

IN THE HIGH COURT OF SOUTH AFRICA,
NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO.: **19577/2009**

In the matter between:

DEMOCRATIC ALLIANCE

Applicant

and

**THE ACTING NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

First Respondent

**THE HEAD OF THE DIRECTORATE OF
SPECIAL OPERATIONS**

Second Respondent

JACOB GEDLEYIHLEKISA ZUMA

Third Respondent

**THIRD RESPONDENT'S ANSWERING AFFIDAVIT DATED 15 APRIL
2015 TO THE SUPPLEMENTARY FOUNDING AFFIDAVIT OF
JAMES SELFE DATED 6 NOVEMBER 2014**

I, the undersigned,

MICHAEL ANDREW THOMAS HULLEY,

do hereby make oath and state:

1.

I am an adult male attorney and I have acted as the attorney of Mr Zuma, the Third Respondent, since criminal proceedings were first instituted against him in June 2005.

2.

2.1 The matters deposed to hereafter are within my personal knowledge save where the context clearly indicates the contrary. In respect of such instances I say that I verily believe the averments made to be true and correct;

2.2 Where I make submissions of law, I have been advised accordingly by legal practitioners;

2.3 I am the appropriate person to present the evidence herein on behalf of the Third Respondent, the President of the RSA. I say this particularly because the Third Respondent was not directly involved in the unfolding of the criminal process against him and the litigation aspects I refer to hereafter.

3.

This is an application to review and set aside a decision of the NPA and indeed of the NDPP, Advocate Mpshe (**Mpshe**), announced on 6 April 2009, not to prosecute Mr Zuma (**Zuma**) and to thus discontinue the prosecution against Zuma then pending.

4.

The Third Respondent (the President of the RSA whose second and last term ends in 2019 - Mr **Zuma**), opposes the review and asks that it be dismissed with costs. I refer to persons by surname only, for brevity's sake.

5.

I deal firstly with the outline of the DA's case and briefly explain why it is a defective and meritless application. Then I set out Zuma's case in outline before dealing with the DA's averments *seriatim* in so far as specific paragraphs require an answer from the Third Respondent.

6.

6.1 I have read the NPA's answering affidavits. I by and large accept the factual averments set out therein and the contentions put forward therein. There are, however, a few instances where the factual averments need to be qualified or added to. Mostly this is

because the picture painted in respect of prosecutorial abuses, is less grim or complete than the actual context reflects;

6.2 I thus answer the Applicant's (the DA's) founding papers mindful of the need to avoid unnecessary repetition.

THE DA'S CASE:

7.

The DA contends that **Mpshe's Decision** (6 April 2009) falls to be set aside on a legality basis. The decision rests solely on the so called Spy Tapes– **the Tapes** - their contents cannot suffice as a rational basis not to prosecute Zuma for the serious crimes alleged against him and on which there is a strong case.

8.

The DA's case is fatally and deeply flawed.

9.

The first fundamental flaw is that it is nowhere stated by the NDPP that he relied solely on the contents of the Tapes. Indeed, that is not what the public **Announcement** (6 April 2009) says. It records that the Mpshe Decision (2009) was premised on the Zuma Representations which made serious allegations

about the Prosecution's Conduct of the Case. This much also appears from the NPA's decision and its answer. Thus reference is particularly made to the NPA's Answer which touches on issues such as Press leakages, the Browse Mole operation, and the November / December abuse of process and related delay issues.

10.

In support hereof, I point out that the NPA and Zuma have stated this also in the Review Papers (parts of this application filed earlier). That was not disputed. The DA sought, as parts of the Record of Decision, the Representations, which demand the DA later decided not to pursue or persist in when these were refused as confidential. The DA obtained a Record replete with reference to other considerations as well. The DA sought the Tapes (and obtained these) because they were allegedly not an integral part of the Representations themselves.

11.

Even in its case built on the "**Spy Tapes**", the DA decontextualizes the contents of these. All McCarthy did to assist the Mbeki camp, was to procure that Zuma got charged on 28 December 2007 as opposed to a week later. So what? So the DA reasons.

12.

The insult offered to Mpshe and his senior advisors at the NPA by this facile explanation speaks for itself.

13.

The Tapes must be considered in their context and in their place in the Representations. Their relevance must be assessed in the context and history of the prosecution of Zuma. The NPA (including Mpshe and his senior advisors) was perfectly aware of this context which informed the Mpshe decision. The NPA was a litigant and protagonist in these. Mpshe would have known this. Mpshe himself featured in some applications.

14.

The DA's lack of challenge to Zuma's claim of confidentiality was the result of their own election. They recognised the general confidentiality of such Representations and elected not to challenge that in seeking production of the Record.

15.

The DA's case is further so replete with inaccurate, incorrect, false and half true statements as to render it patently unreliable. Many of these statements are the results of sheer carelessness (at best) and disregard for the seriousness of the

matter, the truth or Zuma's rights.

16.

I shall exemplify these averments with reference to the individual averments which require my specific responses. I deal specifically only with those averments which call for an answer. Many of the comments made in the papers are scurrilous and vexatious – these are in the main also quite gratuitous. These are rejected. A special costs order shall be sought against the DA.

17.

The other fundamental flaw in the DA's attack on the Mpshe decision is that it is solely a policy decision. That is not indeed so and care must be taken on what is described as merits and what as policy. In our understanding the merits relate to the issue of whether a verdict of guilty would be the outcome. Any defence e.g. prescription, permanent stay, previous acquittal, did not do it or did not have *mens rea*, which precludes a guilty outcome, qualifies as a defence on the merits. Public policy relates to non-prosecution despite a guilty verdict being the clear outcome e.g. a father who negligently runs over his child, unrest in the case of conviction or retaliation by or from other states or the like.

18.

In this case, the bringing of a permanent stay application was recognised as the

first (and perhaps final) stage of the criminal proceedings. This would be started by application and evolve into a full hearing of oral evidence. It was made clear that an Accused does not have to submit, in a criminal case, to a PLASCON-EVANS approach. This was conveyed to the NPA as to the procedural way forward (Indeed there was an earlier stay application brought).

19.

The fanciful attempt by the DA to insulate and elevate the members of the prosecution team as untainted by the NPA manipulations of the Zuma prosecution and hence that their view that he is to be prosecuted is decisive, is quite untenable. It is and was never their decision to take since 2001. They were to implement the decisions made by the DSO and NPA particularly the NDPP. The team were appointed to do so by the DSO (the Head), it was a DSO investigation from the outset to the end and they worked closely with and under McCarthy, the Head of the DSO who was actively involved in the investigation (he initiated and extended it) and who controlled it. The DA's own papers also make a case that the team members were implicated in some prosecutorial abuses.

20.

It is, with respect, very easy to claim that the actual individual prosecutors appearing in the criminal proceedings were not involved in the manipulation of the criminal prosecution of Zuma. It is very easy to be self-righteous as an

individual who cannot even begin to see himself in the position of an accused. From an Accused's perspective, he is confronted by the NPA and an NPA intent on his conviction. It is no solace that some individuals may have been blameless or even fair. It is not for an Accused when confronted with abuses of prosecutorial power, to work out who on the part of the prosecution is of integrity and who is not. There is a hierarchy of accountability and control in the NPA and particularly the DSO.

21.

The DA's contentions also repeat, expressly or implicitly, certain unsubstantiated general assumptions about the prosecution of Zuma. These are false.

22.

The myth that Zuma desperately wants to be charged so as to have his day in Court has become a mantra of the anti-Zuma camps and the DA. That contention is certainly not based on any fact postdating 2003. I deal with this in greater particularity later.

23.

The DA's contention that the Mpshe decision simply rests on a political motive at work in the DSO, is devoid of any factual content. Prosecutorial abuse is

conversely not in order, because it is politically motivated.

THE THIRD RESPONDENT'S CASE:

24.

24.1 The NPA and the NDPP, Mpshe, decided on 6 April 2009, not to prosecute Zuma in the pending proceedings instituted following his December 2007 decision (The 2007 McCarthy/Mpshe Decision) and the pursuant bringing of charges on 28 December 2007. This was essentially a decision made by McCarthy (as appears from the NPA's papers as well);

24.2 The NPA and at the apex, the NDPP, has discretionary powers of prosecution or not in respect of criminal conduct. Even after prosecution commences, he can exercise such powers;

24.3 Prior to plea by an Accused (and Zuma had not yet pleaded), this discretion is indeed wide, unfettered and subject to legality restraints, recognised only in the clearest of cases;

24.4 The NDPP's decision can rest on the merits and / or public policy and / or a combination of these (as it did here).

24.5 In this case, the DA sees it only as a policy issue; it is not. It is a mixed decision – what would a Court do with a permanent stay application given the delay, other factors such as the illegal Browse Mole operation, Press leaks by the prosecution and the manipulation revealed in the Tapes? The question remains in such case: Is it fair to continue a prosecution tainted by the DSO's manipulations?

24.6 In this case, the Prosecution was well aware the Defence would bring a permanent stay defence. This was known to the Prosecution in 2006. The Defence brought a permanent stay application in response to the Prosecution's application for an adjournment of the trial matter before Msimang J. In 2007 before the McCarthy decision, the State described the eventuality of this defence being raised, as a certainty. Arrangements for the 2009 dates thereof had been agreed between Prosecution and Defence even before the Representations were made;

24.7 It was thus not a case where the Defence accepted its guilt. It was contested at the level of factual wrongdoing and at the level of a permanent stay (the factual guilty level Representations were not accepted by the NPA and for now, play no further role herein);

24.8 Mpshe’s decision is not illegal or irrational. It recognises the effect that the DSO and McCarthy’s manipulation had on the prosecution, given its context and obviously undeniable illegal prosecution activities such as the Browse Mole operation and leakages of Zuma prosecution information to the Press and manipulation of the timing of the 2007 charges. It implicitly recognises that McCarthy, the driver of the Zuma prosecution, was untruthful to the Court;

24.9 Far from being irrational, the Mpshe decision is exactly how a responsible NDPP should deal with such a case of prosecutorial abuses. I quote for the Court’s benefit the stance of Mpshe’s predecessor Pikoli, in the Msimang proceedings (the Criminal Trial in which the NPA sought an adjournment).

“[28] This paragraph is denied. I was thoroughly briefed about this investigation and its history upon assuming office as NDPP. Had I come across any evidence of improper or ulterior motives pertaining to the investigation, I would certainly have looked into these closely and, if confirmed, recommended the closure of the investigation. I have not come across any such indications of improper or ulterior motives.”

(my underlining).

(August 2006 – par 28 of Pikoli’s affidavit which like McCarthy’s affidavit contains no reference at all to the Browse Mole operation);

24.10 That is exactly what Mpshe did in this matter when he became aware of the DSO’s (McCarthy) and other’s perfidy (which should have been first revealed in the Msimang proceedings). It was, however, concealed as “**top secret**” – I refer here to specifically the Browse Mole operation;

24.11 The DA’s trivialising of the manipulation of the criminal process by Ngcuka and McCarthy as simply a political motive colouring the process without affecting the validity of that process, misunderstands the complaint. Zuma and his time and political career became the plaything of the DSO to advance political aims of Zuma’s opponents. That and the deliberate untruths perpetrated by the NPA in the Msimang proceedings as to the rectitude of the investigation and prosecution of Zuma, are not trivialities. It raises questions about the honesty and integrity of the entire process;

24.12 What of course is worse is that at least some of the officials of the

NPA testified on affidavit in the Msimang proceedings before the Court that:

24.12.1 The prosecution of Zuma was conducted in an exemplary manner and marked by great rectitude.

24.12.2 The Defence's allegations of prosecutorial manipulation were speculative and untrue.

24.13 These allegations made by the DSO (and often repeated thereafter) were simply false as the Browse Mole operation revealed.

25.

The Defence made Representations (first Written, then Oral) in February 2009 (10 and 20 February respectively) to the NDPP to reconsider the December 2007 decision to charge him. At that stage the S179(5) dispute was before the CC which eventually requested the parties to argue leave to appeal the SCA decision given on 12 January 2009 on the interpretation of S179(5). This issue related to the validity of the decisions of Pikoli (2005) and Mpshe/McCarthy (2007) to prosecute Zuma without a hearing. [Any “**accused**” person may

make Representations to the NPA as to whether he is to be (or continue to be) prosecuted. The relevant NPA official (in *casu* the NDPP) must then consider these. This is not in dispute].

26.

The NDPP carefully considered the Representations consisting of the Written (First) Representations (10 February 2009) and the oral Representations (20 February 2009). The NDPP also investigated some of these and related aspects. Mpshe received input from his senior management and the prosecution team (Bumiputera – **the “B-Team”**). He came to the conclusion that the prosecution was tainted and decided to terminate it. All this is explained in the NPA’s affidavits herein.

27.

The investigation against Zuma was initiated by McCarthy in 2000 (just before the DSO was established). It was an investigation and prosecution which were DSO initiated, driven and controlled. The B-Team were directly or indirectly appointed by McCarthy and he was clearly involved in the operations, investigations, prosecutions and associated litigation. The DSO was the only complainant in respect of the Zuma charges (not e.g. SARS, etc.). There were no other complainants than the DSO itself.

28.

The 2009 Mpshe decision was the first decision at NDPP level re Zuma's prosecution or not from 2003, that McCarthy was not actively involved at the highest input level.

29.

I deal later with the timing of the charges in its proper context hereinafter and also with issues such as the Browse Mole Report, delay and Press leakages hereinafter. The cumulative effect of these considerations, overwhelmingly support the Mpshe decision.

30.

A review of the NDPP's decision to prosecute or not is an extremely narrow one – absent dishonesty or corruption, neither of which is rightly alleged, the NDPP's decision is not to be interfered with. Mpshe had previously decided to prosecute the Third Respondent (or at least agreed to that). There is nothing to suggest that he did not make his 2009 decision honestly and *bona fide*. Indeed, the Zuma camp saw him as hostile to their application.

31.

A decision not to prosecute based on policy grounds and / or that the prosecution may flounder because the prosecution is tainted or an abuse of

process or susceptible to a viable permanent stay application, falls within the prosecutorial legal mandate and hence cannot offend the principle of legality.

32.

The NDPP decision was premised on the Representations made and its subsequent evaluation of these and associated materials. Irrationality etc. must be demonstrated with reference to these. The DA elected not to challenge the Third Respondent's assertion of confidentiality re his representations. That was an election made with the full appreciation of the consequences thereof. If the DA cannot demonstrate the fundamental basis for an attack on the NDPP's decision, when it elected not to obtain the factual and legal bases of these by means of a challenge to the Third Respondent, its application must fail. The NDPP receives Representations in confidence in general and in this case on specific terms. This suffices where it is the NDPP's decision which is challenged.

33.

The NDPP disclosed certain material which it accessed (the Tapes) when it made the announcement of terminating the prosecution. This it based on the fact that it accessed these by an independent pathway (irrespective differences of opinion, this is water under the bridge). These presented major examples of what in the end was a case of abuse of powers.

34.

The NDPP did not **only** rely on the materials in the Tapes. Even these must be considered in their context in order to appreciate their significance.

35.

The Mpshe decision was premised on the manipulation of the Zuma prosecution by the DSO and particularly McCarthy in consultation with Ngcuka and others. This was a rational response especially with reference to the following instances of manipulation of the Zuma prosecution. I set these out and then detail these.

35.1 The 2003 decision by Ngcuka to prosecute Shaik for various offences of corruption premised on a **“generally corrupt relationship”** with Zuma but not to prosecute Zuma then. This decision was taken by Ngcuka and McCarthy. It delayed the prosecution quite deliberately;

35.2 The leaking of information about Zuma and the NPA’s investigation and prosecution of Zuma which information the DSO gained by reason of Zuma being targeted for prosecution. This illegal conduct commenced in 2002 whilst McCarthy was the head of the DSO and Ngcuka the NDPP. It has continued right up to

the present. This conduct was and is illegal and aimed at discrediting Zuma as a political leader and promoting the interest of those adverse to Zuma;

35.3 The Browse Mole operation which was a top secret but illegal investigation of Zuma by the DSO designed to discredit him and promote his prosecution. The NPA dishonestly misled the Court by professing the absence of any unfair or illegal investigation;

35.4 The manipulation of the timing of the 2007 McCarthy/Mpshe decision to prosecute Zuma in order to influence the outcome of Polokwane and the later appointment of the President of the RSA.

36.

Before dealing with these aspects, all of which would have been factors which the NDPP and its staff would have been well aware of, I firstly reiterate what pivotal and important role McCarthy as Head of the DSO played in the entire Zuma saga. It was a position that gave him immense statutory powers and the means to wield such power. It is common cause that he was a staunch Mbeki supporter and anti-Zuma, certainly Zuma as a political role player.

37.

The DA for obvious strategic reasons seeks to minimise McCarthy's role, powers and influence in relation to the Zuma investigation and prosecuting of Zuma. He was an extremely powerful figure who controlled the investigation and prosecution of Zuma. I also deal with this aspect where I respond to certain paragraphs in the DA's affidavit.

38.

38.1 McCarthy initiated the enquiry into possible Arms Deal corruption. He was the official who had such powers by reason of his position as Head of the DSO. He extended the investigation to encompass the conduct of Schabir Shaik and Zuma (in some instances this was done by other DSO officials clearly on his instructions and / or approval);

38.2 He appointed Downer to head the Prosecutions. He directly or indirectly appointed the B-Team. He played a major role in obtaining the search and seizure warrants and in the ensuing litigation;

38.3 He dealt with the Mauritian authorities in respect of the Letter of Request; he made the affidavit seeking such authority from the

High Court. The B-Team reported to him; he controlled the case against Zuma. His was the significant input in respect of the Ngcuka, Pikoli and 2007 Mpshe decision. The extent of his power and his use thereof in the Zuma matter also appears from the NPA's affidavit. He deposed to the main affidavit of the NPA in opposition to the 2006 permanent stay application. He initiated and controlled the Browse Mole operation and carried on with it despite Pikoli's instruction to immediately cease doing so.

39.

The NPA has dealt fully with the manipulation of the prosecution in the immediate run up to the ANC Polokwane conference. The cynical use of prosecutorial powers to engineer political results, is clearly deeply offensive. When it occurs at the level demonstrated, and linked to earlier illegal investigations such as the Browse Mole operation and the deception of the Courts, Mpshe's decision is indeed rational.

THE NPA LEAKAGE OF INFORMATION TO THE PRESS:

40.

The decision must also be seen in the context of the unlawful and indeed illegal leakage of information concerning the investigation against Zuma, to the public media, especially the public newspapers (the press).

41.

The NDPP's office has since at least 2002 continuously and deliberately leaked information to the press concerning the investigation and prosecution. This leakage has continued up to the decision and even thereafter. This conduct of the NDPP was illegal in terms of statutory prohibitions (S41(6) of the NPAA), unlawful in it being contrary to the NDPP's Code of Conduct and the prosecution's duty to conduct its functions impartially and in blatant disregard of fair trial jurisprudential demands.

42.

The leakage of information was designed to promote the denigration of Zuma and adversely affect public opinion.

43.

If there is any suggestion that these aspects must be proven, we point out that there is no such requirement in respect of the NPA's decision or for that matter re any litigant's decision making – the question is whether in a permanent stay application these issues will be proved.

43.1 The leaks were designed:

43.1.1 to impugn Zuma's dignity;

43.1.2 to harm his prospect of leading the ANC and the country;

43.1.3 to promote the prospects of successful prosecution by creating a public perception of guilt;

43.1.4 to bolster and encourage a decision to prosecute him by creating a public perception that he is guilty and dishonourable and that there is a good unanswered case against him.

44.

The investigation against Zuma for the first time made Press headlines when the Mail and Guardian published an article based on Downer's affidavit in an application between the NPA and Shaik.

45.

This started intense general press coverage much of it designed to malign the Third Respondent and to vilify him. As a Deputy President of both the ANC and the RSA, he was obviously a potential candidate for the position of President. It is also well known that he was strongly supported by the rank and file of the ANC. He had a very distinguished record in the service of the ANC. He was,

however, regarded by many as the unacceptable face of Africa and by 2002 the Mbeki faction (supporters of the then President) were determined that Zuma should not become the President of the ANC or of the RSA.

46.

The Third Respondent is quietly but fulsomely convinced that the leaks from the NPA's office concerning the DSO's investigation of all facets of his life, and his prosecution and the information gathered against him, emanated from the DSO including the Prosecution team.

47.

The leaking of information (and clearly selected pieces thereof) to the Press, about cases investigated by the DSO, commenced from the outset of its establishment and continued throughout the Zuma investigation and prosecution.

48.

In support hereof, reference is made to the following:

49.

In the first instance, reference is made to the HEFER REPORT. A copy is annexed marked **MH1**. It is quite clear that there were numerous leaks from the NDPP's office (then Ngcuka) and that these were engineered in contravention of the law.

50.

Secondly, reference is made to the PUBLIC PROTECTOR'S REPORT, copy annexed, marked **MH2** which confirms such leaks in respect of the Zuma investigation and prosecution. This whole report is relevant to the complaint of prosecutorial abuse especially in respect of the Ngcuka decision and the deliberate *prima facie* imputation.

51.

Thirdly, reference is made to the KHAMPEPE REPORT, p59, which is scathing in its comments on such leaks. A copy of p59-p60 is annexed marked **MH3**.

52.

Fourthly, reference is made to the exchanges between Downer and a journalist from the Mail and Guardian. These recordings are part of the Tapes and I refer to these in more detail hereafter.

53.

Fifthly, mention is made of the leaking of the list of questions posed by the DSO to Zuma in 2003 and the answers thereto.

54.

Sixthly, McCarthy, in December 2007, leaked an 8 page summary of the case made against Zuma to Ngcuka. This was intended to reach the Press.

55.

Seventhly, Ngcuka's (then NDPP) meeting with a selected group of Black editors which was not published by them and in respect of which Ngcuka has never explained what exactly he communicated to them (the Hefer Report also refers to this).

56.

There are countless other such examples. The leakages also prompted the oral nature of some of the Representations.

57.

The Policy provides:

Par 7:

“Prosecutors are not allowed to participate in public discussion of cases still before the Court because this may infringe the rule against comment on pending cases and may violate the privacy of those involved.”

58.

The Code provides as follows:

“4.2 Prosecutors should, furthermore:

- (b) refrain from making inappropriate media statements and other public communications or comments, about cases**

**which are still pending or cases in which the time for appeal
has not expired;”**

59.

The Guidelines provide that Prosecutor’s shall:

“13. In the performance of their duties, prosecutors shall:

- (c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;”**

60.

The NPAA provides as follows – S41(6) and 41(7):

“41 Offences and penalties

(6) Notwithstanding any other law, no person shall without the permission of the National Director or a person authorised in writing by the National Director disclose to any other person-

- (a) any information which came to his or her knowledge in the performance of his or her functions in terms of this Act or any other law;**
- (b) the contents of any book or document or any other item in the possession of the prosecuting authority; or**
- (c) the record of any evidence given at an investigation as contemplated in section 28 (1),
except-**

- (i) for the purpose of performing his or her functions in terms of this Act or any other law;**
- or**
- (ii) when required to do so by order of a court of law.**

(7) Any person who contravenes subsection (6) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 15 years or to both such fine and such imprisonment.”

61.

Section 10 of the Constitution provides:

“10 Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.”

62.

Section 14 of the Constitution provides:

“14 Privacy

Everyone has the right to privacy, which includes the right not to have-

- (a) their person or home searched;**
- (b) their property searched;**

- (c) **their possessions seized; or**
- (d) **the privacy of their communications infringed.”**

63.

Section 35(3)(h) reads that:

“(3) Every accused person has a right to a fair trial, which includes the right- ...

- (h) **to be presumed innocent, to remain silent, and not to testify during the proceedings;”**

64.

The contention is that the Prosecution has leaked information about the Zuma investigation and prosecution to advance its interest and so as to prejudice Zuma. The fact that information is frequently leaked from the NPA (and in particular the DSO), was raised in front of the Khampepe Commission.

65.

In this regard I also mention the interchanges between Downer and Sole, a journalist of the Mail and Guardian. The DA refers to these as part of the recordings in [256.8]. The Third Respondent has requested and obtained copies of these. I annex these marked **MH4**. It is clear from these that Downer is giving, on an off the Record basis, information about the arms deal and

Zuma, gleaned from his involvement in the Shaik and Zuma prosecutions. It is also clear that he was not doing it on the basis of any authorisation; on the contrary, he requests care that the finger cannot be pointed to him as the source.

66.

Such leaks, especially when done on a basis of secrecy, are not harmless. They affect even the most senior of Judges.

67.

Reference is further made to the Judgment of the SCA in the matter of Shaik v The State. The press coverage of Shaik's legal travails are of course inextricably linked to Zuma – hence Zuma will have to face the trial publicity hype, twice if he is to stand trial again – this time in the dock.

68.

In the Judgment by 5 judges of the Appeal Court, reference is made to the finding of Mr Justice Squires in the Trial Court that there was a generally corrupt relationship between Shaik and Zuma.

69.

This is the phrase the Prosecution used to describe the relationship between Shaik and Zuma during the criminal trial of Shaik. This was eagerly repeated time and again by the Press who in the aftermath of the Squires judgment

repeatedly attributed this description to Judge Squires and indeed as a finding in his Judgment.

70.

This indeed is indeed wholly incorrect; Judge Squires nowhere stated this in his Judgment – that is a fact. Judge Squires had indeed been unhappy about this statement being attributed to him – he personally conveyed to Zuma’s defence team that he had made no such statement. His son-in-law also wrote a letter to the Mercury to this effect.

71.

The mistaken attribution of the phrase generally corrupt relationship to Judge Squires was quickly discovered.

72.

The SCA reacted to this by releasing a press statement which re-affirmed the use of the term, but acknowledged that they were mistaken as to its source.

73.

The above recognised the error in attributing the phrase and finding that there was a generally corrupt relationship between Shaik and Zuma, to Judge Squires – it sought to minimise the impact of the error.

74.

Once again it is possible to demonstrate that Press reports which had an anti-Zuma refrain and with which society was bombarded over a period of time, do influence the thought processes and mode of reasoning of extremely able and experienced Judges. Clearly the potential for implanting subliminal prejudice over a period of time so as to have a bearing on the actual decision arrived at is real and considerable in the Zuma litigation. That it has happened is clear; what is not clear and what will remain unclear is the extent thereof given the pervasive nature of the anti-Zuma reporting.

75.

Mpshe was clearly aware of these issues and indeed mention is expressly made in the NPA Answer of McCarthy leaking the summary to Ngcuka so that it can be published prior to Polokwane (In its 2009 affidavit in the CC in the S179(5) application for appeal proceedings, the NPA denied any such leakage – obviously unaware of the true facts.

THE NGCUKA / McCARTHY DECISION:

76.

It is indeed so that the investigation by the DSO targeted Zuma and Shaik, since 2001. Zuma had become the Deputy President of the RSA in 1999. He had impeccable struggle credentials. I refer to the evidence he gave in the Rape trial. It soon became apparent that he was no figure head Deputy. His

supporters clearly wanted him to be the President of both the ANC and the RSA after Mbeki.

77.

The DSO targeted Zuma and Shaik for investigation and prosecution as early as 2001 as part of the general Arms Deal investigation.

78.

This became publicly known towards the end of 2002 and intense press coverage commenced. This portrayed Zuma in an extremely negative light.

79.

In 2003, Zuma complained about the inordinate duration of the investigation and the continued pall it cast over him. He eventually challenged the NPA to either charge him or keep their peace forever.

80.

Before Ngcuka, the then NDPP announced his decision on charging Zuma. There is one incident which occurred and which the other parties have sought fit to bring up in their papers. I deal very concisely with this without all the detail.

81.

President Mbeki and Minister Maduna met Zuma (in 2003) and asked him to resign and effectively retire from the political scene. They indicated that there was a formidable case against him in the NPA files. There was very substantial documentation with them. Unbeknown to them, Ngcuka had told Zuma that there was nothing in the case against him. Zuma said as much to Mbeki and Maduna and refused to resign.

82.

What followed is well documented and known to the NPA and the DA. I quote from Zuma' permanent stay application in the Msimang proceedings. I put these in *quotation marks*:

“THE ANNOUNCEMENT OF THE OUTCOME

83.

It is perfectly clear that I have been investigated since 2000 by the NDPP and that I and my financial affairs came under intense scrutiny from the Prosecution in 2001 up until 2003. The Prosecution used a multitude of Government resources to diligently do so for 2 years on its own version. The outcome of the investigation was the decision to charge Shaik. It was expressly announced by the NDPP, Mr. Ngcuka himself, that a decision was taken not to prosecute me as there was insufficient evidence to prove my guilt. I annex hereto the public announcement by Mr. Ngcuka on 23 August 2003 and I mark it “M”. This was

the outcome of an intensive 2 year long investigation with all the resources of the State being utilised.

84.

What Mr. Ngcuka effectively said was that I was party to corruption but that it cannot be proven in a criminal court. That was exactly how the Minister of Justice, Mr. Maduna, understood him – hence his comment at that media conference that it was a “sad day” when the NPA says a Deputy President has a case to answer.

85.

That Mr. Ngcuka wanted to be understood in the above sense and was so understood, brooks no denial. The Sunday Times went on to report in its reaction to this announcement on 31 August 2003 that:

“However, Ngcuka’s announcement that the Scorpions had prima facie evidence of wrongdoing by Zuma but would not be able to secure a conviction took the humiliation to a new level. The implication is that the man is guilty but covered his tracks well.”

86.

I also refer to my complaint to the Public Protector. The NPA and Mr. Ngcuka have never once gone on record to refute such reports evincing such an understanding. They had every reason and every opportunity to do so if the import of the NPA’s announcement was misunderstood.

87.

The response of Mr. Ngcuka as NDPP to the Public Protector's report was to convene a press conference at which both he and Mr. Maduna castigated the Public Protector. This was widely reported on national television.

88.

When the charges relating to Shaik were announced in August 2003, the NDP announced that whilst there was a prima facie case against me, and that the investigating team which include the members of the prosecution team then and now considered that they had a good case against me, there was not sufficient evidence beyond reasonable doubt to convict me. Hence the decision not to prosecute me with Shaik.

89.

I took this matter up with the Public Protector who found in clear terms that my constitutional rights had been infringed.

90.

I further contend that the inference is irresistible that this was a deliberate attempt to poison the minds of the public. There was no need for such pronouncements - they were meant to prejudice and they did. I say so inter alia because of the history of the matter.

91.

Indeed Zuma was so concerned about the delay in the investigation that he took the unprecedented step in the first part of 2003 of virtually inviting / challenging the NDPP to bring an end to the anxiety and stigmatizing by charging him with the offences. Ngcuka's response was the public Announcement of 23 August 2003.

92.

This is dealt with elsewhere but in essence Ngcuka stated that there is a prima facie case of corruption against Zuma but it is not certain that he will be convicted.

93.

The prima facie case statement evoked the expected press response; Zuma is guilty, he is corrupt but has, however, covered his tracks well.

94.

It was clearly foreseeable by the NPA that the announcement cast in the manner it was, would evoke exactly that kind of mass media response. Emboldened by the NDPP's statement that the Accused had a case of corruption to answer, but that there was no absolute guarantee of success, the Press launched the vicious attacks on the credibility of the Accused and his fitness for any office. The harm and prejudice the NPA foresaw in their discrete investigation, was now unleashed in its full fury on the Accused, encouraged and driven by the announced existence of a prima facie case.

95.

The Ngcuka announcement of 23 August 2003, in its tone and terms, effectively exposed Zuma to vicious and sustained attacks in the Press with no effective means of Defence. He was branded guilty by Ngcuka and left without any of the protections engendered by the sub-judice rule ironically used by the Prosecution to later avoid answering the Public Protector's queries. The ease with which a statement could have been framed simply and truthfully (according to the NPA) stating that there was not sufficient evidence against Zuma, as opposed to sufficient admissible evidence against Shaik, to justify prosecution, bears repeating. In short, much of the harm caused to Zuma was avoidable; indeed an explanation such as the above would have taken away much of the associated guilt which would otherwise be read into the indictment against Shaik.

96.

Obviously emboldened by Ngcuka's announcement and subsequent refusal to qualify the NPA's accusation against Zuma (as evident from the Joint Response to the PPR), the Press had a full go at Zuma. He was branded as corrupt, a crook who had covered his criminal activity well. He was depicted as wholly unfit to govern, or lead any political role. Calls for his resignation were strident and continuous. He was, for two years at least, the most vilified and most consistently vilified person in the media."

(end of quote). *The above numbering differs from the actual affidavit.*

97.

It is highly significant that in 2005 and 2006, the Accused made it absolutely clear that the one intolerable state of affairs would be to have the Polokwane elections with the threat of the trial hanging over him. This was expressly stated in a number of affidavits.

98.

In the Mauritian LOR application, the Accused pertinently challenged the NDPP to state whether he is going to be prosecuted or not – to leave everyone in limbo was grossly unfair. The response was that it was not possible to say when a decision would be made. **“The matter of the search warrant appeals remains unresolved. It is impossible to predict when a decision will be able to be made.”**

99.

The Prosecution’s delay in charging Zuma especially in not charging him together with Shaik, was both highly unusual, unique and prejudicial to Zuma. It is and always was sound prosecution principle and usual practice to charge co-Accused at the same time. There are numerous advantages to the Prosecution process and it promotes fairness to the Accused. Witnesses testify once, costs and court time are not duplicated, delay is eliminated and the inevitable prejudice a conviction of the first tried brings to the Accused tried later, eliminated. The case for a joint prosecution is almost unassailable where the offence, as in the Shaik matter, exists largely in the past interaction between

both the Accused, and the State has on its own version, a *prima facie* case against the party whom it decides not to prosecute and such failure would clearly cause the motives for that to be questioned.

100.

The earlier prosecution of Shaik holds further prejudice for Zuma. There were findings in favour of the Prosecution in the Shaik Judgments which relate to issues such as admissibility of the self-same documents as those which may feature in the Zuma matter and in respect of the propriety of conduct by the Prosecution. These findings will no doubt be elevated to precedent and/or as very apposite by the Prosecution; that reasoning has already been employed by it in the Zuma litigation. Where the Accused, if he had faced being charged by Shaik's side, could have challenged the Prosecution's arguments on a basis of equality, the Accused now has to seek to distinguish these rulings and, in the Supreme Court of Appeal, if distinction fails, seek to convince the SCA that its previous finding was **clearly** wrong – a hard row to hoe.

101.

Shaik could deal with these issues untrammelled by precedent very close to the bone; Zuma was denied that opportunity and with no disrespect to Shaik, his defence took, obviously on instructions from Shaik, a different approach to the processes.

102.

That the Prosecution had been intent to establish this advantage for it and disadvantage for Zuma as a litigant, had not gone unnoticed in the SCA albeit that that Court had little or no capacity to curb this. In the debate before the SCA in the criminal appeal of Shaik, Mr Downer was specifically confronted by Judge of Appeal Streicher with the proposition that he was seeking a ruling on admissibility in order to utilise it against Zuma.

103.

The Ngcuka / McCarthy decision was clearly designed to place Zuma at a severe disadvantage by both stigmatising him and casting a shadow of a further prosecution over him. That would teach him that refusing to resign when requested by the President is unwise.

104.

Reference will also be made to the Nicholson judgment.

105.

Ngcuka and McCarthy overrode the B-Team's recommendation that both Zuma and Shaik should be prosecuted together. Whilst at first glance this may have seemed odd coming from persons firmly in the anti-Zuma camp, this was by no means the case. In this regard, it is pointed out that McCarthy, in December 2007, did exactly the same thing. He delayed the decision to prosecute Zuma

because such a step just before Polokwane may have triggered greater support for Zuma.

106.

McCarthy and his acolytes clearly thought they could thwart Zuma's political ambitions by stating that there was a *prima facie* case against him and he may yet be prosecuted.

107.

Pikoli then added to the prejudice by charging Zuma on 20 June 2005.

108.

The Msimang judgment indeed identified the inverse nature of the Pikoli decision. The NPA charged Zuma while major parts of the evidence gathering process had not been completed.

109.

The sequence of events speaks for itself:

109.1 June 2005 : Shaik is convicted;

112.

The Prosecution's failure to have the 2005 charges proceeded with as a Trial, is well documented in the Msimang judgment (copy annexed hereto marked **MH5**). It had resulted in the position Zuma spelt out on affidavit prior to the Msimang proceedings being heard, as intolerable - an unfinished prosecution hanging over his head when the Polokwane conference arrives.

113.

The Msimang Judgment deals decisively and finally with the responsibility for the Trial not proceeding.

114.

In that application, the Accused stated the following:

“THE EFFECT OF THE ADJOURNMENT.

66.

- (a) ...**

- (b) The devastating consequences for me would continue. In this regard I make mention of a fact very well-known to the Prosecution. The present term of office of the ANC top structures come to an end in 2007. The meeting to determine its officials and leaders for the next 5 year period will take place towards the end of 2007. There is every**

indication that the ANC will again emerge as the ruling party by a considerable margin in the next elections – it currently has a two-thirds majority. I, for one as an experienced politician, am certainly of that view and I shall work tirelessly towards that goal. It would be naïve indeed to recognise that the appointment of the ANC leaders (whilst not necessarily mirroring it) does not have a profound bearing on the leadership of the country. That, of course is well known to the Prosecution – indeed it is well known by all interested in this case. It is also well known that if these charges against me are still pending, then it will greatly strengthen the resolve and capabilities of those who seek to exclude me from any meaningful political role. That much is obvious. ”

115.

In short, what would be intolerable delay and what would have a devastating effect on him, and adversely affect the ANC, and indeed the public interest generally, would be for him to have the trial unresolved in December 2007 when the Polokwane elections occur and obviously, if he was elected into an important position such as President, thereafter. This has been his consistent stance since July 2006. The delay in the trial has thus now brought about the maximum harm to him, as spelt out in July 2006 already. Indeed Press articles had in June 2005 already referred to the possibility of the trial process taking **“Zuma to the ANC’s 2007 national conference, at which the succession**

race is to come to a head”.

116.

The indisputable fact is that the Prosecution deliberately refused to go to trial on the evidence, all readily at hand, on which Pikoli decided to reverse the 2003 decision and charge Zuma as he did on 29 June 2005.

117.

It was this refusal to proceed with the trial which the **Trial Court** regarded as unreasonable delay and accordingly struck the matter from the roll.

118.

I set out hereunder that the Record and the contextual materials and knowledge available to the NPA, provide ample grounds for the Mpshe decision.

119.

I have set out these considerations and their impact on the Mpshe decision hereunder also as I dealt with individual paragraphs but firstly I provide a summary of what each of the issues entailed:

THE BROWSE MOLE OPERATION

120.

The DSO, in 2005 and 2006, initiated and continued an illegal investigation of Zuma aimed at finding material to discredit Zuma and / or to prosecute him and

/ or to assist in any future prosecution. The illegality of this invasive Browse Mole operation initiated by McCarthy is common cause. Zuma's banking details etc. were accessed. McCarthy knew this was an illegal operation. Yet, in August 2006, McCarthy and others from the NPA, on oath, assured the Trial Court (the Msimang proceedings) that there was no hint of unlawfulness about the investigation and prosecution of Zuma. On the contrary, these were models of rectitude.

121.

This was a deliberate falsehood designed to persuade the Court to dismiss Zuma's permanent stay application brought in the Trial Court. The Defence did not know about the Browse Mole operation. The Browse Mole documentation reveals that McCarthy accessed Zuma's bank accounts subsequent to the August 2005 search and seizures. This was clearly illegal as well.

122.

I also refer hereafter to what is stated by Hofmeyer in his answering affidavit. I endorse his remarks and assertions in respect of the Browse Mole operation. The significance thereof has, however, been somewhat understated.

123.

I point out that the Court and the Defence had been lied to on oath by the NPA, particularly McCarthy in the Msimang proceedings.

124.

In the Msimang proceedings, the NPA in resisting the striking off / permanent stay application of Zuma, stated per McCarthy as follows:

“[7] The State has always regarded this case as one of the highest importance. That is so for obvious reasons. It is also a highly complex case and one which is vast in the scope of the evidence it traverses. The State and more particularly the NPA and DSO have for these reasons from the outset dealt with this case at the highest level. They have also dedicated their best and most skilled and experienced officers and resources to the investigation and prosecution of this case. They have gone out of their way to maintain the highest standards of integrity, professionalism, skill, impartiality, fairness and diligence. This case has accordingly been highly exceptional in the high level of attention it has always received, in the quality and quantity of the resources allocated to it and in the enduring efforts of the State to conduct this matter in the highest tradition of the administration of justice in this country.

(my underlining).

[8]. The insults and slurs of the defence on the manner in which the State has conducted the investigation and prosecution of this case, are scurrilous and utterly unfounded. ...”

125.

This was held out to the Courts despite the NPA's full knowledge of the Browse Moleoperation the DSO had launched, sanctioned by Mr McCarthy. They mounted an illegal intelligence gathering exercise which was nothing more and nothing less than a spying exercise and grossly invasive of Zuma's privacy and confidential dealings with public figures in other countries which he had every right to expect would be treated as confidential. This was crassly unconstitutional conduct which was designed to find or construct any fact based on unreliable sources which could be used to Zuma's discredit and establish this by unlawful means which was grossly invasive of Zuma's right to dignity, privacy and a fair trial (particularly with reference to his ability to garner funds to pay for facilities for preparing his defence – the NPA had just put him through probably the most expensive and prolonged rape trial in South African legal history lasting some 3 months whilst the Presidency was coy about providing finances for his legal costs in the Corruption Trial).

126.

126.1 The main findings of the JSCI (an all-party Committee investigating the Browse Mole operation) are set out on p8 of their Report and clearly substantiated by the facts (paras 1 and 7):

“1. The Browse Mole Report is the product of the DSO. The leadership of the DSO, particularly the Head, authorised the

investigation and the production of this intelligence document which was outside section 28 of NPA Act, Act 32 of 1998, accordingly the production of the Browse Mole Report was illegal;”

“7. The DSO did not take any remedial or corrective actions after the leak of their Browse Mole Report despite it being classified as a ‘Top Secret’ document. They did not take any action against the senior special investigator from whom the leak originated. They also neglected to take action against the illegal activities of those who were involved in the production of the Browse Mole Report.”

126.2 Equally relevant is the general conclusion:

“The JSCI has come to the conclusion that the activities of the DSO in relation to the production of the Browse Mole Report were very dangerous and against our National Interest. The contents of the Browse Mole Report are extremely inflammatory and divisive. It has the potential of throwing our new democracy into chaos.

The DSO was involved in several illegal activities including intelligence gathering without a legal mandate, lack of appropriate security clearance for DSO officials, non-compliance with Minimum Information Security Standard

(MISS), and unauthorised interaction with private intelligence companies and Foreign Intelligence Services. Such illegal and dangerous activities should be rooted out of our state institutions.”

127.

The Policy and the Code leave no doubt as to obligations of the NPA as to the disclosure of evidence to the Defence. The common law resonates with this obligation.

“They (prosecutors) should disclose information favourable to the defence (even though it may be adverse to the prosecution case).

(Policy, Paragraph 7).

Prosecutors should:

“as soon as reasonably possible, disclose to the accused evidentiary information which is beneficial to his or her defence.”

(Code, par 4.2(g)).

128.

The Prosecution did not only simply not comply with this positive duty, it deliberately held out that the evidence indicate the opposite as the extract from

McCarthy's affidavit demonstrates.

129.

I have little doubt that if Zuma and his legal representatives had known about it then, they would most certainly and with considerable prospects of success, have pressed for a permanent stay. Moreover, the NPA had as its mantra in the multitude of litigation which followed, won considerable sympathy for the NPA on the basis that the Defence made baseless and speculative assertions and fabrications of political manipulation of the prosecution process. In this way they achieved the moral high ground in the various applications the parties fought.

130.

In short, the course of the litigation may well have been changed if the NPA acted lawfully and disclosed material documents to the Defence.

131.

McCarthy knew that the Browse Mole operation was unlawful. He conceded that the DSO was not entitled to resort to intelligence gathering (he conceded this in testifying – 3 February 2006 – before the Khampepe enquiry – which did not deal with that particular operation). The operation was continued despite this knowledge and an agitated Pikoli instructing him to immediately cease the

operation in July 2006.

132.

Yet these persons in August 2006 in response to the permanent stay application brought by Zuma as part of his opposing papers resisting the adjournment sought by the Prosecution, deposed to the absolute rectitude of the Zuma investigation and prosecution. They did so in an outraged tone at even the slightest hint by the Defence as to the impropriety of the investigation and prosecution of Zuma. Not a word was breathed about their top secret Browse Mole operation which must have been very fresh (and indeed ongoing) in their minds.

133.

The NPA indeed misled both the Defence and the Court in the Msimang proceedings. The averments of the scrupulous legality and respect for fair trial rights were false.

134.

This was not a harmless falsehood. It was a deliberate deception on a material issue. Had the Defence known then of the existence and the details of the Browse Mole operation, the Msimang proceedings would have been dealt with very differently. The disclosure of the Browse Mole operation would have

greatly strengthened the application for a permanent stay. Full argument will be addressed on this issue at the hearing of this matter. Not only did the Prosecution (particularly the DSO) breach its duty of disclosure, but it deliberately misrepresented the integrity of its investigation of Zuma.

135.

The documents relevant to the Browse Mole operation are in particular:

135.1 The Browse Mole Report: the leaked second version is annexed as **MH6** – July 2006;

135.2 The Report of the JSCI on the Browse Mole operation: copy annexed as **MH7** – 27 November 2007;

135.3 The findings of the Ginwala commission extract annexed marked **MH8** – November 2008.

(Pikoli has taken issue with any censure of his conduct. Even if he is correct therein, it does not detract from the impact on the Zuma prosecution).

136.

These documents speak for themselves. It is clear that Pikoli impressed on McCarthy the illegality of the operation in July 2006. The NPA clearly hoped that the Browse Mole operation would stay secret.

137.

The 2007 manipulation of the prosecution by McCarthy has been explained by the NPA. The Third Respondent endorses that fully.

THE ANSWER TO THE MAIN DA AFFIDAVIT:

138.

I answer to the DA's main affidavit. This must be read with the earlier opposing affidavit filed on Zuma's behalf in the Record application and the NPA's responses with which common cause is made save where qualified.

139.

The DA trivialises McCarthy's manipulation of the prosecution process in November and December 2007. His conduct was, however, all but trivial when the outcome he wished to promote, is considered. His "**trivial**" interference was designed to detract from Zuma's presidential prospects, that the ANC would have had Mbeki as leader of the ANC and most likely a puppet President of the RSA installed. That is not a trivial difference in outcome.

AD PARA 1:

140.

I do not dispute the deponent's authority.

AD PARA 2:

141.

I dispute that the contents of the affidavit are true and correct. A number of factual averments are plainly incorrect. Others are slanted and distort the facts.

AD PARA 3:

142.

It is simply hypocritical for the DA to contend that it is persisting in this application for the greater good including the Third Respondent's own good: He has been subjected to a gruelling trial on a rape charge. It is a very daunting experience to be accused of a serious crime.

143.

The Third Respondent has no desire to be subjected to the obviously lengthy trials and tribulations of an Accused facing corruption charges. Especially where the trial promises to be lengthy, arduous and redolent with impugments of his conduct and honesty. Indeed, I cannot think of anyone who would wish

that on himself. Zuma is 73 years old (12 April 1942). He has spent 10 years in jail on Robben Island. Those who doubt and malign him shall always do so and conversely, other people will continue to believe in him.

144.

It is correct that in 2003, the Third Respondent called for and challenged the NPA to charge him or forever keep their peace.

144.1 The repeated sentiments expressed by the DA herein of his day in Court constitute sheer hypocrisy. This application is designed to maximise harm to Zuma and the ANC.

144.2 I deal with the time worn cliché that all this is for Zuma's benefit so that Zuma can have his day in Court.

145.

This request by the Third Respondent has since 2003 been deliberately perverted by the DA. It and many other commentators have clamoured that the prosecution of the Third Respondent is what he had himself invited. He must have his day in Court to clear his name as he himself asked for.

146.

This is a cynical perversion and negation of the chronology of events and where the Third Respondent's said request fits in. The Third Respondent was, in 2003, the Deputy President (of both the ANC and the RSA). He was 12 years younger than in 2015 and was a potential candidate for both presidencies. He wanted the matter disposed of one way or the other well before the Polokwane conference of the ANC in December 2007. He did not want to enter the Polokwane fray with the prosecution of himself hanging over him. He has since explained this numerous times but the DA obviously does not want to hear or see what does not suit its perversions for public consumption. It is for that reason that he insisted that the Pikoli prosecution proceed with all due expedition and indeed requested that from Pikoli. Delay by the Prosecution caused the Trial matter to be struck off.

147.

I again spell it out. In 2003, the Third Respondent did invite the NPA and particularly Ngcuka and the DSO to either prosecute him or effectively forever keep their peace.

148.

It is a matter of public Record that the NPA did not prosecute the Third Respondent. It sought to prosecute Shaik, the party with whom Zuma allegedly

had **“a generally corrupt relationship”**: the bribee of the bribor Shaik.

149.

It is self-evident that it was only fair and logical to charge Shaik and Zuma, if there were no ulterior motives, in one and the same criminal proceedings. This would also in my experience accord with the general practice of the NPA save where one of the parties became a witness for the State in the first proceedings. That was not the case. McCarthy and Ngcuka have never explained their decision. Ngcuka excused that by saying that such explanation would expose the weaknesses in the Prosecution case.

150.

It was indeed a Machiavellian twist by the DSO (McCarthy) and the NDPP (Ngcuka) to have the NPA not prosecute Zuma but Shaik. It was a careful stratagem to harm the Third Respondent. It may well have been a stratagem in which certain personnel of the NPA did not share, but it is undeniable that this was the NPA's stance and Zuma was and is so entitled to understand the decision. It was a decision taken by the Head of the DSO (McCarthy) and the NDPP, Ngcuka, publicly announced by the NPA as its decision in the presence of the then Minister of Justice, Maduna.

151.

It was always the NPA's stance that the DSO was for all intents and purposes, the complainant in respect of the Zuma charges. In the Trial matter, the NPA stated on oath that the DSO is the complainant in the matter.

152.

If the DA's concern was really as set out, one would have expected that a large part would have been directed at prosecutorial abuses and the manipulation of the prosecution process for political ends and how to prevent that. That in the end was a main concern of Mpshe as evident from his public Press statement. The DA's case presents complete indifference to that. Mpshe's stance would and will serve to educate and deter resort to, or participation by, public Prosecutors in such abuses. The DA's approach would, on the other hand, promote such conduct in the sense that the Accused will still remain fair game once the NPA, perhaps, said sorry. If the manipulative Prosecutor knows that such games may result in the Accused no longer being an Accused, he may well think twice about political manipulation and illegal investigation.

153.

The Third Respondent does take issue with the Applicant's assertion of *locus standi*. The DA sets out its interest in paras 3 and 4 of its affidavit.

LOCUS:

154.

In the first SCA decision herein, the DA's *locus* was recognised at that stage of the proceedings solely on the basis of the DA's own papers and averments and the acceptance thereof without recourse to the opposing affidavits.

155.

Once all the papers are before the Court, a different approach applies.

156.

It is contended that the DA does not have *locus* to challenge the prosecutorial decision to prosecute or not, because its interest as formulated in its initial affidavits and now clarified, does not suffice.

157.

If such interest suffices, every person in South Africa has the necessary *locus* on that basis, to challenge any prosecutorial decision to prosecute, plea bargain or stop, the prosecution. In addition, once *locus* is so recognised, such person is entitled to see the relevant documents even if these were obtained by invasive means such as search and seizure, S28 (of the NPAA prior to amendment) interrogations and the like. We respectfully submit that this is not

the law of South Africa.

158.

It would moreover introduce a system ripe for abuse by disappointed political challengers and the like. This is a particularly relevant aspect in this case. The DA is intent on utilising the current challenge for political gain. It seeks to maximise political mileage for it as a political party. It seeks to maximise the harm the criminal proceeding against Zuma holds for him.

159.

I repeat what I have stated in my initial opposing affidavit. This case was launched on papers drawn prior to the 2009 Mpshe decision being announced. It was done in the immediate run up to the 2009 General Elections. It was revived in time for litigation in Court to coincide with the immediate run up to the 2014 Elections. The litigation has every hallmark of being pursued not to have an end result, but for the sake of this type of litigation reflecting the DA as the champion of criminal justice.

160.

It is, with respect, a search for publicity rather than the truth. It blusters indignation at every conceivable misdeed or misbehaviour of Zuma whilst gross invasions of human rights and political manipulation by the NPA and others are

indulgently overlooked as irrelevant to whether the prosecution is tainted.

161.

In this regard I also need only mention the pomp and circumstance staged for the Press at the handover of the Record of Decision to the DA. A huge satchel was triumphantly brandished by Zille as containing the Record – it contained a computer memory stick about as big as half a cigar.

162.

It is the Third Respondent's contention that the application be dismissed on the basis of the DA's lack of *locus standi* now that all the papers are before the Court alternatively because the present proceedings constitute an abuse of process.

AD PARA 4:

163.

The factual averments in this paragraph are, like so many others, just factually incorrect. Moreover, there is no reason why such a blatantly incorrect contention would be made if the DA was even in the slightest, interested in the lofty aims it professes to serve.

164.

The charges proffered against Zuma were not in respect of the award of Arms Deal Contracts. He had nothing to do with that.

AD PARA 5:

165.

The State's failure to get an adjournment is not somehow to be laid at the door of the Court (I refer to these trial proceedings as the Msimang proceedings as Msimang J presided in this matter). It was entirely the NPA's fault as found in the Judgment (copy annexed marked **MH5**).

166.

This had the effect that from the B-Team perspective, the Prosecution had been delayed by this stage for some 3½ years already. More particularly this in a matter where a speedy trial was required by all parties and Zuma had challenged the Prosecution to charge him in 2003.

AD PARA 6:

167.

167.1 It is simply untrue that the 2007 Mpshe decision was made on 6 December 2007. I say so for the following reasons – Du Plooy testifying on oath in the opposing NPA affidavit (13/14 December

2007) states that the decision is imminent;

167.2 In the supplementary (January 2008) affidavit he says that the decision was taken on 27 December 2007;

167.3 The Pressure for this decision came from the DSO – the B-Team was part of that and its head, McCarthy, manipulated the decision making process. This much is evident from the NPA's answer.

168.

This much is borne out by the explanation now provided by the NPA. Whilst Mpshe was in principle in favour of prosecuting Zuma, it was McCarthy who took the decision to make this an accomplished fact in late December 2007.

AD PARAS7& 8:

169.

The 2007 indictment did not differ that much from the 2005 indictment. What the prosecuting team were formulating were charges under POCA and Income Tax charges were added. POCA was resorted to, not because of any racketeering going on, but in an attempt to pave the way for the admission of hearsay and documentary evidence at trial. It is in particular because the

defence made it very clear that they will challenge documents and when and if produced in the trial. They would not agree that matters such as the admissibility of evidence shall stand over till the end of trial. The SCA also later had sounded a warning in this regard – what was admissible against Shaik was not necessarily admissible against Zuma. POCA allows on the face of it, the State latitude in putting otherwise inadmissible evidence before Court.

170.

170.1 The position is that Downer thought that the institution of charges would detrimentally affect Zuma's prospects of winning the Polokwane election of the ANC leader. It is difficult to postulate a genuine or *bona fide* prosecutorial reason why Zuma had to be charged in December 2007;

170.2 I draw attention to how the DSO by mouth of Du Plooy, its lead investigator in the Zuma matter, explained the timing of the 2007 charges as premised on a resolve to have the warrant / LOR disputes first resolved but that it was then decided not to delay any longer;

170.3 This explanation was proffered in the Answering Affidavit of the NPA in the then leave to appeal process in the CC;

170.4 It is and has been a very puzzling and thoroughly unconvincing explanation. It is, simply not credible but farfetched. The SCA had given judgment in the Warrant and LOR matters, in favour of the State on 8 November 2007;

170.5 The indictment was served on all three Accused on 29 December 2007.

171.

The B-Team's reason for Pressing for immediate charges is dealt with later. The explanation proffered as their reason by the DA is not an acceptable one. The B-Team was fully aware that charging Zuma prior to Polokwane, might detract from his prospects of election as leader of the ANC, at Polokwane (the protagonists were always split on which would be the most detrimental – the uncertainty of whether he is to be charged or charging him just prior to Polokwane).

AD PARA 10:

172.

172.1 The DA persists in this statement to give the impression that these allegations have been rejected in respect of the truth thereof;

172.2 It is thus untrue to say that the challenge was in part based on the allegations as to political motives. The DA's affidavit is framed in a way which suggests that the truth of these allegations was what was relied upon. The DA's affidavit repeats this falsehood with some regularity. Both the S179(5) application and extracts from the 2009 application to obtain leave to appeal from the CC against the 2009 Judgment of the SCA in the S179(5) matter, bear this out;

172.3 What the DA seeks to achieve, is to have the Court hearing this application, gain the impression that the Zuma contentions of prosecutorial abuse, political motives and interferences in his prosecution, had been considered and rejected by the Courts. This is indeed not true – these issues were never considered by any Court so as to decide the truth of such averments. The DA's purpose is to rubbish such allegations as any basis for Mpshe's 2009 Discontinuation Decision. The closest any Court came to pronounce on these, was in Judge Nicholson's Judgment in the S179(5) proceedings. The SCA castigated him for finding in essence merit in the said allegations **when that was not Zuma's case** and hence, not sufficiently relevant – not that he was wrong in his conclusion (as opposed to being wrong to undertake such exercise at all on the basis done). The DA now suggests that

what Nicholson found was indeed Zuma's case which case was rejected by the SCA. That is untrue.

173.

The statement is skewed. The allegations of an abuse of prosecutorial powers in the investigation and prosecution of Zuma were simply extracts from the Msimang papers and indeed from the Third Respondent's affidavit relating to a permanent stay. The case made in this respect was that as a result of these allegations being raised in litigation between the parties, Mpshe should have seen fit to indicate that fresh charges were being considered and Zuma be given an opportunity to address Representations in this regard based on a common law duty to do so.

174.

The NPA applied for these allegations to be struck out on the basis of their insufficient relevance and that is what the SCA did.

AD PARA 11:

175.

175.1 This is so. It was since July 2006 when the DSO did not proceed with the trial as set down (and frankly, they had made it impossible to proceed), on the cards that the Accused would bring a

permanent stay application if the NPA revived the prosecution. It had indeed brought such an application in the Msimang proceedings;

175.2 The tone and stance in the Representations were simple. The NPA through affidavits by especially Du Plooy, McCarthy, Ngcuka and Pikoli in the past litigation had branded the allegations as to political manipulation and motives and prosecutorial abuses as reckless, speculative and devoid of all truth. The Prosecution was immaculate and there was no evidence at all of DSO prosecutorial impropriety. Zuma was challenged to produce any evidence thereof;

175.3 This was in July 2006 and obviously made in the confident belief in the top secrecy of the Browse Mole operation. Indeed this operation's existence was only leaked in 2007;

175.4 The prosecution of Zuma should indeed have been stayed for this very reason alone. It was an outrageous challenge given that the NPA knew that an illegal investigation utilising DSO powers and means had been conducted by the DSO. Of course, there is no mention of this and the deception of the Trial Court is simply shrugged off by the DA;

175.5 In the Representations, the existence of such evidence was revealed as the Record shows. The NPA's challenge would be met by the production of such evidence in the permanent stay application. I fail to see how that was "**blackmail**" as the DA and a Prosecutor dub it. I accept that the permanent stay was a threat but that was and is a legitimate threat in an adversarial context. I cannot think that this should have been concealed (as the prosecution clearly had done in respect of the Browse Mole operation). I fail to see how that qualifies as blackmail. What was sought as the outcome of the Representations was no different than the outcome to be sought in the permanent stay. The "**threat**" was no different to what litigants face every day in civil litigation;

175.6 These manipulations included constant leakage to the Press of information which came to the DSO by reason of the investigation and prosecution they launched against Zuma.

176.

The timetable was premised on the failure of the S179(5) appeal proceedings in the CC. Obviously if Zuma's appeal succeeded that would terminate the 2007 charges.

AD PARA 12:

177.

The Representations were made in February 2009. The DA had no right to see confidential material and set up some kind of mini trial before the NDPP.

AD PARA 13:

178.

The allegations of “**black mail**” are at best strategic overstatements. At issue was whether a permanent stay application may scupper the Prosecution.

AD PARA 14:

179.

The fact that Mpshe was disconsolate simply underlines the *bona fide* nature of his decision. Apart from that I cannot comment save that the team was obviously not part of senior management nor were Downer and Steynburg at the NDPP’s head office.

AD PARA 16:

180.

This is incorrect. The Mpshe decision was based on an evaluation (including the NPA’s own investigations pursuant to that) of the Representations. It was

not solely based on the contents of the communications from McCarthy. Those contents certainly had significant implications for the evaluation of the Representations but it is incorrect to confine the rationality of Mpshe's decision to only these contents.

AD PARA 17:

181.

There was and is no onus on the Third Respondent to explain the origin of the Tape recordings. The Third Respondent's stance was throughout that if there is evidence of prosecutorial abuse, the NDPP should consider that. If the NPA is satisfied that the evidence is authentic, it cannot shut its eyes or ears to the truth in respect of its own processes and an abuse thereof. It is in that sense that the legality or not of the recordings being made or brought to the attention of the Third Respondent's representatives was always regarded as irrelevant. It can hardly be suggested that if, for example, the recordings actually reflected surveillance by McCarthy of the Third Respondent's representatives' telephones, email and bank accounts and communications re the Zuma prosecution, that the NDPP could simply have shut his eyes and ears to that.

182.

These Tapes were not presented to the NPA at the oral Representations (and there was no mention of these in the Written Representations). What was presented was the impact of these and other factual events on the viability of a

Prosecution.

AD PARAS 18 - 19:

183.

This summary is accurate in so far as it goes.

AD PARA 20:

184.

The NDPP dealt with a real and significant manifestation of the abuse of the prosecution process of Zuma by the DSO.

AD PARA 21:

185.

Of course the Record is stripped from the Representations so that the cumulative case is not before the Court. There is, however, enough before the Court to discern that the Decision was within Mpshe's jurisdiction and made honestly and *bona fide*.

186.

In setting out the relevance of the timing of the charges in 2007, I have quoted from previous litigation papers between the NPA and Zuma. I do so to promote

the understanding that such litigation history was part of the context and that the NPA and Mpshe himself and through other DSO and NPA officials understood such context and appreciated the significance of the Tapes as proving (and this was not a Court of law) what the NPA previously always dismissed as fabrication or speculation.

AD PARA 22:

187.

It is simply not correct that nothing had changed. The Prosecution had never staved off a full confrontation on the issue of an abusive prosecution. In the Msimang proceedings, the Court dealt first with the adjournment application of the State. This adjournment was resisted by Zuma. Zuma was successful. The State case was then struck from the Roll.

188.

There was no argument on the Permanent Stay. As the NPA subsequently argued (later endorsed by the SCA and the CC in the LOR proceedings), the striking off terminated the proceedings. There was nothing pending.

189.

In the S179(5) application, the **allegations**(as opposed to the truth) of manipulation were simply contextual to the main dispute. The SCA struck it out

precisely because it was not sufficiently connected to the real issue.

190.

It is also not true that nothing had changed. Of course not knowing when Mpshe would make a decision, did not assist Zuma in placing certain features of the prosecution before him. In context, it must also be remembered that the JSCI Report re the Browse Mole operation was finalised on 27 November 2007 and the Tapes also cover the November/December period. Things had changed but the DSO obviously did not inform Mpshe.

AD PARA 22:4:

191.

The DA seeks to hide behind the team. The Tapes reveal Downer's close association and interchanges with the Press. That may not have been in the forefront, but it is hardly irrelevant. McCarthy was the Head of the DSO – the B-Team was his team. Who was involved with what skulduggery is unclear and cannot be invited into the positive statement made. It is in any event irrelevant – there is collective responsibility in the NPA. It was never suggested that the B-Team was involved in McCarthy's skulduggery as emerged from the Tapes. That is not the issue.

AD PARA 22:5:

192.

With great respect, the Counsel could only advise in general terms. There are opinions that differ from those quoted and it is not quite clear what factual premises they were based on. Nor can it be remotely said that these opinions were ignored by Mpshe. Mpshe had to consider a plethora of considerations. He could not simply dismiss the Representations out of hand as the B-Team wanted. It is not the South African law that so long as the Prosecution is convinced of the strength of its case, it can happily abuse its powers and that the NDPP is acting unlawfully if he stops the Prosecution in such instance.

193.

This is not a correct summary of the litigation. Such allegations would be pertinent to a permanent stay application. The Third Respondent brought such application in 2006 in the trial matter before Msimang J. A permanent or striking off was sought based on such averments and other abuses by the NPA including delay, unlawful leakage of information to the Press, etc. Notably absent was the Browse Mole operation – this was concealed by the NPA at the time.

194.

The Trial Court determined that it first will deal with the adjournment application.

The NPA's application for an adjournment was refused. The B-Team then stated that it neither can, nor will, proceed with the trial, nor will it withdraw the charges. The Court then struck the matter from the roll. That was held subsequently (by both the SCA and the CC) to have extinguished the proceedings and the 2005 decision to prosecute Third Respondent

195.

The permanent stay application was thus rendered academic – there were no proceedings to stay. This was so understood by the NPA.

196.

In the S179(5) application, there was reference to some aspects (indeed they were quoted verbatim) of the permanent stay application. These were included to sketch the context so as to find a legitimate expectation of being heard by Mpshe before the 2005 Prosecution Decision. The truth or not of these averments, was not the issue and the SCA held that these were to be struck out as not relevant to the hearing issue. It did not enquire into the merits of these averments.

197.

The NPA did dispute these allegations vehemently and indignantly declared that there would never be manipulation of prosecutions for ulterior purposes.

Especially Zuma's prosecution was a role model of impeccable prosecutorial conduct or so deposed McCarthy in the Trial matter. I have dealt with this.

198.

This does not mean that Mpshe could simply ignore the potential merits of a permanent stay application premised on a variety of NPA abuses and delay. This would have been a wholly irresponsible approach to what he had to consider in 2009. Nor did things stay the same – Press leakages continued and delay accumulated. After all, the Court held that the “**collapsing**” of the trial in 2006 was to be laid at the prosecution's door (The Msimang Judgment). That had to be added to the Ngcuka Decision to charge Shaik and not Zuma setting the latter up in the case of success, with SCA precedent so that Zuma was guilty as a matter of simple superficial logic (so the B-Team argued).

199.

It is quite true that the team was not accused of involvement in the McCarthy manipulations. This does not mean that there were no other abuses or NPA conduct (even on the part of the team) which could or would not bolster a permanent stay remedy. It is obvious that the issues of delay, chancing their arm and press leakages would involve the team.

200.

The suggestion that Counsels' advice was ignored by Mpshe seems quite inappropriate. The reality is and was that the NDPP had to decide whether the prosecution had a reasonable prospect of being successful. If likely to be met by a successful permanent stay application, the prosecution did not have such prospects. Prospects call for all types of aspects to be considered and a value judgment. Quite apart from that, a NDPP may also decide not to prosecute because the very attempt to convict an Accused despite NPA abuses may dictate a policy based refusal to continue the prosecution. As long as the NDPP exercises his discretionary power in a *bona fide* and honest manner, it should not be open to challenge.

AD PARA 23:

201.

This is simply not correct. McCarthy was neither delusional nor a prankster (as Ngcuka suggested in his risible statement). He was the person in real control of the prosecution of Zuma. The NPAA reflects the ultimate authority of the NDPP but the prosecution of Zuma and the manner thereof fell under McCarthy's DSO and he had hands on control of that. Obviously Mpshe had in the past (as his predecessor also did) relied on McCarthy's input and advice (and at times that of the team). That must obviously be so. A NDPP must, of necessity, in any complex matter rely on input from the DSO. The question in the end was then also to what extent could an untainted prosecution be assumed? Because

McCarthy told Mpshe so? Certainly not after the Tapes and the Browse Mole operation. McCarthy made numerous affidavits on behalf of the DSO / NPA in the litigation which ensued between Zuma and the NPA.

202.

McCarthy's role in the Zuma prosecution saga is manifest and significant. This can readily be demonstrated by reference to litigation papers and his affidavits, if challenged.

203.

The DA trivialises the issue of the timing of the charges by misstating cardinal facts.

204.

It firstly quite craftily tries to put Mpshe in a catch 22 position whereby he must either state that his decision to prosecute Zuma was improper, or else state that he was merely a puppet (of McCarthy in particular) in this respect and did not apply his own mind.

205.

This is, with respect, somewhat disingenuous. It overlooks the role McCarthy

played in the prosecution of Zuma and that a NDPP can hardly in any complex matter, do otherwise than rely on the advice and information provided by those who control the matter.

206.

In 2007, I wrote to the NDPP enquiring about a review of the Zuma prosecution and seeking an opportunity to make Representations to the NDPP. I annex this letter marked **MH9**.

207.

Mpshe's response was to deny any review process. I annex his response marked **MH10**.

208.

Clearly McCarthy was the person whom he looked to, to advise on whether to prosecute Zuma or not. Naturally he would strongly rely on the input and guidance of the DSO's head for such decision. The problem is that Mpshe later realised that his reliance on McCarthy was misplaced.

209.

The DA secondly deliberately minimised McCarthy's role and control in respect of Zuma.

210.

This is a strategic understatement of McCarthy's position, role and influence and the importance thereof. Someone pushed very hard for Zuma to be charged at the time of Polokwane.

211.

The sense of the decision to wait is readily apparent. By December 2007, Zuma had sought leave in the warrant matter (and LOR matter). In the warrant matter the decision before an experienced senior High Court Judge went in Zuma's favour. In the SCA, the NPA prevailed 3/2 with two very senior Judges finding the warrants unlawful.

212.

There was no question that Zuma would then appeal the matter and to the Constitutional Court.

213.

I do not see on what basis the deponent contends that Mpshe did not have input from McCarthy.

AD PARA 24:

214.

The NPA was aware that there was an enquiry for an opportunity to make Representations should a Zuma prosecution decision be considered. It was also aware that there was an application for an appeal to the CC against the 3/2 SCA decision. The same reasons as before should have caused the DSO to hold back till its resolution. The DSO (McCarthy and the team) did not do so.

215.

There was moreover no sound reason not to advise Zuma that Mpshe is now considering whether to charge him or not and to provide him an opportunity to make Representations.

AD PARA 25:

216.

The manipulation of the process was by McCarthy. He was in control of the Zuma investigation from its inception. McCarthy was also the initiator and controller of the Browse Mole operation targeting Zuma. McCarthy had also misled the Trial Court in the Msimang proceedings. It was common knowledge that Ngcuka was an adversary of Zuma and that his conduct in 2003 lay at the core of the contention of political meddling.

AD PARA 26:

217.

The suggestion that the Third Respondent would permanently appoint Mpshe as a reward for his decision deserves no comment other than that it is scurrilous, vexatious, in very poor taste and absolutely untrue. As a matter of fact, Mpshe was not permanently appointed nor were any of the top management involved in such decision, so appointed. Mpshe was confronted with the reality that the picture of saintly knighthood claimed by the NPA before every Court in respect of Zuma's prosecution, was simply false.

218.

The Mpshe decision was taken with reference to the Representations and the NPA's enquiries. That all of the Representations are not before Court, is simply the immediate outcome of the DA not challenging the confidentiality thereof.

219.

This paragraph is simply insulting especially since Zuma in any event did not appoint Mpshe permanently.

AD PARAS27& 28:

220.

I have set out above what perhaps angered Mpshe. He himself had promoted the notion that there was no wrongdoing in the matter in the previous litigation.

221.

The contention seeks to again minimise McCarthy's conduct. It is simply not so that nothing had changed or that Mpshe's concern should have been confined to a manipulation of timing of the service of the indictment.

222.

The contention that Mpshe should not have had any concern other than that Zuma may wrongly have considered that the timing of the service of the indictment on him was manipulated for political purpose, is astonishing.

223.

In the first place, Zuma would not have been incorrect in drawing this inference – the inference is overwhelmingly clear.

224.

Secondly, the central figures directly plotting the manipulation were Ngcuka and

McCarthy. McCarthy had no business discussing the Zuma matter with Ngcuka let alone plotting with him so as to maximise harm to Zuma's political rule and favour Mbeki. It was in itself clearly a breach of S41(6) of the NPAA and also the Code and Guidelines.

225.

Thirdly, the genesis of Zuma's complaint of prosecutorial abuse lay with the Ngcuka / McCarthy decision to prosecute Shaik and leave Zuma with the cloud of there being a *prima facie* case of corruption against him.

226.

The *prima facie* barb was a deliberate one; Ngcuka prepared his statement to have this sting. He and McCarthy knew full well that the impact thereof would be.

227.

Fourthly, McCarthy was the instigator and controller of the illegal Browse Mole operation. McCarthy also deliberately misled the Msimang Court about the integrity of the investigation and prosecution. He was in the vanguard of the denouncement of Zuma's allegations of abuse as fantasy and speculation. The Tapes at least revealed that this NPA assertion was not true.

228.

Fifthly, it was clear that there was significant political interference in the prosecutorial processes as testified to by Pikoli once he had been suspended.

229.

Zuma had in these (and additional) circumstances, every reason to persist with his averments of political abuse, *inter alia*, as a result of political manipulation. The trial had by then been delayed for some 4½ years. It was also quite remarkable that even in the S179(5) application, the NPA saw fit to dismiss any allegation re prosecutorial abuse as fanciful. It knew by then of the illegal Browse Mole operation **and** the Pikoli suspension. In short, the Zuma saga took on a new light.

230.

In par 28 the DA's real concern is revealed the Third Respondent's image as presidential candidate (and obviously the voters he may attract).

231.

The decision must also be seen in the context of the unlawful and indeed illegal leakage of information concerning the investigation against Zuma, to the public media, especially the public newspapers (the Press).

232.

The NDPP's office has since at least 2002 continuously and deliberately leaked information to the Press concerning the investigation and prosecution of Zuma. This leakage has continued up to the Mpshe decision and even thereafter. This conduct of the NDPP was illegal in terms of statutory prohibitions, unlawful in it being contrary to the NDPP's Code of Conduct and the prosecution's duty to conduct its functions impartially and in blatant disregard of fair trial jurisprudential demands.

233.

This decontextualizes the timing issue which Mpshe would not have done. It isolates and insulates the period mid to end December 2007 and disregards the identity and role of the manipulator McCarthy outside that period. This is a deliberate distortion by the DA in order to present at least at face value, some sort of challenge.

234.

The timing complaint goes back to 2002 – 2003. The NPA is well aware of this – it should be burnt into the collective consciousness of its top management and the team. The timing issue must be revisited in some detail given the DA's head in the sand approach.

235.

In 2002 – 2003 Zuma had been made aware of the investigation by the DSO against him. That investigation was initiated and controlled by McCarthy. On McCarthy's version this started when he was the Head of Serious Economic Crimes. It grew and after this entity was absorbed into the NPA and effectively became the DSO, Zuma's involvement became clear and McCarthy decided to extend the investigation beyond Arms Deal issues to focus on what he termed a **“generally corrupt relationship”** between (Schabir) Shaik and Zuma. Every facet of Zuma's life, every facet of his conduct, his every action was scrutinised, spied on, accessed and considered to determine whether there exists any material for a prosecution. Extensive use was made of the invasive draconian and non-transparent powers available to the DSO under the NPAA. This was done under McCarthy's control and in furtherance of the investigation as extended by him.

236.

The Court may consider that the statement that the DSO was from the time they first set their sights on Zuma in approximately 2001, hell bent on putting his whole life and conduct under the microscope and prosecuting him when it suited them, for whatever might emerge as potentially illegal conduct, as an overstatement. It is indeed not. The simple fact of the Browse Mole operation demonstrates this.

237.

What is Mpshe to do? To concede all the aspects on which he considered the NPA to be vulnerable in, in a Permanent Stay application which on the DA's approach, is not academic? Defend these in order to promote NPA success in the Permanent Stay application? Who is the NPA going to call as witnesses in such an application and how is it going to respond to delay charges and what has happened to the information regarding the Browse Mole Report and the like that the Third Respondent sought?

238.

I refer to the request (2008) made from the NPA by the Third Respondent as an accused in the 2007 proceedings. I annex a copy thereof marked **MH11**. The Prosecution's response is contained in the emails annexed marked **MH12**. This is a response from the DSO (the Prosecution team and McCarthy as their head) in particular. Clearly there was no eagerness to make these documents available to the Accused – their relevance to a Permanent Stay application is obvious. I do not know if this response and the Defence's interest in these documents were conveyed to Mpshe when he considered the Representations.

239.

I point out that the DA was and is at liberty to make Representations to the NDPP to reconsider the decision to prosecute Zuma. Its basis for such

reconsideration would be that the original decision was flawed as it contends for in these papers.

240.

What it seeks to do in these papers is quite impermissible. It seeks to place the obligation on the Courts to decide at the instance of a political party, whether a particular person should be prosecuted for the crimes they allege, he should stand Trial on. In principle this extends to the merits of potential prosecutions and to the stopping of prosecutions by NPA prosecutors. *Bona fide* and honest decisions should not be the subject of such challenge.

241.

The NPA's decision also had to reflect three realities.

241.1 McCarthy who was the architect of the Browse Mole Operation, was not willing to disclose details about the operation and who all was involved. It must have been DSO personnel. It is and was an open question who these were;

241.2 McCarthy was not cooperative in respect of supplying information and explanations regarding the Tapes and their significance and

his relationship and apparent co-operation with Ngcuka and conspiring with him. Nor is his contact and liaison with President Mbeki explained. This was in the run up and aftermath of Polokwane;

241.3 The previous NDPP, Pikoli testified that there was Ministerial and Presidential intervention and Pressure brought to bear not to prosecute Selebe. Indeed he was suspended and then dismissed because he would not have yielded to it i.e. politicians would manipulate the prosecution process within the DSO to achieve their ends. The NPA simply could not have as it did previously in the Zuma litigation, totally deny that its prosecution powers are not abused or that the Mbeki Presidency would not seek to influence such processes (Before the Ginwala commission and subsequent litigation);

242.

The DA's case is redolent with the sentiment that the team somehow had a type of *audi alteram partem* right to be fully heard at all times and stages of the Stopping Decision. That is simply not so. Obviously Mpshe would consider and value their input (and he obviously did) but in the end they were members of the NPA which made the decision. Obviously not everyone would necessarily

agree with Mpshe's decision irrespective its outcome.

243.

Nor does it really matter whether he had come to some decision on 1 April and got later (2 or 3 April) further input from the team. Nothing prevented him from reconsidering his position if their input was convincing enough. He only announced his decision on 6 April.

244.

It is not so that Mpshe made his decision solely on the grounds of the Tapes. On the contrary, he refers to these as independently verified support for some of the serious allegations made. His decision was based on the totality of the representations. Some he clearly decided were not compelling. The Tapes may well have provided a prism through which he could consider many features of the Representations and the prosecution case. The suggestion that his decision was solely premised on the Tapes is a complete overstatement and ignores context completely.

245.

The DA contends that the Written Representations were contentions made on oath by Zuma or Hulley. This is incorrect. They were contentions drafted by Counsel on instructions. That was how these were presented.

246.

I take issue with the DA's assertion that Representations must consist of an affidavit made by the Accused.

247.

The importance and power of the then Head of the DSO in respect of the actual prosecution of the Third Respondent must not be underestimated. It was immense. The practical reality of McCarthy's control of what would have been the team's task, is perhaps nowhere better illustrated than in Ngcuka's statement put up by the DA. McCarthy ponders and discusses with Ngcuka when to present the charges to Zuma.

248.

The Third Respondent makes the following points:

THE NGUCKA ANNOUNCEMENT:

248.1 It suited the anti-Zuma faction down to the ground not to have Zuma charged alongside Shaik. One only has to read the Nicholson Judgment to appreciate that;

248.2 It was extremely unfair not to charge Zuma and Shaik together. It

was also peculiar not to so charge the alleged bribor and bribee together. Every consideration of fairness, logic and principle favoured such a prosecution.

THE PIKOLI DECISION:

248.3 This suited the anti-Zuma faction. It gave credence to Mbeki's dismissal of Zuma. If not completed with due expedition, it would reduce Zuma's presidential prospects significantly;

248.4 The decision was ill timed and ill-considered as the Msimang Judgment held.

THE 2007 MPSHE DECISION:

248.5 McCarthy's crony Ngcuka and others held the view not to charge Zuma prior to Polokwane. Zuma's followers would have exploited, so the Mbeki supporters opined, the bringing of charges just before Polokwane

249.

249.1 After Polokwane, drastic measures were called for – hence McCarthy pushed and obtained the decision to again prosecute

Zuma on 27 December 2007. It is peculiar that this was done in the face of the Warrant and LOR leave to appeal application by Zuma. The unresolved status of these was exactly why the decision to prosecute Zuma was put on ice. What happened? Polokwane;

249.2 McCarthy's manipulations and input in the NDPP decision to prosecute or not must be seen in the light of the prosecution being DSO (McCarthy) initiated, implemented and controlled. Secondly, it must be seen in the light of the DSO's Browse Mole operation and the failure to disclose this illegal investigation;

249.3 Once again, the timing of the charges was quite peculiar.

250.

I have annexed the Msimang Judgment (marked **MH5**). That describes how inappropriate and improper it was to charge Zuma when Pikoli charged him. That Judgment considered affidavits from all the parties and followed full argument. It is a decision both on the woeful timing of the Pikoli decision and that the NPA bore the blame for the trial not proceeding.

251.

After Zuma had been charged, the State sought to bolster its case by:

251.1 Search and seizure operations;

251.2 LOR's;

251.3 The Browse Mole operation.

252.

The Browse Mole operation took place in the first half of 2006 (Zuma was charged in 2005 by reason of the Pikoli decision) and continued to September 2006. It was a DSO operation initiated by McCarthy, the head of the DSO. It was a top secret operation. That was for good reason. It was an illegal investigation.

253.

It resulted in a Second Report in July 2006. A copy of the Report is annexed marked **MH6**. Reference is particularly made to the top of page 28 of the Report and what follows.

254.

This Report was leaked to COSATU in December 2006. A copy of COSATU's enquiry to Pikoli as to, *inter alia*, the responsibility for, nature and general legality of the Report, is annexed hereto marked **MH13**. Pikoli's responses (as agreed with then President Mbeki) are copied in annexure **MH14** annexed hereto. These documents speak for themselves.

255.

The Report of the Parliamentary Joint Standing Committee (**JSCI**), followed after the above leak forced an enquiry into the Browse Mole operation. It condemns the Browse Mole operation as an illegal and dangerous exercise. A copy of this is annexed marked **MH7**.

256.

It is common cause that McCarthy was an adversary of Zuma and a supporter of Mbeki. It is unexplained why and how the Head of the DSO had access to Zuma's bank accounts which were to be subjected to future "**rigorous scrutiny**." (The final data referred to in the Report are not the documents netted in the search and seizure operations. That took place in August 2005. The Browse Mole documents relate to movements in Zuma's bank account post the search and seizure date. The data postdates that seizure). This was clearly illegal conduct.

257.

In the Ginwala Report, the Browse Mole issue and evidence of Pikoli, are dealt with on particularly, **p113 – p122(MH8)**.

258.

Pikoli later complained about these findings (in so far as he was censured) but conceded the illegality of the operation and his private severe censure of McCarthy. This was when the significance of what McCarthy and the DSO had done became apparent to him (July 2006). On first reading and discussing it with McCarthy, he says the full illegal impact of the operation did not dawn on him. Annexed hereto are extracts of his affidavit in impugning his suspension, marked **MH15**

259.

The JSCI's above Report was finalised on 27 November 2007.

260.

Pikoli became fully aware of the illegality of the Browse Mole Report in July 2006.

261.

Reference is made to the NPA's affidavits made in response to the counter-application for a permanent stay which was brought before Msimang J in 2006. Both Pikoli and McCarthy made affidavits.

262.

The contents of McCarthy's affidavit have been quoted above for the Court's convenience.

263.

The fact that the DSO had just freshly conducted an illegal investigation into Zuma for which he was roundly reprimanded by Pikoli, must have been even more freshly imprinted on McCarthy's mind.

264.

The ineluctable inference from the above is that Msimang J was deliberately misled. Zuma was equally at the time not aware of the operation. If he was, this would have been raised and the permanent stay application may well have been argued first. This has, in retrospect, clearly prejudiced Zuma.

AD PARA 31:

265.

I take issue with the content.

AD PARAS 29 – 32:

266.

I take note of the structure. I deny the submissions in [32] and indeed the applicability of PAJA is disputed. The DA regulated the pace of this application.

AD PARA 33:

267.

If the DA suggests that every time an Accused makes Representations, they have a right to be given those Representations to decide on whether or what Representations they would make, this has no merit. Indeed, the DA had no right to see Zuma's Representations, certainly not for the asking where these were presented on a basis of confidentiality. That request was a cynical ploy and publicity stunt.

268.

The history of the litigation relevant to the Zuma prosecution is indeed material. The DA has presented a very selective version as seen from its anti-Zuma

perspective.

269.

The litigation history is well documented. None of the court battles are secret. Nothing prevented the DA from obtaining the application papers and judgments in all such matters. It simply could not be bothered or it was concerned that such exercise would be counter-productive or a mixture of these. It is self-evident that the picture painted is distorted and unreliable and indeed wholly incomplete.

AD PARA 34:

270.

The haste with which the DA acted and the fact that it effectively drew the application papers before Mpshe's announcement, cannot be swept under the carpet. It explains the true motive and reflects the lack of *locus* on the part of the DA. The review was brought for the purpose of damaging the ANC's political campaign for the May 2009 elections.

271.

In it, the DA accuses Zuma of “**Sampson**”- like tactics, threatening to expose corruption by others in the Arms Deal. That was and is errant nonsense as pointed out at the time. Zuma had nothing to do with the award of Contracts

under the Arms Deal – even the Prosecution has always made that point. The passage is simply insulting.

AD PARA 35:

272.

The DA would have known the Representations were made in confidence. That appears very clearly from the S179(5) application for leave to appeal to the CC. One assumes that given the DA's professed interest in the prosecution of Zuma, it had considered the papers in that process.

273.

The DA accepted that the Record would not contain the Representations or material which would reveal it. The DA's contention that Representations may not be entertained on a confidential basis is simply incorrect.

AD PARAS 40 - 44:

274.

The DA did not seek production of the Representations – it acknowledged that these were made on the basis of confidentiality and sought a redacted Record only (i.e. the Record without the Representations being disclosed). If it wanted to make a stand that the Representations must be disclosed, then was the obvious and appropriate time. It elected not to do so – the Third Respondent

indeed queried the sense of a review in such circumstances.

AD PARA 45:

275.

The Order made by the SCA, excluded the Representations from the Record to be produced. The parties indeed agreed that Order.

AD PARA 47:

276.

The DA misleadingly quotes only the part of the dictum which suits it. The part of [33] it quotes is completed by this sentence:

“On the other hand, a reduced record might redound to the benefit of the NDPP and Mr Zuma.”

AD PARA 48:

277.

I dispute the imputation of dilatoriness. The DA brought the application as an urgent matter on 7 April 2009. It sought no immediate relief in its wake. The allegations contained numerous inexactitudes and factual misstatements. The matter was largely shelved until it was necessary to dust it off to again castigate Zuma. It simply suited the DA to have the publicity of urgent Court proceedings.

It displayed casual interest thereafter. Nothing prevented it from pursuing it as an urgent application if indeed it was.

AD PARA 56:

278.

The Judgment seemingly required the Third Respondent to prove the confidentiality of its Representations. That was what prompted the Appeal as that was not the sense of the SCA order.

AD PARA 58:

279.

The Judgment and reasoning of the SCA were very different from the Court *a quo*. Indeed, Zuma may well not have appealed such Order if given at first instance and did not seek leave to appeal to the CC. With respect, the SCA Judgment was very different because the Court *a quo* had held that Zuma must prove that his Representations were confidential and which of these were so confidential. That was not even the DA's case as we understood it. The SCA Judgment restores the *per se* confidentiality of the Representations as per the 2012 Order.

AD PARA 60:

280.

The DA is well aware that the Record is a redacted one. Mpshe's decision does not rest solely on the redacted Record.

AD PARA 61:

281.

This state of confusion is exactly because the DA sought more than the Record which served before Mpshe. Nor did the Record ever exist as a volume of documents placed before Mpshe. He was not dealing with the issue as if he was a Court of Record.

AD PARA 62:

282.

I do not agree that the redaction by Judge Hurt eliminated all that ought to have been eliminated but everyone had agreed that the surviving Record was the part of the Record to be provided. It is somewhat of a cheap shot to suggest that a total 17 page redaction detracts from the view of any party.

AD PARA 65:

283.

This affidavit must be read in its context. Its immediate context is the remainder of the papers. I have set out some relevant contextual extracts at certain appropriate places herein. Mpshe would have been aware of these aspects – his 2007 decision was being targeted in the application on the basis of S179(5) and he was the NDPP (Acting).

284.

Du Plooy gives a very one sided and incomplete version of the events – it was not and is not accepted. The S179(5) litigation in question was not completed; it had become academic.

285.

The DA wishes to suggest that the Third Respondent's attack on the warrants were complete failures. That is not so. A number of very experienced and Senior Judges decided in favour of Zuma; albeit at SCA and CC level in the minority. Moreover, the State conceded the over breadth and unlawfulness of their search warrants in respect of the attorney's offices of Ms Mohammed, Zuma's attorney in the civil matter. The CC also set aside a part of the warrant relating to my offices.

286.

Du Plooy is a member of the DSO. His version must be read in the context of a challenge based on the NPA failure to comply with S179(5) of the Constitution in the making of the Pikoli and Mpshe decisions. The NPA's case was that S179(5) did not find application. The SCA agreed with the NPA. The Third Respondent was directed by the CC to argue the leave to appeal based on the interpretation of S179(5). At issue was not the correctness of the allegations of political conspiracy.

AD PARA 66:

287.

I deny that technical defences were raised. There has never been a need to anticipate the merits as far as substantive guilt was concerned. This did unfortunately not prevent the NPA from introducing the merits of the charges which were indeed without fail, irrelevant to the issues in the litigation.

288.

It is indeed so that the Shaik Judgment implicated Zuma. That could hardly have come as a surprise to the NPA: that is exactly what they alleged in the charges. This simply fuels the abuse of powers by Ngcuka and McCarthy in their decision to charge Shaik only but maintain the slur against Zuma.

AD PARA 67.6:

289.

Zuma was granted his day in Court after the Shaik Trial. That was not what he sought in 2003.

AD PARA 67.7:

290.

The reference is to the Msimang proceedings. Those papers should be put before the Court if the DA seeks to rely on that. The one point which has to be made is that the comprehensive refutation of prosecutorial impropriety makes absolutely no mention of the illegal Browse Mole operation which must have been very fresh in McCarthy's mind. I take issue with the suggestion that the factual allegations were refuted – No Court has ever found that and we now know that the refutations were misleading.

AD PARA 67.10:

291.

In respect of par 67.10, I point out that the State despite its inability to proceed with the matter, did not withdraw it. It deliberately created an impasse when its obvious response should have been a withdrawal. The Judge then struck the matter from the roll.

292.

It is thus as stated elsewhere, only natural that the team would retain the same obdurate stance in respect of the Representations. It has recognised that a permanent stay application would in part be premised on their **“taking their chances in Court”** as described in Judge Msimang’s Judgment.

AD PAR 67.12:

293.

I point out that the issue in respect of the Mauritius documents was not that the Prosecution did not have authenticated copies thereof. They had had these for years (the documents Downer brought from Mauritius). The entire exercise by the DSO was to ensure one thing – to keep Downer out of the witness box. The defence obviously wanted him on the stand to explore the prosecutorial abuses Zuma complained of.

294.

The CC held that the issues of unlawfulness were for the Trial Court.

AD PAR 67.13:

295.

The summary conveniently omits the blatant interference by President Mbeki in the prosecution of Selebe. Pikoli testified that the only reason he was

suspended, was because he would not heed calls not to prosecute Selebi. The DA deliberately avoid this issue for it impacts adversely on its current case.

AD PAR 67.14:

296.

The letter from Hulley and the NPA response have been annexed (marked **MH9** and **MH10**).

AD PAR 67.15:

297.

These were not interlocutory proceedings. Nor were all the challenges to the search warrants dismissed.

AD PARA 68:

298.

Obviously I can only comment on some of these issues as generally interactions in the NPA do not fall within my own knowledge. I find it strange that the DSO (McCarthy and the team) would consider charging Zuma again, a formality. That is not how the NPA explained the decision in 2008 in the S179(5) application nor how it was explained in its answer hereto.

299.

It was also clear that Zuma was at the very least, very interested in making Representations before such a decision (see the correspondence with Mpshe and Mpshe's laconic answer cited above).

300.

Moreover, the DSO knew that the SCA Judgments would be challenged by appeal (and at least applications for leave) in the CC. These applications were brought in November 2007. I have already referred to the Msimang Judgment and the NPA's resolve to await the appeal process.

301.

The DSO and the NPA must also by now have been apprised of the Browse Mole JSCI Final Report (27 November 2007). Perhaps it was to prevent this Report being studied in the NPA, that on 27 December it was decided to prosecute and on 28 December it was announced and on 29 December 2007, summons was served on Zuma. The December 2007 actions were those of the DSO (McCarthy).

302.

These dates are sufficiently inappropriate to raise eyebrows. Zuma was clearly not going anywhere where service could not be effected.

AD PARA 72:

303.

The reason for this was that Downer considered that charges served would harm Zuma's ANC leadership prospects at Polokwane. McCarthy's camp, however, decided not to risk a backlash, hence his crucial stance to hold off the charges.

AD PARA 73:

304.

It is very odd that a DSO (which decided not to procure a fresh decision to prosecute until the appeal process was finalised) would now be so concerned about delay that the appeals to the CC could not be awaited. It conflicts both with common sense and its earlier resolve to await the outcome of the challenges on appeal. It is clear that the B-Team wanted Zuma to go to Polokwane as an Accused.

AD PARA 74:

305.

The sentiment expressed by Downer is wholly at odds with Du Plooy's affidavit in the S179(5) proceedings. It seems to effectively urge Mpshe not to take fresh decisions but to confirm the stale decision (of Pikoli?). The point is made that the Du Plooy affidavit cannot be read in isolation nor is his version

acceptable. It must be read in conjunction with the other papers.

AD PARA 82:

306.

This simply illustrates that Mpshe was guided by the DSO and how important McCarthy's role was.

AD PARA 86:

307.

It is quite clear that no final decision had been made to prosecute Zuma. Again the earlier request to make Representations was simply ignored.

AD PARA 90:

308.

Paragraphs [6] and [7] of the Downer Memo clearly suggest that both Ngcuka and Pikoli dabbled in politics in dealing with Zuma. That comes as no surprise and again exposes the hollow denials of Zuma's allegations of political conspiracy. The Defence stand taken in the Mauritius LOR, is well vindicated by this.

309.

In paragraph [8] it indicates that the harmful fact of prosecution must be conveyed to those at Polokwane. Polokwane must unfold with the news of Zuma being charged. This is disturbing. It is even more disturbing that the facts to be made known do not include the Browse Mole operation and all who were involved in that.

AD PARA 95:

310.

This again demonstrates that McCarthy controlled the Zuma process certainly vis-à-vis the team. Many of the ensuing paragraphs do likewise.

AD PARA 100:

311.

This statement of Du Plooy has been cited above. It is not clear why the DA cannot see the very different version by Du Plooy – the decision was made on 27 December, not 6 December 2007. Nor did Du Plooy portray the McCarthy / Mpshe decision in these terms.

AD PARA 101.3:

312.

This statement is untrue in respect of the Third Respondent. The reason why

the trial could not proceed was that with the same arrogance with which Downer and Steynburg arranged overseas trips in the period of the trial before Msimang J, they did not properly set down the trial matter, with the result that it was never enrolled. Mpshe knew this, unless it was deliberately kept from him. It was not the Accused, but the Judge President, who called the DSO to order on the non-enrolment issue.

313.

The quotations invoked by the DA reinforce the position of a fresh decision by Mpshe. From Downer's notes, the Mpshe decision was a rubberstamp. The Courts were then misled by the DSO in the S179(5) application. So too Zuma, for the Pikoli decision would have been targeted in particular and not regarded as overtaken by a "**formality**".

AD PARA 101.4:

314.

Du Plooy's overreaction must be seen in the light of the Browse Mole revelations. It does, however, confirm what was stated earlier: no Court has pronounced on the political conspiracy / abusive prosecution and rejected the allegations to that effect. Mpshe had no reason to approach these on the basis that they have been rejected. If McCarthy or the Prosecution team so advised him, he came to the right conclusion despite that.

AD PARA 101.10:

315.

The statement is false. I refer to what I have said above. It is correct that the oral submissions also dealt with issues not contained in the Written submissions. I refer also to the NPA affidavits.

AD PARA 108:

316.

Any Memorandum from the team had to be viewed with circumspection. Everyone involved in the Zuma matter knew that there would be a permanent stay application. Delay infringing Zuma's right to a speedy trial would feature strongly. The DSO and Ngcuka would have to explain away their deliberate failure to charge Zuma. The DSO including the team, would have to persuade the Court to regard the Msimang Judgment and the failure to enrol the trial in 2008 as just small inconveniences for the Accused and to be overlooked. Delay would obviously be an important element of any permanent stay application.

317.

How fanciful this notion is, is demonstrated by McCarthy etc. being part of the Prosecution team.

318.

This Memorandum simply illustrates that the DSO (including the team) regarded the Representation process simply as an opportunity to get the supplicant to incriminate himself, place his version on oath in the details they want and address the issues they want him to address. It was an entrapment device without any intention of seriously considering any part thereof save to use it against the Accused.

319.

During the entire period of the Msimang proceedings, the NPA did not breathe a word that it had conducted (and continued with) an illegal investigation including accessing Zuma's bank accounts. The Prosecution is bound to provide the Accused with documentation which may reasonably assist the Accused in defending the charge. In those proceedings, the Prosecution taunted the Defence for its lack of evidence and the role model manner of their conduct of the investigation into Zuma. The Prosecution also adopted this approach in the warrant and LOR litigation.

AD PARA 109&110:

320.

I deal with the true facts regarding the making of the Representations.

321.

The Written Representations were not made on oath. They were drawn by Counsel for the Third Respondent on instructions and with reference to the litigation papers and the proceedings. These were filed on 10 February 2009. I signed the Representations.

322.

The oral Representations, *inter alia*, which briefly expanded on these were made on 20 February 2009 in a meeting with the NPA's top management. The members of the Prosecution team such as Downer and Steynburg were not present. That had nothing to do with the Third Respondent. Presumably the NPA had wished to avoid their presence on an occasion where these individuals may have been implicated. The oral Representations were made by Counsel on instructions – indeed Counsel had, when the Written Representations were made, not been aware of matters such as the Tape Recordings or their contents and had neither seen or listened to these prior to the Written or oral Representations made. Counsel were instructed shortly before the oral Representations about the existence of such evidence which the NPA was in a better position to verify and which it was invited to do.

323.

The DA have not only gotten the basic facts wrong as to the process of

Representations but the slurs and innuendos as to the conduct of the Third Respondent's legal representatives are regrettable and indeed untrue. It would have been highly irresponsible and remiss of the Third Respondent's representatives not to raise the issues they did raise from the perspective of the Third Respondent. It would have been equally irresponsible and remiss of the NPA not to consider the Representations seriously especially in view of the NPA's repeated assertions on oath of a model prosecution in which political manipulation and motives were anathema. It was the NPA's prerogative to weigh and consider the Representations including the fall out of any Permanent Stay application in an honest and *bona fide* manner. The suggestion that this was not done is simply unfounded and scurrilous. That many persons including the DA may have disagreed with the outcome and even more may have agreed or not, is with respect neither here nor there.

324.

It follows that a number of the factual averments made in support of the DA's challenge of the Discontinuation Decision are simply incorrect and / or false.

325.

The DA makes much use of the views of members of the Prosecution team as to what the outcome of the Representations should have been and indeed almost demands that the team's views were to be decisive. That is obviously not so.

326.

I do not detail these inexactitudes or falsities hereafter. A comparison between what I say above and the DA's contentions amply demonstrate the differences.

327.

The factual averments made in this paragraph are simply incorrect. It is not a question of debate or perception. The DA simply has not the slightest inclination to present the correct facts before this Court. It is obsessed with its rhetoric. I have set out in my affidavit in this matter that Written Representations were made and then followed by oral Representations.

328.

Despite this, the deponent repeatedly states that **“the oral representations were made and then later the Written representations.”** No heed is taken of evidence on oath which is not disputed (and there is no reason to doubt that evidence). It is, *inter alia*, such heedless and careless statements which premise the inference that the DA has no real interest other than for this application to serve as political propaganda.

AD PARA 111:

329.

I refer to what I have stated above. The allegations are simply wrong. I cannot

recall serious wrongdoing being attributed to, for example, Hofmeyer or Downer.

AD PARA 112:

330.

The point made was that the NPA should concern itself with the truth or not of the allegations. It was best placed to do so. Zuma would put the information up as part of the permanent stay application. If the NPA sees fit to ignore the truth but to rely on the lawfulness of the access to the information, that would be their choice. The matter would inevitably then have to go to oral evidence.

331.

The Notes do not give a complete picture of what was said. It is correct that Counsel for Zuma was asked whether the information had been lawfully obtained. He said that he cannot say one way or the other to the meeting. That was perfectly correct. The oral Representations were attended by myself and two Senior Counsel (Kemp and Gabriel). They had been instructed the day (or 2 days) before as the evidence was contained in various recordings as well as other evidence. Counsel was not instructed then or thereafter (even up to now) to listen to or see the “**Spy Tapes**”. Counsel saw a NPA transcript of some of the Recordings years after 2009.

332.

Counsel were instructed to draft the Written Representations. The instructions did not relate to the factual aspects covered by the oral Representations. Counsel also presented the oral Representations on 20 February 2009. Counsel were not, subsequent to that, involved in any interaction with the NPA. Meetings to produce material post 20 February 2009, were between NPA officials and myself with or without other members of my staff. These were not what I would term “**Representations**”

AD PARA 113:

333.

It is not clear why the B-Team wanted an embargo as to interaction between the NPA and, for example, myself. I was not aware of this but in any event this was hardly an appropriate course of conduct. The apparent purposes seem to be for the B-Team to filter what was to be placed before Mpshe.

AD PARA 114:

334.

I note the silence on the Browse Mole aspects. It is interesting to see that the Browse Mole operation suggested an enquiry into income tax offences (July 2006). In December 2007 Zuma was charged with tax offences.

AD PARA 115:

335.

The Representations were Representations – they were not presented as if evidence in High Court litigation. Many of the issues they touched upon related to issues within the knowledge of the NPA or which the NPA was better placed to investigate and consider.

336.

I note the Prosecution team's stance that the NPA should not check on the veracity of some of the matters raised in the Representations. This is and was rather an odd and disconcerting attitude to serve as the NPA's touchstone. A powerful State organ could hardly shut its eyes to conduct within its ranks which was quite offensive to its Code, Policy and constitutional mandate. That would just have been irresponsible.

337.

This attitude was rightly not shared by the top management of the NPA.

AD PARA 116:

338.

Representations would on this approach, never be considered or permitted.

They are in essence a waste of time. Apart perhaps from pleas and extenuation, which indeed can be dealt with in mitigation of sentence, Representations are to be abolished. That is not the current position.

339.

Downer's views are coloured by the 'prosecution at all costs approach' evident also herein. He is entitled to his views and he gave the above input.

AD PARA 117:

340.

The submission is incorrect. Prosecutions should not be instituted or continued where there are sound reasons e.g. a potentially successful plea or remedy, not to do so.

AD PARA 119.1 - 2:

341.

This issue was not addressed by Counsel during the formal Representations. I do not know who the legal representatives^{es} referred to are. As stated, Counsel had no involvement after 20 February 2009. These submissions demonstrate just how important confidentiality is. One may well in a discussion refer to some incident as an example, etc. There is no reason to drag names through the mud. If the DA wants to do that they must be consistent.

AD PARA 122:

342.

The imputation herein is offensive. When Counsel were asked during the oral presentation whether the Prosecutors (Downer, Steynburg, Baloyi) themselves were implicated (in McCarthy's manipulations), the answer was that the Defence had not come across any evidence of that. That was, with respect, a fair answer and that is the answer I give. The legal representatives did not **"take any opportunity to implicate"** the team or Mpshe. I also point out the inconsistency with paragraph 111. I have elsewhere also addressed this issue and the Press leaks.

AD PARAS 123 - 126:

343.

I cannot comment on these averments. I have not seen the S38 appointment of the Counsel involved.

AD PARAS 127 - 128:

344.

We record respectful disagreement with the opinion as reflected by the DA. It is simply not so that the question is simply whether the decision to prosecute is tainted. My understanding is that a permanent stay as a remedy is premised on either it being unfair to continue the prosecution or that the Accused cannot

receive a fair trial. It is not, in my understanding, that so long as the decision to prosecute is untainted, there can be no stay. Delay in the prosecution proceedings is a trite ground for a stay irrespective how sound the initial decision to prosecute was. The NPA knew and had always recognized that a stay would be sought also on delay even in respect of Mpshe's 2007 decision. It also did not seem that Mpshe ignored the advice which was based on what was conveyed to Counsel. Moreover, not everyone shares the opinion; certainly not in the terms expressed by the DA.

AD PARA 129:

345.

The obvious implication of this contention is that the NPA had impermissibly delayed prosecution from 2003 to the end of 2007 – that is about 4½ years.

AD PARA 133:

346.

The 2007 decision to prosecute was clearly premised on the DSO advice and Pressure to do so. McCarthy played at least a leading role in that decision as he did in Ngcuka's decision and Pikoli's. The Defence has never accepted that these decisions were sound. Indeed, Zuma had obtained a direction from the CC, despite the best efforts of the DSO, to challenge the validity of Mpshe's 2007 decision. As a result of Mpshe's decision in 2009, that application had become academic and lapsed. The Third Respondent had clearly reasonable

prospects of success in its challenge to Mpshe's 2007 decision.

347.

It may be anathema to the Prosecution team but the Prosecutor is duty bound to disclose to the Defence, information which may enable the Defence to resist the charges. McCarthy, the Head of the Complainant, had every opportunity to disclose the Browse Mole illegal investigation of Zuma and to explain it away in August 2006 before Msimang J. Zuma's complaint there was that he was unfairly investigated and prosecuted. I take issue with the contention that the NPA should not have established the veracity of allegations regarding McCarthy's manipulations.

348.

The NPA would thereby assist in establishing the true facts as to the manipulation of the Zuma prosecution. It seems that the only reason why the NPA would not consider the authenticity of the allegations made, would be because the truth would be detrimental to the continued prosecution of Zuma. It is submitted that where the NPA is well situated to establish what may be a legitimate complaint by an Accused, it is indeed duty bound to do so.

349.

The suggestion that the Representations were designed to so shock the NPA

that it would not consider the relevance thereof, is risible. The NPA took between 6 weeks and 2 months approximately to consider the two sets of Representations. No one prescribed to the NPA as to when they should make their decision known.

AD PARA 134:

350.

The Browse Mole operation showed how dangerous it is to make a single entity Complainant, investigator and Prosecutor, shrouded in secrecy.

351.

I have seen no explanation at all about McCarthy's manipulations and investigations. The interaction with McCarthy and the NPA is not an issue about which I have personal knowledge. The Record contains no explanation of the illegal Browse Mole operation. I also point out that the versions of Pikoli and McCarthy on that differ. The JSCI found that McCarthy had not shelved the Browse Mole operation. The DSO utilised it in its prosecution and persecution of Zuma. They continued this operation despite being advised not to do so – indeed, that it was illegal to do so.

352.

Input from those in the know regarding the prosecution of Zuma, would

obviously have been very sensible from the DSO perspective.

AD PARA 138:

353.

If Mpshe had changed his mind, that was firstly an indication that he was open to persuasion and secondly, that he understands the duty resting on the NPA to also investigate the truth of averments which detract from its case.

AD PARAS 140 - 148:

354.

I am not surprised that Mpshe got angry, if he did. He clearly, in his 2007 decision, trusted and relied on McCarthy's input and the DSO protestations of a role model prosecution. Indeed, he did so to the extent that McCarthy made that decision.

355.

That is hardly a reason for setting aside his decision not to continue the prosecution. Nor is this a reason to support McCarthy's manipulations and reluctance to share innocent explanations of his conduct.

AD PARAS 149 - 151:

356.

The view taken in this passage of McCarthy's conduct i.e. that it brought forward the announcement and service by a week is self-serving and far too narrow, a view. The significance of the Tapes is in the very first place that the Defence's "**scurrilous speculation and false imputations of a political conspiracy**" are not unfounded. In this instance, it had and has a credible basis. Moreover, the Defence demonstrated that the DSO were less than open and frank in asserting to the Courts the lack of any political manipulation and the role model quality of the Zuma prosecution. The Court and the Defence were misled in 2006 – and with respect, deliberately so.

AD PARAS 153 - 154:

357.

The DA clings to the opinion that only if the Accused cannot have a fair trial, would a permanent stay be granted. This is a notion we are in respectful disagreement with.

358.

There is no limitation in the Prosecutorial Code as to the factors which may induce the discontinuation or launching a prosecution.

359.

Downer was well aware of the essential contents of the Representations, oral and Written, shortly after these were made. This emerges, *inter alia*, from his reference to Excursus B which dealt in more detail with an aspect of prosecutorial abuse, strangely enough.

360.

The DA's answer that Mpshe, not McCarthy, made the 2007 decision to prosecute Zuma is a facile one. It ignores the realities of such decision. The NPA has explained what really happened.

361.

The DA participated in the Representation process. It made Representations that the prosecution against Zuma should continue. Obviously it suited them at the time to have the leading candidate for the Presidency and the leader of the ruling ANC party charged with criminal offences.

362.

There were always a number of Prosecutors within the NPA who found the person of Zuma and / or the politics of the ANC as a political party very offensive. These individuals would go to extremes to ensure and promote the downfall of Zuma. Some of these saw him as an undesirable likeness of

President Mugabe of Zimbabwe, others saw him as an adversary of President Mbeki. Irrespective the reason for their disfavour, these individuals were determined to find a basis and vehicles for discrediting Zuma.

363.

The NDPP would also have been very aware of the rape case the NPA brought against Zuma. This prosecution had all the hallmarks of a contrived case which was relentlessly driven by the NPA.

364.

It is no secret that the Representations contained serious allegations of prosecutorial misconduct and political meddling in the prosecution of Zuma. Mpshe stated this very clearly in his Decision Statement. It indeed speaks for itself: obviously the Representations would contain details of these allegations and certain individuals would be implicated.

365.

It was also clear from the Representations that the allegations made had substance. While the NPA could in certain respects verify the factual foundations of the Representations, there were Representations which the NPA could only consider at the level of a value judgment.

366.

The decision which the NDPP faced was not unlike that which confronts any litigant who considers a settlement. Parties to a compromise invariably have tough choices to make as to the risk they run in litigation. A misconception or misevaluation of the risk does not permit a withdrawal from the settlement.

367.

The Prosecution like any other litigant also chances its arm in many instances. It did do so in the postponement application before Msimang J. That failed.

368.

The Representations clearly posed the same dilemma for the NPA. Any permanent stay application would proceed to oral evidence. It would be too late then to retract the prosecution and avoid the fall-out for the NPA. That is the simply reality of litigation.

369.

What the NPA did know was that certain of the allegations were indeed true and verifiable. It was on that basis that the Tapes were relied upon by the NPA.

370.

This left the NPA with the other serious allegations – could it simply dismiss these given that in respect of the Tapes, the Representations were indeed accurate? The answer is obvious. The Browse Mole operation does not relate to the Tapes as such – it was the reason for the Tapes.

371.

The Mpshe Decision must be seen and considered in the context in which it was made. The context is largely provided by the Investigation and Prosecution of Zuma, a process which first started in approximately 2001 at least (there was some dispute as to whether the date should be 2000, but that is not important for now).

372.

That investigation and prosecution was initiated and continued as a DSO case. That did not mean that it was not a NPA and NDPP matter and subject to the ultimate control and oversight of the NDPP. It did, however, mean that immediate and direct control lay with the Head of the DSO. At all material times until he left the NPA in 2008 that Head was McCarthy.

373.

The investigation and prosecution of Zuma by primarily the DSO, were

punctuated by litigation between Zuma and the NDPP on a number of issues (the “**litigation**”). There was also a related commission of enquiry (the Hefer enquiry) into related issues and a Public Protector’s investigation and Report on the Zuma investigation and prosecution. These proceedings serve to contextualise the issues and form the backdrop to the Mpshe Decision. Likewise, the Ginwala enquiry considered the Browse Mole operation.

AD PARA 155:

374.

I have elsewhere set out what the complaint about the timing amounts to if read in context. That is what one versed in the context of the Tapes would consider their meaning and effect to be. The paragraphs that follow are the DA’s interpretation and conclusions based on the Tapes. That is a matter of debate in Court. The DA’s analysis is wholly flawed in the absence of the proper context: McCarthy’s conduct is analysed as if his role and all his conduct existed of a few telephone calls, sharing delusions of grandeur with other parties. This is the incorrect approach. If the DA elects to provide an incomplete context, that is the choice they must litigate by.

375.

I thus deal with only a few of the individual paragraphs under this rubric.

AD PARA 170:

376.

I am not sure why the deponent considers the warrant application to have been an interlocutory one. I am in respectful disagreement with that view.

377.

Clearly, McCarthy was dedicated to using the media in the campaign against Zuma. Moreover, the papers the NPA drafted, deliberately included assertions of Zuma's guilt and a summary of the KPMG Report. Like in this case, those issues were not relevant to the issues raised. The remaining issue was what S179(5) meant (the other issue had been whether there was a common law obligation to hear Zuma prior to the 2007 decision).

378.

The portrayal of McCarthy as some Walter Mitty figure who really had no power is simply wrong. The DSO was an entity which wielded immense powers and without significant checks and balances. McCarthy's notion to arrest Zuma at Polokwane was not risible. Ngcuka did not at the time consider it as anything but a seriously considered step. Ngcuka's annexed statement tries to make McCarthy into a prankster. That is, with respect, to be dismissed with contempt. There is nothing to suggest that McCarthy was not deadly serious and that he could and would do so if Ngcuka agreed. What is disconcerting is that the DA

would find solace in the Head of the DSO being delusional (as they say) about the extent of his powers.

379.

Mpshe drew the correct inferences about the role of McCarthy and the conspiracy between him and Ngcuka. Even if he was wrong in some respects, that does not render his discontinuation decision invalid or susceptible to be set aside.

AD PARA 185:

380.

It is noteworthy that Haffejee expressed the explicit view that McCarthy was a less than honest person. McCarthy with very clear anti-Zuma feelings and who was amenable to conducting the prosecution so as to benefit his political camp, was the most influential person in the NPA in respect of all Zuma decisions.

AD PARA 190:

381.

The DA simply buries its head in the sand. This is illegal conduct designed to provide information from the DSO to Ngcuka for leaking to the Press. The DA makes no attempt to explain why McCarthy shares these issues and the consideration of charges with Ngcuka (who resigned as NDPP and from the

NPA years ago). It is to be contrasted with the failure to even advise Zuma that it is now the time to make Representations. The conduct of McCarthy is a clear breach of S41(6) of the NPAA. No Written authority to make such statement has been proffered, obviously because none existed. It once again demonstrates that the prosecution of Zuma was given impetus and he was publicly denigrated so as to create a wave of public disapproval, by these leakages. This was illegal, unlawful and unfair. This has been a consistent feature of the prosecution of Zuma and not even the B-Team could resist participation. Ngcuka's objective of trying Zuma through the Press has been consistently adhered to by McCarthy, the Press and the B-Team.

AD PARA 197:

382.

It is somewhat naïve or tricky to suggest that the “**new strategy**” re Zuma would not have come up at the time. It is also unclear why McCarthy had to have the sanction of Mbeki to resign. The DA's inference is rather wishful thinking.

AD PARA 202:

383.

If McCarthy stayed on, he would sooner or later have had to explain his evidence of a pure investigation and prosecution of Zuma, with reference to the top secret Browse Mole operation. That JSCI final report saw the light on 27

November 2007. It demonstrates that McCarthy lied to the Msimang Court. Not only had he engaged in the illegal exercise of his powers, he positively lied to proclaim that the very opposite was the case. Yet he is a DSO head in control of the decision making.

AD PARA 215:

384.

I do not accept that McCarthy saw Mbeki on 21 December to simply speak of going to the World Bank. In the same letter the DA refers to, he refers to **“We’re planning a comeback strategy”** – which never was raised in the discussion with Mbeki? McCarthy instructed the prosecution of Zuma to be implemented on the same day he saw Mbeki and a **“new strategy”** was resolved.

AD PARA 217:

385.

Ngcuka’s evidence is not only hearsay but highly suspect – why would McCarthy not have given the explanation Ngcuka gave, if true? The DA’s interpretations and analysis are speculative and dominated by self-interest. These issues are better addressed in argument.

AD PARA 222:

386.

It is not correct that the Mbeki / McCarthy conversation was clearly only about the release of McCarthy. That is both improbable and not supported by primary evidence.

AD PARA 226:

387.

The Third Respondent takes issue with the inferences and conclusions drawn by the DA; these are incorrect. The DA simply ignores relevant context. This will be addressed in argument but the events and discussion show clearly that McCarthy used his position and power as DSO, to have Zuma prosecuted, to poison public perceptions against Zuma and to maximise through investigation and prosecution, the harm to Zuma's political role.

AD PARAS 227 – 229:

388.

Mpshe's decision is not irrational. It was objective and not persecution driven in the zeal to defend the DSO (McCarthy, the team, the investigators and others).

389.

The Third Respondent's impressions (and indeed his conviction) that the prosecution was politically driven and timed, are shared by many persons. We have seen nothing to explain what happened otherwise. We have explained our understanding elsewhere more fully. The DA's contention that the Third Respondent's adverse impressions could have been easily answered is incorrect. The only time these were considered in a Court (the Nicholson Judgment) these concerns were considered well-founded albeit that that was not the pertinent issue.

390.

The DSO has never answered the issue of the leaks to the Press, the timing of the charges, the concealment of the Browse Mole operation, the sudden wish to prosecute for tax offences.

391.

In response to the scurrilous remarks about the Zuma camp, I state as follows:

391.1 The Browse Mole illegal investigation was not a fabrication. Its existence was deliberately concealed from the Third Respondent and the Court in 2006 when it would have been very relevant and indeed even decisive in a permanent stay context. The glowing

rectitude of the Zuma investigation as painted by the DSO and as positively on oath held out to the Court (in 2006 and thereafter) was false and the NPA knew that;

391.2 It is not the Zuma camp who owned up to taking of chances in Court (Msimang Judgment), it was the Prosecution;

391.3 It is highly cynical when the NPA is then given hard evidence of political manipulation, to say that the NPA must not investigate the veracity thereof;

391.4 It is astonishingly naïve to adopt this approach when Pikoli had just taken a stand that he was suspended and later dismissed, because he did not heed the Ministerial and Presidential demand not to prosecute Selebi;

391.5 None of these issues are understandably addressed by the DA.

392.

I have no doubt that Mpshe was well aware of the charges Zuma faced.

AD PARAS 236 – 241:

393.

This was a draft Report. It concedes that its conclusions may well be changed in future if other sources, such as the Third Respondent, deal with it.

394.

It is not clear why the DA has sought to include the “**evidence**” in the Report herein. Not only is it not evidence and also incomplete, but the DA initially stated that the Review is not about such merits. Mpshe approached the 2009 decision on the basis that the merits in the sense of wrongdoing on Zuma’s part, stood.

395.

These allegations in [244 – 248] are scurrilous and more importantly, irrelevant. It would have been relevant if Zuma reviewed the Mpshe decision on his views on the merits.

396.

The allegations in these paragraphs must be struck out. Mpshe assumed that the charges were merited. That is the high water mark of the DA’s case. What follows in these paragraphs are attempts, in the familiar DSO style, to poison

the minds on the Bench.

397.

The B-Team also obviously targeted the ANC generally in their Memo.

AD PARA 252:

398.

The DA misinterprets the law and postulates again the proposition that if the decision to prosecute was correct, that is the end of the matter. This is simply wrong.

AD PARAS 254 – 257:

399.

The DA contends that it was entitled to the entire Record including the Representations after the fact. If it does not avail itself of its “**rights**”, it cannot complain about not seeing part of the Record.

400.

Even in litigation, it often occurs that not all relevant evidence is placed before a decision maker. The decision cannot be impugned on that basis.

401.

The Third Respondent has asked for and obtained the items under [256.9]. We have not received an authorisation for Downer to give information to the Press. These items speak for themselves. Once again, the provisions of the NPAA are breached to promote anti-Zuma sentiment. I dealt herewith elsewhere.

AD PARA 256:

402.

It is correct that Mbeki asked Zuma to resign prior to the Ngcuka Announcement in 2003. This was a request purportedly based on a huge case (volumes of data) against him (Zuma). If Zuma left quietly, he would not be prosecuted and he would be well looked after financially (a R20 million amount was mooted). He advised them (the Minister of Justice Maduna was present) that his understanding is that there was no case against him. He refused to resign.

403.

I simply point out that Mbeki again asked Zuma to resign in June 2005. He again refused and Mbeki dismissed him in Parliament stating Zuma is to still have his day in Court.

(The two meetings are thus distinct from each other).

AD PARA 257:

404.

This raises argument and will be so dealt with.

AD PARAS 258 – 261:

405.

The DA condemns oral Representations as impermissible and reprehensible. It is wrong. There is no legal requirement of Written Representations. There is no need for any Written documentation of the reasons why a Prosecutor may stop a prosecution in terms of S6 of the Criminal Procedure Act 51 of 1977. This would be most blatantly evident where the Prosecutor is the NDPP.

406.

It is ironic that the DA complains about this – it eulogised the team in its papers. The one reason why the one part of the Representations was made orally was that it was the Third Respondent's experience that almost invariably any Written communication to the NPA and particularly the DSO would, within a few days to a week, appear almost verbatim in a major newspaper. The continuous and continued leakage of information in the hands of the NPA has been dealt with elsewhere. It was also precisely why oral Representations were made in respect of certain issues. These issues would have been sensationalised. It would have been very easy to scupper the Representations by leaking those

related to prosecutorial manipulation or other abuse to the Press. The Written Representations in this case were clearly restricted as far as its distribution within the NPA is concerned. Moreover, in certain respects specific individuals were implicated. It was considered appropriate to raise these issues and allow the NDPP to make up his own mind about these.

407.

The allegation that I made the Written Representations on oath is simply false, nor was there any need to do so. Representations do not equate to an Accused testifying before the NPA to an exculpatory version.

408.

The allegation that the oral Representations were blackmail is equally false. It is clear that the B-Team (the product of DSO appointments) wanted to investigate DSO irregularities. Obviously that was not done. The Press would have had a field day.

THE NPA'S CONSIDERATION OF REPRESENTATIONS:

409.

It is accepted that the weight Representations carry, may, depending on their subject matter, be affected by whether they are made on oath or not. There is, with respect, no general rule or practice that a statement on oath by an Accused

is a jurisdictional requirement for a consideration of Representations from such Accused. In many cases the Accused would have little or no personal knowledge of abuses of prosecutorial power (especially when the DSO cloaks such abuse under the mantle of “**Top Secret**”).

410.

In this case the team’s internal demand that the Third Respondent be put on terms to make Representations on oath, record and virtually diarise his movements in the past in relation to certain events and that he consents to the Representations being used against him, seems quite tricky.

411.

The Prosecution team demands herein leave to investigate the NPA for abuses they were involved in, delay, Press leaks, etc., the manipulations of their own DSO and its Head and the illegal investigations by the DSO. They had already tried to change the right to make Representations into a trap for the Accused.

412.

This is also why McCarthy refused to disclose the three top DSO officials who ran the illegal Browse Mole operation with him. No more needs to be said. Now the team wants access to the defence witnesses and materials in this regard.

AD PARAS 266 – 272:

413.

McCarthy had every opportunity to provide input; his failure is deliberate rather than anything else. He cooperated but reluctantly with the JSCI and did not disclose the identity of the three senior DSO officials who participated in the top secret Browse Mole operation and implemented it, targeting Zuma. He was untruthful about major aspects when he accounted for his conduct. The operation follows after the 2005 Pikoli prosecution (despite large parts of the investigation, about 5 years after it started, still to be done). The Defence still does not know who these three senior officials were (as per the JSCI – its findings were never disputed by the DSO and / or McCarthy – they had every reason and opportunity to do so, if the JSCI erred in law or fact. The full extent of the perfidy of the Browse Mole, the illegal invasion of privacy and the extraction of private information and the identity of the DSO participants are all **“shrouded in secrecy”**The NPA’s answer speaks to this.

AD PARAS 273 – 277:

414.

The DA’s contention equates the making of Representations to an adversarial mini trial between the **“Accused”** and whoever else wished to be involved in the process. That is simply unsound at the level of legal principle and practice. It also makes a mockery of any confidentiality remaining for Representations. This will be addressed in argument.

415.

The DA was entitled to access all the litigation papers in the Zuma prosecution (which it chose not to do). Even now it has a misconception about what the criminal case is about. It has not even read the Answering Affidavits previously filed herein. It has made distorted factual statements.

416.

It chose not to seek an Order for the DA to be given the Representations. It recognises the confidentiality of the Representations (especially at the outset). The contentions in this paragraph are wholly inconsistent with that.

417.

The argument herein has no merit at all.

AD PARA 278 – 281:

418.

From the papers, it is clear that the B-Team was provided with the Representations and had ample opportunity for their input. Surely unless the process was just a charade, as seemingly intended by the team's preconditions, they were aware that Mpshe could decide not to prosecute? What is seemingly required is that each time Mpshe changes his mind or inclination he must seek informed consent from the team. This is, with respect, nonsensical.

419.

The Prosecution team had full insight into the Representations and full opportunity to vent their irresponsible, truth-defying jaundiced stand. There was no reason why they should have had a greater role. What they wanted was for them to make the decision about the Prosecution. That would in itself have been offensive. They were involved in the illegal leakages to the Press and responsible for major delay and oddities in the timing of the charges. Apart from it being his decision and having learnt a lesson re DSO input, Mpshe could not make the goat the gardener.

420.

The SARS' charges are indicative of the 'prosecute at all costs for any possible crime Zuma may have committed'. The point made and which the DSO has never answered, save to say it can prosecute for any offence, is as follows:

420.1 SARS would be the natural complainant in respect of tax offences. A person's income tax return is a matter between him and SARS. Unless SARS decides otherwise, the relationship and information are secret between them. Thus in the Shaik prosecution SARS refused to provide the taxpayers returns and the Court upheld that refusal;

420.2 In Zuma's case the B-Team took it upon themselves to seize his returns in the raids on him and his family's homes and decided that he should have disclosed as income certain payments without provisions of the actual returns from SARS or the assessments of SARS. SARS and Zuma had thereafter settled his tax affairs.

421.

There was no reason why the 2 April Memorandum if sufficiently realistic and persuasive, could not persuade Mpshe. He was not *functus officio* then. Nor was Mpshe ever regarded as pro-Zuma (on the contrary).

AD PARAS 282 - 288:

422.

This will be addressed in argument. It is not clear on what factual basis the contention is premised. The NPA has explained how the decision was made.

423.

I simply point out that if this contention of the DA is sound, both the Pikoli and Mpshe / McCarthy decisions to prosecute were nullities.

424.

The contention made herein is not in line with the jurisprudence. The DSO was the prosecuting director, if any.

425.

The NDPP is the apex official in control of the NPA. It is fairly trite that he who appoints, can dismiss, in the absence of express terms to the contrary. If the DA by its contentions suggests that Mpshe's 2007 decision was flawed and he could not take it, it endorses the Zuma appeal to the CC albeit on different grounds. Ms Batohi has never had anything to do in the matter – it was a DSO investigation and prosecution (with parts still shrouded in secrecy).

426.

The threats are no more and no less than what litigants and legal representatives put up and deal with in everyday litigation. The NPA is a huge organisation with vast resources to deal with Zuma. Bluntly speaking, a threat to go to Court and lead damning evidence on relevant issues is hardly a threat to cry about in litigation between adversaries.

AD PARA 289:

427.

It has always been common cause that that application became academic when

the charges were struck from the roll in the Msimang Judgment.

428.

I dispute that the setting aside of the Mpshe 2009 decision can be premised on an error of law. That would equate, by parity of reasoning, to an Accused setting aside a decision to prosecute on such basis. It is untenable further to distinguish between Accused persons who must demonstrate innocence and never get to the error of law initial decision, and those who, like the DA, can attack it first up. Prosecutions impact severely on persons other than the Accused who would be remediless on the DA's approach.

429.

The 2009 Mpshe decision was made *bona fide*, honestly and within the legal parameters of his statutory powers. The argument that the Court's time must be wasted and a charade of a trial be carried on with and the people's choice for President, be kept in Court for months, is simply the stuff of modern day bread and circus, not true jurisprudence.

AD PARA 290:

I have dealt with the legal argument herein. In short, a permanent stay application if successful destroys the case on the merits. There is no reason why the Prosecution has to endure such Court proceedings or why the Court's time should be wasted.

AD PARA 293:

430.

I simply state with respect to [293] that this view conflates a wrongful prosecution with the discretion not to prosecute and that Harms DP did not have the latter in mind.

AD PARA 294:

431.

The decision to prosecute Shaik and not Zuma then, started the rot.

AD PARA 295:

432.

This is obviously disputed.

AD PARA 296:

433.

The Third Respondent denies that a proper case was made out and the DA is not entitled to any costs.

AD HOFMEYER'S AFFIDAVIT:

AD PARA 40:

434.

The Pikoli papers and the Ginwala Report can be made available. The pressure on Pikoli was designed to get him to deal in a different manner with the Selebi prosecution.

AD PARAS 68 - 70:

435.

It is obvious that McCarthy gave instructions to place a certain NPA version before the Court hearing the S179(5) application. That version was not an accurate version and was obviously detrimental to the Zuma case. It is as demonstrated, not the first time McCarthy misled the Court. A reading of the reasoning in the SCA judgment reveals how prejudicial the inaccurate version was.

AD PARA 93:

436.

Zuma acknowledges that such a deal was offered to him. He rejected it. At that meeting Maduna was also present. Reference is made to this hereinbefore.

AD PARA 116:

437.

The Prosecution, in November 2007, was insistent on charging Zuma despite the status of the seized documents not being resolved – Zuma had applied to appeal the decision to the CC.

AD PARA 131:

438.

I do not accept that this was a proper approach by the NPA nor that the merits of guilt or innocence can affect the lawfulness of a warrant one way or the other.

AD PARA 155.3:

439.

The NPA's affidavits did not all confine the hold to SCA decisions. Clearly the Prosecution Team regarded a bringing of charges as detrimental to Zuma's Polokwane prospects of success.

AD PARA 221:

440.

McCarthy's resolve to serve the indictment on 24 December simply underlines the malice in the DSO conduct.

AD PARA 245:

441.

I do not dispute this. It was in any event known that Zuma would bring such an application.

AD PARA 276:

442.

The complaint about the Browse Mole operation was directed both at the fact that the DSO made such an illegal investigation and that the NPA had misled both Zuma and the Court in the Msimang proceedings by indignantly asserting conduct which was a model of rectitude.

AD PARA 280 et seq:

443.

Zuma and Mr Kasirils (“**Kasirils**”) were not on good footing.

444.

The NPA has, in its answer referred to the interaction between Kasirils who had been a Minister in the Mbeki Cabinet and McCarthy. The Third Respondent endorses those averments and draws attention to another coincidence involving Kasirils in a Zuma Prosecution.

445.

Zuma was charged and prosecuted for the rape of the complainant, a daughter of a deceased Comrade of his. The allegation and outcome of the Prosecution are set out in the reported decision.

446.

It suffices to say that Zuma was acquitted and his version of events was accepted by the Trial Court.

447.

The Complainant was, on her version, raped literally 10 metres from an armed policeman on duty at the entrance of the Zuma residence. Zuma's daughter was in the house at the time. The Complainant spent the night in the residence, despite being raped as alleged. She had breakfast the next morning before leaving. She then stayed overnight at a lady friend of hers. The following morning she went and laid the rape charge against Zuma. The rest is history.

448.

That friend of hers was at the time the professional assistant to Kasirils. Evidence at the Trial establishes that there was frequent telephonic contact between the Complainant's mother and Kasirils from the day the rape charge was laid. This the Complainant's mother sought to explain by referring to a

friendship between Kasirils and her deceased husband, having served time together on Robben Island. There was no explanation when it was pointed out that Kasirils would not as a white prisoner have served time on Robben Island.

AD PARA 314:

449.

The JSCI report of November 2007 is annexed hereto, marked **MH7**.

AD PARA 315:

450.

The fact is that McCarthy edited the Reports and added his additions and comments and conclusions to the Report.

AD PARA 315:

451.

The point about the Browse Mole operation is that it was illegal; it accessed Zuma's bank account between August – December 2005 and worst of all, it was concealed in the proceedings before Msimang J.

AD PARA 484:

452.

I agree with the averment reading it as “It is now settled ...”.

AD PARA 500:

453.

The Third Respondent does have an issue with the *locus* of the Applicant on a conspectus of all the evidence.

AD PARA 512:

454.

There was no arrangement that the outcome of the Representations would be secret.

AD PARA 532:

455.

McCarthy’s abuse of power related also to the illegal investigation.

AD PARA 544:

456.

Zuma still disputes his guilt on the substantive merits – however, Mpshe’s

contrary position simply assists the Applicant which can hardly complain about.

457.

In summary:

457.1 The NPA has in the Zuma litigation persistently claimed and premised their cases on positive assertions of the role model rectitude and propriety of the DSO's investigation and prosecution of Zuma;

457.2 Zuma's allegations of prosecutorial abuse, political plotting and impropriety, were rubbished and special costs orders and strike outs were obtained;

457.3 The Representations revealed that Zuma's allegations were not the fabrications they were made out to be. The top secret Browse Mole operation, its illegality and its deliberate concealment to allow the model of prosecutorial rectitude to be presented and dominate the litigation, as well as the deliberate manipulation of the timing of the Zuma charges in 2007 (and these should clearly have awaited the outcome of the S179(5) challenge in the CC in any event) for no less a purpose than to dictate the identity of the President of

the RSA, destroyed the edifice;

457.4 These Representations destroyed the entire credibility of the prosecution process. Ngcuka's 2003 decision, the access to Zuma's bank accounts, the leaks to the Press all suddenly take on a very sinister overtone. So too the hasty Pikoli decision to prosecute with its inevitable collapse so that the one situation Zuma dreaded and expressly stated would be intolerable was reached: Polokwane with the unresolved criminal process hanging over his head;

457.5 The Mpshe decision rests on the reality that whilst the November / December 2007 events may have been the tip of the iceberg, the DA's contention that the iceberg consists only of the tip, is irrational.

458.

The Third Respondent thus asks the Court to dismiss the application with costs on the attorney and client scale and in any event inclusive of the costs of three Counsel.

DEPONENT

I HEREBY CERTIFY that the deponent has acknowledged that he/she knows and understands the contents of this affidavit which was signed and sworn to before me at _____ on this the _____ day of _____ 2015, the regulations pertaining to the administering of an oath having been observed.

COMMISSIONER OF OATHS