

**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's 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 than 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 development and the promotion 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: