; Delique testified that Thétard instructed her to type the document and to fax it in encrypted form; and the appellants admitted that the creases which appear on the original document were not caused by the document having been crumpled up in a ball as alleged by Thétard. In the circumstances, quite apart from the fact that Thétard indicated that he was not prepared to come to South Africa to testify, the State could not have been expected to call him as a witness or to apply for his evidence to be taken on commission. It was open to the appellants to do so if they thought that his evidence would advance their case.

Any prejudice to appellants which the admission of the evidence could entail.

[177] The fact that the admission of the fax could lead to the conviction of the appellants was clearly not intended to constitute prejudice to be taken into account in deciding whether the evidence should be admitted or not. It is for this very purpose that hearsay evidence is, in the interests of justice, admitted in criminal cases. The appellants, however, contended that they were prejudiced by the admission of the fax because they had not had an opportunity to cross-

examine Thétard. However, it could only be found that the appellants would be prejudiced in this respect if there appeared to be a reasonable possibility that cross-examination of Thétard would strengthen the appellants' case. In the light of what has been said in the preceding paragraph it is highly unlikely that cross-examination of Thétard would have rendered positive results for the appellants. All the indications were that cross-examination of Thétard would have served no other purpose than to reinforce the impression that he is dishonest and unreliable. In the circumstances the risk that the appellants would be prejudiced by not being given an opportunity to cross-examine Thétard was very slim.

Any other factor

[178] Another factor that should in our view have been taken into account is that this is not a case in which the appellants were faced with evidence of which they had no knowledge and which could for that reason not be contradicted by them. Shaik was present at the meeting referred to in the fax and knew exactly what had been said. No other relevant factor to be taken into account in terms of s 3 was suggested by the appellants and we are not aware of any such factor.

Conclusion in respect of the admissibility of the evidence

[179] Having regard to the high probative value of the evidence and the fact that the risk that the appellants would be prejudiced by its admission was slim, the admission of the fax in evidence was in the interest of justice notwithstanding the fact that its admission was sought in criminal proceedings and the fact that such evidence is of vital importance to the state's case.

[180] In terms of s 3(1) the section is subject to the provisions of any other law. Section 8 of the same Act repealed sections 216 and 223 of the Criminal Procedure Act 51 of 1977 but not s 222 of that Act. Section 222 provides that the provisions of sections 33 to 38 inclusive of the Civil Proceedings Evidence Act 25 of 1965 shall *mutatis mutandis* apply with reference to criminal proceedings. Relying on these provisions the state submitted, in its heads of argument, that

the fax should also have been admitted in terms of s 34 of the Civil Proceedings Evidence Act.[29]

[181] The court below made no mention of this section in relation to the admissibility of the fax; the appellants did not in their heads of argument or in their oral argument address the question whether the fax should have been admitted in evidence in terms of this section; and although the respondent submitted in its heads of argument that the fax should in any event have been admitted in terms of this section it did not, in oral argument before us, by reference to this section, counter the appellants' argument that the fax should not have been admitted. *Prima facie* it seems to us that all the requirements of the section were satisfied and that the court below was obliged in terms of the section to admit it in evidence. However, in the light of the fact that the matter was not canvassed in argument before us and the fact that we do not know for what reason the court below and the appellants did not consider the fax to be

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[29] The section provides as follows:

'34 (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of that fact, provided –

(a) the person who made the statement either –

(i) had personal knowledge of the matters dealt with in the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with therein are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had or might reasonably have been supposed to have personal knowledge of those matters; and

(b) the person who made the statement is called as a witness in the proceedings unless he is dead or unfit by reason of his bodily or mental condition to attend as a witness or is outside the Republic, and it is not reasonably practicable to secure his attendance or all reasonable efforts to find him have been made without success.

(2) The person presiding at the proceedings may, if having regard to all the circumstances of the case he is satisfied that undue delay or expense would otherwise be caused, admit such a statement as is referred to in subsection (1) as evidence in those proceedings –

(a) notwithstanding that the person who made the statement is available but is not called as a witness;

(b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof proved to be a true copy.

(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

(4) A statement in a document shall not for the purposes of this section be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the provisions of this section, any reasonable inference may be drawn from the form or contents of the document in which the statement is contained or from any other circumstances, and a certificate of a registered medical practitioner may be acted upon in deciding whether or not a person is fit to attend as a witness.'

admissible in terms of the section, we deem it inadvisable to decide the matter on this basis.

[182] Substantial corroboration for the evidence contained in the fax is to be found in the other evidence adduced by the State and in Shaik's own evidence. We shall now deal with such corroborative evidence.

[183] It is common cause that Shaik and Thétard met in Durban on 30 September 1999. Shortly before the meeting, namely on 21 September 1999, a motion by De Lille, a member of parliament, had been tabled in parliament, calling for the establishment of a full judicial commission of enquiry into the arms acquisition and offset process, to determine whether certain officials and public representatives were guilty of criminal conduct in their dealings in regard to the arms procurement process. In addition, only two days before the meeting, the Minister of Defence approved a special audit review of the procurement of the strategic defence packages.

[184] On 9 February 2000, a newspaper, City Press, reported under the heading 'Senior defence official in arms corruption scandal':

'Claims under scrutiny include that:

- a senior politician intervened to reopen negotiations for the contract to provide the corvette defence suite, after which French outfit Thomson, together with a local empowerment group, African Defence Systems, were declared the preferred bidders.
- this was after a different local company received indications it was the preferred bidder.'

As was stated by the court below the report 'clearly identified Thomson as one of the culprits in the allegations of corruption and left the identity of the senior politician to guesswork and rumour'. On the same day the Presidency issued a statement rejecting 'any insinuation that Deputy President Jacob Zuma is implicated in shady arms deals'.

[185] Two days later Shaik wrote to Thétard:

'I refer to our understanding Re: Deputy President Jacob Zuma and issues raised.

I will appreciate it if you can communicate to me your availability to meet.'

It is common cause that pursuant to Shaik's letter Shaik, Thétard and Zuma met in Durban on 10 or 11 March 2000.

[186] It is furthermore common cause that Shaik on these occasions ie on 30 September 1999 and again on 10 or 11 March 2000 requested that an amount be paid by Thomson. However, according to Shaik his request for the payment of an amount had nothing to do with an enquiry into the arms procurement process. He testified that he, at both meetings, asked for a donation to be made to the Jacob Zuma Education Trust but this evidence was rejected by the court below and was so clearly false that the court's finding was in no way called into question before us.

[187] The ADS dividends were irrelevant in so far as the Jacob Zuma Education Trust was concerned but not in so far as Nkobi was concerned. Nkobi had cash flow problems at the time, due in part to the fact that it was assisting Zuma financially. It was probably foreseen, correctly as it turned out, that once it started receiving dividends from ADS its problems would be at an end. This explains why the payments of R500 000 per annum were in terms of the fax to come to an end when ADS started to pay dividends.

[188] Subsequent to the meeting on 10 or 11 March 2000, on 22 May 2000, Shaik met with Perrier in Paris. Thereafter, on 31 August 2000, he wrote to Thétard:

'I have also raised a very important matter with Mr Jean Paul Perrier which he had sanctioned, for implementation by yourself. This was done during our last meeting in Paris several months ago, and despite my several attempts to raise this issue with you in order to resolve the undertaking, you have continually ignored this concern.

You leave me no choice but to seek alternative remedy to this matter, and therefore I wish to put the above matter on record with you.'

Shaik testified that he was referring to 'the donation' ie he confirmed that he was referring to the matter that was discussed at the meetings with Thétard on 30 September 1999 and on 10 or 11 March 2000. He also, in his evidence in chief, confirmed the statement that Perrier had sanctioned 'the donation' for implementation by Thétard. Later, under cross-examination, he backtracked by saying that Perrier still had to get authority from his own board and still later that Perrier said that he had to take the matter up with his senior management.

[189] On 6 October 2000 Shaik wrote to Thétard:

'The subject matter agreed by ourselves in Pretoria during the Dexsa show over breakfast. My party is now saying that we are reneging on *an agreed understanding, this request already having been agreed upon by Mr Perrier*. I since then communicated this understanding to my party. Several months later no real action. I share the sentiment with my party that he feels let down, this is particularly unpleasing given the positive response from Mr Perrier, consequently as my party proceeded to an advanced stage on a certain sensitive matter which was required to be resolved. This delay is obviously proving to be extremely detrimental and embarrassing for all of us. I therefore urge you to respond timeously on this extremely delicate matter.'

(Emphasis added.)

Once again Shaik confirmed in evidence that he was referring to 'the donation'.

[190] Shortly before this letter

- Shaik had learnt of Zuma's Nkandla project, the estimated cost of which was more than R2m.
- a special review by the Auditor-General of the selection process of strategic defence packages for the acquisition of armaments had been referred to parliament's Standing Committee on Public Accounts ('Scopa').

[191] The terms of the letters referred to are consistent with the terms of the fax and inconsistent with Shaik's explanation that his request was that a donation be made to the Jacob Zuma Education Trust. If the request was for a donation there

would have been no need to refer to it in such guarded terms as ‘a very important matter’, ‘this issue’, this understanding’, ‘a certain sensitive matter which was required to be resolved’ and ‘this extremely delicate matter’. It would likewise not have been necessary to refer to Zuma or the Jacob Zuma Education Trust as ‘my party’. Had the request been for a bribe as the fax indicates, the use of these expressions is understandable.

[192] On 2 November 2000 a report by Scopa recommending a joint investigation by the Public Protector, the Auditor-General, the National Prosecuting Authority and the Heath Special Investigation Unit into the arms procurement process was adopted by parliament. Shortly thereafter on 7 November 2000 Bianca Singh, Shaik’s personal assistant at the time, accompanied him on a trip to Mauritius. Her function was to keep minutes of a meeting that was to be held with representatives of Thomson. Shaik instructed her to take along a file containing newspaper articles relating to the arms deal investigation. The meeting took place on 8 November and was attended by Shaik, Thétard and De Jomaron. According to Singh, Shaik said during the course of the meeting that they had to discuss ‘damage control’. Thétard made copies of the newspaper articles and Shaik then said that if the Heath Investigating Unit continued and a certain ANC member opened his mouth there would be big trouble. He looked at Singh and said that he hoped that she was not minuting what was being said. Shortly thereafter she was asked to leave. Her evidence about the newspaper articles; that Shaik said that they had to discuss damage control; that it was said that if a certain member of the ANC were to open his mouth there would be trouble; that she was told not to minute the discussion; and that she was subsequently asked to leave, were not challenged. It was merely put to her that Shaik and others had their suspicions about other contractors and that one of those contractors could be in trouble if certain investigations were done. Singh denied what was put to her and testified that she had a clear recollection of what had been said.

[193] In yet another letter to Thétard, dated 8 December 2000, Shaik wrote:

'Kindly expedite our *arrangement* as soon as possible, as matters are becoming extremely urgent with my client.'

(Again the emphasis is ours.)

This letter incorporated an application for a 'service provider agreement' dated 1 November 2000 and signed by Shaik. On the same day that the letter was written Scopa called on the President to issue a proclamation authorising the Special Investigative Unit to take part in the investigation of the arms procurement process.

[194] According to the draft 'service provider agreement' signed by Shaik on behalf of the fourth appellant, Thomson CSF International Africa Ltd undertook to pay the service provider, being the fourth appellant, R500 000 in two instalments of R250 000 each. The first payment was payable before the end of December 2000 and the second on 28 February 2001. The agreement was to be for an initial period of six months and was by agreement renewable for successive one-year periods.

[195] Shaik again wrote to Thétard on 11 December 2000:

'I assume the first service arrangement payment to occur before the 15th December 2000 so that I could give effect to its intended purpose before we close.'

[196] Acting on behalf of the fourth appellant Shaik concluded a service provider agreement dated 1 January 2001 with Thomson-CSF International Africa Ltd ('Thomson Africa') represented by De Jomaron. The agreement differs in some respects from the draft service provider agreement. One difference is that the first instalment of R250 000 was payable before the end of January 2001. In terms of this agreement the fourth appellant undertook to identify new investment projects and to present them to Thomson Africa together with a business plan. In this regard the fourth appellant undertook to submit monthly activity reports to Thomson Africa.

[197] Thomson Africa made a payment of R249 925 in terms of the service provider agreement to the fifth appellant on 16 February 2001. On 28 February 2001 the fifth appellant paid R250 000 to Development Africa. The court below found that there was no sign that Development Africa was anything other than the alter ego of a Mr Reddy who eventually arranged for the payment of the bulk of the costs of the home that had been erected for Zuma at Nkandla.

[198] The fourth appellant failed to submit the monthly activity reports required in terms of the service provider agreement and on 1 March 2001 Thomson Africa requested Shaik to 'submit a monthly activity report on a regular basis' and to also do so in respect of the previous months. The second payment in terms of the service provider agreement was not made and the agreement was not renewed when it expired at the end of May 2001. Shaik nevertheless wrote two letters dated 15 April 2001 and 16 July 2001 respectively to Thales Africa (Thomson had by that time changed its name to Thales) in which he mentioned projects which he considered worthy of consideration by Thales. He admitted in evidence that these letters were written in August and backdated. According to him it was done at the request of De Jomaron of Thales in order to comply with Thales' own financial and administrative guidelines.

[199] Shaik testified that, unlike the letters preceding the letter dated 8 December 2001, the letters dated 8 December 2001 and 11 December 2001 had nothing to do with 'the donation'. A cheque in an amount of R2m and endorsed by Mr Mandela in favour of Zuma, had on 17 October 2000 been deposited into Zuma's current account. On the same day Zuma paid R1m of that amount to the Jacob Zuma Education Trust. According to Shaik he became aware that there was a substantial credit in Zuma's account, whereupon he arranged for an amount of R900 000 to be transferred to a call account of the tenth appellant so as to attract a higher rate of interest. He said that the arrangement between him and Zuma was that he could move funds in and out of the account in his discretion. Subsequently, on 6 December 2000, he learnt that

R1m of the amount of R2m was intended for Development Africa. The R900 000 that he had deposited into the tenth appellant's call account was by then no longer available with the result that he needed the service provider agreement to restore the money he had taken from Zuma's account. That, according to Shaik, was the intended purpose referred to in his letter of 11 December 2000 and that was the matter that was becoming 'extremely urgent with his client'. Asked what had happened to the request for a donation Shaik said that it had become evident that the donation was not forthcoming and, 'as the funds from Mandela arrived in December', he and Zuma simply lost interest in pursuing a matter that was leading them nowhere.

[200] There are various problems with this evidence of Shaik. First, on his own evidence in chief he had not told Thétard that he needed the money payable in terms of the service provider agreement to repay the amount that he had withdrawn from Zuma's account.[30] In the circumstances it is somewhat unlikely that he would, in his letter of 11 December 2000, have referred to an intended purpose, meaning the restoration of the amount he had taken from Zuma's account. Thétard would have understood the intended purpose to be the one discussed at the meeting on 10 or 11 March 2000 and subsequently agreed to by Perrier. Second, if the intended purpose was to repay a debt and not to give effect to the aforesaid agreement, one would not have expected Shaik, in his letter dated 8 December 2000, to refer to Zuma as his client. Third, the ostensible purpose of the service provider agreement is to earn a fee for services rendered and not to repay a debt. Had it been a genuine transaction Shaik would not have described his professed intention to use the fee to pay a debt as the intended purpose of the agreement. Fourth, the service provider agreement was apparently conceived in November at a time when it was not known to Shaik that the R900 000 he had withdrawn from Zuma's account was destined for Development Africa. The service provider agreement would therefore, at its

[30] Under cross-examination he retracted this evidence and said that he had told Thétard why he needed the money.

inception, not have been intended to restore the money Shaik had taken from Zuma's account. On the other hand, if the intended purpose was still 'the donation', the references to an 'intended purpose' and to 'my client' are quite understandable.

[201] The court below rejected Shaik's evidence that he was, after he had learnt of the donation of R1m from Mandela to the Jacob Zuma Education Trust, no longer concerned about 'the donation' and that he was thereafter in his letters of 8 and 11 December 2000 referring to an arrangement unrelated to 'the donation' earlier agreed to. The finding was clearly correct and the appellants did not suggest any basis for interfering with it.

[202] The court below concluded that there was no doubt that the encrypted fax reported 'the conclusion of an agreement reached by Shaik and Thétard that Thomson would pay Jacob Zuma R500 000 until the ADS dividends became available, in order to secure the two benefits for Thomson, namely that he would provide a present protection from the corvette acquisition investigation and hereafter help in securing Government contracts in future'. We do not agree that the fax reflects an agreement between Shaik and Thétard. According to the fax Thétard was merely conveying a request by Shaik. The agreement was only reached when, on Shaik's own evidence, Perrier subsequently approved his request. Shaik's later evidence that Perrier still had to get approval from his senior management and board can safely be rejected in the light of the two letters in which he categorically stated that Perrier had approved the request and the fact that he did not qualify these statements in his evidence in chief.

[203] The fax, the correspondence, Shaik's false evidence, the service provider agreement and the payment in terms thereof cumulatively, in our view, fully justified the finding of the court below that it had been proved beyond reasonable doubt that what Shaik described as a request for a donation to the Jacob Zuma Education Trust was in fact a request for the payment of a bribe to Zuma. As was

found by the court below the service provider agreement was in reality nothing more than a vehicle to give effect to the request recorded in the encrypted fax and to disguise the fact that the amount of R249 925, paid in terms of the service provider agreement, was intended to be a bribe.

[204] In terms of the fax Zuma confirmed Shaik's request in a code devised by Thétard and evidently explained to Zuma by Shaik. The appellants submitted in the court below that Shaik could have misrepresented the meaning of the code to Zuma; that there is consequently a reasonable possibility that Zuma did not know of the bribe and did not agree to the bribe; and that in order to succeed the state had to prove that Zuma knew of the request and agreed to accept the bribe. The court below rejected this argument on the ground that Shaik testified that Zuma knew what was being discussed; that Shaik would not have misrepresented the position as there was a risk that his deception would subsequently be revealed; and that it was unlikely that a dishonest broker would arrange a meeting between the two parties that he was deceiving.

[205] In their heads of argument the appellants repeated these submissions but during the oral argument before us they made it clear that they were no longer relying on them. In our view they were correct in doing so. It was for the reasons that follow not necessary for the state to prove that Zuma was aware of the request by Shaik and that he agreed to accept the bribe.

[206] The State proved that Thomson corruptly offered (the offer having been communicated to Shaik)

- to give a benefit
- which was not legally due
- to a person, being Zuma,
- who had been charged with duties, being the duties set out in s 96(2) of the Constitution
- by virtue of the holding of the office of Deputy President of the RSA

- with the intention to influence him
- to commit or to do an act in relation to such duty.

The State, therefore, proved that Thomson committed an offence in terms of s 1(1)(a)(i) of the CA. The section does not expressly require communication of the offer to the person who is sought to be influenced and there is no reason to read such a requirement into the section. An offer to pay a bribe to an official may for example be made to his secretary and be withdrawn immediately because of the secretary's reaction. In these circumstances an offer, within the natural meaning of the word, was made and there is no reason to think that the intention was to exclude such an offer from the offence of corruption in terms of the section.

[207] The State also proved that it was Shaik who persuaded Thomson to make the offer. Shaik is, therefore, himself guilty of an offence in terms of s (1)(1)(a)(i) of the CA. It follows that it is unnecessary to decide whether Zuma was aware of the offer.

[208] In terms of s 4 of POCA any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and who enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property or performs any other act in connection with such property, which is or is likely to have the effect of enabling or assisting any person who has committed or commits an offence, to avoid prosecution, shall be guilty of an offence. It is clear that fourth appellant by entering into the service provider agreement and the fifth appellant by receiving the payment made in terms of the service provider agreement assisted Shaik and Thales to avoid prosecution and that they therefore committed an offence in terms of the section.

[209] In the result the appeal of the first appellant against his conviction in respect of the main charge under count 3 and the appeal of the fourth and fifth

appellants against their convictions under the first alternative charge under count 3 should be dismissed.

SENTENCE

[210] Dealing first with the corporate appellants, this court granted the second, third, fourth, fifth and eighth appellants leave to appeal against the sentences imposed by the court below in respect of count 1. Leave was refused in respect of the sentences imposed on the sixth, seventh, ninth, tenth and eleventh appellants.[31] Having regard to the conclusions reached earlier in this judgment the sentences imposed on the last-mentioned appellants on this count thus remain extant.

[211] The basis for the appeal against sentence on count 1 imposed on the appellants referred to above is that the fines set out in para [57] above are shockingly inappropriate, especially in view of the fact that the use of their accounts was fortuitous and that they did not gain any advantage as a result of the payments made.[32]

[212] Squires J took care to ensure that he imposed fines only on those corporate appellants who could afford to pay. Each of the corporate appellants is a separate legal personality. The fortunes of each are linked to the prosperity of the group and of Shaik. Section 332 of the CPA provides for the prosecution of corporations in circumstances such as those of the present case. See in this regard *S v Joseph Mtshumayeli (PVT) Ltd* 1971 (1) SA 33 (RA) at 34B-35E. In our view, the fines imposed are not shockingly inappropriate and achieve the correct balance between societal interests and the circumstances of the corporate appellants. We also detect no misdirection or irregularity in this regard.

[31] See para [61] above.
[32] This appears from the notice of appeal. The heads of argument contained no submissions on this aspect nor did counsel for the appellants address it before us.

[213] Leave was not granted to any of the affected appellants (in this instance Shaik included) to appeal against the sentences imposed in respect of count 2. Following on our conclusion in relation to the convictions on this count the sentences imposed by the court below on this count remain extant.

[214] Leave was not granted to appellants 4 and 5 to appeal against the fine of R500 000 imposed on each in respect of count 3. Having regard to our conclusion in relation to the convictions on this count their sentences thus remain extant.

[215] Shaik's application for leave to appeal against the sentences imposed on counts 1 and 3, as appears from the order of this court set out in para [61] above, was referred by this court for oral argument. We turn to consider the material factors in relation to the sentences imposed on him on these counts.

[216] Shaik is a 48 year-old married man with no previous convictions. From humble beginnings he is now a businessman heading a corporate empire. As a result of his convictions he is disqualified from holding directorships in companies. In a judgment delivered by this court in a related asset forfeiture case Shaik has effectively been stripped of his fortune. His criminal activities have reduced him to a position without money and power, the two things he most sought and strove towards.

[217] It was submitted on behalf of Shaik in relation to count 1 that this was not a case where a low-ranking official who might be able to bring influence to bear to benefit someone who intended bribing him was deliberately targeted and thereafter relentlessly 'stalked' in order to effect the desired result. It was contended that it should be considered in favour of Shaik that his relationship with Zuma had mutated over time and had slipped into the situation leading up to his conviction. We are not persuaded by this argument.

[218] The payments to Zuma, a powerful politician, over a period of more than five years were made calculatingly. Shaik subverted his friendship with Zuma into a relationship of 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.

[219] In our view, the sustained corrupt relationship over the years had the effect that Shaik could use one of the most powerful politicians in the country when it suited him. In our view this is an aggravating factor. As stated earlier in this judgment it is clear that very soon after the advent of our democracy Shaik saw economic opportunities beckon and realised early on that he could use political influence to his financial advantage.

[220] In *S v Kelly* 1980 (3) SA 301 (A) the following appears at 313F:

'Bribing has been described by this Court as a corrupt and ugly offence. . .In the business world it undermines integrity for the temptations offered are often, as in this case, great. It is an insidious crime difficult to detect and more difficult to eradicate. It can, if unchecked or inadequately punished by the courts, have a demoralising effect on business standards and fair trading.'

Bribery as pointed out earlier in this judgment is encompassed within the meaning of corruption as that term appears in the provisions of s 1 of the CA.

[221] In *R v Sole* 2004 (2) SACR 696 (LesHC) the Lesotho High Court considered appropriate sentences for a series of bribery convictions. At 699b-700b the court referred to the abhorrence of bribery in Roman-Dutch law and the expressions of strong reproval that have multiplied with the years.

[222] The Constitutional Court in *South African Association of Personal Injury Lawyers v Heath and others* 2001 (1) BCLR 77 (CC) at 80E-F said the following:

'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.'

[223] The seriousness of the offence of corruption cannot be overemphasised. It offends against the rule of law and the principles of good governance. It lowers the moral tone of a nation and negatively affects development and the promotion of human rights. As a country we have travelled a long and tortuous road to achieve democracy. Corruption threatens our constitutional order. We must make every effort to ensure that corruption with its putrefying effects is halted. Courts must send out an unequivocal message that corruption will not be tolerated and that punishment will be appropriately severe. In our view, the trial judge was correct not only in viewing the offence of corruption as serious, but also in describing it as follows:

'It is plainly a pervasive and insidious evil, and the interests of a democratic people and their government require at least its rigorous suppression, even if total eradication is something of a dream.'

It is thus not an exaggeration to say that corruption of the kind in question eats away at the very fabric of our society and is the scourge of modern democracies. However, each case depends on its own facts and the personal circumstances and interests of the accused must always be balanced against the seriousness of the offence and societal interests in accordance with well-established sentencing principles.

[224] Counts 1 and 3 are offences that fall within the ambit of Part II of the second schedule to the Criminal Law Amendment Act 105 of 1997. The statute prescribes minimum sentences of 15 years imprisonment for these offences, unless there are substantial and compelling reasons which justify a lesser penalty.

[225] In *S v Malgas* 2001 (1) SACR 469 (SCA) at 476g-477b, this court, in

dealing with statutorily prescribed minimum sentences, stated the following:

'In what respects was it no longer to be business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed for the listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.'

[226] In the present case Squires J took into account all relevant factors including Shaik's 'struggle credentials'. He considered 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. The court below concluded that it was left with no alternative but to impose the minimum prescribed sentence.

[227] We can see no fault with the reasoning of Squires J in respect of the sentence imposed on Shaik on count 1 or with the conclusion that there were no substantial and compelling circumstances justifying a sentence other than the prescribed minimum of 15 years imprisonment.

[228] On Shaik's conviction on count 3 the court considered the submission on his behalf that he had only acted as a facilitator and concluded that even if this were so the arrangement plainly suited his purpose. Squires J found that Shaik's first object was to undermine the law and to thwart the investigation which would reveal his corrupt activities and to further 'intensify corrupt activity and at the

highest level in the confident anticipation that Jacob Zuma may one day be President.'

[229] Squires J did not consider the fact that Shaik received only one payment of R250 000 pursuant to the bribe arrangement to be a mitigating factor. Weighing all the evidence in respect of count 3 the learned judge arrived at the same conclusion as with count 1, namely, that there were no substantial and compelling circumstances to justify the imposition of a sentence other than the prescribed minimum of 15 years imprisonment. Once again, on this aspect, we can see no flaw in his reasoning nor can we fault his conclusion.

[230] The appeal by the second, fourth, fifth and eighth appellants against the sentences imposed on count 1 and the application for leave to appeal by the first appellant against the sentences imposed on him in relation to counts 1 and 3 therefore cannot succeed. In the result all of the sentences imposed by the court below must stand.

ORDER

[231] The order of the court is accordingly as follows:

1. All the applications for leave to appeal that were referred for argument are dismissed.
2. All the appeals are dismissed.

_____
C T HOWIE P

_____
L MPATI DP

_____
P E STREICHER JA

_____
M S NAVSA JA

_____
J A HEHER JA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case no: 248/06

In the matter between

SCHABIR SHAIK	**1ST Appellant**
NKOBI HOLDINGS (PTY)	**2ND Appellant**
NKOBI INVESTMENTS (PTY) LTD	**3RD Appellant**
KOBIFIN (PTY) LTD	**4TH Appellant**
KOBITEC (PTY) LTD	**5TH Appellant**

and

THE STATE	**Respondent**

Coram: **HOWIE P, MPATI DP, STREICHER, NAVSA and HEHER JJA**
Heard: **27 SEPTEMBER 2006**
Delivered: **6 NOVEMBER 2006**

Summary: Prevention of Organised Crime Act 121 of 1998 – s 18(1) confiscation – absence of direct benefit from crime – indirect benefit derived through shareholding in company sufficient;

- s 18(1) – same proceeds of crime passed through different hands – multiplicity of orders appropriate;
- s 1 'proceeds of unlawful activities' – means gross proceeds without subtraction of costs laid out to obtain the result – whether appropriate to order confiscation of both value of shares and dividends used to acquire the shares – no duplication in the circumstances – no disproportion in ordering confiscation of both;
- s 18(1) – rearrangement of shares resulting in pay out of value – although mechanistically connected with crime not tainted by such crime in the circumstances.

Neutral citation: This judgment may be referred to as *Shaik v The State* (2) [2006] SCA 134 (RSA).

JUDGMENT

THE COURT:

[1] This is an appeal against three orders of confiscation made in terms of s 18(1) of the Prevention of Organised Crime Act 121 of 1998 ('POCA') by Squires J in the Durban High Court.

[2] The five appellants are Mr Schabir Shaik (first appellant) and four companies that were at all material times controlled by him, Nkobi Holdings (Pty) Ltd (second appellant), Nkobi Investments (Pty) Ltd (third appellant), Kobifin (Pty) Ltd (fourth appellant) and Kobitec (Pty) Ltd (fifth appellant).

[3] The appellants together with six co-accused were convicted of various offences. For the present purpose only the conviction of the first, second and third appellants on count 1 of the indictment on a charge of contravening s 1(1)(a) of the Corruption Act 94 of 1992 is of importance. The first appellant was sentenced to 15 years imprisonment for that offence and the other appellants received substantial fines.

[4] After conviction the prosecution applied for the holding of an enquiry under s 18(1) into such benefits as the appellants may have derived from that offence. The prosecution exercised its right under s 21(1) of POCA to explain and enlarge its application and to clarify the value of the proceeds of unlawful activities allegedly derived by the appellants from the offence of which they had been convicted and from criminal activity that was alleged to be sufficiently related to that offence as contemplated by s 18(1)(c).

[5] In the result the learned judge was persuaded by the merits of the application. He made orders in the following terms:

'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[33], 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:

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[33] Previously Thomson-CSF (Pty) Ltd by which name it will be referred to in this judgment.

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.'

The court made no order against the fourth and fifth appellants but neither did it grant them the costs of having successfully resisted the application. That shortcoming is the only reason for their participation in this appeal. The respondent conceded the merit of their complaint in its heads of argument and save for making an appropriate order in their favour no more requires to be said of their role in the events. Future references to 'the appellants' are, unless the context indicates otherwise, references to the first, second and third appellants.

[6] The appellants are before this Court with leave granted by Squires J. The appellate proceedings in respect of their convictions and sentences were heard immediately before argument commenced in the present appeal. The application for leave to appeal against the conviction and sentence on count 1 has now been dismissed and it therefore becomes necessary to deal with the confiscation orders which were the consequence of that conviction.

[7] We do not propose to rehash the facts which underpin the conviction on count 1. These are dealt with fully in the judgment on that matter in this Court. For easier understanding of what follows a summary of the relevant findings is set out in paragraph 8 below.

[8] Between 1996 and 2002 Shaik and Mr Jacob Zuma engaged in what the trial court appropriately called 'a generally corrupt relationship' which involved frequent payments by Shaik to or on behalf of Zuma and a reciprocation by Zuma in the form of the bringing to bear of political influence on behalf of Shaik's business interests when requested to do so. For the purpose of the confiscation orders the particular intervention by Zuma which was of consequence was a meeting between himself and Mr Perrier, the chief executive of the Thomson group, during a visit by Zuma to London in his capacity as Member of the Executive Committee: Economic Affairs and Tourism in the province of KwaZulu-Natal on 2 July 1998. As explained in the judgment of this Court in the criminal appeal, that meeting took place at a time when the future participation of Shaik and his companies in the pending arms contracts which had been put out to tender by the South African government stood in serious jeopardy. The reason was that Thomson, with whom Shaik had been negotiating to obtain an interest in African Defence Systems (Pty) Ltd ('ADS') which was effectively one of the tenderers, had, for reasons explained in the judgment, lost faith in the credentials of Shaik and the Nkobi group and, instead of housing the ADS shares in Thomson-CSF (Pty) Ltd, a South African subsidiary in which the third appellant held shares, Thomson had utilized a foreign subsidiary from which Shaik and his companies were excluded. As a result of Zuma's intervention, it was common cause, Thomson agreed to relocate the ADS shares into Thomson-CSF (Pty) Ltd and, eventually, did so. We have held in the criminal judgment that Zuma's involvement in July 1998 fell within the scope of Shaik's corrupt intention that Zuma should wield the full weight of the political clout which he carried to bring about the desired result and that such an intention properly fell within the direct scope of the corruption

charge on count 1. Squires J, in the confiscation proceedings, was therefore wrong in regarding that particular intervention as 'related criminal activity' which fell to be dealt with pursuant to s 18(1)(c) of POCA and not s 18(1)(a). That conclusion disposes of the need to consider wide-ranging areas of argument in the confiscation appeal.

[9] It is necessary to explain the link between the fact of Zuma's intervention in July 1998 and the conclusion of Squires J that the appellants received or derived the proceeds of crime (the three benefits declared forfeit in the orders) from that intervention.

[10] Once Thomson was persuaded to soften its resistance to the beneficial participation of Shaik and his group in ADS they necessarily had to devise a basis for that participation. It took a considerable time to bring the scheme to fruition.

[11] As at 15 September 1999 the third appellant held
(a) 30% of the shares in Thomson-CSF (Pty) Ltd directly; and
(b) 10% of the shares in Thomson-CSF Holding (Southern Africa) (Pty) Ltd.
The last-mentioned company in turn held the other 70% of the shares in Thomson-CSF (Pty) Ltd. In consequence of these interests the third appellant held an effective shareholding in Thomson-CSF (Pty) Ltd of 37%. It was decided to rearrange the relative balance of shareholdings in various companies controlled by Thomson in order to accommodate the ADS shares.

[12] On 15 September 1999 Thomson-CSF (International) held all the ADS shares. On that day it sold (a) to Thomson-CSF (Pty) Ltd 80% of its

shares in ADS for R29 874 293; and (b) to Futuristic Business Solutions Holdings (Pty) Ltd, a Black Economic Empowerment partner, the other 20% for R7 468 573.

[13] If the interest of the third appellant had remained unchanged it would have held an effective 29,6% of the equity in ADS. Two material changes were however made which resulted in the third appellant having an effective 20% share in ADS.

[14] The first change concerned the relative shareholdings of the third appellant and Thomson-CSF Holding (Southern Africa) in Thomson-CSF (Pty) Ltd. The last-mentioned raised the R29 874 293 for the purchase of 80% of the ADS shares by issuing 29876 shares of R1000 each to its shareholders as follows:

(i) Thomson-CSF Holding (Southern Africa) got 22412 shares for R22 412 000, which, when added to its existing 70 shares gave it a total of 22842 shares, equating to a 75% shareholding in Thomson-CSF (Pty) Ltd and an effective 60% shareholding in ADS.

(ii) the third appellant got 7464 shares for R7 464 000, which when added to its existing 30 shares, gave it a total of 7494 shares, equating to a 25% shareholding in Thomson-CSF (Pty) Ltd and an effective 20% shareholding in ADS. That effective shareholding was the *first benefit*, which was the subject of the first order of confiscation.

[15] Thomson-CSF Holding (Southern Africa) raised the R22 412 000 for its additional 22412 shares in Thomson-CSF (Pty) Ltd by issuing 22412 shares of R1000 each to Thomson-CSF (International).

[16] The third appellant raised the R7 464 000 for its additional 7464 shares in Thomson-CSF (Pty) Ltd by borrowing the money from Thomson-CSF International Africa Ltd (Mauritius), a wholly-owned subsidiary of Thomson-CSF International. The loan was secured by a security cession (pledge) to Thomson-CSF International Africa Ltd (Mauritius) of all the shares of the third appellant in Thomson-CSF (Pty) Ltd and a security cession of all dividends to be received by the third appellant from Thomson-CSF (Pty) Ltd. In terms of an escrow agreement between the borrower and the lender the shares and dividends would be retained by a named escrow agent and the dividends would be paid to and held by that agent until the third appellant had repaid the capital and interest on it to the lender.

[17] The second change concerned the shareholding of Thomson-CSF Holding (Southern Africa) (Pty) Ltd. Prior to 26 July 1999 its shareholders were Thomson-CSF (France) which held 85%, Gestilac SA (a Swiss company) with 5% and the third appellant with 10%. On 26 July 1999 Gestilac SA sold to Thomson-CSF (France) its 5% shareholding thereby raising the purchaser's shareholding in Thomson-CSF Holding (Southern Africa) to 90%. On the following day Thomson-CSF (France) sold its 90% shareholding in Thomson-CSF Holding (Southern Africa) to Thomson-CSF International.

[18] On 30 July 1999 Thomson-CSF International and the third appellant signed an agreement for the sale by the latter to the former of the third appellant's 10% shareholding in Thomson-CSF Holding (Southern Africa) for R500 000 and the shares were duly transferred. The third appellant

received the purchase price on 5 October 1999 by means of two deposits of R299 568,64 and R200 000 into the bank account of the fifth appellant which acted as the banker for the Nkobi group. The total of those payments constituted the *third benefit* and was the subject of the third confiscation order. (The figure of R499 688 in paragraph 3 of the order was apparently a typing error and should have been R499 568.) The learned Judge found that the buy-out of the third appellant's interest in Thomson-CSF Holding (Southern Africa) was an integral part of the allocation to the third appellant of an effective 20% shareholding in ADS and the final realisation of the goal which was secured by Zuma's intervention in July 1998.

[19] As the third appellant held 25% of the shares in Thomson-CSF (Pty) Ltd from September 1999 it became entitled to an equivalent percentage of the dividends paid by that company pursuant to its earnings from ADS. (As appears from the judgment in the criminal appeal, ADS was a member of a consortium which in November 1999 was awarded the tender for the corvette munitions suite portion of the defence contract.)

[20] It was common cause between the parties to the application that Thomson-CSF (Pty) Ltd had, on behalf of the third appellant, paid dividends to the escrow agents as follows:

20 September 2001	R2 794 941
11 September 2002	R3 024 000
15 December 2003	R2 955 000
15 July 2004	R2 099 200
4 February 2005	R1 924 190.

The total of those payments, R12 797 331, comprised the *second benefit* which was the subject of the second order of confiscation. The parties were agreed that the third appellant had used the dividends in the escrow account to settle its entire liability to Thomson-CSF International Africa Ltd (Mauritius).

[21] Finally, in this regard, it is necessary to note that, at all material times, the appellants stood in the following relationships to each other:

The second appellant held 100% of the shares in the third appellant (and thus held indirectly 20% of ADS);

The first appellant held, directly and indirectly, 92% of the shares in the second appellant (and thus effectively held 18,4% of ADS).

[22] Messrs Deloitte & Touche representing Thomson-CSF Holding (Southern Africa) (Pty) Ltd[34] prepared an indicative valuation of Thomson-CSF (Pty) Ltd. The date of valuation was 30 June 2005. In doing so, they estimated the value of that company's shareholding in ADS to be R101 029 000, and valued the interest of the third appellant (wrongly referred to as 'Nkobi Holdings' in their report) at R21 018 000. At the application the parties accepted that valuation as correct. Hence Squires J placed a value of R21 018 000 on the first benefit and also made orders appropriate to the values of the interests of the first and second appellants.

[23] We are now in a position to consider the various aspects of the challenge launched by the appellant on the orders made by the learned judge. Two general submissions affecting the application of chapter 5 of POCA may conveniently be addressed first.

[34] By then renamed Thint Holdings Southern Africa (Pty) Ltd.

[24] The appellants submitted that a confiscation order cannot be made against a defendant who has not benefited directly from his crime but, as was the case with

both first and second appellants, only indirectly through the enrichment of a company (the third appellant) in which they possessed an interest. We agree with counsel for the respondent that this is not the law. First, the definition of 'proceeds of unlawful activities' in s 1(1) includes benefits received 'directly or indirectly'

which in its ordinary meaning includes benefits indirectly obtained through another person or entity. Second, the confiscation provisions are directed at stripping criminals of the economic benefits of crime. The more skilful the criminal undertaking the better the camouflage that will be created. That, no doubt, is why s 19(1) is phrased in expansive terms which include any 'advantages, benefits or rewards', concepts that are wide enough to include the advantage, benefit or reward which a shareholder derives if a company is enriched by his crime.

[25] The appellant also submitted that the same proceeds, passed through different hands, cannot constitute the proceeds of criminal activity in the hands of each intermediary. Consequently there cannot be a multiplicity of confiscation orders against each, as had happened in the present instance. We do not agree. The movement of funds through different hands is essential to the concealment of crime and the successful manipulation of its benefits. Multiple orders are necessary as a deterrent not only to the principal actors in the criminal activity but to all those who facilitate such concealment and manipulation. To uphold the appellant's submission would therefore serve to frustrate the aims of POCA. There was, correctly so, an implicit recognition of this by Van der Merwe J in *NDPP v Johannes du Preez Joubert and others* (unreported judgment in TPD case 24541/2002 delivered 2 March 2003) quoting *R v Simpson* (1998) 2 CR App R(S) 111:

'. . . the phrase "any payments or other rewards received in connection with drug trafficking" has been interpreted literally, notwithstanding that such an interpretation means that there can be multiple recovery of the same sum which passes through the hands of successive dealers, regardless of the amount of profit made by the dealer or dealers or of whether any profit was made at all.'

Of course a court confronted with the choice may consider it appropriate to so phrase its order that the recovery in its total effect, will be limited, although made against a number of defendants. That is what Squires J achieved in the present case by placing a cap on the total which the State would be entitled to recover.

The first benefit

[26] The appellants argued that the respondent had failed to establish that this benefit was derived from criminal activity on the part of the appellants and could not properly be the subject of an order under s 18(1)(a).

[27] This submission was to some extent disposed of by the finding in the criminal appeal that Zuma's intervention fell within the ambit of count 1 of the indictment. For the purposes of s 18(1)(a) it was therefore conduct which formed part of the offence of which the appellants were convicted. The benefit to the appellants was the securing of an interest in ADS which but for the intervention they would have lost. However, their counsel submitted in their heads of argument that the appellants' entitlement to the benefit long predated July 1998: its origin was said to be an agreement between the shareholders of Thomson-CSF Holding (Southern Africa) (Pty) Ltd that the Nkobi group and, more particularly, the third appellant, would share in the ADS benefits by the housing of the ADS shares in Thomson-CSF (Pty) Ltd.

At best therefore Zuma's assistance went no further than ensuring that the appellants were not deprived of their rights by the breach of contract which resulted in Thomson-CSF France acquiring the shares. We however agree with Squires J that the appellants did not prove that they were possessed of contractual rights to have the shares sited in the local Thomson company or, even if there was an agreement to that effect, that Thomson-CSF France, which appropriated the ADS shares to itself, was a party thereto. It is clear from the minutes of the meeting at which the agreement was said to have been reached that the first appellant expressly reserved the position of his group when the basis of its participation was discussed. In any event, and even had the interest of the appellants acquired some enforceable content before the first appellant called on Zuma to exercise his influence, it became clear from the evidence of the first appellant that he was neither able nor willing to take on Thomsons whom he recognised as an adversary of determination and means far beyond those available to him. On the assumption of an enforceable right, therefore, Zuma's mediation was intended to and did have the direct effect of ensuring that when the tender was awarded the third appellant would benefit from the ADS involvement, as it would not have benefited without such intervention. The definitions of 'proceeds of unlawful activities' in s 1(1) and s 19(1) are indicative that the connection between the proceeds and the crime need not be direct. The proceeds include everything a defendant 'derived, received or retained' as a result of or in connection with his offences. Such proceeds could include benefits which the defendant legitimately acquired but afterwards retained by or as a result of his offences. Even on the foundation of pre-existing contractual rights that was the position in this case. We accordingly find that the attack on the first order of confiscation has no merit.

The second benefit

[28] The appellants submitted that the third appellant had been unable to raise the necessary finance to fund its share of the capitalisation of Thomson-CSF (Pty) Ltd which was necessary for the acquisition of the ADS shares. As a result the escrow agreement was entered into and the shares were pledged as security for the loan advanced to the third appellant; the dividends were used to pay the loan and interest and only once the debt had been discharged were the shares in Thomson-CSF (Pty) Ltd returned. Such being the facts, counsel submitted that 'proceeds of unlawful activities' in ss 1(1) and 19(1) means the nett proceeds after deduction of *inter alia* the cost of acquisition. We cannot agree with counsel. The definition in s 1(1) is consistent with gross values and when s 19(1) describes the value of a defendant's proceeds of unlawful activities as 'the sum of the values of the property, services, advantages, benefits or rewards received' it clearly intends the value of everything received by the defendant in connection with the crime without taking account of what the defendant had to lay out in order to bring about a particular result. This was also the conclusion reached by Van der Merwe J in *NDPP v Joubert and others*, above, after a survey of similar legislative provisions in England. It may be noted that in *R v Smith* [2002] 1 All ER 367 (HL) at para 23 Lord Roger of Earlsferry said (in an analogous context):

'the courts have consistently held that payments received in connection with drug trafficking means gross payments rather than nett profit and that the "proceeds" of drug trafficking means the gross sale proceeds, rather than the nett profit after deducting the cost of the drug trafficking operation.'

[29] In the alternative counsel argued that the appellants should not have been ordered to pay to the State both the value of the shares and the value of the dividends used to pay for the same shares. This duplication, they submitted, resulted in a significant disproportionality between the terms of the order and the statutory rationale for such an order, *viz* the deprivation of fruits of crime. Given the facts set out above it simply had the effect of enriching the State; *cf NDPP v Rebuzzi* 2002 (2) SA 1 (SCA) at para 19; *NDPP v R O Cook Properties (Pty) Ltd and others* 2004 (2) SACR 208 (SCA) at 229d; *Prophet v NDPP* 2006 (1) SA 38 (SCA) at para 37.

[30] We do not agree with this submission. The return on an investment in the purchase of shares has capital and revenue components. In the context of the proceeds of crime both require to be taken into account as direct benefits of criminal activity. There may of course be overlapping but in this instance there is not: the valuation of the shares which was carried out on 30 June 2005 valued future benefits but left out of account dividends paid before that date. Both shares and dividends were in fact proceeds of the corruption in count 1. Does the order bring about an unfair duplication in the recovery of proceeds simply because the dividends were used to pay for the shares? The appellants could have used untainted funds to finance the acquisition but instead they used the fruits of the tainted acquisition to pay for it. They did so entirely for their own convenience and benefit. If they were to forfeit only the value of the asset so acquired the result would be a partial confiscation. As counsel has pointed out the Act is directed at both deterrence and incapacitation. Yet the appellants claim a right to be treated as if they had taken nothing out of the company; in fact they received R12 million. They ask for an order which will leave them in the same position as if they had

innocently paid for the shares out of their own pockets whereas they used the profits of the company in which their participation was an ill-gotten gain. The learned judge did not think that such an order was appropriate. It will be apparent from what we have said that we find no grounds for interfering with the exercise of what is in any event a very wide discretion. In so far as there remains any element of a penalty in an order exacting the confiscation of the values of both the dividends and the shares it seems to us that that consequence is a subsidiary one, merely incidental to the primary achievement of causing the appellants to disgorge proceeds illicitly obtained. In our view there was no disproportion in the forfeiture of the gross proceeds of the illicitly procured (or retained) acquisition of the ADS shares. For these reasons we find no grounds for interfering with the order in respect of the second benefit.

The third benefit

[31] The grounds on which the appellants assailed the third order were the following. The third appellant's 10% interest in Thomson-CSF Holding (Southern Africa) prior to the rearrangement of the shareholdings was solely made up of the value of that company's shares in Prodiba (Pty) Ltd which earned its profits from the (untainted) contract to manufacture South Africa's driver's licences. The negotiations between Thomson-CSF France and the third appellant as to the value of the latter's 10% shareholding were concluded with an agreement signed on 30 July 1999 in terms of which the third appellant would sell its shares to Thomson-CSF International for R500 000. Because the ADS shares were then still held by Thomson-CSF International the appellants submit that the added value which those shares might have given to the transaction could not have played any role in the

value of the third appellant's shares in Thomson-CSF Holding (Southern Africa).

[32] In *NDPP v R O Cook Properties and others, supra*, at 241b this Court considered the meaning of the phrase 'in connection with' used in the expression 'proceeds of unlawful activities' in s 1(1) of POCA and said (at para 72):

'Bearing in mind that the objective of the Act is to render forfeit the returns that might accrue from unlawful activity, we consider that the "connection" the definition envisages requires some form of consequential relation between the return and the unlawful activity. In other words, the proceeds must in some way be the consequence of unlawful activity.'

[33] Had the unlawful activity not taken place the third appellant would probably not have sold its shares in Thomson-CSF Holding (Southern Africa). In that sense it can be said that the R499 568 constitutes proceeds which were received as a consequence of the unlawful activity. However it was not a consequence that was necessary for achieving the object of the unlawful activity and the appellants did not intend to derive a financial benefit as a result of the share transaction and did not do so. The result of the sale of the shares in Thomson-CSF Holding (Southern Africa) was to deprive the third appellant of the interest in ADS which it would otherwise have held through that company and not to provide an additional benefit. The court below held that the proceeds were tainted because of their connection to the corruptly procured intervention by Zuma. However, in our view, although in a purely mechanistic sense the proceeds were the consequence of the unlawful activity of Shaik and Zuma, it cannot fairly be

said that the proceeds were so tainted. In consequence the order was solely penal in its effect and served only to enrich the State. In the circumstances the court *a quo* should not have ordered the appellants to pay the amount of R499 688 to the State.

The costs of the appeal

[34] The first, second and third appellants have achieved a small but not insignificant victory. It would not have been such as to influence the costs order in the application proceedings, but merits consideration in relation to the costs of appeal. Because the appellants would in any event have pursued those aspects of the confiscation in respect of which we have ruled against them, the measure of success should only be reflected in the actual proportion of the costs of appeal which were caused by time spent on the third benefit. In our judgment that was not more than 10% of the overall time devoted to the preparation and arguing of the appeal. It would be fair to the parties if the appellants are ordered to bear 90% of the respondent's costs on appeal and the respondent is ordered to pay 10% of the appellants' costs.

[35] We accordingly make the following order:

1. The appeal by the first, second and third appellants against paragraphs 1 and 2 of the order of the court *a quo* is dismissed.
2. The appeal by the first, second and third appellants against paragraph 3 of the order is upheld. That paragraph is set aside and replaced with the following:

   'The application for a confiscation order in respect of the third benefit is refused.'

3. The first, second and third appellants are ordered jointly and severally to pay 90% of the respondent's costs of appeal and the respondent is ordered to pay 10% of the first, second and third appellants' costs of appeal.

4. No costs order is made in respect of the fourth and fifth appellants in the appeal but the costs order made by the court *a quo* is varied by the addition of the following paragraph:

   '3. The applicant is to pay the costs of the fourth and fifth defendants.'

5. All the orders for costs are made upon the basis that they are to include the costs incurred consequent upon the employment of two counsel.

_____
C T HOWIE
PRESIDENT

_____
L MPATI
DEPUTY PRESIDENT

_____
P E STREICHER
JUDGE OF APPEAL

_____
M S NAVSA
JUDGE OF APPEAL

_____
J A HEHER
JUDGE OF APPEAL

S SHAIK AND 10 OTHERS v THE STATE **(Criminal appeal)**
and
S SHAIK AND 4 OTHERS v THE STATE **(Civil appeal)**

JUDGMENT SUMMARY

[1] The Court has prepared written reasons for judgment in these two cases. The judgments are unanimous. Before stating the orders, which come at the end of each judgment, we shall give a brief outline of the Court's principal decisions. It must be noted that this summary forms no part of the judgments and therefore does not add to them or explain them. It merely summarises.

[2] In the criminal case Mr Schabir Shaik and various of his companies (which we shall call the Nkobi group) were charged on three counts. We shall focus on the case of Mr Shaik for purposes of the summary.

[3] On count 1 he was charged with contravening the Corruption Act by making payments to or on behalf of Mr Jacob Zuma with the corrupt intention to influence Mr Zuma to perform his duties in ways that would be to the advantage of Mr Shaik's commercial interests.

[4] Mr Shaik's counsel said the prosecution failed to prove what Mr Zuma's duties were or what they involved. We think the answer is in the Constitution. At the times with which the case is concerned Mr

Zuma was initially the Member of the KwaZulu Natal Executive Committee (MEC) for Economic Affairs and Tourism and subsequently the Deputy President of the Republic. The Constitution says an MEC and a cabinet member (which the Deputy President is) may not do three things: (1) undertake paid work, (2) act in a way which bring his official responsibilities and private interests into conflict, or (3) use his position to enrich himself or improperly benefit another person. Therefore if Mr Shaik corruptly gave benefits to Mr Zuma to influence him to act in any of those ways then Mr Shaik committed the offence charged.

[4] It was admitted that Mr Shaik made 238 payments totalling over R1,2m from October 1995 to September 2002 and that they were to the benefit of Mr Zuma. However, Mr Shaik's counsel argued that payments equal to about a third of that total were regarded by him really as payment to the ANC even if their effect was to benefit Mr Zuma. We find that the Nkobi group's books and a number of relevant witnesses, for both prosecution and defence, show that Mr Shaik could not believably have regarded any of the payments made as payments to the ANC rather than to Mr Zuma.

[5] That argument, like many other issues in the case, engage Mr Shaik's credibility as a witness. The trial court, which had the opportunity for many days to hear him testify and assess his truthfulness in the light of all the other evidence, rejected his evidence where it conflicted with acceptable contrary testimony or with circumstance or clear documentary evidence. We consider that the trial court's credibility finding against Mr Shaik was fully justified and we agree with it on this and all other issues where it is relevant. We therefore find that all the payments were to or on behalf of Mr Zuma.

[6] As to the reason for the payments, the defence case was that they were made out of friendship or were loans. The defence relied on purported acknowledgments of debt and a purported loan agreement and on evidence of a long standing friendship between Mr Shaik and Mr Zuma. We find a wealth of evidence to show that the friendship, which we accept exists, was persistently and aggressively exploited by Mr Shaik for his own and his group's business advantage. In particular there were four occasions revealed by the prosecution evidence in which interventions by Mr Zuma at Mr Shaik's instance advanced, or were aimed at advancing, Mr Shaik's commercial interests. The most important one concerned the

Defence Force's arms procurement program. Mr Zuma's efforts contributed to Mr Shaik acquiring a material interest in a highly lucrative contract to supply the armaments for the Navy's new corvettes. The evidence also showed that when the payments were made Mr Shaik was in no position to afford them without substantial borrowings and Mr Zuma had no realistic prospects of repayment.

[7] In the light of all the evidence on count 1 we find that the only reasonable inference is that the payments were corruptly made to influence Mr Zuma to act in conflict with his constitutional duties and thereby enhance Mr Shaik and his group's business interests. We therefore find that Mr Shaik was correctly convicted on count 1 of corruption.

[8] On count 2 Mr Shaik was charged with fraud arising out of an irregular writing off in the Nkobi group's 1999 annual financial statements of about R1,2m. The writing off was admitted, as was its irregularity. It was also admitted that the write-off erased Mr Shaik's debit loan account in his group with the result that the financial statements gave a better picture of the group' financial state to present to its bank than was truly the case. The importance of that result was that the group was crucially dependent on overdraft

facilities. In addition the write-off served to avoid a qualified audit report. It was not disputed that the group's auditors were responsible for the way in which the write-off was effected. Mr Shaik testified that he had nothing to do with it and did not know it was being done. The main evidence for the State was given by one of the auditors. The trial court found him an unsatisfactory witness. We agree. We also agree, however, with the trial court's conclusion that the auditors would not have had reason, unprompted, to contrive the write-off by themselves and that circumstantial evidence and the testimony of two other prosecution witnesses pointed to Mr Shaik's having been a party to it. The other legal elements of the crime of fraud being present, we think that Mr Shaik was correctly convicted on count 2.

[9] On count 3 Mr Shaik was charged with corruption for having brought it about, in collaboration with Mr Zuma and Alain Thétard of Thomson- CSF (the French arms supplier), that Thomson offered Mr Zuma R500 000 per year until a certain specified event. In return Mr Zuma would shield Thomson from investigation into their role in the much discussed arms procurement dealings, and also support its future projects in South Africa.

[10] The key State evidence consisted of a document widely referred to as 'the encrypted fax'. It is the printed version of a handwritten draft letter compiled by Thétard following on a meeting with Mr Shaik and Mr Zuma. It was addressed to his superiors in Paris. It conveys that Mr Shaik requested Thomson to make the payments referred to in return for the favours mentioned; that Thétard had asked for Mr Zuma's confirmation of the request; and that Mr Zuma had done so in an encoded form. The prosecution established that the fax was sent and also proved circumstances from which it is to be inferred that the request was accepted by Thomson.

[11] At the trial the defence objected to the fax being admitted in evidence. The trial judge ruled it admissible on a certain ground. We think, on a different ground, that the fax is indeed admissible. In addition, not only does the fax prove that Thétard wrote the words it contains but there is abundant surrounding evidence to find that there was proof beyond reasonable doubt that what Mr Shaik requested of Thomson was a bribe to Mr Zuma. Even if Mr Zuma was unaware of the request or had not agreed to accept the bribe there was nevertheless proof of commission by Mr Shaik of all the necessary elements of the offence charged. Mr Shaik's evidence

that he, Mr Zuma and Thétard had indeed met shortly before the date of the fax but that the subject matter of their discussions was a request that Thomson make a donation to the Jacob Zuma Educational Trust, rightly rejected by the trial court. He was therefore correctly convicted on count 3.

[12] Turning to sentence, 15 years imprisonment was imposed on each of counts 1 and 3. On count 2, the sentence was 3 years. The sentences were ordered to run concurrently. Only the 15 year sentences were subject to appeal. The 15 year terms were mandatory unless substantial and compelling circumstances justified less. The trial Judge dealt fully with all the relevant facts and circumstances. He concluded that there were, whether on count 1 or count 3, no substantial and compelling circumstances justifying less that the sentence prescribed. Given the very high level at which the corruption in this case occurred, given corruption is inconsistent with the rule of law and the fundamental values of the Constitution, and given that corruption lowers the moral tone of a nation and negatively affects developmet and the rpomotion of human rights that we do not think any grounds have been shown to interfere with the sentences imposed.

[13] In so far as the civil case is concerned, the State, through the National Director of Public Prosecutions, applied after the criminal trial for confiscation of the proceeds received by Mr Shaik and four of his companies in consequence of their conviction on count 1. A confiscation order was granted. It required Mr Shaik and two of his companies to pay the State three particular amounts. The first was the value of the Nkobi shareholding in the company which is part of the consortium which won the corvette munitions contract. As mentioned earlier, that shareholding was acquired as a result of Mr Shaik's corruptly obtained intervention by Mr Zuma. The second amount comprised dividends paid in respect of that shareholding. The third amount represented the value of the Nkobi shareholding in another company. We find that the confiscation order was rightly granted as regards the first and second amounts. We find the appeal succeeds as regards the third.

The orders of the Court are as follows:

Crime case:

Civil case: