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[1], there will

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

be an order in these terms:

Subject to a combined aggregate liability of R21 018 000

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

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

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

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

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

Subject to a combined aggregate liability of R12 797 331,

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

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

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

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

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

Subject to a combined aggregate liability of R499 688,

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

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

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

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

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

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

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

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[2] 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.

[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

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

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