REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 3957/2020

In the matter between:

THALES SOUTH AFRICA (PTY) LTD Applicant
(Registration No. 1996/006180/07)

and

THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS *N.O.* First Respondent

MOKOTEDI JOSEPH MPSHE SC IN HIS CAPACITY
AS ACTING NATIONAL DIRECTOR OF PUBLIC
PROSECUTION AT THE TIME Second Respondent

SHAUN KELVIN ABRAHAMS IN HIS CAPACITY
AS NATIONAL DIRECTOR OF PUBLIC
PROSECUTION AT THE TIME Third Respondent

ADV WILLIAM JOHN DOWNER SC IN HIS
CAPACITY AS THE LEAD STATE PROSECUTOR Fourth Respondent

ORDER

The following order is granted:

The application is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

JUDGMENT

Bezuidenhout AJ (Van Zyl and Chetty JJ concurring):

Introduction

[1] The applicant, Thales South Africa (Pty) Ltd ('TSA'), seeks, inter alia, an order that the decision by the third respondent, Mr S Abrahams, alternatively, the second respondent, Mr M Mpshe, to authorise a prosecution in terms of section 2(4) of the Prevention of Organised Crime Act 121 of 1998 ('POCA'), against TSA on a charge of racketeering in terms of section (2)(1)*(e)* of POCA, be declared to be inconsistent with the principle of legality. It seeks to have the decision reviewed and set aside.

[2] The second respondent, Mr Mpshe, was the Acting National Director of Public Prosecutions at the time when he signed the authorisation as required by section 2(4) of POCA on 14 December 2007.

[3] The third respondent, Mr Abrahams, was the National Director of Public Prosecutions when he signed the second authorisation in terms of section 2(4) of POCA on 6 June 2018.

[4] The parties were ad idem that the issue before the court is in essence whether the second or third respondents ('the NDPPs') rationally concluded that there was reasonable and probable cause to believe that TSA had, directly or indirectly or with common purpose, participated in an enterprise run by Mr Shabir Shaik, through a pattern of racketeering activity, comprising the planned, ongoing, continuous or repeated participation or involvement in at least two Schedule 1 offences.

[5] TSA sought the following relief in its notice of motion:

'2. Declaring the decision taken by the Third Respondent in terms of the provisions of Section 2(4) read with Section 1 and 2 of the Prevention of Organised Crime Act No. 121 of 1998 ("POCA") on 6 June 2018 to authorise the Applicant's prosecution on a charge of racketeering in terms of Section 2(1)(e) read sections 1, 2(2) and 3 of POCA ("the second authorisation"), inconsistent with the Constitution of the Republic of South Africa, 1996 and invalid;

3. Reviewing and setting aside the aforesaid decision taken by the Third Respondent on 18 June 2018;

4. And, in the event that the above Honourable Court finds that the authorisation dated 14 December 2007 ("the first authorisation"), is valid an order in terms of prayer 2 above as well as an order declaring the decision taken by the Second Respondent in terms of the provisions of Section 2(4) read with Section 1 and 2 of the Prevention of Organised Crime Act No. 121 of 1998 ("POCA") on 14 December 2007 to authorise the Applicant's prosecution on a charge of racketeering in terms of Section 2(1)(e) read sections 1, 2(2) and 3 of POCA, inconsistent with the Constitution of the Republic of South Africa, 1996 and invalid;

5. Reviewing and setting aside the decision taken by the Third Respondent on 6 June 2018 and the decision taken by the Second Respondent on 14 December 2007;

6. Declaring the decision taken by the First and/or Second and/or Third and/or Fourth Respondent to charge the Applicant pursuant to the authorisation in prayer 2 and/or prayer 4 on a racketeering charge in count 1 of the Indictment in case number CCD30/2018 in the High

Court the KwaZulu Natal held at Pietermaritzburg to be inconsistent with the Constitution of the Republic of South Africa 1996 and invalid;

7. Reviewing and setting aside the decision taken by the First and/or Second and/or Third and/or Fourth Respondent to charge the Applicant pursuant to the authorisation in prayer 2 and/or prayer 4 on a racketeering charge in count 1 of the Indictment in case number CCD30/2018 in the High Court the KwaZulu Natal held at Pietermaritzburg;

8. Ordering the Respondents who oppose this application to pay the Applicant's costs of suit jointly and severally, which costs are to include the costs consequent upon the employment of two counsel;

. . .'

Chronology

[6] On 2 June 2005, Mr Shaik and a number of corporate entities were convicted in the Durban and Coast Local Division of, inter alia, contraventions of the Corruption Act 94 of 1992 and POCA. The judgment delivered by Squires J, reported as *S v Shaik and others* 2007 (1) SACR 142 (D), deals with the evidence presented by the State as well as the analysis thereof in detail. The matter subsequently came before the Supreme Court of Appeal, reported as *S v Shaik and others* 2007 (1) SA 240 (SCA) where the convictions appealed against, were upheld. The matter then came before the Constitutional Court, reported as *S v Shaik and others* 2008 (2) SA 208 (CC) where, inter alia, the application for leave to appeal against the criminal convictions and sentences was dismissed.

[7] Shortly after Mr Shaik's conviction and on 16 June 2005, the fourth respondent, Mr Downer SC, and Mr A Steynberg, the Deputy Director of Public Prosecutions, KwaZulu-Natal, addressed a memorandum to the National Director of Public Prosecutions at the time, Mr V Pikoli, on the prospects of a successful prosecution against Mr J Zuma.

[8] On 4 July 2005, the fourth respondent and Mr Steynberg addressed a further memorandum to Mr Pikoli to deal with the possibility of prosecuting TSA and Thint (Pty)

Limited ('Thint'), a subsidiary of TSA, which was initially charged as an accused with Mr Shaik and other corporate entities.

[9] On 4 November 2005 both TSA and Thint were summoned to appear with Mr Zuma. Their trial was scheduled to commence on 31 July 2006 in the Pietermaritzburg High Court.

[10] Various applications were launched which are irrelevant to the current proceedings. Of significance however are the proceedings on 20 September 2006, at which Msimang JP refused an application by the State to postpone the trial and the matter was struck off the roll.

[11] On 13 November 2007 the prosecution team submitted a formal application in terms of section 2(4) of POCA to the second respondent, as it now wanted to include for the first time a racketeering charge in terms of section 2(1)*(e)* of POCA in the indictment against Mr Zuma, TSA and Thint.

[12] On 14 December 2007, the second respondent signed the authorisation in terms of section 2(4) of POCA for the inclusion in the indictment of a charge of contravening section 2(1)*(e)* of POCA against Mr Zuma, TSA and Thint.

[13] On 28 December 2007 a new indictment was served on TSA, Thint and Mr Zuma. Mr Zuma brought an application in the Pietermaritzburg High Court, seeking to review and set aside the decision to recharge him on the ground that he was not given a prior hearing. On 12 September 2008, Nicholson J upheld Mr Zuma's application for judicial review. The decision was subsequently set aside by the Supreme Court of Appeal on 12 January 2009.

[14] Mr Zuma thereafter made representations to the second respondent who accepted the representations, and on 6 April 2009 decided to withdraw the charges

against Mr Zuma, TSA and Thint. The charges were formally withdrawn in court on 7 April 2009.

[15] On the same day, the Democratic Alliance brought an application for a judicial review of the second respondent's decision to withdraw the charges against Mr Zuma. It culminated in the Supreme Court of Appeal on 13 October 2017 upholding a decision by the Pretoria High Court, reviewing and setting aside the second respondent's decision to withdraw the charges against Mr Zuma, on the basis that it was unlawful and irrational.

[16] Despite receiving representations from Mr Zuma, the third respondent announced his decision to proceed with the prosecution against Mr Zuma and TSA, accused no 1 and accused no 2 respectively. Thint no longer featured as it had been deregistered.

[17] On 24 May 2018, the prosecution team requested the third respondent to sign a 'fresh' authorisation in terms of section 2(4) of POCA, as the original authorisation signed by the second respondent could not be located, and Thint was no longer an accused, due to it having been deregistered. On 6 June 2018, the third respondent signed the current authorisation for Mr Zuma and TSA to be tried on a charge of contravening section 2(1)*(e)* of POCA. The charges against TSA as set out in the indictment were briefly:

(a) One count of racketeering in contravention of section 2(1)*(e)* read with sections 1, 2(2) and 3 of POCA as amended: whilst employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly of such enterprise's affairs through a pattern of racketeering activities (count 1). This count related to TSA's conduct or participation in conduct, directly or indirectly in the affairs of the enterprise through a pattern of racketeering between 25 October 1995 and 1 July 2005, which involved the participation or involvement in the predicate offences set out in racketeering acts 1 – 1582 and/or included in the commission of two or more predicate offences.

(b) One count of corruption in contravention of section 1(1)*(a)* read with section 1(2) and 3 of the Corruption Act with two sub counts as alternatives (count 3). This count related to TSA, acting in concert with Mr Shaik, unlawfully and corruptly giving services or benefits between 25 October 1995 and 1 July 2005 as set out in a schedule, which were not legally due to Mr Zuma, with the intention to influence him to commit any act in relation to his powers and/or duties to further the interests of Mr Shaik and/or TSA.

(c) One count of corruption in contravention of section 1(1)*(a)* read with section 3 of the Corruption Act (count 5). This related to the period between 30 September 1999 and 2001, and involved TSA corruptly agreeing to or offering to give Mr Zuma annual benefits (R500 000 per annum until certain dividends became payable) with the intention to influence him to further the interests of TSA, Mr Shaik and the Nkobi Group.

(d) One count of money laundering in contravention of section 4, read with sections 1 and 8 of POCA (count 6). This count related to TSA and various other parties entering into a so-called service provider agreement between 30 September 1999 and 2001 which had the effect of concealing or disguising the nature, source, location, disposition of property.

[18] Both Mr Zuma and TSA brought applications for a permanent stay of their prosecutions. TSA's application included constitutional relief as well as a review of the third respondent's decision to charge it together with Mr Zuma. The applications were heard by a Full Court of the Pietermaritzburg High Court, which dismissed both applications. The judgment was handed down on 11 October 2019 and is reported as *S v Zuma and another; Thales South Africa (Pty) Limited v KwaZulu-Natal Director of Public Prosecutions and others* [2019] ZAKZPHC 76.

[19] Applications for leave to appeal were dismissed by the Full Court as well as the Supreme Court of Appeal. Applications to the Constitutional Court were launched but not proceeded with.

Present application

[20] The present application was launched on 26 June 2020. Mr J Ripley-Evans, the attorney of TSA deposed to the founding affidavit on behalf of TSA.

[21] According to him, TSA's current attorneys of record, who were appointed as such in October 2019, received the police docket, consisting of 'hundreds of thousands of pages' in addition to a forensic report with its annexures which exceeded 'tens of thousands of pages'.

[22] TSA's legal team commenced perusing the documents, and discovered what appeared to be the prosecution's application to the second respondent, requesting an authorisation to charge TSA with racketeering offences. It apparently consisted of a memorandum dated 30 November 2017 with a draft indictment annexed to it, a memorandum relevant to Mr Zuma and Thint (now TSA) and a separate memorandum on TSA. It also appeared from the documents that the aforementioned authorisation was granted on 14 December 2007.

[23] According to Mr Ripley-Evans, it became clear upon perusing the application, that it did not disclose evidence upon which the second respondent could have concluded that there was reasonable and probable cause to believe that TSA had committed a racketeering offence in order to justify the granting of the first authorisation. The second respondent's decision accordingly violated the principles of legality.

[24] TSA's legal representatives entered into correspondence with the prosecution team, and it subsequently became clear that the application for the first authorisation initially identified by TSA's representatives was not the complete application. It was also disclosed by the prosecution that there was an application for a new authorisation which was issued by the third respondent on 6 June 2018, in order to replace the 'missing' first authorisation.

[25] TSA was supplied with a copy of the second application; however it remained of the view that no reasonable and probable cause existed to implicate it in the

racketeering activities which justified the authorisation granted by the second and third respondents.

[26] The present application was brought and has been opposed by the first, third and fourth respondents ('the respondents'). The second respondent has filed no papers and failed to co-operate with the respondents' legal representatives.

[27] The respondents have filed under separate cover the records of the proceedings in relation to the authorisations issued on 14 December 2007 and 6 June 2018 respectively, as required by rule 53(1)*(b)* of the Uniform Rules of Court, the contents of which will be dealt with herein below.

[28] Both sides have filed comprehensive affidavits, totalling close to 1700 pages, including annexures, and have also submitted comprehensive heads of argument, for which I thank counsel involved.

Applicant's case

[29] It is the applicant's case that the principle of legality applies to section 2(4) of POCA. This section reads as follows: 'A person shall only be charged with committing an offence contemplated in subsection (1) if a prosecution is authorised in writing by the National Director'. TSA contends that the authorisations have failed the test of legality.

[30] In *Booysen v Acting National Director of Public Prosecutions and others* 2014 (2) SACR 556 (KZD), Gorven J dealt with the legal framework governing applications of this nature and in particular with the principle of legality. The following was said at paras 14-15 (footnotes omitted):

'[14] The principle of legality is an aspect of the rule of law. In *Fedsure* it was said that the principle of legality expresses the fundamental idea that "the exercise of public power is only legitimate where lawful". It is clear that the NDPP exercised a public power in arriving at the impugned decisions. The impugned decisions are therefore subject to the scrutiny of the court based on the principle of legality. This begs the question as to the content of the principle of legality in the context of the impugned decisions. The detailed content of the principle of legality

must be worked out from the Constitution as a whole. This is an ongoing, incremental process which has been addressed by the Constitutional Court in a series of cases involving non-administrative action. Sachs J in a minority judgment in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* described the principle of legality as "an evolving concept in our jurisprudence, whose full creative potential will be developed in a context-driven and incremental manner".

[15] In turn, the principle of legality requires that the exercise of public power "must be rationally related to the purpose for which the power was given". This is the rationality test. It has been held that rationality is a minimum requirement applicable to the exercise of all public power. "Decisions must be rationally related to the purpose for which the power is given, otherwise they are in effect arbitrary and inconsistent with this requirement." A rational connection means that —

> "objectively viewed, a link is required between the means adopted by the [person exercising the power] and the end sought to be achieved".

The test is therefore twofold:

> "Firstly, the [decision-maker] must act within the law and in a manner consistent with the Constitution. He or she therefore must not misconstrue the power conferred. Secondly, the decision must be rationally related to the purpose for which the power was conferred. If not, the exercise of the power would, in effect, be arbitrary and at odds with the rule of law."'

[31] Gorven J also referred to the decision of *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC),where it was held at para 46 that (footnotes omitted):

'the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.'

[32] Gorven J proceeded to consider the merits of the matter, and dealt quite extensively with what was said by the NDPP in her affidavit, and came to the conclusion that the documents relied on by the NDPP did not provide a rational basis for the decisions to sign the authorisations in terms of section 4(2) of POCA. Although the

outcome was based purely on the facts of that matter, the following useful comments were made at para 38:

'As mentioned, there is reference to documents in correspondence and the NDPP states that she will not detail all the information placed before her prior to her making the first impugned decision. Had she outlined even in basic terms what these documents and information comprised, said that she had relied on them and shown that they had included information linking Mr Booysen to the offences in question, this application might not have seen the light of day. The "rhyme or reason" test for rationality might have been satisfied. The level of disclosure of the NDPP for offences of this nature cannot be such as to prejudice the state in its conduct of a future trial. In my view it will therefore not require an exacting, still less an exhaustive, level of disclosure. *De Vries* found that the consideration of a request for authorisation "forwarded to the NDPP under cover of a letter summarising the form and content of the charge-sheet, setting out a detailed background to the charges and summarising the evidence" was sufficient. It is certainly not necessary to disclose every detail of the state's case, strategy or evidence where this is not subject to the criminal discovery process. In the light of the provisions of POCA, it is also not necessary to have before her sworn statements from witnesses on which the state intends to rely. I expressly refrain, however, from making a positive finding as to the level of disclosure necessary in meeting an application such as the present one, or the detail required. This can only be assessed on a case by case basis.'

The reference to *De Vries* is the matter of *S v De Vries and others* 2008 (4) SA 441 (C) paras 26-28.

[33] In his concise heads of argument, counsel for TSA, Mr Roux SC submitted that in order to determine probable cause, the NDPPs at the very least had to consider the draft indictment, as well as the prosecutor's memoranda in the context of a summary of the available identified evidence in order to satisfy themselves that:

(a) What was alleged in the draft indictment and the memoranda was substantiated by available and acceptable evidence; and

(b) The allegations met the requirements of participation forming the basis of the alleged contravention of section 2(1)*(e)* of POCA.

[34] It was further submitted that no summary of the evidence was placed before the NDPPs, and that the prosecution simply alleged that there was sufficient evidence to

show that TSA was aware of the payments without reference to the available evidence (which Mr Ripley-Evans contended in the founding affidavit does not exist).

[35] It was also submitted that where the prosecution seeks to rely in the alternative on racketeering acts 1569 (the alleged corruption agreement) and 1570 (the alleged payment in terms of the corrupt agreement – alleged to be money laundering) to create the two required Schedule 1 offences referred to in POCA, they are actually only one offence.

[36] It was furthermore submitted that the payment was not from the proceeds of crime and could therefore not be money laundering.

The State's case

[37] In their short heads, counsels for the State submitted that the prosecutors' memoranda to the NDPPs, read with the documents accompanying them, as well as the judgments of the High Court, the Supreme Court of Appeal and the Constitutional Court in the successful criminal prosecution of Mr Shaik and his Nkobi group of companies, referred to the evidence available to the State. Such evidence showed that there was reasonable and probable cause to believe that:

(a) The TSA officials controlling TSA were aware that Mr Shaik and his companies were making corrupt payments to or for the benefit of Mr Zuma;

(b) Between October 1999 and March 2000, the TSA officials controlling TSA and Mr Shaik engaged in the planning and conclusion of an illegal agreement between the Thales Group and Mr Zuma. In terms of this agreement, Mr Zuma would, in exchange for an annual payment of R500 000 until certain dividends became payable, protect the Thales Group against an ongoing investigation into corruption, and also promote the interests of the Thales Group in South Africa; and

(c) During early 2001, the officials of the Thales Group controlling TSA, and Mr Shaik, caused a false service provider agreement to be concluded between Thales

International Africa Limited (Mauritius) and Kobifin (Pty) Limited, with the aim of concealing the payment of the annual bribes by the Thales Group to Mr Zuma pursuant to the illegal agreement concluded in March 2000. In February 2001, pursuant to the alleged false service provider agreement, R250 000 was paid by the Thales Group to Kobitech (Pty) Limited and then on-paid to the Development Africa Trust – to which Mr Zuma owed money.

[38] It was also submitted that the conclusion of the annual bribe agreement in March 2000, on the one hand, and the conclusion of the false service provider agreement in early 2001 and the payment of the R250 000 pursuant thereto, on the other hand, constituted separate offences. The first being corruption in contravention of section 1(1)*(a)* read with sections 1(2) and 3 of the Corruption Act (as set out in count 5) and the second being money laundering in contravention of section 4, read with sections 1 and 8 of POCA (as set out in count 6).

[39] It was further submitted that the prosecution did not seek the authorisation to prosecute Thales on the charge of racketeering for an improper purpose (as alleged by TSA in its founding affidavit).

[40] A few days before the hearing, we were provided with the State's 'Note for hearing' drafted by the first and fourth respondents' lead counsel, Mr Trengrove SC. At the hearing of the matter before us, TSA's counsel indicated that he would present argument based on the State's note for hearing only, which he duly did. I will deal with this more fully herein below.

Reasonable and probable cause

Documents provided to NDPPs

[41] It is of course necessary to firstly scrutinize and consider what exactly was placed in front of the NDPPs in order to be able to gauge objectively whether there was sufficient evidence before them on which they could rationally conclude that reasonable

and probable cause existed that TSA had committed the alleged racketeering acts it is being charged with.

[42] From the record of the so-called 2007 authorisation, it appears that the following documents were placed before the second respondent:

(a) Various judgments which comprised the following:

(i) *S v Shaik and others* 2007 (1) SACR 142 (D);

(ii) *S v Shaik and others* 2007 (1) SA 240 (SCA) (Criminal Appeal);

(iii) *Shaik and others v S* [2007] 2 All SA 150 (SCA) (Civil Appeal);

(iv) *S v Shaik and others* 2008 (2) SA 208 (CC);

(v) *National Director of Public Prosecutions and others v Zuma and another* 2008 (1) SACR 298 (SCA); and

(vi) *Thint (Pty) Limited v National Director of Public Prosecutions and others* [2008] 1 All SA 229 (SCA).

(b) A report on the prospects of a successful prosecution of Mr Jacob Zuma dated 16 June 2005, comprising 88 pages:

(i) The introduction inter alia contains references to the investigation, which assumed large proportions, requiring documents in excess of 50 000 pages to be perused. It also refers to business records, financial statements, correspondence and bank records having been obtained in respect of the Nkobi group of companies, Mr Shaik and various entities within the Thomson/Thales Group, both in South Africa, France and Mauritius.

(ii) Under the heading ‘Evidence’ mention is made of the fact that:

‘Much, although by no means all, of the evidence is circumstantial in nature”. It also states that: “Since much of what follows has now become notoriously familiar in light of the evidence presented at the Shaik trial and summarised in the judgment thereto, the reader who is familiar with such evidence may wish to skim through the next section.’

The evidence is then dealt with under various headings over the next 69 pages, and includes references to inter alia TSA’s correspondence which indicates that it was urgently seeking influence in South African government circles, minutes of meetings and of course the so-called encrypted fax.

(iii) It concludes, inter alia, with a recommendation that although the possibility of adding Thomson as an accused had been considered, it had been discounted due to 'practical difficulties and misjoinder issues'.

(iv) It was recommended that the Shaik judgment and 'the evidence in respect of the second corruption charge' be referred to the French authorities with a view to prosecute the Thomson/Thales entities and personalities in France, in accordance with 'French extra-territorial corruption provisions'.

(c) A report dated 4 July 2005 on the legality of charging Thint (the former accused no 3) and whether it should be added to the prosecution of Mr Zuma:

(i) It expressed the view that the National Prosecuting Authority would be at liberty to regard a previous agreement not to charge Thint as being of no force and effect.

(ii) Mention was also made of the fact that TSA was never charged, and that there was no agreement not to prosecute it. Mention was inter alia made of the fact that Mr Shaik was at all times a director of Thint, and that 'documents seized from Shaik's premises will arguably be admissible against Thint (Pty) Limited in terms of section 332(3) and (4) of Act 51 of 1977'.

(iii) It concluded that it was tactically and legally advisable to add Thint 'Holdings and Pty' as co-accused to Mr Zuma's prosecution.

(d) A memorandum on the motivation for deciding to prosecute Thint Holdings (Pty) Limited and Thint (Pty) Limited dated 13 October 2005:

(i) It appears from this short memorandum that despite the recommendations in the report dated 4 July 2005, the then NDPP decided to hold over the decision pending developments. Reference was made to additional motivation appearing from an affidavit by SSI du Plooy.

(ii) It is again recommended that the two Thint entities be indicted immediately on the two charges of corruption as previously detailed.

(e) An extension of an investigation in terms of section 28(1)*(c)* of the National Prosecuting Authority Act 32 of 1998 ('the 'NPA Act') dated 1 December 2006. In terms of this document, the investigation was extended to include the offences of racketeering in contravention of section 2 of POCA, and money laundering in contravention of

sections 4, 5 and 6 of POCA against Mr Zuma, Thint Holdings (TSA) and Thint (Pty) Limited.

(f) A report on the investigation in terms of section 33 of the NPA Act, Project Bumiputera, dated 8 October 2007:

(i) It dealt with various issues which included the refusal of the State's application for an adjournment, and subsequent developments such as the dismissal of Mr Shaik's appeals in both the Supreme Court of Appeal and the Constitutional Court.

(ii) With reference to the Supreme Court of Appeal judgment it stated that:

'without entering into a detailed analysis of the judgment, suffice it to say that every aspect of the State case was confirmed, including issues of law, facts, credibility and admissibility. One issue that bears mentioning is that the legal basis for the admissibility of the so-called encrypted fax would also render it admissible against Zuma and the Thint companies.'

(iii) It also dealt with various issues regarding documents from Mauritius and the United Kingdom, as well as search warrant appeals which appeared to be 'the only real obstacle to the decision on whether to recharge'.

(g) The application to the Acting NDPP, the second respondent, for the institution of a prosecution in terms of Chapter 2 of POCA in the *State v JG Zuma and Others,* dated 13 November 2017:

(i) Attached to the application as annexures were the indictment, the report dated 16 June 2005, the report dated 4 July 2005, the Supreme Court of Appeal judgments in the matters of *NDPP v Zuma, supra* and *Thint (Pty) Limited v NDPP, supra* (which dealt with the search warrant appeals and the request for documents in Mauritius).

(ii) In the introduction, mention was made of the appeal regarding the Thint search, and that the judgment was regarded as 'being overwhelmingly in favour of the State.' A view was expressed that a prosecution in terms of section 2(1) of POCA 'provides the best solution to the unique challenges which face the State in this matter. Furthermore, we believe that a racketeering prosecution best suits the merits of the matter.'

(iii) Under the heading ‘Summary of the Case and Synopsis of the Evidence’, reference was made to the two earlier reports dated 16 June 2005 and 4 July 2005 which were attached as annexures. It was stated that the State’s evidence had been ‘thoroughly tested in the Shaik case and found to be credible and reliable’ and that ‘we are of the view that the evidence will prove equally satisfactory in the present matter’.

(iv) The application also contained a heading ‘The Racketeering Prosecution Theory and Legal Discussion’, one of the two sections in the application that drew a lot of criticism from TSA’s counsel in argument before the court and of course in the application papers.

(v) Reference is made to the indictment and specifically to the preamble from which the prosecution theory appears. The racketeering ‘enterprise’ for the purpose of the prosecution is defined as the corporate entity Nkobi Investments (Pty) Limited, which was the operating company through which Mr Shaik ran his Nkobi group of companies (two of which were convicted of money laundering in the Shaik prosecution).

(vi) Reference was made to the pattern of racketeering activities set out in the indictment which comprised of, firstly, the ongoing and corrupt payments of benefits to and on behalf of Mr Zuma as set out in a schedule. It was alleged ‘that the Thint Companies were *socii criminis* and hence also liable for these acts of racketeering’. Secondly, the specific corrupt agreement set out in the encrypted fax formed another discreet racketeering act to which all accused were party to. Thirdly, and finally, it was alleged that the Thint Companies were *socii criminis* in respect of the money laundering scheme devised between the enterprise and Mr Alain Thetard to disguise payments pursuant to the specific corruption as proceeds of a ‘service provider agreement’. It was also stated that the Thint Companies were ‘associated with the enterprise as joint venture parties in ADS and Prodiba projects as well as their alleged complicity in the bribery of Zuma’.

(vii) The second section that came under attack from TSA was what was contained under the heading ‘The Benefits of a Racketeering Prosecution.’ It dealt with the potential misjoinder between Mr Zuma and Thint and stated that:

'the evidence of Thint's involvement in the general corruption count is open to more than one interpretation . . . They will no doubt argue that there is no acceptable evidence upon which the State can charge them on this count and that it has done so merely in an effort to avoid a misjoinder, which would amount to an abuse of process.'

(viii) The view was however expressed that there was sufficient evidence to support the allegation that Thint was aware of Mr Shaik's payments to Mr Zuma (this issue was pertinently addressed in the State's Note for hearing and in argument and will be addressed herein below). Caution was however expressed that this remained one of the weakest aspects of the case, as 'it relies predominantly from inferences rather than direct evidence' and was vulnerable to criticism.

(ix) The evidential benefits were discussed with specific reference to section 2(2) of POCA which allows for the admission of hearsay evidence and similar fact evidence. It is this aspect, TSA alleged, that points to an improper purpose for seeking the racketeering prosecution.

(x) The application concluded with a recommendation that the Acting NDPP authorise a prosecution in terms of Chapter 2 as per the attached indictment.

(h) The application to the Acting NDPP for the centralisation of charges in terms of section 111 of Criminal Procedure Act 51 of 1977 in the *State v JG Zuma and others* dated 20 November 2007, to which was attached the memorandum (application) dated 13 November 2007, the draft indictment, the draft summary of substantial facts, the draft list of witnesses, and a draft section 2(4) certificate for racketeering authorisation.

(i) A report on the investigation in terms of section 33 of the NPA Act, Project Bumiputera, dated 3 December 2007, which provided an update on issues such as the search warrant appeals, confirming that the investigation was all but complete as well as an explanation for the additional charges brought against Mr Zuma and the Thint Companies as opposed to what Mr Shaik was charged with. Attached to it was a copy of the indictment.

(j) An internal memorandum regarding the delay of the announcement of the decision to charge Mr Zuma and Thint dated 6 December 2007.

(k) The authorisation in terms of section 2(4) of POCA, signed on 14 December 2007. Although a signed copy is enclosed in the papers, it is assumed that initially an unsigned draft copy would have been placed before the second respondent.

(l) The final indictment.

[43] From the record of the 2018 authorisation, it appears that the following documents were placed before the third respondent:

(a) The two judgments delivered in the Gauteng High Court and the Supreme Court of Appeal respectively, namely:

(i) *Democratic Alliance v Acting National Director of Public Prosecutions and others* 2016 (2) SACR 1 (GP); and

(ii) *Zuma v Democratic Alliance and others* 2018 (1) SA 200 (SCA).

(b) A prosecution memorandum regarding Mr GJ Zuma and Thint dated 12 January 2018:

(i) The history of the matter as well as the outcome of the most recent litigation, which required that Mr Zuma should face the charges in the indictment, was discussed.

(ii) The previous memoranda were attached to the report, including the report dated 16 June 2005, the report dated 4 July 2005 and the application dated 13 November 2007.

(iii) The issue of Mr Zuma's representations was also dealt with in detail.

(iv) It also contained a discussion of the evidence still available, reporting that 'with some insignificant exceptions and qualifications', the State witnesses have been traced and were available in principle to testify.

(v) The documents also remained available, and in particular

'the mainstay of the corruption charges, for instance, being Shaik's 783 payments to Zuma, are incontrovertibly proved by the various bank statements and other pieces of documentary evidence that are immune to the ravages of time'.

(vi) It was recommended that the prosecution against Mr Zuma and Thint be enrolled immediately.

(c) Correspondence between Mr Driman and Advocate Noko regarding the instructions from the Thales Group to make representations dated 3 to 8 February 2018, as well as correspondence between Mr Driman and the NDPP's office requesting an opportunity to make representations, and the refusal of such requests by the NDPP dated 14 February 2018.

(d) A prosecution memorandum which contained the prosecution team's response to the representations received from Mr Zuma and his legal team dated 23 February 2018.

(i) It comprised 52 pages and attached to it was a chronology of material facts, drafted by Mr Zuma's representatives and a copy of the indictment.

(ii) Copies of the previous memoranda dated 16 June 2005 and 4 July 2005 were referred to under the heading 'Evaluation of the Evidence against the accused' and were also attached. It was stated that the prosecution team 'aligns itself with these memoranda'. A lot of the content of this report was a repetition of what was contained in previous reports.

(iii) It was recommended that the representations should not be acceded to and that the prosecution be reinstated.

(e) The media announcement regarding the representations by Mr Zuma, dated 16 March 2018, in terms of which it was announced that the representations were unsuccessful.

(f) A memorandum dated 24 May 2018 from the prosecution team to Advocate Noko, DPP KZN, requesting the NDPP to sign a new section 2(4) certificate as the old signed one could not be found:

(i) A new certificate was also necessary to incorporate certain formal changes, as the name of accused no 2, Thint Holdings South Africa (Pty) Limited had been changed to Thales South Africa (Pty) Limited and accused no 3, Thint (Pty) Limited, had been deregistered.

(ii) Attached to the memorandum was a copy of the 2007 application to the Acting NDPP dated 13 November 2007.

(g) The application to the NDPP for authorisation to prosecute the accused for racketeering in terms of section 2(1)*(e)* and *(f)* of POCA, dated 28 May 2018.

(h) A memorandum dated 4 June 2018 advising the NDPP on the application for authorisation of a racketeering prosecution. In the memorandum reference is made to the *Zuma v DA supra* judgment and the NDPP is also advised on the applicable case law such as *S v De Vries, supra*, in matters of this nature. It was recommended that the approval be granted for the prosecution of the accused in terms of section 2(4) of POCA.

(i) The authorisation signed by the NDPP, the third respondent, on 6 June 2018. As before, it is presumed that an unsigned draft copy would have been placed before the third respondent.

(j) A memorandum from the prosecuting team regarding representations made on behalf of TSA dated 28 June 2018, with a recommendation that the representations not be acceded to.

(k) Correspondence from the NDPP informing TSA's legal representatives that the representations were unsuccessful.

[44] One of the key arguments advanced by TSA's counsel was that it would not suffice if the prosecution team placed what amounted to mere allegations before the NDPPs, resulting in the NDPPs relying on the mere say-so of the prosecution. This, it was argued, would amount to a rubberstamping exercise. It was further submitted that at least a summary of the facts had to be provided in order to enable the NDPPs to independently determine if the offences were committed.

[45] TSA's counsel, accepted, for purposes of the hearing only, that there was a general retainer between Mr Shaik, the Nkobi Companies and Mr Zuma, and that the so-called encrypted fax agreement constituted an agreement to bribe. It was also accepted that the NDPPs had read the Shaik judgments, and would have known that Mr Shaik was not on the list of witnesses for the State. It was submitted in this regard that a lot of the findings in the Shaik judgments were based on Mr Shaik's evidence.

[46] As mentioned, one of the primary reasons for bringing this application centred on the allegations that there was no evidence amongst thousands of pages of discovered documents to indicate that TSA was aware of the 783 payments made to Mr Zuma.

[47] It was stated in the application dated 13 November 2007 to the second respondent for his authorisation that the State would be relying on 'predominantly' drawing of inferences 'rather than direct evidence'.

[48] It was argued by the State's lead counsel that the question we have to decide is whether the NDPPs had evidence before them on which they could rationally conclude that there was reasonable and probable cause that TSA knew of the ongoing retainer.

History of TSA, Mr Shaik and his companies

[49] It is crucial to take note and understand the history, structure and role of TSA, Mr Shaik and his group of companies when considering the issue of TSA's knowledge of the ongoing retainer. The background of the various role players is set out in the general preamble and the summary of substantial facts in the indictment, and is also dealt with in the High Court judgment in *S v Shaik and others* 2007 (1) SACR 142 (D), at 149D-I and at 163C-E.

[50] The applicant, TSA, formed part of a group of companies, the Thomson CSF Group. Thomson-CSF International (France) was a division of the Thomson CSF Group. It was headed by Mr Jean-Paul Perrier. Its name was later changed to Thales International.

[51] Thales International Africa Limited (Mauritius) was a subsidiary of Thales International and was headed by Mr Yann Leo Renaud de Jomaron.

[52] Thomson-CFS Holding (Southern Africa) (Pty) Limited was incorporated in South Africa on 21 May 1996. It later changed its name to Thint Holding (Southern Africa) on

23 October 2003. It subsequently changed its name to Thales South Africa (Pty) Limited which is of course the applicant, TSA.

[53] At the time of TSA's incorporation, 85 shares were issued to Thomson-CSF (France), 10 shares were issued to Nkobi Investments (Pty) Limited and 5 shares were issued to Gestilac SA (Switzerland).

[54] At various stages, the authorised share capital of TSA was increased and transfers of shares took place between different entities, resulting ultimately in TSA being wholly owned by Thomson-CSF International (France).

[55] On 4 April 2001, Thomson-CSF International (France), now known as Thales International, transferred all its shares in TSA to Thales International Africa Limited (Mauritius).

[56] Mr Shaik was a director of TSA from its incorporation in 1996 until 30 September 1999. Nkobi Investments (Pty) Limited was initially wholly owned by Mr Shaik.

[57] Mr Alain Thetard was appointed as a director of TSA from 1 April 1998 until 30 September 2002. Mr Pierre Jean-Marie Rober Moynot was a director of TSA from its incorporation until 1 April 1998. He was reappointed on 1 October 2002.

[58] On 16 July 1996, Thomson-CSF (Pty) Limited was incorporated in South Africa. TSA (which was still called Thomson-CSF Holding (South Africa) (Pty) Limited at the time) was issued with 70 shares and Nkobi Investments (Pty) Limited was issued with 30 shares. TSA's shareholding was later increased to 75% and Nkobi Investments' shareholding was reduced to 25%.

[59] Thomson-CSF (Pty) Limited changed its name to Thint (Pty) Limited on 19 August 2003 and later to Thales Participation South Africa (Pty) Limited.

[60] Mr Shaik was a director of Thales Participation South Africa (Pty) Limited since the date of incorporation until 16 June 2005. Mr Thetard was appointed as a director on 1 April 1998 and resigned on 30 January 2002. Mr Moynot was a director since the date of incorporation until 1 April 1998. He was reappointed on 16 January 2004.

[61] Thales Participation South Africa (Pty) Limited was previously charged, and was accused no 3 in the criminal proceedings where it has always been referred to as Thint (Pty) Limited. It has since been deregistered, as mentioned before, resulting in the prosecution against it no longer proceeding.

[62] Nkobi Investments (Pty) Limited, mentioned hereinabove, formed part of the Nkobi group of companies. On 20 August 1998, Nkobi Holdings was the sole shareholder in Nkobi Investments, which in turn wholly owned, inter alia Kobifin (Pty) Limited and Kobitech (Pty) Limited. Mr Shaik was at all relevant times a director of and exercised control over all the corporate entities in the Nkobi Group.

Discussion

[63] It was submitted by the State's counsel that it was important to recognise that TSA was not a Thomson company at arm's length with Mr Shaik and his group of companies who paid bribes to Mr Zuma. TSA and its subsidiary were set up pursuant to a shareholders' agreement concluded between Mr Shaik and Thomson International. In terms of this agreement, Thomson International undertook to conduct all its South African business through these two joint venture companies.

[64] It was submitted that, bearing in mind that Mr Shaik was a director of TSA until 30 September 1999, his knowledge of the bribes paid to Mr Zuma under his ongoing retainer, was accordingly attributable to TSA at least until that date. It means, it was argued, that TSA was the vehicle of a partnership, while Mr Shaik, who was one of the partners, had Mr Zuma in his pocket through the payment of ongoing bribes.

[65] A further argument advanced to counter TSA's claim that there was no proof of any knowledge of the racketeering on TSA's part, was with reference to an incident where Mr Zuma interceded on Mr Shaik's behalf when Thomson International reneged on its agreement with Mr Shaik to hold its South African interests through TSA. Mr Zuma attended a meeting in London during July 1998 and persuaded Mr Perrier of Thomson International to retain Mr Shaik as its South African partner, to which Thomson International agreed. The Supreme Court of Appeal in its judgment in *S v Shaik and others* 2007 (1) SA 240 (SCA), when dealing with this incident, said the following at para 119:

'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 . . . This was something no commercial competitor would have been able to procure.'

It was submitted that TSA knew that this 'extraordinary intervention' was achieved by the ongoing bribes paid to Mr Zuma by Mr Shaik, who, when he paid these bribes and convinced Mr Zuma to intervene on his behalf, was also a director of TSA.

[66] It was also argued that further indications of TSA's knowledge or awareness were the events surrounding the encrypted fax and what followed thereafter. News broke of threatened investigations into the so-called arms deal. Mr Shaik sought to persuade Mr Thetard at a meeting on 30 September 1999 to pay bribes to Mr Zuma of R500 000 per annum. Following a conversation with Mr Perrier in Paris on 10 October 1999, Mr Thetard required confirmation of the request for the bribes from Mr Zuma personally. The fax, authored by Mr Thetard, described the meeting with Mr Shaik and Mr Zuma on 11 March 2000. Mr Zuma confirmed the request for the bribes by an 'encoded declaration'. The purpose of the bribe was twofold, firstly to buy Mr Zuma's protection and secondly to buy Mr Zuma's permanent support. It was contended that the only way Mr Thetard would have been persuaded to pay the bribes is if he had been told by Mr Shaik, if he did not know so already, that he had Mr Zuma 'in his pocket'.

[67] Squires J, in his judgment in *S v Shaik and others* 2007 (1) SACR 142 (D) at 215A-217D, 220B – 221E and 222G – 223B dealt with this particular aspect in detail and described the evidence which established the facts.

[68] In conclusion on this particular point, the State's lead counsel submitted that TSA was at all material times aware of the ongoing bribes paid by Mr Shaik to Mr Zuma under their ongoing retainer and that TSA participated in Mr Shaik's racketeering in the following manner:

(a) As an accessory after the fact to the bribes paid to Mr Zuma under his general retainer before the encrypted fax agreement;

(b) As an accomplice to the bribes paid to Mr Zuma under his general retainer after the encrypted fax agreement; and

(c) By agreeing to pay Mr Zuma's bribes of R500 000 per annum in terms of the encrypted fax agreement.

[69] Bearing in mind what is contained in the various memoranda by the prosecution, the indictment and in particular its preamble and summary of substantial facts and the judgments in the Shaik matters, it is difficult to fault this reasoning. As far as participation is concerned, 'actual participation' is required, as held by Cloete JA in *S v Eyssen* 2009 (1) SACR 406 (SCA) para 5, and has been established by the State, despite this particular aspect not being dealt with in so many words in the memoranda.

[70] A further argument advanced by TSA's counsel relates to counts 5 and 6, pertaining to corruption and money laundering, also described in the indictment as racketeering acts 1569 and 1570. It was submitted that it only constituted one offence as the bribe and the payment of the bribe are intrinsically linked.

[71] Reliance was inter alia placed on the fact that the Supreme Court of Appeal in *S v Shaik and others* 2007 (1) SA 240 (SCA) disagreed with the finding of Squires J that the encrypted fax in itself was a corrupt agreement and instead found that it was a request for a bribe by Mr Shaik.

[72] The prosecution was also accused, for want of a better word, of splitting the alleged corrupt agreement and the alleged payment into two separate counts in order for it to constitute a pattern of racketeering, which is defined in POCA as:

'The planned, ongoing, continuous or repeated by participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within ten years . . . after the commission of such prior offence.'

[73] The State's lead counsel, in dealing with this particular aspect, submitted that under section 1(1)*(a)* of the Corruption Act (with which TSA is charged on count 5) anybody who 'corruptly gives or offers or agrees to give' a bribe to another person was guilty of corruption. On that basis, the mere offer or agreement to pay a bribe was accordingly a complete offence. Therefore, the payment of the bribe was not a necessary ingredient, nor was the disguising of such payment.

[74] It was further submitted that the fraudulent disguise of the bribe, as a lawful payment under a service provider agreement, was an additional 'feature' which constituted the offence of money laundering and contravention of section 4 of POCA. It was separate from and in addition to the crime of corruption.

[75] In *S v Shaik and others* 2007 (1) SA 240 (SCA), the Supreme Court of Appeal at paras 206 and 208 held:

'[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. . . .
[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 . . . 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.'

[76] It was also submitted that there is always a link between the underlying crime of corruption and the money laundering of its proceeds, simply because the very essence of money laundering lies in the disguise of the proceeds of a crime. It does however not detract from the fact that they are two separate offences.

[77] I agree with this argument. The offence of corruption had clearly been completed. In paragraphs 78 to 81 of the general preamble of the indictment, the payment of the bribe is dealt with. The following is stated:
'[78] It was agreed between the parties that the bribes would not be paid directly to accused no. 1, but that some method of payment would be employed that was calculated to disguise the nature of the payments so as to avoid detection. Consequently, during the period late 2000 to early 2001, Kobifin (Pty) Limited entered into a so-called "service provider agreement" with Thomson-CSF International Africa Limited in Mauritius, as a device to conceal or disguise the true nature and source of the payment of the bribe. In terms of the agreement remuneration was to be paid in instalments of R250 000-00. The first two instalments were initially due before the end of December 2000 and on February 2001 respectively. Shaik stipulated that the total remuneration was to be R1 million.
[79] Accused no. 1 needed funds to pay for the development of his traditional residential village estate at Nkandla in rural KZN. Plans for the development were dated March 2000 . . . At no stage during construction and thereafter has accused no. 1 been able to settle the outstanding amount or obtain finance without the intervention and assistance of third parties, including arrangements for payment through Shaik in accordance with the agreement to disguise payments to accused no. 1 described above.

[80] On 16 February 2001 R249 725-00 was transferred from Thales International Africa Mauritius to the Absa current account of Kobitech (Pty) Limited as a first payment in pursuance of the abovementioned scheme.

[81] Within eight days (on 24 February 2001) and in furtherance of the common purpose to bribe accused no. 1, Kobitech (Pty) Limited paid R250 000-00 to Development Africa, a trust to which accused no. 1 was indebted to the sum of R1 million, in reduction of accused no. 1's liability to Development Africa.'

This was in line with what the Supreme Court of Appeal had found in relation to the money laundering.

[78] TSA's counsel also submitted that the money paid by Thales International Africa Limited (Mauritius) to Kobitech was not the proceeds of crime as it was not 'dirty or hot money' and therefore did not constitute money laundering.

[79] Section 4 of POCA, which deals with money laundering, reads as follows:

'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

(ii) . . .

shall be guilty of an offence.'

[80] In terms of section 1 of POCA 'proceeds of unlawful activities' is defined as :

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

[81] In section 1 of the Financial Intelligence Centre Act 38 of 2001 (FICA), 'money laundering' and 'money laundering activity' is defined as:

'an activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds, and includes any activity which constitutes an offence in terms of section 64 of this Act or section 4, 5 or 6 of [POCA]'.

[82] It is clear from the definitions of money laundering and the proceeds of unlawful activities, read with what is set out in section 4 of POCA, that the concept of money laundering is so much wider than simply looking at whether the money was 'hot' or 'dirty'.

[83] In *S v Van der Linde* 2016 (2) SACR 377 (GJ) para 111, Nicholls J refers to the three stages of money laundering namely, placement, layering and integration and discusses various cases. The following was said at paragraph 124:

'What is apparent from the above cases is that in order to be found guilty of money-laundering, there must be a clear intention to hide or conceal what is often referred to as 'hot' money. This entails the laundering of the illegal funds to convert them into 'clean' money, which the criminal can safely spend. As stated in De Koker, money-laundering is by its very nature a secretive practice. I am not persuaded that by spending the proceeds of fraud, a conviction of money-laundering should follow axiomatically. Instead, there has to be an element of concealment which must be proven or inferred.'

The Court found that there was no attempt at concealment and that the accused were therefore not guilty of money laundering.

[84] Authors L de Koker et al in *South African Money Laundering and Terror Financing Law*, November 2019 – SI 20, paragraph 3.05 in Chapter 3, criticised the judgment in *Van der Linde, supra*, in as far as it overlooked certain aspects of section 4. The following was said towards the conclusion of the section on money laundering:

'Whether the actions of an accused has, or are likely to have, the effects listed in paragraphs 4(i) or (ii) is largely a factual question and while the mere spending of proceeds of crime may not necessarily have these effects, it is arguable that actions, such as using the bank account of

a legal person instead of one's own to receive and disburse those proceeds, are at least likely to conceal their source as well as the ownership of or interests in them.'

[85] De Koker, *supra,* when dealing with the definition of proceeds of unlawful activities in paragraph 3.04 said that

'. . . money or property can only constitute proceeds of crime if the crime that gives rise to the proceeds (the "predicate offence") has been completed and the relevant proceeds was derived, received or retained in connection with or as a result of that offence.'

Reference was also made to the decision of *S v Imador* 2014 (2) SACR 411 (WCC) where Blignault J referred to a judgment of the England and Wales Court of Appeal (Criminal Division) in *R v Anwoir and others* [2008] EWCA Crim 1354 para 21, where that Court of Appeal held that:

'. . . there are two ways in which the Crown can prove the property derives from crime, a) by showing that it derives from conduct of a specific kind or kinds and that conduct of that kind or those kinds is unlawful, or b) by evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from crime.'

[86] In the present matter, the crime of corruption had been completed after the offer had been made or there was an agreement to pay. When it however came to the actual payment of the bribe, the proceeds of the crime, it was agreed that the payment had to be concealed or disguised, especially in light of the spotlight being cast on all activities surrounding the so-called arms deal. It was concealed by disguising the money to be paid to Mr Zuma as a payment in terms of the service provider agreement between Thales International Africa Limited (Mauritius) and Kobifin and payment to Kobitech for on-payment to Development Africa, to eventually reach its destination for the benefit of Mr Zuma.

[87] The Supreme Court of Appeal confirmed Kobifin and Kobitech's convictions on the charge of money laundering and what was said in that regard is equally applicable to TSA. As mentioned hereinabove it also referred to the fact that the two companies had helped Mr Shaik and TSA to avoid prosecution.

[88] The service provider agreement was clearly contrived and designed to conceal the true nature of the payment. It would simply make no sense that TSA, as an accomplice in the group also including Thales International Africa Ltd (Mauritius), should escape prosecution because the latter allegedly used its own 'clean money' to pay the bribe. The moment the decision was made to pay the bribe and the transaction to effect payment commenced, the money used to do so became proceeds of the unlawful activity.

[89] TSA's counsel relied on *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd*; *National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd and another*; *National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA) as support for his submission that the payment was not from the proceeds of crime and could therefore not be considered to be money laundering. In that particular matter, the State had applied for an order forfeiting funds held by Sanlam after it was invested by the respondent under fictitious names. The State's application was dismissed as it had failed to prove that the funds were derived from crime or that the funds were initially earned through crime. The facts are clearly distinguishable from the present matter and the matter does not assist TSA.

[90] Finally, TSA's counsel's contended that the prosecution of TSA for racketeering was instituted for alleged ulterior purposes. Section 2(2) of POCA clearly comes to the assistance of prosecutors by allowing a court to 'hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to the offences contemplating in subsection 1. . .'. It does however contain a safeguard by including the words 'provided that such evidence would not render a trial unfair', which would protect an accused person's rights.

[91] TSA's protestations in this regard stems from what was said in the application dated 13 November 2007, where the prosecution team set out the benefits of charging TSA with racketeering. It is however clear that the particular comments followed upon a chapter where the prosecution team had justified the racketeering charge by dealing

with the merits of such a charge. I agree with the submission on behalf of the State that it was perfectly legitimate for the prosecutors to discuss the advantages of a lawful racketeering charge. Even more so when POCA itself specifically grants such advantages.

[92] The State's counsel referred to the matter of *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 38 where it was held that:

'The motive behind the prosecution is irrelevant because, as Schreiner JA said in connection with arrests, the best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal. The same applies to prosecutions.'

[93] In the final analysis, it is clear in my view that sufficient information was placed before the NDPPs on which they could rationally conclude that there was reasonable and probable cause to believe that TSA had, directly or indirectly or with common purpose, participated in the enterprise run by Mr Shaik, through a pattern of racketeering activity compromising the planned, ongoing, continuous or repeated participation or involvement in at least two Schedule 1 offences.

Order

[94] The following order is accordingly made:

The application is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

_____

BEZUIDENHOUT AJ

I agree.

_____

VAN ZYL J

I agree.

_____

CHETTY J

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MATTER ARGUED ON:	26 OCTOBER 2020
JUDGMENT DELIVERED:	22 JANUARY 2021