IN THE HIGH COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION

DURBAN

CASE NO **CC27/04**

DATE 2005/06/08

THE STATE versus

1. **SCHABIR SHAIK**
2. **NKOBI HOLDINGS (PTY) LTD**
3. **NKOBI INVESTMENTS (PTY) LTD**
4. **KOBIFIN (PTY) LTD**
5. **KOBITECH (PTY) LTD**
6. **PROCONSULT (PTY) LTD**
7. **PRO CON AFRICA (PTY) LTD**
8. **KOBITECH TRANSPORT SYSTEMS (PTY) LTD**
9. **CLEGTON (PTY) LTD**
10. **FLORYN INVESTMENTS (PTY) LTD**
11. **THINT (PTY) LTD [charges withdrawn]**
12. **CHARTLEY INVESTMENTS (PTY) LTD**

BEFORE THE HONOURABLE MR JUSTICE SQUIRES

ASSESSORS: MR J I JACOBSZ
MR A B MOHAMED SC

ON BEHALF OF THE STATE: MR W J DOWNER SC, assisted by MR G H PENZHORN SC
MR A STEYNBERG
MR S MANILALL

ON BEHALF OF THE DEFENCE: MR F VAN ZYL SC [On behalf of accused 1 - 10 & 12, instructed by Reeves Parsee Attorneys]

MR H K NAIDU SC [On behalf of accused 11, instructed by Fathima Karoida Attorneys]

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SNELLER RECORDINGS (PTY) LTD - DURBAN

CASE NO: CC27/04

DATE: 8 JUNE 2005

THE STATE versus SCHABIR SHAIK & 11 OTHERS

ON RESUMPTION ON 8 JUNE 2005

ALL APPEARANCES AS BEFORE

SENTENCE 6 JUNE 2005

SQUIRES J The question of punishment of persons found guilty of criminal offences is often the most difficult and anxious aspect of a trial. One has to focus on three distinct factors. In no particular order of importance, they are, first, the circumstances of the offender; secondly, the nature of the offence or offences of which he has been found guilty; and, thirdly, the interests of the community in the type and level of sentence imposed, balancing those three factors against each other to decide on a fit and suitable penalty, and taking care not to over-emphasise any one of them at the expense of any other.

In the instant case that exercise is complicated by the fact that so far as accused No 1 is concerned, all three offences of which he has been found guilty fall within the ambit of part II of the second schedule to Act 105 of 1997, the Criminal Law Amendment Act of that year. That statute introduced a prescribed level of sentence of 15 years' imprisonment for the various criminal offences set out in that schedule, unless there are substantial and compelling reasons which justify the imposition of a lesser penalty than that prescribed. If such circumstances are so identified, then they must be entered in the record of proceedings. By that enactment Parliament plainly intended that, when considering sentence for these

offences, emphasis had to be shifted to the objective gravity of the type of offence and the public's need for effective sanctions against it.

That does not mean other considerations are to be left out of account. If passing of the standard sentence in any particular case would lead to a discernible injustice, then the Court is given a discretion to pass a sentence that would reflect one more ordinarily given for that sort of offence.

It has to be observed, in addition, that these provisions of the statute are to be read in the light of the values that are enshrined in the Constitution and, unless it proves impossible to do so, they are to be interpreted in a manner which respects those values.

To deal first then with the nature of the offence that is established in counts 1 and 3, that is corruption in contravention of the Corruption Act. I do not think I am overstating anything when I say that this phenomenon can truly be likened to a cancer, eating away remorselessly at the fabric of corporate probity and extending its baleful effect into all aspects of administrative functions, whether State official or private sector manager. If it is not checked, it becomes systemic and the after-effects of systemic corruption can quite readily extend to the corrosion of any confidence in the integrity of anyone who has a duty to discharge, especially a duty to discharge to the public, leading eventually, and unavoidably, to a disaffected populace. One can, hopefully, discount the prospect of it happening in this country. But it is that sort of increasing disaffection which leads, and has led in other parts of our continent and elsewhere, to *coups de'état* or the rise of Populist leaders who, in turn, manipulate politics for even greater private benefit.

There was led before us on this subject the evidence of Mr Hendrik van Vuuren of the Institute of Strategic Studies, a long-time student and qualified observer of this phenomenon, and a report he prepared on the subject was handed in as Exhibit MMM1-24. Apart from some questionable quantifications of the economic costs of corruption on a world-wide or continent-wide basis, his report was not challenged, and it is, in any case, a well-put statement of what really is the visceral feeling of all fair-minded people about corruption. There are two excerpts from his report that are worth highlighting and including in the instant exercise.

The first is the effect of corruption on human rights and that this factor plays a role in a situation like the present is stated by the late ISMAIL MAHOMED CJ in the decision of *S v Salzwedel and Others* 1999 (2) SACR 593, where the Learned Chief Justice said this:

> "The ethos of human rights, as espoused in the Bill of Rights, permeates the length and breadth of our Constitution. Such ethos should influence judicial interpretation and discretion, as well as the application of sentencing policies."

I turn then to consider the impact of corruption on human rights, as assessed by Mr van Vuuren.

> "Corruption in all its forms constitutes a violation of the human rights of the people who experience it. Governments who are complicit in corruption are failing in their duty to protect and promote human rights. The struggle for human rights and the

> struggle against corruption are intimately and inextricably linked because corrupt governments do not respect human rights. Human rights are, by definition, general and universal while corruption, by definition, concerns the few and the particular. And corruption plays an important role in perpetuating the situation, where the mass of people are denied those rights. It infringes this aspect of people's lives because it achieves a discrimination against those who cannot afford to resort to it or will not do so, and so denies them access to public services and the due benefits of the rights given by the Constitution. In this respect it is an obstacle to the realisation of those rights. For example, if a child cannot obtain a place in a school without paying a bribe to a head teacher, that child's rights have been violated. It is a denial of accountability and prevents people from exercising their due political rights. When politicians are bought and sold by powerful economic interests, it undermines the democratic process. Most importantly, human beings are an expression of a belief in the equality of human beings and of equal treatment of them by their government."

Then there is one further aspect of corruption which might be described as "estrangement from the political process". This is what Mr van Vuuren says about that:

> "An open, responsive and effective political process requires at a minimum a significant amount of citizen trust in officials, in institutions and in each other. Open politics means not only that people are free to advocate vigorously their own interests but also that they abide by official decisions, accepting unfavourable outcomes as fundamentally legitimate and mounting their responses through the political process. It also means people trust others to do likewise, for there is little reason to play by the rules if one's critics and opponents are unlikely to do so. In addition to its material costs, one of the primary political costs of corruption is that it undermines and can destroy this political trust. Citizens can conclude, quite rightly, that it is futile to deal with government through official, political and bureaucratic channels, or that even if such channels are still functional others will pre-empt them through bribery and connections. Before long, citizens come to distrust each other, not only because their goals and interests differ, but because those differing interests can be fundamentally threatening in a situation where rights and protections are no longer believable and dependable. The very right to express oneself politically can become endangered."

It is plainly a pervasive and insidious evil, and the interests of a

democratic people and their government require at least its rigorous suppression, even if total eradication is something of a dream.

I turn next to the accused's own circumstances. A middle-aged, married businessman, who came from a fairly lowly start in adult life to a considerable fortune and business achievement. He has become the Chairman and CEO of a small corporate empire which he has taken to eventual prosperity by his vision, ambition and energy. The convictions alone will have an adverse effect on this career because he will need at least the Court's permission to be a director of a company in future. Furthermore, he or his companies, or both, may well be disqualified from tendering for government work in future, which was his main area of economic operation.

Moreover, said Mr *van Zyl*, the offence in count 1 was not the usual form of corruption. It started as friendship for Jacob Zuma and a desire to help him manage his debts, and not as a wilful, direct attempt to offer bribes. Nor did it succeed in obtaining any contracts from Jacob Zuma's ministerial competence.

And in count 3, Mr *van Zyl* said, it was not accused 1 who offered the money to Jacob Zuma and agreed to pay it, but Thomsons. The accused really only acted as a facilitator for this situation to be reached and, since it was not clear who instigated the offence, the accused should be given the benefit of the doubt and not be regarded as the prime culprit. Apart from that, he argued that only 25% of the promised amount was ever paid and there is nothing to show that Jacob Zuma ever did anything for that. His letter of 19 January 2001 only shows his reaction to a refused recommendation made by the SCOPA committee that the President

appoint the Special Investigation Unit to pursue the Auditor-General's inquiries. Even if it was an Executive decision, and not that of the President alone, there may well have been compelling reasons other than those that appear in this letter for refusing SCOPA's request and there is nothing to show that Jacob Zuma helped or urged the decision. In short, that the accused's role in count 3 was the lesser of the participants and that should be reflected in the sentence.

And then, as regards count 2, it was said the offence consisted only of his being party to the false representation that the loan accounts that were written off were stated to be development costs of Prodiba, when they were not. It had no adverse effect on any shareholder, nor was there any clear evidence that the bank was misled by the better profit presented. At most, in that situation, the prejudice was potential and not actual.

Furthermore, the tax liability of the accused did not affect the company and his own fiscal debt has been resolved with the Revenue Service.

In those circumstances it would be a great injustice to inflict the prescribed minimum sentence on the accused for this. It is entirely distinguishable from the sentence imposed in the case like *S v Price*, referred to in the argument, and which the prosecutor urged as a guide in the instant case.

I have considered those submissions as fully as I can in consultation with my Assessors. While they have given me the benefit of their views, these are my conclusions.

Against the submissions to which I have just referred made by Mr *van Zyl*, there has to be weighed these factors. In the first place, these

were no payments to a low-salaried bureaucrat, who was seduced into temptation. And I think it must be axiomatic that the higher the status of the beneficiary of corruption, the more serious is the offence.

Moreover, these payments over 5½ years, and which are almost entirely admitted, were a sustained level of support designed to allow Jacob Zuma to pursue a lifestyle he could not otherwise afford on his ministerial salary, and to the point where it created a dependence. They effectively constituted an investment in Zuma's political profile and from which the accused could benefit.

Both the start and the continuation of these payments were the accused's own decision. He was the principal actor and he pursued the payments with a single-minded purpose, despite being frustrated and annoyed in doing so at times.

There was no trickle-down effect that resulted in a benefit for anyone else. He was the only potential beneficiary. Nor were they paid to avoid red tape or bureaucratic delays. They had that result once in the appointment achieved through Jacob Zuma's intervention to bring Mr Grant Scriven of Venson PLC to a meeting with the late Minister of Safety and Security. But they were not paid with that in view, as is sometimes the excuse put forward by businessmen seeking business from a particular government.

Nor do I think eventually that the accused merits any favourable consideration because of what was called "his struggle credentials". In the old apartheid regime the economy was politically directed, with the allocation of resources, some of them scarce, being deliberately skewed in favour of a particular privileged group. Despite the accused's professed

claims to have struggle credentials with Jacob Zuma, the political profile and rise of Jacob Zuma's fortunes was as much a part of the accused's plan as was his plan for building the Nkobi company empire. His corporate empire's progress and prosperity was plainly linked to the possibility that Jacob Zuma would finally ascend to the highest political office.

The favours which he asked and intended to ask were calculated to achieve exactly the same situation as the old regime's command of the economy. That is to say a skewed economy in favour of the few elite rich who could afford to pay for the favours that they asked, whilst the bulk of the population, who could not, or would not, resort to this, would have no prospect of the same advantages the accused was able to command.

So, far from achieving the objects to which his struggle credentials were directed, the situation which he thereafter developed and exploited was the very same that the struggle had been intended to replace. Far from carrying out the objects of the struggle, this whole saga represents a subversion of them.

Turning to count 3, even accepting that the accused only acted as a facilitator, the arrangement that is the subject of count 3 plainly suited his purpose. His companies were cash-strapped and could not easily, if they could at all, continue the level of payments to Zuma, and the corvette munitions suite contract was threatened by investigation. That investigation could have revealed that he and his patron had been linked by a series of payments, which fact might well have supported the belief held by someone, as reported to Patricia de Lille, that he was benefiting from some irregularity in the bidding process.

He therefore had good reason for wanting protection from any investigation of that exercise, particularly in view of the extent to which he had been funding Zuma's enhanced lifestyle. His letters of 31 August 2000 and 6 October of that year show the measure of his increasing concern at Thomsons' lack of performance. Moreover, Thomsons' future welfare could have brought him benefits to the extent of a 30% share in Thomson-CSF (Pty) Limited's gain.

Apart from that, what did this agreement try to achieve? The first object was certainly to undermine the law and the second was to further intensify corrupt activity, and at the highest level, in the confident anticipation that Jacob Zuma may one day be President. The author of the note found in the Nkobi offices to the effect that he would thereafter being in "the pound seats" was more than likely to be correct in his prediction.

Nor does it seem to me to matter that, in the event, only one payment was made. It is not known why Thomsons paid only the one instalment. But that payment and the accused's own contribution of R250 000 went to the person who eventually saw to the payment of Zuma's residential complex at Nkandla. It was a typical example of a privileged treatment to a selected political figure in a situation redolent with lack of transparency and subversive of administrative fairness and integrity, and that is what the law seeks to punish.

Then, finally, as it seems to me, I do not think that money matters all that much to the accused. It is undoubtedly pleasant to have ample for one's needs. But I think what was important to him was the achievement of a large multi-corporate business group of the sort he described to

Professor Sono and the power that goes with that and close association with the greatest in the land. And it is precisely in such circumstances that corruption works. The starting point is the belief that prevailing over someone else would be advantageous. For, in order to win, one has to take advantage of other players in the scene. One creates the advantage by an offer or a suggestion, which then allows one to dictate terms to one's own advantage, and the slippery slope starts from there.

Weighing all those factors together in respect of counts 1 and 3, and giving the matter the fullest consideration I can, I am eventually unable to see my way to finding that there are compelling and substantial reasons in the situations created by the commission of these two offences why the penalty directed by Parliament should not be enforced. That is not something one can take any satisfaction in doing to someone who otherwise showed commendable vision, ambition and energy. But somewhere and somehow, on his journey to achieve his ambition, the accused seems to have lost his moral compass and the scruples that should be upholding the values of the Constitution that his participation in the struggle helped to achieve.

In passing any sentence after conviction in a criminal trial, a Court is the mouthpiece of the community whose interests are one of the requirements that any sentence is required to safeguard. And, to that end, a sentence must be a message to that community. For present purposes, it is this. If any businessman gives money or money's worth to an official of the State with the intention and expectation that such official will exercise or neglect his or her duty in favour of that businessman, and the amount involved is more than R500 000, he is liable to a punishment of

this level. Nor is it limited to businessmen and State officials. It is of the same sort of application to the same relationship in the private sector.

So far as count 2 is concerned, I think Mr *van Zyl* is on stronger ground. While fraud in the conduct of a commercial enterprise is always a potentially serious occurrence, the circumstances of this offence do not seem to me to be that grave that justifies a level of the sentence ordered in Act 105 of 1997. While the total sum of the loan accounts that were written off was R1,2 million and a little over, it is not as though any innocent party was cheated or deprived of that sum as a result. It was an intra-group accommodation that did not actually result in any prejudice that was established. And although the corporate veil would found an argument that the accused's loan account written off the Kobifin books was effectively lost to that company as a claim against him, in reality, he was the only person who would actually suffer, save for the Revenue Service, which has received its tax with interest long since. Nor does the evidence show that it was Shaik's idea. If it had been, then the matter would be much more serious. But the evidence before us shows that he protested the draft statements that showed his large loan account of over R500 000 in Kobifin's books, on the basis that these were expenses he had incurred in procuring business for his companies. Without checking this claim, the auditors accepted it and devised the solution which met his protest.

In those circumstances then, I agree it would be so far removed from a just punishment to impose the mandatory penalty of 15 years that I am justified in departing from it for those reasons. But, that said, it was not an act that merits a mere slap on the wrist. The Revenue Service was

paid eventually, but only after the Directorate of Special Operations alerted the auditor firm to the question of fraud.

And, while there was no evidence that these financial statements containing the false representation were presented to the bank, the object of the audit was to improve the group's balance sheet and show an increase of profitability in Kobifin. The bank needed to see the financial statements to consider the overdraft and it did, in fact, increase it to as much as R1 500 000 shortly after 31 December 1999, which was the day to which Mrs Bester said the existing overdraft was then extended.

So there is a discernible measure of agreement to the wilful deceit, although it was an intra-group transaction. But the potential for mischief was certainly there. However, because of the great disparity that would result in the eventual gravity of this offence, compared to what the statute requires, I am at large to impose a different and reduced level of sentence. But I do so having regard to the factors I have just set out.

In the result, and for those reasons, the sentence on accused 1 on counts 1 and 3 is one of <u>FIFTEEN (15) YEARS' IMPRISONMENT</u> on each count. On count 2 it is <u>THREE (3) YEARS' IMPRISONMENT</u>.

However, since these were all part of the same sustained course of corruption, particularly the circumstances of counts 1 and 3, there is an obvious basis to reduce the cumulative effect of the sentence, which would otherwise be far too long, by ordering that the sentences on counts 2 and 3 are to run concurrently with that on count 1.

I turn next to the sentence on the corporate accused. It follows from their legal nature that the only penalty that can be imposed on them is a fine, nor are they subject to the provisions of Act 105 of 1997. It is

therefore the ordinary guidelines that regulate the imposition of a fine as a suitable punishment which can apply to them. The situation is complicated, however, by the fact that accused Nos 6, 7, 9, 10 and 12 are either dormant or have no assets, or both. Of those that are active and earn an income or are investment or holding companies, the situation is further bedevilled by the fact that the Asset Forfeiture Unit, acting under the Prevention of Organized Crime Act 121 of 1998, has seized part or all of the assets of Thint (Pty) Limited, in which Nkobi Investments (accused No 3) has a 25% share, and there has also been identified to that unit, but not yet seized, another asset in Nkobi Investments, being the shares in Cell C (Pty) Limited, which Nkobi Investments effectively owns.

From all that, it seems that the only corporate accused who are able to pay a fine are accused Nos 2, 3, 4, 5 and 8. I am satisfied, however, that even though it may cause some dislocation to their present arrangements, they are all able to pay a fine, particularly if given some time to raise the money. They have, either available or can raise from their resources, the fines I have in mind to impose.

On count 1 accused No 2 is sentenced to a FINE OF R125 000; accused No 3 to a FINE OF R1 MILLION; accused Nos 4, 5 and 8, a FINE OF R125 000 EACH, making a total of R1 500 000. For the rest of the accused, that is Nos 6, 7, 9, 10 and 12, it is not sensible to impose any fine that is presently exigible. But since some sentence must be imposed, I propose to sentence each of them to a FINE OF R25 000, but in each case that fine will be SUSPENDED for five years on condition they are not found guilty of any offence involving corruption, fraud or dishonesty, committed during the period of suspension.

On count 2, of the accused companies found guilty on this count, only accused No 4 has the ability to pay a fine. It is therefore sentenced to pay a FINE OF R1 400 000. Accused Nos 7, 9 and 10 are sentenced to a FINE OF R33 000 EACH. But in each case, that is SUSPENDED for five years on the same conditions as apply the suspension of the penalties in count 1.

On count 3, accused Nos 4 and 5 are each sentenced to a FINE OF R500 000 EACH.

In all cases, these are to be paid by 30 July next, unless further suspended by Court order.

Finally, Mr *Downer*, I propose to order that the evidence of Mr Ahmed Paruk be sent to the Secretary of the Accountants and Auditors Board, for that body's consideration of the professional conduct of the auditors in the events that led to the prosecution and conviction of the accused on count 2.

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MR VAN ZYL M'Lord, at this juncture I have instructions to apply for leave to appeal on behalf of all the convicted accused against their convictions and the sentences imposed. I have prepared a notice of application for leave to appeal, which I beg leave to hand up.

SQUIRES J Yes, thank you. Yes, very well, Mr van Zyl. I'll note that fact. We obviously can't hear it now. 26 July is a convenient date?

MR VAN ZYL Yes, M'Lord.

SQUIRES J Yes, very well. I'll note the fact and adjourn the application to that date.

MR VAN ZYL M'Lord, and then, in these circumstances, I also apply that

the bail on behalf of accused No 1 be extended until 26 July or until after the application for leave to appeal has been disposed of.

SQUIRES J Yes. Any objection, Mr Downer?

MR DOWNER M'Lord, there are very different circumstances which pertain at this juncture in the proceedings. The matter is, however, entirely within the discretion of the Court, and I am at Your Lordship's discretion, M'Lord. As it pleases the Court.

SQUIRES J I am satisfied that these can be extended - the same conditions as apply now can be extended till 26 July.

MR VAN ZYL As the Court pleases.

SQUIRES J Well, Mr Downer, then it seems that - for this Court at any rate, that is the last step in the thousand mile journey.

MR DOWNER That is so, M'Lord.

SQUIRES J Very well, then we will adjourn.

COURT ADJOURNED