THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case 573/08

In the matter between:

THE NDPP Appellant

and

JACOB GEDLEYIHLEKISA ZUMA Respondent

THE NDPP'S SUBMISSIONS

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INTRODUCTION

The essence of the appeal

1. Mr Zuma applied to the High Court to overturn the NPA's decision to prosecute him because it was taken without first affording him a hearing. He claimed to be entitled to a hearing on two grounds. The first was in terms of s 179(5)(d) of the Constitution and s 22(2)(b) of the National Prosecuting Authority Act 32 of 1998. The second was an alleged legitimate expectation that he would be afforded such a hearing.

2. Mr Justice Nicholson upheld both Mr Zuma's causes of action and declared the decision to prosecute him invalid. We will submit with respect that his lordship erred on both grounds. Neither afforded Mr Zuma a right to be heard.

The critical facts

3. The Directorate of Special Operations investigated allegations of fraud and corruption arising from the arms deal. Mr Zuma and his financial advisor Mr Shaik were suspects in the investigation from an early stage.

4. In August 2003 the NDPP Mr Ngcuka and the Head of the DSO Mr McCarthy decided to prosecute Mr Shaik but not to prosecute Mr Zuma. Mr Ngcuka

announced the decision at a media conference on 23 August 2003.[1] We will call it "*the Ngcuka decision"*.

5. Mr Shaik was convicted and sentenced in early June 2005.[2] A few days later on 20 June 2005 the new NDPP Mr Pikoli announced that the NPA had decided to prosecute Mr Zuma.[3] We will call it "*the Pikoli decision"*.

6. The matter came before the High Court on 31 July 2006. The state applied for a postponement to complete its forensic investigation and finalise the indictment. The defence opposed the application. His lordship Mr Justice Msimang handed down his judgment on 20 September 2006. He refused the postponement and when the state did not withdraw the prosecution, he struck it from the roll.[4]

7. On 27 December 2007 the NPA again decided to prosecute Mr Zuma. The decision was taken by the current Acting NDPP Mr Mpshe and Mr McCarthy. They implemented the decision by serving an indictment on Mr Zuma and his co-accused the following day.[5] We will call it "*the current decision"*.

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1 Zuma founding affidavit vol 1 p 31 paras 36 to 38 and p 33 para 38(g); Ngcuka press statement 23 August 2003 annexure D vol 3 p 197, especially p 201 para 32(a); Du Plooy answer vol 5 p 397 para 5.1 and pp 410 to 417 paras 30 to 32; Zuma replying affidavit vol 9 p 714 para 20(a)

2 Zuma founding affidavit vol 1 pp 39 to 41 paras 50 to 54; Du Plooy answer vol 5 pp 420 to 422 paras 37 to 40 and pp 424 to 441 paras 45 to 53

3 Zuma founding affidavit vol 1 p 41 para 56; Du Plooy answer vol 5 pp 442 to 451 paras 55 to 56; Pikoli affidavit 14 August 2006 annexure JDP2 vol 6 pp 545 to 549 paras 6 to 15

4 Zuma founding affidavit vol 1 p 68 paras 108 to 109; Du Plooy answer vol 5 p 465 paras 80 to 81

5 Zuma founding affidavit vol 1 p 15 para 4 and p 76 para 128; Indictment 28 December 2007 annexure A vol 2 p 97; Du Plooy answer vol 5 pp 470 to 471 paras 92 to 94

8. The new indictment is based on substantial new evidence obtained during and after the Shaik trial.[6] It includes a charge of racketeering, four charges of corruption, a charge of money laundering and 12 charges of fraud.

9. Mr Zuma launched this application in June 2008.

Mr Zuma's causes of action

10. Mr Zuma contends that the Pikoli and current decisions were subject to s 179(5)(d). It allows the NDPP to review decisions to prosecute or not to prosecute but requires him when he does so, to take representations from the parties including the accused.

11. We will submit that s 179(5)(d) did not apply to the decisions to prosecute Mr Zuma. They apply only when the NDPP overrules a prosecution decision of a DPP. They do not apply when the NDPP reverses his own prosecution decision or that of his predecessor as Mr Pikoli did in this case. In any event, the current decision was a fresh decision taken *de novo* after the prosecution resulting from the Pikoli decision was terminated when Msimang J struck the case from the roll in September 2006. It was not a review of an earlier decision to prosecute or not to prosecute.

12. Mr Zuma contends in the alternative that the NDPP's failure to afford him an opportunity to make representations before taking the current decision, "*was*

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[6] Du Plooy answer vol 5 pp 471 to 475 paras 94 to 97.4 and vol 6 p 501 para 181. There has also been a re-evaluation of the old evidence in the light of the new evidence.

unlawful, unreasonable or procedurally unfair within the parameters of section 33 of the Constitution, alternatively offends the principle of legality".[7] He contends that he had a legitimate expectation that he would be afforded a hearing before the current decision was taken.[8] He raises this cause of action only in relation to the current decision and not in relation to the Pikoli decision.[9]

13. We will submit that this cause of action is bad in law and in fact because,

- Mr Zuma cannot claim directly under s 33 of the Constitution and has to bring his claim under the Promotion of Administrative Justice Act 3 of 2000, but it specifically excludes any "*decision to institute or continue a prosecution"* from the "*administrative action"* which it protects;
- Mr Zuma did not establish as a matter of fact that he had any expectation of a hearing, and
- such expectation of a hearing as Mr Zuma might have had, was in any event not "*legitimate*".

The findings of political interference

14. Nicholson J also made a series of findings that successive Ministers of Justice had improperly interfered with the NPA's decisions over the years, initially not to prosecute Mr Zuma and later to prosecute him. It is not clear why he made these findings.

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7 Zuma founding affidavit vol 1 p 19 para 10; see also vol 1 pp 95 to 96 para 164

8 Zuma founding affidavit vol 1 pp 89 to 94 paras 158 to 160(j)

9 Zuma founding affidavit vol 1 p 90 para 160

15. We will submit that his lordship ought not to have made any of these findings because,

- they were findings of facts never pleaded or advanced by anybody;
- they violated the Plascon-Evans rule;
- they were irrelevant to the issues before the court, and
- they were in any event wrong in that they were the product of a flawed and unjustified analysis of the evidence.

THE COMMON LAW BACKGROUND

16. Our courts were slow at common law to interfere with an attorney-general's decision to prosecute.[10] That was so for a variety of reasons. The first is that the law affords the prosecuting authority a significant degree of prosecutorial independence and thus a wide discretion to decide whether to prosecute or not. The second is that a decision to prosecute is merely a preliminary decision in that it does not determine the rights of the accused. It merely initiates a process by which he will be afforded a full and fair hearing on the determination of his rights. The third is that the administration of justice would be unduly frustrated and delayed if the courts were to allow and entertain a proliferation of challenges which go only to the decision to prosecute and not to the substance of the guilt or innocence of the accused.

17. The English courts have adopted the same approach. They have held that a decision to prosecute is subject to review but only by way of rare exception. Lord Steyn put it as follows in Kebeline:

> "*My Lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance, the decision of the DPP to consent to the prosecution of the respondents is not amenable to judicial review … While the passing of the 1998 Act [the Human Rights Act 1998] marked a great advance for our criminal justice system it is in my view vitally*

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10 Gillingham v Attorney-General 1909 TS 572 at 573 to 574; Wronsky en 'n Ander v Prokureur-Generaal 1971 (3) SA 292 (SWA) 294 to 295; Highstead Entertainment (Pty) Ltd t/a "The Club" v Minister of Law and Order and Others 1994 (1) SA 387 (C) 393G to 394H; Kaunda and Others v President of the Republic of South Africa and Others 2005 (4) SA 235 (CC) para 84 footnote 64

important that, so far as the courts are concerned, its application in our law should take place in an orderly manner which recognises the desirability of all challenges taking place in the criminal trial or on appeal. The effect of the judgment of the Divisional Court was to open the door too widely to delay in the conduct of criminal proceedings. Such satellite litigation should rarely be permitted in our criminal justice system."[11]

18. The Privy Council more recently endorsed and applied this policy in Sharma.[12] Lord Bingham and Lord Walker said that,

"*It is also well established that judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy. The language of the cases shows a uniform approach: 'rare in the extreme' …; 'sparingly exercised' …; 'very hesitant'…; 'very rare indeed'…; 'very rarely'….*"[13]

19. They went on to quote Lord Steyn's statement in Kebeline that we have already mentioned and added that,

"*With that ruling, other members of the House expressly or generally agreed... The Board is not aware of any English case in which leave to challenge a decision to prosecute has been granted. Decisions have been successfully challenged where the decision is not to prosecute: ...: in such a case the aggrieved person cannot raise his or her complaint in*

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11 R v DPP, *ex parte* Kebeline and Others [2000] 2 AC 326 (HL) 371 ([1999] 4 All ER 801 (HL) 835j to 836b)

12 Sharma v Brown-Antoine and Others [2007] 1 WLR 780 (PC)

13 Page 788A to C

> *the criminal trial or on appeal, and judicial review affords the only possible remedy... In Wayte v United States ... Powell J described the decision to prosecute as 'particularly ill-suited to judicial review.' The courts have given a number of reasons for their extreme reluctance to disturb decisions to prosecute by way of judicial review. They include ... 'the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits'".*[14]

20. We submit that procedural fairness does not require that a suspect be given a hearing before a decision is taken to prosecute him. It is part of a wider principle which Professor De Ville describes as follows:

> "*If an administrative authority decides to institute legal proceedings against a person or persons acting in contravention of a law, there is no need to give notice of its intention to bring such an application to such person(s) beforehand or to hear the person(s) concerned. The reasoning appears to be that the persons concerned would have the opportunity to put their case before the court and it is therefore not necessary for the administrative authority also to give them a hearing. The decision to institute such proceedings is thus only one step in a multi-staged process. Not giving a person a hearing at the first stage does therefore not result in the action being procedurally unfair."*[15]

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14 Page 788 D to F

15 De Ville *Judicial Review of Administrative Action in South Africa* (2003) 241 to 242

21. The High Court for instance applied this principle in the case of Meyer when it dismissed an attorney's application for the review of the Law Society's decision to apply to court to have him struck from the roll of attorneys, on the basis that it had failed to afford him a hearing before taking the decision to do so. Nicholas J held at first instance that where the Law Society exercises its internal disciplinary jurisdiction over an attorney, it must adhere to the *audi alteram partem* rule. It does not have to do so however when it merely decides to apply to court for an attorney's removal from the roll:

> "*Where, however, it decides to apply to Court for the removal from the roll of the name of a practitioner, it does not itself make any findings; it does not seek to impose any punishment; and it does not decide anything more than that there is a prima facie case which it is proper should be considered by the Court. Such a decision does not affect the rights of the practitioner and consequently the rules of natural justice have no application."*[16]

22. The full bench of the High Court endorsed and followed this approach on appeal. It also held that, where an administrative functionary merely determines that there is a *prima facie* case for a matter to be referred to another tribunal or body, the *audi alteram partem* rule does not apply.[17]

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16 Meyer v Law Society, Transvaal 1978 (2) SA 209 (T) 214F to H

17 Meyer v Prokureursorde van Transvaal 1979 (1) SA 849 (T) 855G to 856E

23. The High Court applied the same principle in Huisamen[18] and in Park-Ross[19] and the SCA endorsed and applied it in Simelane.[20]

24. In both Meyer cases and in Park-Ross the High Court referred with approval to the leading House of Lords judgment in Wiseman where Lord Reid said the following:

> "*Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case, but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party.*"[21]

25. The Court of Appeal followed and applied Wiseman in Raymond.[22] Watkins LJ quoted the statement of Lord Reid with approval and went on to say that "*the audi alteram partem rule is inapplicable to the process of the preferment of a bill of indictment*".[23]

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18 Huisamen and Others v Port Elizabeth Municipality 1998 (1) SA 477 (E) 482E to F

19 Park-Ross v Director: Office for Serious Economic Offences 1998 (1) SA 108 (C) paras 23 and 24

20 Simelane and Others NNO v Seven-Eleven Corporation SA (Pty) Ltd and Another 2003 (3) SA 64 (SCA) paras 17 and 22 read with para 16

21 Wiseman v Borneman [1971] AC 297 (HL) 308E-G ([1969] 3 All ER 275 (HL) 277i to 278b)

22 R v Raymond [1981] 2 All ER 246 (CA)

23 Page 254g

26. The Privy Council endorsed and applied the principle in Brooks.[24] Lord Woolff described the rules that govern a decision to prosecute as follows:

> "*This is a procedural step which is not required by principles of fairness, the common law or the Constitution (of Jamaica) to be the subject of prior notice to the person who is to be subject to the proceedings. If guidance as to the position at common law is required, then it is provided by the decisions of the House of Lords in Wiseman … and … Raymond … . The Constitution adds nothing to the position at common law."*[25]

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24 Brooks (Lloyd) v DPP of Jamaica and Another [1994] 1 AC 567 (PC) ([1994] 2 All ER 231 (PC))

25 Page 580 (239g-h)

SECTION 179(5)(d) OF THE CONSTITUTION

Introduction

27. The High Court held that the Acting NDPP Mr Mpshe was obliged in terms of s 179(5)(d) of the Constitution, to afford Mr Zuma a hearing before he took the current decision on 27 December 2007.[26] It is common cause that he did not afford Mr Zuma such a hearing. We accept that, if he was obliged to do so in terms of s 179(5)(d), his failure to comply with this requirement rendered his decision invalid.

28. We submit with respect however that s 179(5)(d) applies only when the NDPP overrules a prosecution decision of a DPP. It does not apply to a case such as this one, where the NDPP reverses his own previous decision or that of his predecessor.

The language, structure and purpose of section 179

29. Section 179(1) creates the NPA which comprises the NDPP, the DPPs and prosecutors. Section 179(2) entrusts the NPA with the power to institute criminal proceedings on behalf of the state.

30. There is some tension between the powers of the NDPP on the one hand and the powers of the DPPs on the other:

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[26] Judgment vol 15 p 1275 para 126

30.1. In terms of s 179(1)(a), the NDPP is the head of the NPA. His position as the head of the organisation gives him *prima facie* power to control the NPA in the performance of its prosecutorial functions.

30.2. Section 179(3)(b) however provides that national legislation must ensure that the DPPs "*are responsible for prosecutions in specific jurisdictions".* The section gives them original powers of prosecution. It gives them *prima facie* authority to exercise those powers as they think fit.

31. Section 179 strikes a balance between these powers of the NDPP and the DPPs respectively:

31.1. It qualifies the DPP's powers of prosecution in s 179(3)(b) by making them "*subject to subsection (5)"*.

31.2. Section 179(5) vests the NDPP with limited and circumscribed powers of control over the way in which the DPPs exercise their powers of prosecution. The NDPP,

- must determine binding prosecution policy with the concurrence of the Minister of Justice in terms of subsection (a),
- must issue binding policy directives in terms of subsection (b),
- may intervene in the prosecution process when the policy directives are not complied with in terms of subsection (c), and

- may lastly review a prosecution decision "*after consulting the relevant Director of Public Prosecutions"* in terms of subsection (d).

31.3. The balance between the NDPP's powers as head of the NPA on the one hand and the DPPs' powers of prosecution on the other, is in other words struck on the basis that he may exercise some control over them but that his powers to do so are limited and circumscribed. That is what s 179(5) does.

32. Section 179(5)(d) is thus one of the cluster of provisions in s 179(5) which vest the NDPP with circumscribed powers of control over the way in which the DPPs exercise their powers of prosecution. It does not apply when the NDPP reverses his own prosecution decision or that of his predecessor. It applies only when he overrules and reverses a DPP.

33. The language of s 179(5)(d) supports this interpretation:

33.1. It vests the NDPP with the power to "*review"* a decision to prosecute or not to prosecute. Although this word is capable of wider meanings, it normally connotes a review by one person of a decision taken by another. One would not ordinarily describe a decision-maker's reconsideration of his own decision as a "*review"*.

33.2. The section requires the NDPP in every case to consult with "*the relevant DPP"*. It is a strong indication that the premise is that the prosecution decision under review is that of the DPP.

33.3. The NDPP is required in every case to take representations from both the accused and the complainant. The NDPP's decision on review to prosecute or not to prosecute, would usually be favourable to the accused or to the complainant. It is thus odd to require him to take representations from both of them in every case. The explanation is that he is required to do so, not to protect the accused or the complainant, but to protect the prosecutorial autonomy of the DPPs. He may overrule them and reverse their prosecution decisions but may only do so with care. He must at least consult with the DPP concerned and take representations from the parties involved before he does so.

34. Mr Zuma's interpretation of s 179(5)(d) gives rise to unexplained anomalies such as the following:

34.1. Why protect an accused when an earlier prosecution decision is reversed but not when the first prosecution decision is taken?

34.2. Why protect an accused when the NDPP reverses an earlier prosecution decision but not when a DPP or a prosecutor does so?

34.3. Who is "*the relevant Director of Public Prosecutions"* with whom the NDPP must consult in terms of section 179(5)(d) when the earlier decision was his own?

34.4. Why must the NDPP consult with the accused before he withdraws a pending prosecution against him, that is, before taking a decision favourable to the accused?

34.5. Conversely, why must the NDPP consult with the complainant before he decides to institute a prosecution, that is, to take a decision favourable to him?

The legislative history of section 179

35. The legislative history of s 179 bears out our interpretation that s 179(5)(d) only applies when the NDPP overrules and reverses the prosecution decision of a DPP.

36. Section 3 of the Criminal Procedure Act 51 of 1977 governed the power to prosecute on behalf of the state until 1992. Section 3(1) provided that every provincial attorney-general had authority to prosecute in any court within his jurisdiction. Section 3(5) however gave the Minister of Justice complete control over all the attorneys-general:

> "*An attorney-general shall exercise his authority and perform his functions under this Act or under any other law subject to the control and directions of the Minister who may reverse any decision arrived at by an attorney-general and may himself in general or in any specific matter exercise any part of such authority and perform any of such functions"*.

37. The Attorney-General Act 92 of 1992 repealed section 3 of the CPA and provided in section 5(1) that every attorney-general had the authority to prosecute in any court within his jurisdiction. The Minister's control over attorneys-general was removed altogether.

38. Section 108(1) of the Interim Constitution vested the attorneys-general with authority to institute criminal proceedings on behalf of the state. They were not subject to control by any higher authority.

39. Section 179 of the Constitution also entrenched the powers of prosecution of the DPPs (that is, the former attorneys-general). It moreover introduced two innovations. The first and most important was to introduce the NDPP as the national head of the NPA.[27] The second was to reconcile the entrenched powers of prosecution of the DPPs with the authority of the NDPP as the head of the NPA. It did so by preserving the DPPs' entrenched powers of prosecution on the one hand but affording the NDPP limited and circumscribed powers of control over them on the other.

40. Mr Hofmeyr tells the story of the negotiation and enactment of section 179.[28] He was the co-chair of the committee of the Constitutional Assembly (Theme Committee 5) in which Chapter 8 of the Constitution (of which section 179 forms a part) was negotiated and drafted.[29] We submit his evidence is admissible at least to identify the "*mischief*" section 179(5) was designed to address.[30]

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27 Minister of Defence v Potsane and Another; Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others 2002 (1) SA 1 (CC) para 19

28 Hofmeyr vol 7 pp 564 to 570 paras 10 to 27

29 Hofmeyr vol 7 p 564 para 8

41. This history makes it clear that section 179(5) was designed to afford the NDPP a number of limited and circumscribed powers of control over the manner in which the DPPs exercise their powers of prosecution.

42. The requirements that the NDPP consult with the relevant DPP and take representations from the complainant and the accused before he reviews a decision in terms of section 179(5)(d), were moreover only introduced when the section was amended to allow the NDPP, not only to review decisions not to prosecute, but also to review decisions to prosecute. This new power was a drastic power because it allowed the NDPP to block or stop prosecutions by the DPPs. Since there would then be no criminal trial, the merits of the NDPP's decision would not be subjected to judicial scrutiny. That was why it was made subject to the special requirements of section 179(5)(d).

The High Court's judgment

43. The High Court upheld Mr Zuma's interpretation. The foundation of its judgment on this score, is its clear but unarticulated assumption that the purpose of the requirement of s 179(5)(d) that the NDPP take representations from the accused, is to protect the accused.[31] It said for instance that a review in terms of section

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30 S v Makwanyane and Another 1995 (3) SA 391 (CC) paras 17 to 19 (*per* Chaskalson CJ: "*where the background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a Court in interpreting the Constitution*"); Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as *Amici Curiae*) 2006 (2) SA 311 (CC) paras 200 to 201 (*per* Chaskalson CJ)

31 Judgment vol 15 p 1275 paras 125 to 126

179(5)(d) "*is a constitutional imperative directed at affording an accused the right to the reconsideration of a prosecution"*,[32] that the section affords the accused a "*right to make representations"* which "*would pay appropriate tribute to his right to human dignity"*[33] and that "*it would be grossly unequal to allow representations to an accused on the happenstance that his case emanated from a decision by a DPP*".[34] The *ratio* of the court's conclusion based on this assumption, is that it would be anomalous to afford the accused this protection only when the NDPP overrules the prosecution decision of a DPP and not also when he reverses his own prosecution decision or that of his predecessor as was done in this case.

44. We submit with respect for the reasons that follow that this founding premise and the interpretation based on it are both wrong.

45. First, the Bill of Rights and more particularly section 35 deal at length with the protection of an accused in a criminal prosecution. It is incongruous to interpret section 179(5)(d) to extend yet further protection to an accused. Its place in the Constitution suggests strongly that its purpose is not to protect the accused but to regulate the NPA and more particularly the relationship between the NDPP and the DPPs.

46. Section 179(5)(d) secondly forms part of a cluster of provisions in section 179(5) and must be interpreted within that context. All of these provisions give the NDPP limited and circumscribed powers of control over the manner in which the DPPs

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32 Judgment vol 15 p 1265 para 106

33 Judgment vol 15 p 1271 para 120

34 Judgment vol 15 p 1271 para 120

exercise the powers of prosecution conferred on them by section 179(3)(b). The proviso to the latter section makes it clear that the DPPs' powers of prosecution are "*subject to subsection (5)"*, that is, subject to the NDPP's limited and circumscribed powers of control in section 179(5). That is also the purpose of section 179(5)(d). It would be anomalous to attribute a wholly different purpose to it.

47. The High Court thirdly with respect misunderstood the NDPP's power of review in terms of section 179(5)(d):

47.1. The High Court held that the NDPP's power of review under section 179(5)(d) "*is a unique role ascribed to him"*[35] and that he is the only member of the NPA who has this role.[36] But this is with respect a misunderstanding. Every member of the NPA including the NDPP, a DPP and a prosecutor vested with prosecutorial powers, has the power to reverse his own prosecutorial decisions and those of his underlings. The NDPP's power to do so is common to all. The unique feature of section 179(5)(d) is that it restricts the NDPP's power to overrule the prosecution decisions of the DPPs because their powers of prosecution are entrenched in section 179(3)(b).

47.2. In line with its assumption that the purpose of section 179(5)(d) is to protect the rights of the accused, the High Court held that it affords an

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35 Judgment vol 15 pp 1264 to 1265 para 105

36 Judgment vol 15 p 1266 para 108

accused "*the right to the reconsideration of a prosecution*"[37] and vests the NDPP with a concomitant "*constitutional and statutory obligation to review*".[38] But this understanding is with respect mistaken. Section 179(5)(d) does not impose any obligation on the NDPP to review any prosecution decision and does not vest any accused with any right to such a review. It says merely that, if and when the NDPP chooses to exercise his powers of review, he must do so in the prescribed manner.

48. There is in the fourth place an inherent contradiction in the High Court's interpretation of section 179(5)(d):

48.1. It held on the one hand that the NDPP's power of review under section 179(5)(d) "*assumes a role somewhat elevated to and distant from the person whose decision is being reviewed*".[39] It recognised that it followed that the NDPP could not exercise this power of review in relation to his own prosecutorial decisions. It said that, if he were to properly exercise his powers of review "*it necessarily implies that he did not make the decision as such to prosecute as this would nullify his independence with regard to the review*".[40]

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37 Judgment vol 15 p 1265 para 106

38 Judgment vol 15 p 1266 para 108

39 Judgment vol 15 p 1265 para 106

40 Judgment vol 15 p 1270 para 117

48.2. If this interpretation is correct, then it must necessarily follow that section 179(5)(d) does not apply when the NDPP reverses his own decision to prosecute or not. He clearly cannot assume a role "*somewhat elevated to and distant from the person whose decision is being reviewed"*, if the decision was his own.

48.3. The High Court's judgment however contradicts this logic when it concludes that the requirements of section 179(5)(d) also govern any reversal by the NDPP of his own earlier decision to prosecute or not to do so.[41]

49. The High Court lastly recognised that its interpretation give rise to anomalies. It sought to address some of these anomalies by reading additional provisions into the NPA Act.[42] Its attempt to avoid anomaly in this way, is significant for three reasons:

49.1. It is an impermissible route because reading-in is a remedy available to the court only to cure an unconstitutional statute.[43] It cannot be employed to remove anomalies and absurdities in the court's interpretation of a statutory provision. In the present case there was no attack on the constitutionality of the NPA Act and no finding that it was unconstitutional.

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41 Judgment vol 15 p 1275 paras 125 to 126

42 Judgment vol 15 pp 1274 to 1275 paras 124 and 125

43 National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) paras 64 to 76

49.2. Perhaps more importantly however, is that it illustrates that the court's interpretation is flawed. It gives rise to anomalies which can only be cured by changing the language of the statute. It is a very strong indication that the interpretation which gives rise to the anomalies is not correct.

49.3. The High Court's reading-in moreover does not solve its problem. It removes some of the anomalies arising from its interpretation of the NPA Act. But the anomalies have their origin in s 179(5)(d) of the Constitution. It can obviously not be cured by reading-in.

Conclusion

50. We submit with respect that the High Court's interpretation of s 179(5)(d) is incorrect. On a correct interpretation of the section, it did not require the NDPP to afford Mr Zuma a hearing.

Alternative submission

51. We submit in the alternative that, even if we are mistaken in our interpretation of section 179(5)(d), it in any event does not avail Mr Zuma for the following reasons:

51.1. If the NPA's decision to prosecute Mr Zuma constituted a review of the Ngcuka decision in terms of section 179(5)(d), then it was in any event

done by the Pikoli decision of June 2005. That was the decision which reversed the Ngcuka decision not to prosecute Mr Zuma.

51.2. The Pikoli decision was implemented but the resultant prosecution was terminated when Msimang J struck the case from the roll in September 2006.[44]

51.3. Nothing remained of the Ngcuka and Pikoli decisions thereafter. The Ngcuka decision was overturned by the Pikoli decision. The Pikoli decision was in turn spent and no longer had any effect when the case was struck from the roll in September 2006.

51.4. It follows that when the NPA again decided to prosecute Mr Zuma in December 2007, it was a fresh decision taken *de novo*. It was not a review of an earlier decision to prosecute or not to prosecute. It was not a decision subject to section 179(5)(d).

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[44] Thint Holdings (Southern Africa) (Pty) Ltd and Another v NDPP (CCT 90/07); Zuma v NDPP (CCT 92/07) [2008] ZACC 14 (31 July 2008) paras 41 to 42

LEGITIMATE EXPECTATION

Introduction

52. The High Court held that Mr Zuma had a legitimate expectation in December 2007, that he would be afforded a hearing before the NPA decided to prosecute him again.[45] It based this finding on a statement Mr Ngcuka had made more than four years earlier when he announced on 23 August 2003 that the NPA had decided not to prosecute Mr Zuma. The statement was made in paragraph 25 of his press release:

> "*We have never asked for nor sought mediation. We do not need mediation and we do not mediate in matters of this nature. However, we have no objection to people making representations to us, be it in respect of prosecutions or investigations. In terms of section 22(4)(c) of the Act, we are duty bound to consider representations."*[46]

53. We submit with respect that the High Court erred in its finding of a legitimate expectation on this basis because,

- the decision to prosecute Mr Zuma did not constitute "*administrative action"* and was accordingly not subject to the rules of procedural fairness under section 33 of the Constitution read with PAJA,
- Mr Zuma did not in fact have any expectation of a hearing arising from Mr Ngcuka's statement,

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45 Judgment vol 15 p 1325 paras 230 and 231

46 Ngcuka press statement 23 August 2003 annexure D vol 3 p 200 para 25

- Mr Ngcuka's statement was not a clear and unambiguous representation that Mr Zuma would be afforded a hearing before the NPA decided to prosecute him and could accordingly not give rise to a legitimate expectation of such a hearing, and
- Mr Ngcuka's statement was not a competent and lawful representation that Mr Zuma would be afforded a hearing and could accordingly not give rise to a legitimate expectation of such a hearing.

No administrative action

54. Mr Zuma's claim that he was entitled to be heard because he had a legitimate expectation of a hearing, seems to assume that the law affords a right to be heard to everyone with a legitimate expectation of a hearing. But that is mistaken. There is no free-standing rule that says that everyone with a legitimate expectation of a hearing has a right to be heard for that reason alone.

55. A legitimate expectation of a hearing is protected by the right to fair administrative action in s 33 of the Constitution which has been fleshed out in PAJA. Their protection is limited to "*administrative action"*. The implication for this case is that Mr Zuma did not have a right to be heard even if he had a legitimate expectation of a hearing unless the decision to prosecute him constituted "*administrative action"* protected under s 33 of the Constitution read with PAJA.

56. To determine whether the decision to prosecute Mr Zuma constituted "*administrative action"*, one has to look to the provisions of PAJA. This is so because litigants may no longer claim directly under section 33 of the

Constitution. They must bring their claims under PAJA which has been enacted to give effect to s 33.[47] In New Clicks Chief Justice Chaskalson put it as follows:

> "*PAJA is the national legislation that was passed to give effect to the rights contained in section 33. It was clearly intended to be, and in substance is, a codification of these rights. It was required to cover the field and purports to do so.*
>
> *A litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on section 33(1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights in section 33 to be given effect to by means of national legislation."*[48]

57. Mr Zuma may accordingly attack the decision to prosecute him on the basis that it violated his right to procedural fairness only if the decision constituted "*administrative action"* within the meaning of PAJA. But section 1 of PAJA makes it clear that the "*administrative action"* subject to its protection, excludes "*a decision to institute or continue a prosecution"*. Such a decision accordingly does not have to comply with the requirements of procedural fairness laid down by section 33 of the Constitution read with PAJA.

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47 Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) paras 25 to 27; Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC) paras 99 to 100; Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as *Amici Curiae*) 2006 (2) SA 311 (CC) paras 93 to 97 and 431 to 438; Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others 2007 (6) SA 4 (CC) paras 36 to 37

48 Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as *Amici Curiae*) 2006 (2) SA 311 (CC) paras 95 to 96

58. It follows that Mr Zuma's attack on the decision to prosecute him on the ground that it violated his right to procedural fairness because he had a legitimate expectation of a hearing before the decision was taken, is bad in law. Legitimate expectations are only protected under s 33 of the Constitution read with PAJA. Mr Zuma cannot claim directly under s 33 and has to bring his claim under PAJA. It however expressly excludes decisions to prosecute from the ambit of its protection.

Mr Zuma had no expectation of a hearing

59. We submit for the reasons that follow that Mr Zuma did not establish that he had any expectation of a hearing arising from Mr Ngcuka's statement at his press conference of 23 August 2003.

60. Mr Zuma did not say that he had such an expectation as a matter of fact. He merely said that "*It will be contended on my behalf that I had a legitimate expectation to be so informed and that any representations made by myself in response, would be duly and carefully considered before any decision to prosecute me would be taken"*.[49] He accordingly went no further than to say that it would be contended as a matter of law, that he was entitled to a hearing on the basis of a legitimate expectation. He failed to establish as a matter of fact that Mr Ngcuka's statement caused him to expect that he would be afforded a hearing before a decision was taken to prosecute him.

[49] Zuma founding affidavit vol 1 pp 89 to 90 para 158

61. Mr Zuma's founding affidavit on the contrary made it clear that Mr Ngcuka's announcement of the decision not to prosecute him "*had an air of finality about it which I accepted as such"*.[50]

62. If Mr Zuma harboured any expectation of a hearing before reconsideration of the decision not to prosecute him, then his expectation was dashed in June 2005 when Mr Pikoli announced that the NPA had decided to prosecute him. Mr Zuma did not protest when Mr Pikoli's decision was announced as he would have done if he expected to be heard before such a decision was taken.

63. When Mr Hulley requested an opportunity to make representations on Mr Zuma's behalf on 11 October 2007, he based it on reports that the NPA "*is intent on engaging in a review of certain cases of which the case against Mr Zuma constitutes one such case"*.[51] This was a request based on section 179(5)(d) of the Constitution. Mr Zuma made this clear in his replying affidavit when he said that it was not necessary to say that the request was being made in terms of that section because "*the provisions of section 179(5) were pertinently raised in argument before Msimang J"*.[52]

64. This understanding of the request was moreover borne out by Mr Mpshe's reply to Mr Hulley's request and Mr Zuma's response to it. Mr Mpshe merely said in his reply of 12 October 2007 that Mr Zuma's matter "*is not subject of a review*" but "*is undergoing further investigations in the normal route for a decision to be*

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50 Zuma founding affidavit vol 1 p 43 para 59

51 Hulley letter 11 October 2007 annexure K vol 4 pp 342 to 343

52 Zuma reply vol 9 pp 785 to 786 para 138(c)

taken".[53] If Mr Zuma had a legitimate expectation of a hearing before such a decision was taken arising from Mr Ngcuka's earlier statement, he would surely have said so. His failure to do so is consistent only with Mr Mpshe's understanding that his request was based on section 179(5)(d) and not on any legitimate expectation.

65. The current decision to prosecute Mr Zuma was implemented by the service of an indictment on 28 December 2007. Mr Zuma again did not protest that the decision was taken contrary to his legitimate expectation of a hearing. He first protested some six months later when the current application was launched.

66. We accordingly submit that Mr Zuma's application lacked the first requirement for a cause of action based on legitimate expectation because it did not establish that he in fact had any expectation of a hearing in December 2007 arising from Mr Ngcuka's statement more than four years earlier.

Mr Ngcuka did not make a clear and unambiguous representation

67. Heher J held in Phillips[54] and this court confirmed in Szymanski,[55] Phambili,[56] Grey's Marine[57] and Dunn[58] that the law does not protect every expectation but

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53 Mpshe letter 12 October 2007 annexure L vol 4 p 344

54 National Director of Public Prosecutions v Phillips and Others 2002 (4) SA 60 (W) para 28

55 South African Veterinary Council and Another v Szymanski 2003 (4) SA 42 (SCA) para 19

56 Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA) para 85

only those which are "*legitimate"*. The requirements for legitimacy of the expectation are *inter alia* that it must be based on a representation which is "*clear, unambiguous and devoid of relevant qualification"*. The rationale for this requirement is the following:

> "*The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril."*

68. Mr Ngcuka's statement at his press conference of 23 August 2003 cannot be said to have been a representation which was "*clear, unambiguous and devoid of relevant qualification"* to the effect that the decision not to prosecute Mr Zuma would not be reversed without first affording him an opportunity to be heard. Mr Ngcuka went no further than to say that the NPA "*have no objection to people making representations to us"* and that the NPA were duty bound to consider any such representations if and when they were made. It was a general statement of policy. It went no further than to say that anybody was at liberty at any time to make representations to the NPA. It did not make any promise not to prosecute Mr Zuma or anybody else without first affording them an opportunity to be heard.

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[57] Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others 2005 (6) SA 313 (SCA) para 32

[58] Minister of Defence and Others v Dunn 2007 (6) SA 52 (SCA) para 31

69. It must moreover be borne in mind that, what Mr Zuma contends for, is not merely that he should be allowed to take the initiative to make representations of his own accord. The question in this case is whether the NPA should have invited Mr Zuma to make representations before deciding to prosecute him and whether it should moreover have facilitated such representations by providing him with information of "*all the ramifications of the case against him"* including "*the basis upon which (the NDPP) had since changed his thinking about the decision to prosecute"* and "*what criteria were applied in not prosecuting him and how those had changed"*.[59] Mr Ngcuka's statement certainly did not amount to a clear and unambiguous promise of a hearing in this sense.

Such a representation would not have been competent or lawful

70. The cases to which we have already referred also held that it was a further requirement for a legitimate expectation that the representation upon which it was based was "*one which it was competent and lawful for the decision-maker to make"*.

71. Even if Mr Ngcuka's statement could be interpreted as a promise not to prosecute Mr Zuma without first affording him a hearing on the issue, the promise would in any event not have been competent and lawful. That is because no other suspect enjoys the same privilege. It was not competent or lawful for Mr Ngcuka to promise special treatment to Mr Zuma. Accordingly, if he had promised him a procedural benefit not extended to all suspects, it would have amounted to favouritism extended to a powerful person in violation of the

[59] Judgment vol 15 pp 1239 to 1241 paras 47 to 52, p 1293 para 163 and p 1328 para 239

requirement of section 179(4) that the NPA exercise their functions "*without fear, favour or prejudice"*.

POLITICAL INTERFERENCE

Introduction

72. The High Court held that the President, Minister Maduna and Minister Mabandla had improperly interfered with the Ngcuka decision not to prosecute Mr Zuma of August 2003, the Pikoli decision to prosecute him of June 2005 and the NPA's decision to prosecute him again of December 2003. Its findings of political interference are set out in the annexure to these submissions.

73. We will submit on the following grounds that the High Court erred in making these findings:

73.1. The High Court's findings were not based on accusations made by Mr Zuma. He did not plead them and did not advance any evidence in support of them. They were entirely of the court's own making. The successive NDPPs, Mr Ngcuka, Mr Pikoli and Mr Mpshe, were never called upon to meet a case based on these accusations. The court's findings were accordingly irregular in two fundamental respects. The first was that the findings exceeded the bounds of the court's judicial function to determine the disputes raised before it. The court made a case instead which went beyond the one advanced by Mr Zuma. The findings moreover violated the principle of *audi alteram partem* in that the NDPPs were never afforded an opportunity to defend themselves against the case upheld against them.

73.2. The High Court's findings violated the Plascon Evans rule. The High Court made findings of fact in the face of clear and comprehensive disputes raised by all three the NDPPs involved. The Plascon Evans rule demanded that the court accept their evidence that they had acted in good faith and without fear, favour or prejudice all along.

73.3. The High Court's findings were irrelevant to the issues in the case. The only issue was whether Mr Zuma was entitled to a hearing before the NPA made the current decision to prosecute him in December 2007. Mr Zuma contended that he was entitled to a hearing on only two grounds, section 179(5)(d) of the Constitution and an alleged legitimate expectation. He either had such a right on either or both those grounds or he did not. It was not in any way dependent on the question whether there had been political interference with the NDPPs' decisions. If Mr Zuma was entitled to a hearing, political interference could not deprive him of it. If he was not entitled to a hearing on the other hand, political interference could not give him one.

73.4. The court's findings were lastly in any event wrong. They were not justified on the evidence before the court. They were based on inferential reasoning which was fundamentally flawed and not justified by the evidence on which it was based.

74. We will elaborate on each of these grounds in turn. We must make it clear that our contentions are not in any way dependent on the controversy whether the

High Court had to determine either or both of the applications to strike out.[60] We will assume that the court was obliged or at least entitled to do so. Even on that assumption however, its findings of political interference were irregular and wrong on all four grounds.

The findings were not based on the pleaded case

75. Mr Zuma's founding affidavit made accusations of political interference[61] but the High Court's findings of political interference were not based on his accusations. They went beyond his accusations. None of them were based on accusations made in Mr Zuma's founding affidavit.

76. It follows that the successive NDPPs Mr Ngcuka, Mr Pikoli and Mr Mpshe were never called upon to meet the accusations ultimately upheld against them. The court's findings were based on its own inferential reasoning. The NDPPs never had an opportunity to address the court's inferences and to defend themselves against its conclusions that their decisions were the product of improper political interference.

77. The findings were thus made in breach of the fundamental rules of motion proceedings that require an applicant to plead his case in his founding affidavit to afford the respondent a fair opportunity to meet the case against him. This basic rule is trite. Heher J formulated it as follows in the Phillips case:

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60 Contrast NDPP application for leave to appeal vol 16 pp 1354 to 1366 para 11, with Hulley answering affidavit vol 16 pp 1389 to 1396 paras 6 to 11

61 Subject to reservations: see Zuma founding affidavit vol 1 p 19 para 10 and p 23 para 18

"*In motion proceedings the parties' affidavits constitute both their pleadings and their evidence …*

Pleadings must be lucid, logical and intelligible. A litigant must plead his cause of action or defence with at least such clarity and precision as is reasonably necessary to alert his opponent to the case he has to meet. A litigant who fails to do so may not thereafter advance a contention of law or fact if its determination may depend on evidence which is opponent has failed to place before the court because he was not sufficiently alerted to its relevance."[62]

78. This Court elaborated on this principle in the Wevell Trust case as follows:

"*It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest – the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal. In motion proceedings, the affidavits constitute both the pleadings and the evidence … and the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to*

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62 National Director of Public Prosecutions v Phillips 2002 (4) SA 60 (W) para 36. See the authorities referred to in the same paragraph.

speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted."[63]

79. These cases say that an applicant may not make a case in argument which was not made in his founding papers. This case went further. Mr Zuma did not even seek to make the case in argument which the High Court ultimately upheld against the NDPPs.[64] The High Court's findings of political interference were entirely of the court's own making based on its own inferential reasoning after all the papers had been filed and the arguments concluded. It follows *a fortiori* that the court erred in upholding a case never made on the papers or in argument and one which the respondents were never called upon to meet.

80. The court's findings were thus irregular for two fundamental reasons:[65]

80.1. The first was that the court's judicial function is to determine the disputes raised by the parties in the case before it. It is not permitted to go beyond them. In this case, the court drew inferences and made findings beyond those advanced by either party. It exceeded the legitimate bounds of its judicial function.

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63 Minister of Land Affairs and Agriculture v D & F Wevell Trust 2008 (2) SA 184 (SCA) para 43

64 Mr Zuma's written submissions in the NPD dated 28 July 2008 vol 12 pp 998 to 999 para 106(a). Mr Zuma's supplementary written submissions in the NPD dated 3 August 2008 vol 13 p 1076 paras 33(a) to (c); see also p 1079 para 33(i)(v), p 1080 paras 33(i)(vi) to 35 and p 1082 para 40. Transcript vol 14 p 1124 line 17 to p 1126 line 21. Transcript vol 14 p 1124 line 17 to p 1125 line 3. Transcript vol 14 p 1126 lines 12 to 21

65 Director of Hospital Services v Mistry 1979 (1) SA 626 (A) 636G-H; Kauesa v Minister of Home Affairs and Others 1996 (4) SA 965 (NmS) 973I-974A; Welkom Municipality v Masureik and Herman t/a Lotus Corporation and Another 1997 (3) SA 363 (SCA) 371G-H; Groenewald NO and Another v Swanepoel 2002 (6) SA 724 (E) 726F-I

80.2. The court's findings violated the principle of *audi alteram partem.* They were findings adverse to the respondent without affording him an opportunity to defend himself against the accusations upheld against him.

The findings violated the Plascon-Evans rule

81. The Plascon Evans rule is trite and need not be repeated. This court recently reiterated and elaborated on the rule in Wightman.[66]

82. In this case the NDPP was never called upon to meet the particular allegations of political interference the court ultimately upheld against the NPA. All the court's findings were however to the effect that Mr Ngcuka's decision not to prosecute Mr Zuma, Mr Pikoli's decision to prosecute him and Mr Mpshe's decision to prosecute him again, were the products of political interference. They were made in the face of unambiguous and elaborate descriptions by Mr Ngucka, Mr Pikoli, Mr Mpshe and Mr Du Plooy of the way in which their decisions were made and emphatic denials that they were the product of any political interference:

82.1. Mr Ngcuka's decision and the way it was made, was described by Mr Du Plooy in his answering affidavit.[67] He quoted extensively from the earlier affidavits of Mr McCarthy[68] and Mr Ngcuka.[69] His

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66 Wightman v Headfour (Pty) Ltd (66/2007) [2008] ZASCA 6 (10 March 2008) paras 12 and 13

67 Du Plooy answer vol 5 pp 410 to 419 paras 30 to 35

68 Du Plooy answer vol 5 pp 410 to 414 para 31

description was confirmed by Mr Ngcuka who deposed to a fresh confirmatory affidavit in this application.[70]

82.2. Mr Pikoli's decision was similarly described by Mr Du Plooy.[71] He again quoted extensively from the earlier affidavit of Mr Pikoli[72] and Mr McCarthy.[73] His description was again confirmed by a fresh confirmatory affidavit by Mr Pikoli in this application.[74]

82.3. Mr Mpshe's decision was similarly described by Mr Du Plooy[75] and was also confirmed by Mr Mpshe's confirmatory affidavit.[76]

83. The affidavits of Mr Du Plooy, Mr Ngcuka, Mr Pikoli and Mr Mpshe left no room for the NPD's findings to the effect that their decisions were the product of improper political interference by the President, Minister Maduna and Minister Mabandla. Its findings were accordingly made in violation of the Plascon Evans rule.

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69 Du Plooy answer vol 5 pp 414 to 417 para 32

70 Ngcuka confirmatory vol 8 pp 694 to 697

71 Du Plooy answer vol 5 pp 423 to 451 paras 42 to 56, vol 6 p 498 para 170, pp 502 to 503 paras 182 to 184 and pp 504 to 510 paras 190 to 198

72 Du Plooy answer vol 5 pp 446 to 451 para 56. Mr Pikoli's affidavit itself was attached as annexure JDP2 vol 6 pp 543 to 561

73 Du Plooy answer vol 5 pp 442 to 446 para 55

74 Pikoli confirmatory vol 7 pp 642 to 644

75 Du Plooy answer vol 5 pp 471 to 475 paras 94 to 97 and vol 6 pp 527 to 528 para 260

76 Mpshe confirmatory vol 7 pp 639 to 641

84. Mr Zuma acknowledged in his answer to the NDPP's application to strike out, that his accusations of political interference have always been in dispute. He said the following in this regard:

> "*The State has always been aware of my allegations and cannot now contend that they are scandalous, vexatious, irrelevant and bring the administration of justice into disrepute. In fact, the State has consistently denied these allegations and continues to do so."*[77]

85. The High Court also acknowledged in its judgment that the NDPP denies the accusations of political interference most emphatically:

> "*The NDPP denies it (that is, the accusations of political interference) most emphatically and says at all times the decision, not to prosecute the applicant, and, thereafter to prosecute him, were his alone. In fact he stigmatises the allegations of political interference as scandalous, vexatious and irrelevant."*[78]

86. The High Court nonetheless made its findings of political interference in the face of these denials by applying the wrong test for the resolution of disputes of fact on paper. Instead of applying the Plascon Evans rule, it held that, because the facts were peculiarly within the knowledge of the NDPPs, "*the court is forced to accept the inference which is the least favourable"* to them.[79] We submit with respect that this was a fundamental error. The court should have applied the

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77 Zuma answer to application to strike out vol 10 p 809 para 15(d)

78 Judgment vol 15 p 1295 para 167

79 Judgment vol 15 p 1321 para 220

Plascon Evans principle which required it to accept the innocent account of the relevant decisions put forward by the NDPPs.

The findings were irrelevant

87. The NDPP applied to have the accusations of political interference made in Mr Zuma's founding affidavit struck out on two grounds. The main ground was that they were irrelevant to the issues before the court. The NDPP raised this objection to each of the parts of Mr Zuma's affidavit sought to be struck out.[80] The second ground raised in respect of some but not all of the portions sought to be struck out, was that they were based on inadmissible evidence or no evidence at all.

88. The NDPP's application to strike out did not address the particular allegations of political interference upheld by the NPD because they were not raised in Mr Zuma's founding affidavit. We submit for the reasons that follow however that they are equally irrelevant and that the NPD erred in making them.

89. The only question in this case is whether Mr Zuma was entitled to a hearing before the NPA decided to prosecute him again in December 2007. Mr Zuma based his contention that he was entitled to such a hearing on two grounds. The first was section 179(5)(d) of the Constitution. The second was section 33 of the Constitution on the basis of a legitimate expectation of a hearing. The only issue before the NPD was whether Mr Zuma was entitled to a hearing on either of these two grounds. If he was entitled to a hearing, it was common cause that the

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80 Du Plooy affidavit in application to strike out vol 8 pp 653 to 658 para 14

decision to prosecute him was invalid because he was never afforded such a hearing.

90. It was in the circumstances wholly irrelevant whether Mr Ngcuka's decision of August 2003 not to prosecute Mr Zuma, Mr Pikoli's decision of June 2005 to prosecute him and the current decision of December 2007 to prosecute him again, were the product of political interference:

90.1. If Mr Zuma was entitled to a hearing on either of the two bases upon which he based his contention, then it was common cause that he was not afforded a hearing and that the decision to prosecute him again was invalid. No amount of political interference could have detracted from this conclusion.

90.2. By the same token, if Mr Zuma was not entitled to a hearing on either of the two bases upon which he based his contention, then no amount of political interference could have afforded him a right to a hearing he would not otherwise have had.

90.3. It follows that it was irrelevant to the outcome of this case whether there had been political interference or not. The NPD should have struck out Mr Zuma's accusations of political interference and should not have gone on to make findings of political interference of its own. They were entirely irrelevant to the issues before the court.

91. Mr Zuma contended that his accusations of political interference were relevant on two grounds:

91.1. He sought in his founding affidavit to infer from the accusations of political interference that the NDPP's failure to afford him a hearing had been deliberate.[81] We submit that the inference is illogical but in any event irrelevant. If Mr Zuma had a right to be heard, then it does not matter whether the NDPP's failure to afford him a hearing was deliberate or inadvertent.

91.2. Mr Zuma also contended that the relevance of his accusations of political interference "*does not for present purposes lie in the truth or correctness thereof …, but in the simple existence thereof*".[82] Mr Hulley repeated in his answer to the application for leave to appeal that "*the truth of the averments is not wherein their main relevance lay*".[83] But this contention is unfounded and does not justify the court's findings for three reasons:

91.2.1. The first is that it is untrue. Mr Zuma did not merely record past instances where he had made accusations of political interference. He made many fresh accusations of political interference in his founding affidavit.

91.2.2. The mere fact that he had made accusations of political interference was secondly in any event irrelevant. The fact

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81 Zuma founding affidavit vol 1 p 42 para 58, p 44 para 62, pp 46 to 47 para 68, p 64 para 99 and pp 88 to 89 paras 155 to 157

82 Zuma founding affidavit vol 1 p 95 para 163

83 Hulley answer to application for leave to appeal vol 16 pp 1389 to 1390 para 6 (81)

that such accusations had been made, could not in any way add to or detract from such right as he might have had to a hearing before the NPA decided to prosecute him again.

91.2.3. Thirdly, even if his accusations of political interference were relevant for that limited purpose however, it would have meant that the court was required to do no more than to hold that he had made those accusations in the past. It was then in any event not called upon to consider and make findings on the truth of the accusations. The court's findings were accordingly in any event irrelevant.

92. We accordingly submit that the court erred in making the findings of political interference because they were irrelevant to the issues before it.

The findings were wrong

93. We submit that all the High Court's findings of political interference were wrong in that they were based on unfounded and flawed inferential reasoning which was not justified by the evidence before the court.

94. We will deal with the High Court's findings of political interference by addressing each of the themes of the High Court's findings identified in the annexure to these submissions.

Mr Ngcuka's decision of August 2003

The High Court's findings

95. The High Court made findings of misconduct of the highest order in relation to the Ngcuka decision. It held that the decision not to prosecute Mr Zuma,

- was "*bizarre to say the least"* and was "*a total negation of the constitutional imperatives imposed on the NDPP to prosecute without fear and favour, independently and in consistent, honest and fair fashion"*;[84]
- "*brought justice into disrepute"*;[85]
- was taken "*for reasons totally antithetical to the constitutional duties of the NDPP to make consistent, fair and honest decisions without fear or favour"*,[86] and
- was "*an egregious breach"* of the principles of prosecutorial independence.[87]

96. We submit with respect that these findings were sheer and unjustified speculation. The High Court seems to have based them on three factors. The first was that Mr Ngcuka decided not to prosecute Mr Zuma despite his own acknowledgment that they had a *prima facie* case against him. The

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84 Judgment vol 15 p 1286 para 150

85 Judgment vol 15 p 1288 para 155

86 Judgment vol 15 p 1298 para 174

87 Judgment vol 15 p 1303 para 182

second was that they decided to prosecute Mr Shaik who was accused of paying bribes to Mr Zuma who must accordingly have been equally guilty of receiving those bribes. The third was Mr Maduna's presence and role at the press conference where the decision was announced. We will deal with each of these in turn.

A prima facie case

97. The High Court drew far-reaching adverse inferences against Mr Ngcuka from the mere fact that he failed to prosecute Mr Zuma despite the *prima facie* case against him.[88]

98. But these inferences were based on the court's misconception that a mere *prima facie* case is "*what would normally be sufficient to prosecute*".[89] A responsible prosecutor does not prosecute unless there is a reasonable prospect of a successful prosecution.[90] The NPA's prosecution policy makes this clear when it says that "*there must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued*".[91] The very point Mr Ngcuka made in his press statement of 23 August 2003 was that, although there was a *prima facie* case against Mr Zuma, they had decided not to prosecute him

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88 Judgment vol 15 pp 1285 to 1286 paras 148 to 150

89 Judgment vol 15 p 1285 para 149

90 Beckenstrater v Rottcher and Theunissen 1955 (1) SA 129 (A) 135-6, as approved and applied in, amongst others, Prinsloo and Another v Newman 1975 (1) SA 481 (A) 495H and S v Lubaxa 2001 (4) SA 1251 (SCA) para 19

91 NPA Prosecution Policy annexure H vol 4 p 292 para 4(a): see also the factors to be considered when evaluating evidence p 293 para 4(b)

because "*our prospects of success are not strong enough"*.[92] That was also the explanation given by the NDPP in this application.[93]

The decision to prosecute Mr Shaik

99. The High Court branded as "*bizarre"* that Mr Ngcuka had decided to prosecute Mr Shaik but not Mr Zuma given that bribery is a bilateral crime.[94] It also said (with the benefit of hindsight) that it was "*very difficult to understand why the state did not proceed against Zuma on the evidence they had, given that it had resulted in a 15 year sentence for Shaik"*.[95]

100. The High Court however overlooked two things:

100.1. The first was that the crime of bribery depends on the intention with which a bribe is paid or received. It does not follow from the fact that the state could prove that Mr Shaik had paid bribes to Mr Zuma with a corrupt intention, that it could also prove that Mr Zuma had received those bribes with the same corrupt intention.

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92 Ngcuka press statement 23 August 2003 annexure D vol 3 p 201 para 32

93 Du Plooy answering affidavit vol 5 p 410 para 30.2; Du Plooy answering affidavit vol 5 p 412 para 31, quoting para 53 of Mr McCarthy's affidavit in the 2006 stay of prosecution and postponement proceedings; Du Plooy answering affidavit vol 6 p 507 para 196; Du Plooy answering affidavit vol 5 pp 415 to 416 para 32, quoting para 32 of Mr Ngcuka's affidavit in the 2006 stay of prosecution and postponement proceedings; Du Plooy answering affidavit vol 5 pp 416 to 417 para 32, quoting para 34 of Mr Ngcuka's affidavit in the 2006 stay of prosecution and postponement proceedings

94 Judgment vol 15 p 1286 para 150

95 Judgment vol 15 p 1316 para 208

100.2. We know today that the case against Mr Shaik was to a very substantial extent based on evidence of the books of account of Mr Shaik and his companies, their correspondence with third parties, minutes of their meetings with third parties, their contracts with third parties and their discussions with third parties. Evidence of this kind is obviously admissible against Mr Shaik and his companies but their admissibility against Mr Zuma is fraught with complication. There was accordingly a very real difference between the case against Mr Shaik on the one hand and the case against Mr Zuma on the other.

Mr Maduna's presence at the press conference

101. The High Court drew far-reaching inferences from the fact that Mr Maduna attended Mr Ngcuka's press conference of 23 August 2003 and that Mr Ngcuka thanked him for his unstinting support and said that he had demonstrated political leadership. The sole basis for the court's inferences is that it could not think of a legitimate reason for Mr Maduna to attend the press conference and for Mr Ngcuka to thank him. The court's inability to do so was apparently informed by its perception that "*there should be no relationship with the Minister of Justice – certainly insofar as his decisions to prosecute or not to prosecute anybody*".[96]

102. We submit with respect that the High Court was under a misconception. In terms of s 179(6) of the Constitution and s 33 of the NPA Act, the Minister of Justice exercises "*final responsibility*" over the NPA. It means that there must be a working relationship between the Minister and the NDPP. When the NDPP

[96] Judgment vol 15 p 1315 para 207

decides to arrest and prosecute the Deputy President, the duties of the NDPP and the Minister would at least include the following:

102.1. The NDPP must keep the Minister informed of the process towards the arrest and prosecution of the Deputy President to enable the President and his cabinet to address and deal with the fall-out of such a dramatic event.

102.2. The Minister must in turn protect the NDPP against political pressure and make it clear to him that he enjoys government's support whatever his decision because the Constitution requires him to act without fear, favour or prejudice.

103. We do not know why Mr Maduna attended the press conference or why Mr Ngcuka thanked him because nobody ever raised the issue and the NDPP was never called upon to explain those things. What one can say however is that they were perfectly consistent with the proper performance of their functions by the Minister and the NDPP. There was nothing in their conduct to warrant the High Court's sinister inferences.

Conclusion

104. We have already highlighted the fact that the High Court made adverse findings of facts which Mr Zuma had never advanced or contended for. In relation to the Ngcuka decision, the irony is moreover that Mr Zuma's case has always been that Mr Ngcuka had decided not to prosecute him because the case against him was so weak. The High Court's finding on the other hand, is that Mr Ngcuka's

decision was sinister and must have been the product of political interference because the case against Mr Zuma was so strong. The High Court's adverse inference was accordingly the opposite of the one that Mr Zuma advanced and was irreconcilable with it. We submit it illustrates that both Mr Zuma's conspiracy theory in one direction and the High Court's conspiracy theory in the opposite direction constitute no more than unfounded speculation.

Mr Maduna's role in the negotiations with Thint

105. The High Court drew adverse inferences from the role Mr Maduna played in the NPA's negotiations with Thint in the run-up to Mr Shaik's trial. The High Court assumed that Mr Maduna's participation in these negotiations were in the nature of improper political meddling[97] and it went on to assume that Mr Ngcuka had made Mr Maduna a partner in his strategic planning and decision-making.[98]

106. We submit with respect that the High Court's inferences are wholly unfounded. The history upon which it is based, shows that every time Mr Maduna became involved, it was done at the behest of Thint. They approached him with offers of settlement and co-operation. He then facilitated meetings between them and the NDPP. The NDPP took over and conducted the further negotiations with Thint. They culminated in Mr Ngcuka's decision of May 2004 to withdraw the charges against Thint. There is no basis for any inference that Mr Maduna's role in these events was in any way untoward.

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97 Judgment vol 15 p 1308 paras 192 to 193

98 Judgment vol 15 p 1309 paras 195 and 196

The NPA's contact with the DG in the Presidency

107. The High Court quoted Mr Pikoli who had said in his affidavit before Msimang J that the prosecution team "*have in fact been engaging with the Director-General in the Presidency in this regard since February 2006"*.[99] The High Court commented that these consultations "*are also cause for concern given the constitutional imperative of independence"*.

108. But the High Court firstly misunderstood Mr Pikoli's statement. He was merely responding to Mr Zuma's accusation that the investigating team ought to have taken a statement from the President on his involvement in the arms deal but that they had not done so.[100] It was in response to this accusation that Mr Pikoli said that the prosecuting team had "*in fact been engaging with the Director-General in the Presidency in this regard since February 2006"*.[101] The High Court's concern was accordingly based on a misunderstanding of Mr Pikoli's evidence.

109. The High Court's criticism is in any event misguided because, as we have already submitted, the NDPP would not only be entitled but would also be obliged to keep the President and the Minister of Justice informed of the arrest and prosecution of the Deputy President. Contact between the NDPP and the Presidency for this purpose would have been entirely innocuous.

The NPA's decision of December 2007

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99 Judgment vol 15 p 1311 para 197

100 Application for leave to appeal vol 16 p 1374 para 14(b)

101 Pikoli affidavit 14 August 2006 annexure JDP2 vol 6 p 554 para 30

110. We submit for the reasons that follow that the High Court erred in its finding that the current decision to prosecute Mr Zuma taken by the NPA on 27 December 2007 was the product of political interference.

111. The first basis on which the High Court found that the NPA's decision in December 2007 to prosecute Mr Zuma again was the product of political interference, was its inference that the President had interfered with Mr Pikoli's decision to prosecute Mr Selebi by suspending him from office in September 2007.[102] But the court erred by inferring that it followed that the President interfered with the NPA's decision three months later to prosecute Mr Zuma again:

111.1. The court firstly based its inference on Mr Pikoli's failure to respond to an article published in the *Mail & Guardian* of 5 October 2007 in which it was alleged that Mr Pikoli had been suspended to stop his prosecution of Mr Selebi.[103] The court drew the inference because it said that Mr Pikoli was "*by law … supposed to admit or deny or confess and avoid these allegations or face the prospect of the court accepting the allegations as correct"*.[104] But it erred in this regard. This court has held that it is not proper to base an argument in motion proceedings "*on passages in documents which have been annexed to*

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102 Judgment vol 15 pp 1312 to 1315 paras 200 to 207

103 Judgment vol 15 pp 1312 to 1314 paras 201 to 205

104 Judgment vol 15 p 1314 para 204

the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits."[105]

111.2. Mr Zuma attached the newspaper article to make a different point, namely that the article reported that his case was one of those under "review" by Mr Mpshe along with that of South African Police Service Commissioner Jackie Selebi's case, and it would be odd and constitute unequal and discriminatory treatment if his case were not "reviewed" and no representations were called for.[106] The NDPP answered this point.[107]

111.3. If Mr Zuma had pertinently said in his founding affidavit that Mr Mpshe did not review Mr Zuma's case because, unlike Mr Selebi's case, Mr Zuma's case was politically palatable to Mr Mbeki, not only would Mr Mpshe and Mr Pikoli have been alerted to the points but Mr Mpshe might also have been alerted to the inferences that might be drawn from it in relation to the NPA's later decision to prosecute Mr Zuma. Because Mr Zuma did not do so, it is not permissible to draw an inference from Mr Pikoli's failure to respond to it, not only against him but also against Mr Mpshe.

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105 Minister of Land Affairs and Agriculture v D & F Wevell Trust 2008 (2) SA 184 (SCA) para 43; see also Port Nolloth Municipality v Xhalisa and Others; Luwalala and Others v Port Nolloth Municipality 1991 (3) SA 98 (C) 111B

106 Zuma founding affidavit vol 1 p 92 para 161(f)

107 Du Plooy answering affidavit vol 6 pp 527 to 528

111.4. But even if such an inference was justified, its highwater-mark would be that the President or the Minister of Justice interfered with Mr Pikoli's decision to prosecute Mr Selebi. There is no basis at all for the further inference that the President or the Minister of Justice also interfered with the NPA's decision some three months later to prosecute Mr Zuma.

111.5. On the contrary, the NPA's decision to prosecute Mr Zuma was taken against the background of the Shaik judgment and Mr Pikoli's decision to prosecute Mr Zuma in June 2005. That decision was based on the strength of the evidence that the NPA had marshalled against Mr Zuma and Thint. It would have been odd for the NPA not to take the same decision again in December 2007 because nothing had happened to detract from the Pikoli decision or the evidence. In fact, this Court had ruled in November 2007 that the NPA's 2005 searches and search warrants in respect of Mr Hulley's (Mr Zuma's attorney) and Thint's premises were lawful, thus assuaging the NPA's concerns about relying on the evidence obtained during these searches.[108] The overwhelming likelihood was thus that the NPA did not require any political prompting to decide in December 2007 to prosecute Mr Zuma again. It was the evidence that called for a prosecution in the normal course. The inference that it was the product of political interference was accordingly unfounded.

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[108] See paragraph 112.5 below

112. The only other basis upon which the court inferred that the current decision was prompted by political interference, was that the timing of the indictment of 28 December 2007 "*after the President suffered a political defeat at Polokwane, was most unfortunate*".[109] But this inference was also wholly unjustified for the following reasons:

112.1. Mr Zuma did not advance this contention in his founding affidavit. He expressly refrained from doing so. He said the following in this regard:

> "*I do not comment on the timing and the reasons for the decision by the Acting NDPP in December 2007 to prosecute me. This will be addressed in a permanent stay application if required.*"[110]

112.2. Mr Mpshe was accordingly never called upon to address an adverse inference from the timing of the decision.

112.3. Mr Zuma swung around in reply when he opportunistically sought to draw an inference from the timing of this decision for the first time:

> "*The coincidence of this decision (and its implementation by the service of the indictment) and the events at the Polokwane ANC elections is remarkable. It is also unexplained. I respectfully believe that it cries out for an explanation but none has been forthcoming.*"[111]

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109 Judgment vol 15 pp 1316 to 1317 para 210

110 Zuma founding affidavit vol 1 p 88 para 153

111 Zuma replying affidavit vol 9 p 741 para 58(b)

112.4. The court should have paid no heed to this opportunistic attempt to draw an inference in reply for the first time which Mr Zuma had expressly disavowed in his founding affidavit. The court erred by drawing the same inference.

112.5. The timing of the decision of 27 December 2007 and the indictment that followed the following day, was in any event entirely innocent as is evident from the sequence of events described in Mr Du Plooy's answer. The decision whether to prosecute Mr Zuma again, was delayed after the judgment of Msimang J until greater clarity was obtained on the status of the evidence gathered under the disputed search warrants.[112] This court handed down its judgments upholding the searches on 8 November 2007.[113] Immediately after this court's judgments were handed down, the prosecuting team commenced a process of finalisation of a draft indictment based on all the available evidence, both old and new, in the light of this court's judgments.[114] This process was completed by 11 December 2007 whereupon Mr Mpshe and Mr McCarthy considered the matter as a whole with a view to taking a decision.[115] They decided on 27 December 2007 to prosecute Mr Zuma again and the NPA implemented their decision the

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112 Du Plooy answer vol 5 p 465 para 81

113 Du Plooy answer vol 5 p 465 to 466 para 82 and p 470 para 91

114 Du Plooy answer vol 5 pp 470 to 471 para 92

115 Du Plooy answer vol 5 p 471 para 92

following day.[116] There was nothing sinister in the timing of their decision and no basis for an adverse inference against them.

112.6. The High Court's comment that the timing of the decision was "*most unfortunate"* is in any event unfounded. The decision was made immediately after the Polokwane conference which had ended on 20 December 2007. If it had been made and announced any sooner, the NPA would have been accused of trying to influence the election of the new president of the ANC at the Polokwane conference. There is on the other hand no basis for any suggestion that the decision ought to have been made later. They took the decision to prosecute Mr Zuma soon after receiving the revised indictment from the investigating team on 11 December 2007, thus avoiding any unnecessary delay.

112.7. Finally, the papers contain an emphatic denial that Mr Mpshe and Mr McCarthy took the decision to prosecute Mr Zuma because of political influence from Mr Mbeki. In response to an allegation by Mr Zuma concerning the current decision that "*[t]he only reasonable inference to be drawn is one of a grim resolve, irrespective the facts and circumstances, to prosecute me and so prevent my Presidency since the earlier strategy to denounce me in public as a crook did not have this desired effect*",[117] Mr Du Plooy (the NDPP's deponent) said:

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116 Du Plooy answer vol 5 p 471 para 93

117 Zuma founding affidavit vol 1 p 88 para 154

"*This paragraph is completely unsubstantiated and vehemently denied. It is also entirely irrelevant to the present proceedings*".[118]

The President's complicity

113. The High Court's speculation about the President's complicity was based on its findings that Ministers Maduna and Mabandla had improperly interfered with the decisions not to prosecute Mr Zuma and later to prosecute him. We have already submitted that those findings were wrong. The foundation of the High Court's finding of complicity by the President was accordingly misconceived.

General conclusions of political interference

114. The same goes for the High Court's general conclusions of political interference with the decisions not to prosecute Mr Zuma and later to prosecute him. They were also based and entirely dependent on the High Court's specific findings which we have already submitted were wrong. The general conclusions were accordingly equally unfounded.

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118 Du Plooy answer vol 6 p 524 para 248

PRAYER

115. The NDPP accordingly asks for an order in the following terms:

"*1 The appeal is upheld.*

2 The order of the High Court is set aside and replaced with the following order:

'1. The application is dismissed.

2. Mr Zuma is directed to pay the costs of this application, including the costs of three counsel.'

3 The Respondent is directed to pay the Appellant's costs in the appeal, such costs to include:

3.1 the costs of three counsel in the appeal; and

3.2 the costs of the application for leave to appeal in the Court a quo, including the costs of two counsel."

Wim Trengove SC

Assisted by:
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George Baloyi
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Anton Steynberg

Counsel for the NDPP

Chambers
Johannesburg, Pretoria, Durban and Cape Town
30 October 2008

APPELLANT'S AUTHORITIES

Gillingham v Attorney-General 1909 TS 572

Wronsky en 'n Ander v Prokureur-Generaal 1971 (3) SA 292 (SWA)

Highstead Entertainment (Pty) Ltd t/a "The Club" v Minister of Law and Order and Others 1994 (1) SA 387 (C)

Kaunda and Others v President of the Republic of South Africa and Others 2005 (4) SA 235 (CC)

R v DPP, *ex parte* Kebeline and Others [2000] 2 AC 326 (HL) ([1999] 4 All ER 801 (HL))

Sharma v Brown-Antoine and Others [2007] 1 WLR 780 (PC)

De Ville *Judicial Review of Administrative Action in South Africa* (2003)

Meyer v Law Society, Transvaal 1978 (2) SA 209 (T)

Meyer v Prokureursorde van Transvaal 1979 (1) SA 849 (T)

Huisamen and Others v Port Elizabeth Municipality 1998 (1) SA 477 (E)

Park-Ross v Director: Office for Serious Economic Offences 1998 (1) SA 108 (C)

Simelane and Others NNO v Seven-Eleven Corporation SA (Pty) Ltd and Another 2003 (3) SA 64 (SCA)

Wiseman v Borneman [1971] AC 297 (HL) 308E-G ([1969] 3 All ER 275 (HL))

R v Raymond [1981] 2 All ER 246 (CA)

Brooks (Lloyd) v DPP of Jamaica and Another [1994] 1 AC 567 (PC) ([1994] 2 All ER 231 (PC))

Minister of Defence v Potsane and Another; Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others 2002 (1) SA 1 (CC)

S v Makwanyane and Another 1995 (3) SA 391 (CC)

Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as *Amici Curiae*) 2006 (2) SA 311 (CC)

National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC)

Thint Holdings (Southern Africa) (Pty) Ltd and Another v NDPP (CCT 90/07); Zuma v NDPP (CCT 92/07) [2008] ZACC 14 (31 July 2008) paras 41 to 42

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC)

Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC)

Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others 2007 (6) SA 4 (CC)

National Director of Public Prosecutions v Phillips and Others 2002 (4) SA 60 (W)

South African Veterinary Council and Another v Szymanski 2003 (4) SA 42 (SCA)

Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA)

Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others 2005 (6) SA 313 (SCA)

Minister of Defence and Others v Dunn 2007 (6) SA 52 (SCA)

Minister of Land Affairs and Agriculture v D & F Wevell Trust 2008 (2) SA 184 (SCA)

Director of Hospital Services v Mistry 1979 (1) SA 626 (A)

Kauesa v Minister of Home Affairs and Others 1996 (4) SA 965 (NmS)

Welkom Municipality v Masureik and Herman t/a Lotus Corporation and Another 1997 (3) SA 363 (SCA)

Groenewald NO and Another v Swanepoel 2002 (6) SA 724 (E)

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S v Lubaxa 2001 (4) SA 1251 (SCA)

Port Nolloth Municipality v Xhalisa and Others; Luwalala and Others v Port Nolloth Municipality 1991 (3) SA 98 (C)

ANNEXURE

HIGH COURT'S FINDINGS OF POLITICAL INTERFERENCE

Mr Ngcuka's decision of August 2003

1. The decision not to prosecute Mr Zuma when there was a *prima facie* case and given that bribery is a bilateral crime, "*was bizarre to say the least"* and was "*a total negation of the constitutional imperatives imposed on the NDPP to prosecute without fear and favour, independently and in consistent, honest and fair fashion"*.[119] The failure to prosecute Mr Zuma "*brought justice into disrepute"*.[120] The NDPP should either have prosecuted Mr Zuma or made no mention of a *prima facie* case of corruption against him.[121]

2. "*We know that the decision not to prosecute him was for reasons totally antithetical to the constitutional duties of the NDPP to make consistent, fair and honest decisions without fear or favour and we are conscious of the irrationality of charging the briber and not the recipient of bribes, but does this alone show political conspiracy?"*.[122]

3. The failure to prosecute Mr Zuma "*was an egregious breach of those principles"* (that is, the principles of prosecutorial independence).[123]

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119 Judgment vol 15 p 1286 para 150

120 Judgment vol 15 p 1288 para 155

121 Judgment vol 15 p 1288 para 155

122 Judgment vol 15 p 1298 para 174

123 Judgment vol 15 p 1303 para 182

4. "*It is very difficult to understand why the state did not proceed against Zuma on the evidence they had, given that it had resulted in a 15 year sentence for Shaik*".[124]

5. Mr Ngcuka thanked Mr Maduna for his unstinting support and said that he had demonstrated political leadership.[125] It is *"a startling statement, given the total independence the NDPP is supposed to exercise"*.[126] The most plausible inference is that the decision not to prosecute Mr Zuma "*needed political evaluation and Mr Ngcuka learned from the advice of his leader"*.[127]

6. The Minister's presence at the press conference "*is otherwise inexplicable and seems to indicate a total lack of appreciation of the independence of the NPA"*.[128] The Minister "*gave generous amounts of his time and energy to the NDPP and political leadership in the long period leading up to the press conference"* which was "*not consonant with the fearless and unfettered independent exercise of extensive powers"* and "*certainly strengthen the inference that the decision not to prosecute the applicant was politically driven."*[129]

Mr Maduna's role in the negotiations with Thint

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124 Judgment vol 15 p 1316 para 208

125 Judgment vol 15 pp 1305 to 1306 para 188

126 Judgment vol 15 p 1306 para 189

127 Judgment vol 15 p 1306 para 190

128 Judgment vol 15 pp 1306 to 1307 para 190

129 Judgment vol 15 p 1307 para 191

7. Mr Maduna's role in the negotiations between the NDPP and Thint: "*The political meddling … was being repeated"*.[130] The Minister "*must have made his input into the offer (of a settlement) and its consequences for the prosecution against Shaik"*.[131] "*The Minister and Mr Ngcuka were using the oldest device in the ancient art of prosecution … using a sprat to catch a mackerel*".[132]

8. "*Put at its very lowest, Mr Maduna seems to have played a not insignificant part in the planning of the strategy in question, whatever its end objective might be*". It was "*a most regrettable occurrence, in the light of the fact that it also constituted a serious criminal offence"*.[133]

The NPA's contact with the DG in the Presidency

9. Mr Pikoli said in his affidavit before Msimang J which was also filed in this application, that the NPA had been in regular contact with the Director-General Presidency (Dr Chikane) on the Zuma prosecution. These consultations "*are also cause for concern given the constitutional imperative of independence"*.[134]

The NPA's decision of December 2007

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130 Judgment vol 15 p 1308 para 192

131 Judgment vol 15 p 1309 para 193

132 Judgment vol 15 pp 1309 to 1310 para 195

133 Judgment vol 15 p 1310 para 196

134 Judgment vol 15 pp 1311 to 1312 para 199

10. The court infers from Mr Pikoli's failure to respond fully to the *Mail & Guardian's* article of 5 October 2007, that President Mbeki suspended Mr Pikoli to stop him from prosecuting Mr Selebi.[135] The most plausible inference is "*that there was again political interference at the very time Mr Mpshe was contemplating charging the applicant"*.[136]

11. Mr Mpshe says Mr Pikoli was suspended because of a breakdown in his relationship with the Minister of Justice but "*there should be no relationship with the Minister of Justice – certainly insofar as his decisions to prosecute or not to prosecute anybody from the Commissioner of Police downwards"*.[137]

12. Mr Mpshe must have realised "*that to disobey the Executive would in all probability ensure his own professional demise"*.[138]

13. "*The timing of the indictment by Mr Mpshe on 28 December 2007, after the President suffered a political defeat at Polokwane was most unfortunate*".[139] This factor, together with the suspension of Mr Pikoli, "*persuade me that the most plausible inference is that the baleful political influence was continuing"*.[140]

The President's complicity

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135 Judgment vol 15 pp 1312 to 1315 paras 200 to 206

136 Judgment vol 15 pp 1314 to 1315 para 206

137 Judgment vol 15 p 1315 para 207

138 Judgment vol 15 p 1315 para 207

139 Judgment vol 15 p 1316 para 210

140 Judgment vol 15 pp 1316 to 1317 para 210

14. The court seems to find, not only that President Mbeki and his Cabinet are in law collectively responsible for the misconduct of Ministers Maduna and Mabandla, but as a matter of fact that President Mbeki was complicit in their conduct. It makes the following statements in this regard. "*Is it possible that ... Mr Maduna was on a frolic of his own or acting on instructions?*"[141] "*It seems very improbable that in so important a matter as one involving the Deputy President … a mere minister would get involved without the President knowing and agreeing"*[142]. "*[I]s it conceivable that the President did not know?*"[143]

General conclusions on political interference

15. Mr Zuma suggests that the decision to prosecute him "*was a stratagem to cloak him in the guise of an accused at the critical moments in the political process and so to hamper his election as ANC President"*.[144] "*There does seem to be merit in that contention"*.[145]

16. Given the rules of evidence, the court is forced to accept an inference which "*is certainly more egregious than the 'hint or suggestion' of political interference referred to in the Yengeni matter"*.[146]

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141 Judgment vol 15 p 1318 para 214

142 Judgment vol 15 p 1318 para 214

143 Judgment vol 15 p 1318 para 215

144 Judgment vol 15 p 1316 para 209

145 Judgment vol 15 p 1316 para 209

146 Judgment vol 15 p 1321 para 220

17. "*Because of the political meddling I am of the view that the respondent did not maintain his independence and was not in a proper position to carry out his duties to honour the promise to hear representations or to respond properly to the request to receive representations.*"[147]

18. "*The court has gained the impression that all the machinations to which I have alluded form part of some great political contest or game. For years the applicant is under threat of prosecution for serious corruption and yet never brought to trial. There is a ring of the works of Kafka about this.*"[148]

19. "*I am satisfied that political meddling cannot be excluded and I am of the judgment that it existed to a sufficiently egregious degree that it justified inclusion in the papers*".[149]

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147 Judgment vol 15 pp 1324 to 1325 para 229

148 Judgment vol 15 p 1327 para 237

149 Judgment vol 15 p 1328 para 238