

EXCERPTS

Here are key excerpts from internal National Prosecuting Authority correspondence in response to the spy tape “oral representations” that Jacob Zuma’s lawyer, Michael Hulley, made to the authority in February 2009.

These representations followed written representations about the merits and fairness of the corruption charges against Zuma, which were roundly rejected by top NPA managers.

The excerpts have been edited to omit revealing the written representations, whose confidentiality the courts have confirmed.

Key to names

Baloyi, George – a prosecutor and member of the Bumiputera team

Breitenbach, Andrew -- external senior counsel consulted by the Bumiputera team

Bumiputera team – The team of NPA prosecutors and Scorpions investigators assigned to the Jacob Zuma matter

Downer, William (Billy) – The prosecutor in charge of the Bumiputera team

Du Plooy, Johan – a Scorpions senior special investigator (SSI) and member of the Bumiputera team

Ferreira, Gerda – original prosecutor heading arms deal investigation, resigned in 2003

Hofmeyr, Willie – a deputy national director of public prosecutions (DNDPP)

Hulley, Michael – The attorney who made the written and oral representations to the NPA in early 2009 arguing that corruption charges against his client, ANC president Jacob Zuma, should be dropped

Mbeki, Thabo (TM) – then president

McCarthy, Leonard (LM) – head of the Scorpions (Directorate of Special Operations or DSO) at the time

Mphego, Mulangi – then head of police crime intelligence

Mpshe, Mokotedi – acting national director of public prosecutions (NDPP or ANDPP) at the time

Mzinyathi, Sibongile – a deputy national director of public prosecutions (DNDPP)

Ngcuka, Bulelani (Bul) – former national director of public prosecutions

Steynberg, Anton -- a prosecutor and member of the Bumiputera team

Thint – the French arms company that would have been Zuma’s co-accused

Trengove, Wim – external senior counsel consulted by the Bumiputera team

March 9, 2009: Project Bumiputera Team to Mpshe

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Allegations of conspiracy made orally

The Bumiputera team has been advised of the supplementary representations made orally on 20 February 2009 to the NPA. These representations did not merely elucidate the written representations but they went much further. Zuma's legal representatives offered a body of information that is said to show that successive NDPPs and Mr McCarthy were part of a concerted political conspiracy to prevent Zuma from becoming president. The failure to prosecute him initially in 2003 and the successive decisions thereafter to prosecute him were merely strategies in the conspiracy, rather than bona fide prosecutorial decisions based on a professional appraisal of the evidence. The allegations do not, apparently, extend to the Bumiputera team. This concession is correct, as the Bumiputera team was not, is not and never will consent to be part of an unlawful conspiracy, if such ever existed, contrary to the NPA's united assertions throughout these and all related proceedings.

The team advises that the form of these representations is extremely unfortunate and it places us in an invidious position. We are unable to appraise properly the merits of these representations. They should be reduced to writing under oath and presented in the normal course, if Zuma wishes to continue to rely on them. Unless this is done, they amount to little more than blackmail. We should be given an opportunity after this is done to evaluate the allegations properly in the usual way by consulting all the parties allegedly involved and gathering whatever evidence there is to the contrary. Only in this way can the merits of these representations be determined, if necessary also after obtaining senior counsel's advice. The allegations are simply too serious to be avoided other than by proper investigation, even if the results are damaging to previous NDPPs or any other NPA personnel.

Furthermore, in light of the Zuma camp's track record of making unfounded allegations, presenting distorted versions of the truth and even manufacturing blatantly false allegations and "evidence" to advance their cause, these allegation must be treated with a healthy dose of skepticism.

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Conclusion

We accordingly recommend that the representations should be declined, for all the abovementioned reasons.

All the issues raised are eminently suitable for resolution in court, and not behind the scenes away from public appraisal in a non-judicial fashion.

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ENDS ENDS ENDS

March 18, 2009: Minutes of meeting at Mpshe's boardroom

Present:

Willie Hofmeyr

Adv Mpshe

Sibongile Mnsinjathi

Dr Silas Ramaeti

Trish Metske

Billy Downer

Anton Steynberg

George Baloyi

Johan du Plooy

Representations of JZ:

Not to meet the timetable set previously because JZ filed his representations late. Hulley had meetings with Willie Hofmeyr on their own re possible new evidence that they did not want to disclose in the written representations.

Everyone agree re merits that we are not satisfied with the representations.

We need to discuss the extra info that was provided Hulley.

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Willie & Sibongile's information from Hulley:

- Phones of Leonard McCarthy (LM) and Mbeki George were bugged - Especially 3 weeks before Polokwane and 3 weeks thereafter.

- Tapes seem to be from NIA/SASS. Hulley said that they would use the info in the permanent stay application.
- Information on tapes – notes from Willie and Sibongile they made whilst they listened to the tapes:
 - LM was part of campaign for Thabo Mbeki (TM);
 - TM told LM not to charge JZ and Selebi before Polokwane;
 - LM also spoke and leaked info to media and Bullelani;
 - LM spoke to Fahek Davids (currently at SIU);
 - Conversation between LM and FD – FD said Willie sold them out – he is on JZ’s side and against TM; Plus other stuff Willie did not want say –possible personal stuff.
 - LM talked to Bul – saying “are we going to win”;
 - LM to FD – “I am a Mbeki man”;
 - LM saying to Bul “we need to hit back – plan come back strategy” – This was after Polokwane;
 - LM also talked to TM after Polokwane;
 - LM spoke to Kasrils;
 - He speaks to ex Minister of Justice – Mbandla;
 - LM spoke to TM – LM says “TM will always be his president”. LM wanted to meet TM on the Friday;
 - LM spoke to a certain Luciano - Could refer to international conspiracy theory – refer to FBI/Croll;
 - LM spoke Mzi Khumalo – he received presents from him – Mzi also TM man;
 - Willie & Sibongile also saw sms’s – same tone – conspiracy;
 - Suicide note of Kate Zuma – tried to influence Polokwane’s outcome – leaked to media;
 - Bul to LM – “when do we file in CC” – 12 Dec 07 – Bul says it will help a lot”;
 - Fax of 8 pages to Bul on 13 Dec 07;
 - Chikane sms – “stop this shit” – could be about Kate Zuma’s suicide note;
 - 17 Dec 07 – Monday of Polokwane – sms of LM – “decided to give them a vreak in the interest of SA – ou boet (Selebi) and ou Jan (JZ) – their nicknames;
 - Long sms from Luciano to LM at Polokwane – 6-8 points;
 - Bull says to LM after Polokwane – “sad day for SA”;
 - 20/12/07 – media says Selebi will be arrested – possible leak from LM;
 - Johan on tape re signing of indictment iro JZ – cannot find Thanda;
 - Browse Mall report – Ivor Powell author – He says he did report on instruction from LM;
 - Investigation was done by Arthur Fraser (Gov);
 - TM and presidency behind report;
 - LM against Vusi;
 - TM gave contract to Croll do gather private intelligence on people spying on NPA and others, etc.
 - Kebble, Mphogo and Bul (and LM) met in 2003 before the announcement re JZ and SS;
 - Kebble was JZ man – he complained that he was extorted by Saki Makozoma;
 - Saki threatened Kebble that he would use the scorpions to take him to the cleaners if Saki was not made the president of SA – Mbeki president of ANC and Phumzile deputy pres of SA;
 - Kebble should change sides – 7 hour conversation;
 - Zuma is on his way out – before 2003 announcement;
 - LM, Kebble and Bul met re possible plea;
 - Gerda was not happy that JZ is not going to be charged;
 - Bul called Gerda in – said JZ is not going to charged – Gerda unhappy and resigned.

- Mzi, LM and Bul – investigation against Mzi – investigation was closed against Mzi on orders from LM and Bull;
- LM told people that case against Selebi is a plot from Gerrie.

My understanding in summary:

The first decision re not to charge JZ in 2003 was a plot from Bul, TM and LM. Everything was about TM to stay in power – either as ANC president or SA president – factions in the ANC.

Selebi was not charged to assist at Polokwane. TM was behind everything with Bul and LM supporting him. There are also other powers (International – Luciano) and private sector that pulled strings.

The investigation/prosecution team was not aware of this manipulation and conspiracies – they followed the evidence. Unfortunately I doubt if any will ever believe them.

This is a sad, sad day in the history of SA!!!

ENDS ENDS ENDS

March 20, 2009: Project Bumiputera Team to Mpshe

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We refer to our memorandum dated 03-03-09 in which we made our first recommendation to decline to accede to the representations. It may be noted that at the meeting in Pretoria on 18 March, there was broad consensus that this should be accepted for the reasons that we gave, and on the basis of all the other cogent considerations that were raised at the meeting.

The oral representations

The contents of the oral representations and the evidential material subsequently disclosed to the NPA were presented to us at the meeting on 18 March.

After much anxious debate and personal reflection on the part of each of the Bumiputera team members, we consider that the oral representations do not change our recommendation and we stand by it, on the basis tendered in our previous memorandum, what was discussed at the meeting and for the reasons that follow.

The process of evaluating the oral representations, and the further investigation that the meeting decided upon, will continue after this memorandum. For that reason, we do not tender this memorandum as our final word on the matter. Nevertheless, we consider that it is important to add our views to the debate at this stage, because the issues are so

important and the time for proper consideration of all the issues is running out. We would not like to present this memorandum for the first time at the next meeting that is planned for next Friday 27 March.

It may be mentioned that this memorandum has been drafted before we have had any idea of what Mr McCarthy's reaction to the oral representations is. Adv Baloyi and SSI du Plooy consulted briefly with Mr Ngcuka on 20 March and his reaction is discussed below.

Events subsequent to the meeting on 18 March

Counsel's advice: Adv Trengove SC

Mr Hofmeyr, together with Advocates Downer SC, Steynberg and Baloyi met with Adv Trengove SC in Johannesburg on the afternoon of 18 March. Mr Hofmeyr took Adv Trengove through the essence of the oral representations and evidential material. The team members presented to him some of the considerations for and against acceding to the representations. We all expressed our dismay and sense of betrayal that we had felt when we had learnt what was alleged in the oral representations and expressed our insistence that the allegations required the most serious investigation and sanctions, if true.

Advocate Trengove advised in essence that the Mpshe decision to prosecute lay at the heart of the fairness of the trial. If this remained defensible in that it was unaffected by the alleged political machinations of Adv McCarthy and those with whom he was alleged to have been conspiring, and based on evidence that is also so untainted, then the decision to prosecute should remain. Even if Adv Mpshe may have been unwittingly influenced to some degree by Adv McCarthy, as long as he is still satisfied that the decision was the correct one on the merits, he advised against acceding to the representations. He stressed that when faced with difficult ethical dilemmas such as the present, the best course of action inevitably is to adhere unwaveringly to principle rather than to surrender to the temptation of acting out of expedience.

The proper forum for evaluating the allegations and their relevance to fair trial was the court, as envisaged in the permanent stay arrangements that we had already settled with the defence and the Judge-President. He said that our position could be re-evaluated once the permanent stay papers had been received, if necessary, depending on the evidence that was tendered and response we could tender. He cautioned that we would not persist with a hopeless case, but from what we had told him, this was not the case at present.

It is observed as an aside that although a decision to continue with the prosecution could still be re-evaluated in this manner, the opposite is not true. If charges were to be withdrawn now, it is almost inconceivable that they could subsequently be resurrected, even if it were to transpire that all the allegations were completely false.

Counsel's advice: Adv Breitenbach SC

Adv Downer consulted with Adv Breitenbach when he returned to Cape Town on the evening of 18 March. Adv Breitenbach's advice was similar to that of Adv Trengove. He

advised that if the Mpshe decision was untainted, then this provided a basis on which the trial should continue.

Adv Breitenbach expressed more strongly his reservations about the relevance, legitimacy and coherence of the allegations made in the oral representations.

Adv Ferreira

Adv Downer contacted Adv Ferreira telephonically on 19 March, in advance of Mr Hofmeyr's planned meeting with her on 21 March. His reason for doing so was that he wanted clarity about what she had told him (Adv Downer) regarding Mr Ngcuka's alleged report to her when she resigned. This was that his declining to prosecute Mr Zuma was not a loss for her, but a victory, in that Mr Zuma would be stepping down from office. It should be noted that Advocates Ferreira and Downer shared everything with each other during Project Bob. According to Mr Hofmeyr, this could add substance to a possible conspiracy as far back as 2003 to the effect that the prosecution strategy should be aimed at removing Mr Zuma from office.

Adv Ferreira denied either that Mr Ngcuka had said this to her or that she had told Adv Downer so (the latter being so of course because it had not happened). She said that she would give the matter further consideration prior to her meeting with Mr Hofmeyr.

Advocates Ferreira's and Downer's overall recollection of their impressions of their dealings with Messrs Ngcuka and McCarthy in that period in fact contradicts the supposed theory of a political conspiracy to remove Mr Zuma from office. Their abiding impression was always that Mr Ngcuka was, if anything, intent upon protecting Mr Zuma and the ANC from the embarrassment of a prosecution and would have been quite happy if they had recommended that Mr Zuma not be prosecuted and that he remained in office unaffected by the Project Bob allegations. Few people in management appeared to have any confidence in the Shaik case. Adv Downer thinks that they expected Shaik to be acquitted and that would have been the end of the matter regarding Zuma.

Consultation with Mr Ngcuka

Adv Baloyi and SSI du Plooy consulted with Mr Ngcuka on 20 March, after the Acting NDPP had arranged this with him and informed him of the purpose.

It would appear that Mr Ngcuka will admit some of the conversations attributed to him and dispute others. Overall, he will deny that any of the recordings indicate anything sinister. We will be able to expand on Mr Ngcuka's version when Adv Baloyi and SSI du Plooy have reported more fully.

Public reaction

The NPA cannot be beholden to public reaction to the false rumours that the charges have been or are about to be withdrawn. Nevertheless, the NDPP has received representations from at least one political party that the charges should not be withdrawn. We mentioned in our last memorandum the representations also to this effect from Mr Richard Young. He has reiterated them and requested to make further oral representations. This has been declined. A body of public opinions against withdrawing is beginning to develop in the press, some of it from respected commentators, some of it raising the respectable constitutional imperatives that we have relied upon too.

The contrary arguments in favour of withdrawal have also been vigorously expressed in public, reflecting the tenor of the representations.

In our view, it remains a very weighty consideration that the various opposing interests should be seen to be vented in court in the proper judicial manner. In the circumstances, to accede to the representations, apart from being contrary to the merits and the interests of justice, would not be appropriate. Such a course of conduct, however weighty the reasons given in support thereof, will forever leave the impression that the NPA has become a pawn of the political establishment and cause irrevocable damage to public confidence in the system of justice.

Conclusion regarding the events subsequent to the meeting of 18 March

In the final analysis, we remain convinced that our original recommendation is correct, despite the allegations contained in the oral representations, in the light of all the circumstances mentioned above.

We are furthermore convinced that to accede to the representations in an attempt (misguided in our view) to protect the reputation of the NPA would be antithetical to our constitutional duty and would subvert principle to expedience.

Our recommendation: draft letter to Mr Hulley

A draft letter to Mr Hulley in which the Acting NDPP announces the decision to decline to accede to the representations, is attached to this memorandum. The contents are self-explanatory. We consider that the letter encapsulates the results of all the discussions thus far, and it explains adequately why the representations should be declined.

In the circumstances, we incorporate all those considerations and explanations into this memorandum. They are the reasons for our recommendation.

We recommend that the NDPP should send this letter to Mr Hulley. Naturally, there will be much debate about the contents between the receipt of this memorandum and when the final letter is dispatched. Nevertheless we recommend that the essence of this letter should not be substantially amended.

Careful consideration will also have to be given as to how much of these reasons will be included in the NPA's announcement in the media.

In the light of the above, it is our firm view that the representations should be declined.

ENDS ENDS ENDS

March 20, 2009: Draft letter to Hulley prepared by Bumiputera team for Mpshe

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Considerations of political conspiracy and abuse of process by erstwhile members of the NPA

It is this aspect of your representations which have given my colleagues and I occasion for the greatest anguish and personal reflection. If true, the alleged conduct of the individuals in question is cause for enormous concern and strikes a blow against everything that the NPA stands for. As such, this is not a matter to be suppressed and concealed, but rather one which must be vigorously and transparently investigated.

Although I am advised that the material which you have shared with us seems to be authentic, I must caution myself that the authenticity and reliability has not yet conclusively been established. The legality of the manner in which this material was obtained and passed on to your client is also highly questionable and will no doubt also be the subject of any further investigation into the matter. However, in the light of the serious implications of the allegations if true and the need to take a swift decision in this matter, I have approached your representations on the assumption that these allegations are true and that I am obliged to take them into account, notwithstanding any illegality which may attach to them.

From the oral representations which you have made and the further material which you have showed to Mr Hofmeyr and Adv Mzinyathi, I am able to glean the following main salient features:

- It is alleged that the Head of the DSO at the time, Adv McCarthy conspired with various others including the erstwhile National Director Adv Ngcuka to support former President Mbeki's bid for re-election as President of the ANC. In the process he is alleged to have manipulated the timing of the 2007 decision to prosecute your client.
- Adv McCarthy is alleged to have abused his position by instructing or allowing certain erstwhile employees of the DSO to gather intelligence regarding your client which culminated in the production of the so-called "Browse Mole" report.
- Adv McCarthy is alleged to have had improper communications with a member of the media and an alleged foreign intelligence operative regarding your client's case.
- None of the persons implicated remain in the employ of the NPA at present.
- None of the material implicates any member of the investigation or prosecution team, nor the previous NDPP or myself, in any of these improper activities. I do not understand that there is even any allegation to this effect.

These allegations have come as a complete shock to myself and the other members of my top management. Without the material which you have recently shared, I would hardly have been able to give any credence to these claims. It is indeed difficult to comprehend how this could have occurred and to express the feeling of betrayal which it has engendered. The NPA has already begun with preliminary enquiries aimed at establishing the nature and extent of such improper behavior and a decision on the appropriate way to tackle this will be taken in consultation with our Minister.

However, my task at hand is first and foremost to consider how all of this impacts upon the prosecution of your client. Essential to this exercise is an assessment on how any of this may have impacted on my decision to prosecute in 2007.

After anxious consideration, I have concluded that my decision to indict your client in 2007 was not influenced, improperly or otherwise, by Adv McCarthy. This is notwithstanding the fact that we both agreed on the decision. Even in the event that I am wrong in this conclusion, having now again reconsidered the decision, even taking into account your representations, I remain convinced that it was and is the correct decision.

I have also had regard to the various adverse consequences which the actions of the abovementioned persons may have had on your client. It goes without saying that these are extremely regrettable. However, I am firmly of the view that the stopping of the prosecution against him on extremely serious charges on the strength of sufficient and reliable evidence is not the appropriate remedy. In this regard, the old saying that two wrongs do not make a right is eminently apposite. I do not consider that this matter in itself will prevent your client from still having a fair trial. If I am wrong in this assessment, then your client will still have an opportunity to persuade the court of this in the pending permanent stay application.

I take note of your stated intention to include these allegations in your permanent stay papers and your observations that this would be a great embarrassment to the NPA and the persons concerned. The unspoken corollary to this statement, as I understand it, is that if I accede to your representations this could all be avoided. However, to withdraw the charges on this basis would be the very antithesis of my duty in this situation. I can neither give in to what might be construed as blackmail, nor can I be a party to the suppression of this information. If it is true, then it must undoubtedly be exposed, whether in your papers or otherwise. The burden will of course fall on you to establish the veracity thereof.

Therefore, for all these and many other reasons which I do not deem appropriate nor necessary to spell out in detail, I regret to inform you that I am unable to accede to your representations to withdraw the charges against your client.

ENDS ENDS ENDS

March 31 2009: Bumiputera team record of interviews with Ngcuka

[March 20 interview as reported by Baloyi]

The consultation took place at Mr Ngcuka's offices in Sandton, Johannesburg at 15h00.

Mr Ngcuka's attorney, Mr Dumisani Tabata was in attendance. SSI du Plooy and myself conducted the interview. The interview took approximately 30 minutes. The purpose of the interview was to inform Mr Ngcuka of the alleged tape recordings and sms text messages between him and Adv Leonard McCarthy.

We first gave him a general background and mentioned to him that it may have been NIA or SAPS CI who was monitoring one Mr Bheki Jacobs and that Adv McCarthy apparently came to be monitored because of his contact with Mr Jacobs.

We mentioned to him that Mr Hulley has now come into possession of these recordings and that they formed part of their oral representations to the NPA. We mentioned to him that Messrs Hofmeyr and Mzinyathi have listened to these recordings. Mr Ngcuka wanted to know if we had transcripts of the recordings and we replied in the negative.

We took them through the various recordings and sms's. After we read out the notes to them, Mr Ngcuka's immediate reaction was; "where is the smoking gun?" He said that the recordings were a lot of "twak". Between him and his attorney they informed us as follows:

1. Adv McCarthy is a friend to Mr Ngcuka and they were in contact from time to time.
2. The issues that were discussed with the run up to Polokwane were topical and were generally discussed amongst Mr Ngcuka's circle of friends and the general populace.
3. Mr Ngcuka said he was aware that Adv McCarthy had a meeting with the President around 22 December 2007. He says the purpose of the meeting was for Adv McCarthy to seek permission from the President to release him from his contract with the NPA so that he could pursue a new job opportunity at the World Bank in Washington. Mr Ngcuka mentioned that he was a referee of Adv Mc Carthy in his World Bank job application, and had recommended him when approached by the Bank.
4. Mr Ngcuka did confirm that there was a discussion between him and Mr McCarthy relating to the filing of the NPA papers in the CC regarding the search warrant appeals. He said that it was a known fact that the NPA was intent on filing papers in the CC. He also said that there may have been an 8 page fax that was sent by McCarthy to him.
5. He also confirmed that he communicated with Adv McCarthy (via sms) after Polokwane about the fact that Adv McCarthy was now on his own and told him to finalize his career plans. He also confirmed that he did mention to Adv McCarthy that in his view the outcome of the Polokwane Conference was a sad day for South Africa.
6. He thought it unlikely that Mr Saki Macozoma will have approached the late Mr Brett Kebble in 2003 and asked the latter to offer him a job at R3 million per annum as he intended to succeed Mr Mbeki. He believed it unlikely that Mr Macozoma would have mentioned to Mr Kebble that Mr Ngcuka's wife was to be appointed Deputy President and that Mr Zuma was going to leave politics. Mr Ngcuka pointed out that they only became aware for the first time that his wife was going to be appointed Deputy President in 2005.

He was aware that other people were being touted, including Mr Cyril Ramaphosa to avail themselves for the position of President.

7. Mr Ngcuka confirmed that he did have a meeting with Mr Brett Kebble regarding his case. He says the meeting took place at a restaurant in Pretoria and that Mr Gerrie Nel had by prior arrangement with him recorded the meeting at a remote venue. He says Mr Nel should still have the tapes.

8. He denied that he stopped the investigation of Mr Mzi Khumalo. He said in any case the documentation relating to the case is still there and that if anyone feels that there is a case against Mr Khumalo, he could still be prosecuted.

9. He denied that he mentioned to Ms Gerda Ferreira that she should feel vindicated by the investigation as Mr Zuma was going to leave politics.

Mr Ngcuka expressed his displeasure that his telephone conversations were intercepted. He enquired if there was a judge's certificate which authorized the interceptions. He requested that the circumstances under which his telephone was intercepted, be investigated.

He also mentioned that the recordings were state property and that Mr Hulley was illegally in possession thereof. He wanted the circumstances under which Mr Hulley came in possession of the recordings to be investigated.

We informed Mr Ngcuka and his attorney that we will return on Tuesday 24 March and we will expect him to give us a written response to the allegations contained in the recordings.

[March 24 interview]

SSI J Du Plooy conducted the interview and was assisted by Adv W Downer SC and G Baloyi. Mr Ngcuka was assisted by his two legal advisors, to wit Messrs Dumisani Tabata and Lungisa Dyosi.

Adv Downer began by introducing the purpose of the meeting. He assured Mr Ngcuka that it was being held on a "without prejudice" basis and that the proceedings were confidential. He gave the assurance that Mr Ngcuka's response is being sought by way of consultation in his capacity of state witness in the criminal trial and as a witness for the NPA in threatened civil proceedings (the permanent stay). The consultation and any ensuing answers are sought with a view to enabling the NPA to answer the representations and to formulate a position to adopt if and when the permanent stay application is brought. The consultation was not part of an investigation regarding allegations of alleged wrongdoing on Mr Ngcuka's part. He informed him that if an investigation of whatever nature did eventuate, that would be a separate matter and Mr Ngcuka may well be approached again in another capacity by such investigators, whoever they might be.

Adv Downer emphasised that the NPA could not provide advice as to how Mr Ngcuka should respond to the questions, if at all. Nevertheless, it was the NPA's earnest request that Mr Ngcuka should provide his answers under oath, for the reason that this would best enable

the NPA to respond properly to the representations and possibly the permanent stay application.

Mr Ngcuka and Mr Tabata indicated that they would not give a final answer as to whether the questions would be answered under oath. They nevertheless indicated the difficulty of the situation that faced Mr Ngcuka, being confronted by second-hand reports of alleged recordings that themselves were not given confirmed under oath. Furthermore, it was difficult to contextualize such alleged recordings and so provide properly informed and accurate answers.

Mr Ngcuka and Mr Tabata indicated that they wished to cooperate fully with the NPA.

After a long debate as to whether they should answer the questions at all, given the constraints which they had put forward, they withdrew for about 30 minutes to confer amongst themselves. On their return, they indicated that Mr Ngcuka will answer the questions.

They reiterated the concerns mentioned above. They raised the concern that the Acting NDPP, without first obtaining clarification on issues such as the legality and authenticity of these interceptions by NIA or the circumstances under which Mr Hulley came in possession of these recordings and the prima facie violation of Mr Ngcuka's rights, requires of them to respond to these recordings. They are concerned that the NPA listened to these tapes without investigating the legality of these recordings. They expressed the concern that Mr Ngcuka will be used as a "fall-guy" for the decision to withdraw charges against Mr Zuma.

They mentioned that they have no idea as to what is being done about the violation of Mr Ngcuka's rights, they have no idea what the NDPP's stance is on these apparent violations. The defence did not put these allegations on paper, which indicates that they were illegally obtained.

They have no idea what the extent of the violations is, whether they stretch from 2003 to 2007 or only the three weeks before and after the Polokwane conference. They have no idea about the context and breadth of the surveillance and interception of his voice and text messages. Nothing has been made available to them and they have to rely on third hand information.

They mentioned that the potential for ambush is huge and they wondered what the usefulness of giving us the information will be if they do not know the extent of the violations. They understand from Adv McCarthy that he was in discussion with Advocate Wim Trengove SC around the time allegedly, covered by the recordings, and they wondered if such discussions have also been monitored and intercepted.

They mentioned that Mr Ngcuka has co-operated with the NPA before and he does not intend to change that.

Mr Ngcuka emphasized that he has never sat in any room and conspired against Mr Zuma. It was of concern to him that the very same people who made the "spy allegations" against him are now putting forward these tapes.

They emphasized that if these allegations are put in an affidavit before a court of law, they will respond appropriately. Mr Ngcuka pointed out that he does not need anybody to protect him by saying that they do not want the allegations to be made public for fear that he could be embarrassed or compromised. Those allegations must be put up by way of affidavit in open Court and in that case he will respond likewise.

They mentioned that Mr Ngcuka was not part of any conspiracy and he never tried to improperly influence anyone at the NPA. They raised concern about the article in "The Times" newspaper to the effect that Mr Ngcuka was pulling the strings behind the scene in the NPA, and that the NDPP has not taken any steps to refute this allegation. He had put it to Mr Mpshe during their telephonic discussion that he had never spoken to him about the Zuma prosecution, or attempted to influence him. Mr Mpshe confirmed this.

We reiterated our assurances that Mr Ngcuka's response is being sought by way of consultation in his capacity of state witness in the criminal trial and as a witness for the NPA in threatened civil proceedings (the permanent stay).

Mr Ngcuka then responded as follows to the questions :

(i) Does he know if Adv McCarthy or Ivor Powell had contact with Mr Bheki Jacobs?

Answer: No.

Did he have contact with Jacobs? If so, about what?

Answer: No. "I never met him and I never gave him money".

(ii) Did he provide funds to Mr Jacobs? If so for what purpose. Does he know whether Mr Khumalo or Mr Macozoma did so?

Answer: No.

(iii) Was he in contact with Adv McCarthy in December 2007 regarding the filing of the state's papers in the CC, during which he insisted that our papers be filed as soon as possible. Why did he make contact with McCarthy regarding the state's papers and why did he suggest that they be filed sooner?

Answer: He may have contacted Adv McCarthy. He may have asked him as to when the NPA was going to file its papers and might have said the sooner the better. This would have been in the context of the fact that the matter had been going on for a while and (because his name gets dragged into this case from time to time) he still has an interest in the matter. He denied "insisting" that the papers must be filed. It was a suggestion.

(iv) A fax report shows that 8 pages were sent to him by Adv McCarthy. What were the contents of the documents and why were they sent to him?

Answer: He cannot recall. He has received faxes from Adv McCarthy on a whole range of issues, eg, copies of speeches he made at conferences such as the one on International Association of Anti-corruption Authorities. Adv McCarthy thinks that the fax was a copy of his resumé and profile for the World Bank job, for which application Mr Ngcuka was a referee. Furthermore, the NPA has from time to time sent him copies of Court papers and

other documentation in the Zuma matter for the purpose of requesting him to respond to allegations in such papers. An example was that he had been sent the papers in the Thint matter so that he could deal with allegations made in Applicants papers. In some case he needed documents from Adv Mc Carthy to refresh his memory before responding to allegations made by Applicant.

(v) Did he discuss the conduct of the Zuma matter with Adv McCarthy at any time after he resigned?

Answer: He had had discussions with Adv Mc Carthy about the matter. However these were not about the 'conduct' of the matter but about issues that arose during his term of office, that related to the matter.

Please give a detailed description of the content of those discussions.

Answer: From time to time, Adv McCarthy contacted him regarding the affidavits that he (Ngcuka) had to make in the interlocutory applications in the Zuma matter, mainly about the allegations and factual issues raised in Mr Zuma's or Thint's papers about him and events covering his term of office that the NPA or DSO needed to have responded to.

(vi) In the period between September to December 2007, did he discuss the time when Mr Zuma should be charged with Adv McCarthy or Mr Mbeki or anyone else in the Presidency?

Answer: There was no discussion between him and Mr Mbeki or anyone in the Presidency regarding this matter.

Did he indicate to Mr McCarthy that it was not desirable to charge or not to charge Mr Zuma before Polokwane?

Answer: He does not recall discussing the timing of charging Mr Zuma with Adv McCarthy but he doubts that he did. In his view however, it would have been wrong to charge Mr Zuma before Polokwane. He also thought then that it was wrong to charge him immediately after Polokwane, since it might have created the impression of a vendetta against Mr Zuma. He explained that as the first NDPP of the NPA, any negative perception about it concerns him. He is interested in the NPA's credibility. The surveillance tapes will no doubt explain the matter fully and indicate that he did not seek to influence the NPA.

(vii) Were any other faxes or other information sent to him by Adv McCarthy about the Zuma matter at any time after he resigned?

Answer: see his answer at paragraph (iv)

What were they and for what purpose were the given to him?

Answer: see his answer at paragraph (iv)

(viii) Did he discuss the conduct of the Selebi matter with Adv McCarthy, Mr Mbeki or anyone else in the Presidency or at the DOJ at any time after he resigned?

Answer: He never discussed the Selebi matter with Mr Mbeki, or anyone else in the Presidency or DOJ.

Did he make any suggestions to or have any discussion with Adv McCarthy about whether the prosecution should continue and when the matter should be prosecuted?

Answer: He did have discussions with Adv McCarthy. The discussion was not about the conduct of the Selebi matter. Selebi had made allegations in his affidavit in the Pretoria High Court against Ngcuka to the effect that he (Ngcuka) was still in charge of the NPA by pulling strings behind the scenes. He discussed with Adv McCarthy how these allegations should be responded to in an affidavit. In particular whether it was necessary for him to respond thereto. In the end they agreed that Adv Mc Carthy would respond to the allegations and that it was unnecessary for him to respond.

(ix) The Minister of Justice has indicated that she asked him to resign after seeing certain evidence that made her believe that he was no longer suitable for the position of NDPP. What was the evidence?

Answer: The Minister never asked him to leave. On the contrary, she begged him not to leave the NPA. He knows nothing of the alleged evidence. The Minister has been approaching him since he left the NPA requesting his advice on complicated legal issues and matters affecting the Department of Justice. The notion that he was forced to resign is inconceivable.

(x) What is his comment regarding the discussion between Messrs Saki Macozoma and Brett Kebble in 2003, two months before he announced his decision regarding Mr Zuma? Does he know anything about the allegations that Mr Macozoma asked Mr Kebble to give him a job at R3 million per annum as the former intended to succeed Mr Mbeki as the President? Does he know anything about the fact that Mr Macozoma allegedly told Mr Kebble that Mr Ngcuka's wife was going to be appointed as the Deputy President and that Mr Zuma was going to leave politics?

Answer: He is not aware of these things. Mr Macozoma is very close to him. This is no secret. He would have known it if Mr Macozoma was positioning himself to become President. Mr Ngcuka found the notion that Mr Macozoma was in search of a job laughable. Mr Macozoma sits on several important Boards, eg Safika and Standard Bank and is unlikely to have approached Mr Kebble for a job. It was never even contemplated in their wildest dreams that his wife would be appointed Deputy President. It came as a complete shock in 2005. She never aspired for that office. They argued against her accepting the offer.

(xi) Was he aware of any discussion during or about 2003 about the possibility of Mr Macozoma positioning himself to be President after Mr Mbeki, of Mr Mbeki running for a third term as ANC president or his wife becoming deputy president?

Answer: see his answer at (ix)

(xii) Did he meet Mr Kebble and talk about possible plea bargaining regarding his case, how many times and what was discussed?

Answer: Yes, but they could not agree. Mr Kebble wanted his transgressions to be dealt with administratively, he then told him to go to court. The question of sentence did not arise because Mr Kebble was not prepared even to plead guilty. The discussion, in other words, could not even move from first base.

(xiii) Did he know about the investigation against Mr Mzi Khumalo and did he give instructions or advice that the investigation or prosecution should be discontinued?

Answer: Yes, he was aware of the investigation. It was not his decision that the investigation should be discontinued. He does not know whose decision it was.

(xiv) Did he mention to Ms Gerda Ferreira that Mr Zuma was going to leave politics and that she should feel vindicated by this outcome of the investigation?

Answer : No, But whether Ms Ferreira might have thought that Mr Zuma would resign in light of the fact that Mr Shaik was going to be charged, he did not know.

(xv) Did he campaign actively for the re-election of Mr Mbeki as he informed Mr Hofmeyr at a discussion on the 15th December 2007 at East London airport?

Answer: He has always supported Mr Mbeki but did not actively campaign for him, although there would have been nothing wrong in doing so. His wife was Deputy President; he wished them well and wanted them to win at Polokwane. Mr Hofmeyr knows where he (Ngcuka) stands politically and there would have been no reason for Mr Ngcuka to tell Mr Hofmeyr so. Mr Hofmeyr was in Mr Mbeki's office as a parliamentary advisor when Mr Ngcuka recruited ("got") him from there.

Did he know whether Adv McCarthy did so?

Answer: He does not know but he doubts it.

Did Adv McCarthy discuss with him that Mr Hofmeyr was not loyal to Mr Mbeki and could not be trusted? If so, did he give any reasons?

Answer: No, Adv McCarthy did not tell him about it.

(xvi) Is he friendly with Mr Mzi Khumalo? Can he describe the nature of the friendship and when it started?

Answer: Yes, they have been friends for a long time

Did he work with Mr Khumalo to campaign for Mr Mbeki's election?

Mr Tabata remarked: These are strange questions from the NPA. Mr Ngcuka responded in the negative.

(xvii) Is he aware of the friendship of Adv McCarthy and Mr Khumalo? Can he describe the nature of the friendship and when it started? Also, what does he say about Khumalo's unwillingness to co-operate with the NPA in the Schabir Shaik trial and his readiness to testify in the S v Zuma matter.

Answer: As far as he was aware, they are acquaintances, but not friends. Mr Ngcuka did not see anything untoward in the fact that Mr Khumalo cooperated with the NPA as a state witness only after the Shaik trial. Mr Khumalo had explained to him that as Zuma was not an accused in the Shaik matter it made no sense to him to testify against him in that matter. If Mr Zuma were charged, the implication was that he would cooperate.

(xviii) Does he know of any discussion regarding the leaking for publication and the timing of the story Mrs Kate Zuma's death with the run up to the ANC's Polokwane Conference?

Answer: He knows nothing about this.

(xix) Does he know of any contact that Adv McCarthy had with the then President before and after the Polokwane Conference and what was discussed between them?

Answer: He knows of no contact before Polokwane, but after Polokwane Adv McCarthy asked him to arrange a meeting with Mr Mbeki. That was around the 22nd December 2007, to ask for his release from his contract in order to take up a position with the World Bank. Given that Mr Ngcuka had a better chance of meeting the President, Adv Mc Carthy had requested him to facilitate a meeting with Mr Mbeki for this purpose. It had been a requirement by the World Bank that both the President and the Minister of Finance approve Adv Mc Carthy's departure from the NPA and his appointment by the Bank. Adv Mc Carthy had requested him to facilitate the meeting with the President because he had been unsuccessful in his own attempts to meet Mr Mbeki.

(xx) Did he send an sms to Adv McCarthy after the ANC Polokwane conference to the effect that the outcome of the Polokwane conference was a sad day for South Africa, that Adv McCarthy was now on his own and that he must finalize his future career plans ? What was the meaning of this?

Answer: Yes, he did send an sms to Adv McCarthy. He was aware of Adv McCarthy's plans to leave. He also knew that he (McCarthy) was one of the persons who was going to be targeted, eg, the disbandment of the Scorpions.

Did he organise the job for Adv McCarthy at the World Bank?

Answer: He recommended him for the World Bank job. He was one of Adv McCarthy's referees.

Why did he do so?

Answer: It is good for the country and for Adv Mc Carthy. Adv Mc Carthy wanted the job and Mr Ngcuka believed he qualified for it because of his integrity and competence.

Did he ever discuss this with the Presidency?

Answer: Yes, he informed the President the purpose of his meeting with Adv Mc Carthy at the time of making the arrangement. He also spoke to Minister Mabandla about it.

(xxi) After the voting in Polokwane, as far as he is aware, did Adv McCarthy ever use words to the effect that "we must plan a comeback strategy, we must wipe off blood from

our face, we must clean up around us?” Does he know what was meant by a “comeback strategy”?

Answer: He is not aware of this.

(xxii) In discussion with others, Adv McCarthy several times uses words to the effect that to the effect that “we must plan a comeback strategy,” Does he know what he means by this?

Answer: He is not aware of this.

(xxiii) Did he ever see the Browse Mole report or did Adv McCarthy ever discuss the report with him?

Answer : He has never seen the report. He and Adv McCarthy discussed what was published in the newspapers.

(xxiv) Did he ever discuss the suspension of Mr Pikoli with Adv McCarthy, the Minister of Justice or the Presidency?

Answer: Yes, with the Minister of Justice but not with the President. See (viii)

What was discussed? Did he discuss the Ginwala Commission and its possible outcome with Adv McCarthy?

Answer: No

Did he ever suggest that it was a good thing or desirable that Mr Pikoli be suspended?

Answer: No, he did not think that it was the right thing to do, he also mentioned this to the Minister.

(xxv) Can he explain the creation of CICU and the creation of a crime or general intelligence gathering capacity at the DSO? Was this matter discussed with the Minister of Intelligence, the DGs of NIA or SASS or with anyone in the Presidency? Was the creation of the capacity approved by any of the above? Were intelligence type reports ever supplied to the Presidency? If so, on what topics?

Answer : CICU was not an intelligence gathering unit; all Ministers and DG’s were at the meeting where its creation was discussed and they made submissions. CICU was about pre-investigation and not intelligence gathering. They never gathered any intelligence or produced any intelligence reports. Mr Rudolph Maastenbroek was its head and this could be verified from him.

(xxvi) Was there any contact with Kroll or Pasco or their employees regarding the gathering of intelligence?

Answer: Neither the NPA nor DSO were involved in intelligence gathering. Kroll was hired by SASS to assist in the Billy Rautenbach case. In the early stages of the investigation there was contact with Kroll in that context and not intelligence gathering. He does not know Pasco.

Did he have further contact with them after his resignation?

Answer: No.

(xxvii) Did he ever have contact with Mr Bheki Jacobs before or after his resignation? If so, when and about what?

Answer: No.

(xxviii) Did he ever have contact with a Luciano or Thomashausen before or after his resignation? If so, who are they, when was it and about what?

Answer: He does not know Luciano. Thomashausen was a professor at UNISA. He has never met Thomashausen.

(xxix) Was his “prima facie” statement of 2003 discussed with the Minister or the President ?

Answer: The Minister was right next to him when he made the announcement. He had briefed the Minister and given a report in terms of section 33 to the Minister. It was the Minister’s responsibility to inform the President. He did not discuss the statement with the President.

In conclusion Mr Ngcuka said that he left the NPA for the good of the NPA. He had wanted to avoid him being the focus of attention, at the expense of the NPA.

It was agreed that the draft minutes of the meeting of 20 March would be settled between the parties before they are used or disseminated.

Similarly, the minutes of the meeting of 24 March would also be settled to the satisfaction of both parties before being used or disseminated.

Accordingly, a draft of these minutes was forwarded to Mr Dumisani Tabata on 27 March 2009 and returned on 31 March 2009 with his corrections. All of the corrections have been incorporated in this document.

Mr Ngcuka having answered the questions, Mr Tabata reiterated the difficulties that Mr Ngcuka faced in confirming them under oath at this stage, without in turn being confronted by accusations under oath.

ENDS ENDS ENDS

April 2, 2009: Bumiputera team final recommendations to Mpshe

Introduction

The purpose of this memorandum is to update our recommendations regarding what the final decision should be whether or not the NDPP should accede to Zuma’s written and oral representations.

The present memorandum takes account of the last meeting in Pretoria on Monday 30 March 2009.

We continue to recommend that the representations should be declined and that the prosecution should continue in accordance with the timetable that has previously been agreed between the state, Zuma and Thint.

We refer to our memoranda dated 03-03-09 and 20-03-09 in which we made our recommendations before the last meeting. It may be noted that at the last meeting on 30 March, the broad consensus that had previously been achieved regarding the merits of the representations remained.

It appeared that the only issue on which there was not broad consensus was the issue of the effect of Mr McCarthy's alleged prosecutorial misbehaviour. Mr Hofmeyr considered that the NPA should not continue with the prosecution for this reason. The Bumiputera team and, it would appear, the other DNDPPs, considered overall that the prosecution should proceed nevertheless.

The December 2007 "Mpshe" decision to prosecute

Counsel's advice: Advocates Trengove SC and Breitenbach SC

We refer to our memorandum of 20 March, in which we recorded counsel's advice. Counsel advised the NPA that if the decision to prosecute Mr Zuma in December 2007 was taken properly according to the merits of the evidence, then it would withstand Mr Zuma's conspiracy claims, whatever their merits. Counsel persist with their advice.

Further investigation of the December 2007 decision to prosecute

Given the importance for the present decision of the 2007 decision to prosecute, the Bumiputera team re-examined our notes, diaries and memoranda concerning the events of November and December 2007.

Having done so, we are satisfied that the position is quite clear. All the members of the Bumiputera team and all the NPA top management to whom our recommendations were presented, were unanimous that Mr Zuma should be charged. The consensus was also that racketeering charges in terms of POCA should be included. The consensus included the Acting NDPP. Indeed, on 14 December 2007, Adv Mpshe signed the POCA authorization for the racketeering charges.

The recommendations, discussions, motivations and decisions were founded on the merits of the evidence.

Despite this consensus concerning the correctness of the decision in principle, the Acting NDPP had not actually made the final decision to prosecute, and when, before he went on leave after 14 December.

The delay can be attributed to a difference of approach between the Bumiputera team and the Acting NDPP regarding when the decision would be taken. The team recommended that

the decision to prosecute should be taken and implemented immediately in early December or as soon as possible after that, as all obstacles to the prosecution had by then been removed and we were ready to prosecute. We codified our recommendations in our memorandum to the Acting NDPP dated 6 December 2007. Part of our motivation was (and remains) that political considerations, which might include the then impending Polokwane conference, should be left out of account.

Adv Mpshe decided nevertheless to delay his decision until after Polokwane. He told Adv Downer that he did not wish the NPA to be seen to be interfering in the Polokwane proceedings. Adv Downer noted that the Acting NDPP told him expressly that this decision was his (Adv Mpshe's) and his alone.

Adv McCarthy issued the instruction to Adv Downer after Polokwane on 21 December to proceed with issuing and serving the indictment and summoning the accused. We do not know what interaction between Advocates Mpshe and McCarthy preceded this instruction.

The 2007 decision to prosecute is untainted

Adv Mpshe confirmed at the meeting on 30 March 2009 that Adv McCarthy informed him prior to the indictment being signed on 27 December and served on 28 December 2007 that this was going to be done. Adv Mpshe informed the meeting that he would have to check his diary and notes for further details.

If Adv McCarthy was part of an alleged conspiracy to prejudice Mr Zuma, on instructions from Mr Mbeki, or otherwise, by withholding the decision to prosecute until after Polokwane, then this does not matter, because Adv Mpshe's decision to delay was his own. It remains untainted.

If Adv McCarthy was part of an alleged conspiracy to prejudice Mr Zuma by deciding to prosecute immediately after Polokwane, then this also does not matter. This is so because the team's recommendation in any case was to prosecute as soon as possible, for exclusively non-political reasons. It is also so because Adv Mpshe was informed of Mr McCarthy's decision before it was implemented. Adv McCarthy may even have sought Adv Mpshe's approval before he issued the instruction to Adv Downer.

Whatever the case, the ultimate decision to prosecute was in accordance with the Bumiputera team's untainted recommendations, based only on the evidence, and to do so immediately. The recommendations remained constant both before and after Polokwane. NPA management, the Investigating Director and the NDPP accepted our recommendations without exception.

The meetings on 20 March and 30 March 2009 noted that there were no allegations that any member of the Bumiputera team was in any way party to the alleged conspiracy. This must be so because we know that we have acted throughout free of any political motive and only in accordance with our duties. It is also not alleged that Adv Mpshe or any other member of NPA top management is tainted. This must also be so for the same reasons. This leaves all NPA participants in the 2007 decision untainted, except Adv McCarthy. The decision remains untainted.

Mr Ngcuka's answers to the allegations

The minutes of the two meetings between the team and Mr Ngcuka have now been settled and circulated.

It is now settled that Mr Ngcuka denies that he was part of any conspiracy against Mr Zuma.

Adv McCarthy's opportunity to respond to the allegations

The Acting NDPP directed a letter to Adv McCarthy requiring his response by 16h00 on 1 April 2009. We do not know the result.

The personal commitment of the Bumiputera team

Adv Downer described to the meeting on 30 March 2009 that the duration of the investigation and prosecutions, both past and to come, had taken its toll on the team members. So too had the more recent attacks on the NPA, all in the glare of publicity.

Nevertheless, personal preferences have to be put aside and our commitment to do what is right remains. This must include the prosecution continuing.

Recommendation

The representations should be declined along the lines of our draft letter to Mr Hulley which has now been considered.

ENDS ENDS ENDS

April 3 2009: Bumiputera team to Mpshe final recommendations addendum

Introduction

The purpose of this memorandum is to add an addendum to our last update to our recommendations regarding what the final decision should be whether or not the NDPP should accede to Zuma's written and oral representations.

The present memorandum takes account of Mr Hofmeyr's further analysis of the November/December 2007 decision-making process which he circulated by e-mail on 2 April 2009 after he had received our memorandum of that date.

We continue to recommend that the representations should be declined and that the prosecution should continue, for all the reasons mentioned in our previous memoranda.

Mr Hofmeyr's further analysis of the 2007 decision-making process

The NDPP's understanding of the process

If Mr Hofmeyr's report of the NDPP's version of his understanding of the decision is correct, then this version comes as a surprise to the Bumiputera team.

In particular, we had all been under the impression that Adv McCarthy's instruction on 21 December 2007 to proceed, originated from or had been approved by Adv Mpshe.

Be that as it may, the NPA has confirmed under oath in both our CC search warrant papers and our section 179 papers that the decision was taken by both Adv Mpshe and Adv McCarthy. Both Adv McCarthy and Adv Mpshe have confirmed this under oath in confirmatory affidavits.

As we said in our previous memorandum, Adv Downer noted that the Acting NDPP told him expressly that the decision to postpone the announcement, if not the ultimate decision itself, was his (Adv Mpshe's) and his alone.

The team's memo to the NDPP dated 30 November 2007

This accurately reflects the team's understanding that the ultimate decision to prosecute was the NDPP's, in consultation with all the other parties, whatever the technicalities of implementing the decision and signing the indictment might have been.

The section 33 report to the Minister

The team's draft section 33 report to the Minister was drafted by us according to our understanding, just as the affidavit in the CC was. In both instances, however, the NDPP confirmed them.

Whether Adv McCarthy called for a report mentioned in his conversation with Mr Ngcuka of 26 December 2007

The only report that we gave him prior to his discussion of the 26th was our application to institute a racketeering prosecution, dated 13 November. It did recommend that we charge, but doesn't deal with directly with the question of timing. We did, however state that we should not wait for the CC appeal in the search warrant cases. Of course, Adv McCarthy knew by that time that our view was that we were ready to proceed with the charge and that we regarded the matter as extremely urgent, given that the undue delay clock had started ticking again.

Adv Downer has an undated file note prior to 14 December 2007 to the effect that Adv McCarthy required the final indictment for the POCA authorization which we know was signed on 14 December.

In all the circumstances, Adv McCarthy could remark with some accuracy to Mr Ngcuka that the Bumiputera team urgently required the decision to be made and implemented, for reasons, of course, only related to the proper prosecution process.

The resolution of the apparently conflicting versions regarding whose decision it was to prosecute

It is clear ultimately that the decision to prosecute was a corporate decision. There was consensus by everyone present as early as 29 Nov that Zuma should be re-charged and that the charge should include racketeering. Our various notes of the meeting reflect that the NDPP said "I am persuaded that there is a racketeering case". Hence our record in the memo accompanying the s33 report.

Furthermore, para 22 of our draft sec 33 report reads as follows:

"In accordance with the above, I intend to announce the decision to charge Zuma and the two Thint companies by no later than the end of this week."

Adv Breitenbach SC's queries regarding the resolution of the seemingly conflicting versions are understandable. They are ultimately able to be resolved along the lines above that the decision was a multi-layered corporate decision. For instance, Adv Mngwengwe would have been involved in the process at an earlier stage when the racketeering charges were being formulated. His Deputy Dave Damerell was closely involved in the process and was presumably reporting to Adv Mngwengwe. Adv Mngwengwe would have to clarify this.

Our view is still that it was ultimately the ANDPP's decision, in accordance with his in-principle decision of 29 November, whoever finally put their name to it. He has consistently taken responsibility for the decision since it was implemented. The only issue between him and Adv McCarthy, it now seems, was the timing of the decision. (Of course, as we said above, this is the first hint we the team have ever heard that there was anything other than complete unanimity) I repeat, however, that everyone was *ad idem* as to the merits of the decision. The fact that Adv McCarthy might have decided, for his own Machiavellian reasons, to implement the decision on 28 December 2007 instead of the following week/month does not in and of itself make it Adv McCarthy's decision and not that of the ANDPP.

Before we allow ourselves to become too distracted from the main issue, we would do well to recall Adv Trengove's advice on the matter, which was twofold: Adv McCarthy's ulterior motives are not a valid reason to stop the prosecution, provided the ANDPP can answer either or both of the following questions in the affirmative:

(a) Can I say that my decision to prosecute was not improperly influenced by Adv McCarthy's improper motives? [A simple *sine qua non* test can be applied here]; and if not

(b) Am I now still satisfied, with ex post facto knowledge of Adv McCarthy's shenanigans, that the decision wa? on the merits the correct one?

Recommendation

The representations should be declined along the lines of our draft letter to Mr Hulley which has now been considered.

ENDS ENDS ENDS

April 14 2009: Bumiputera team to Mpshe (post decision to drop charges)

Purpose

The purpose of this memorandum is to record the events and decisions reached on 6 April regarding the termination of the prosecution against Zuma and Thint, to record the taskings issued, to report back on the progress on these and to record certain reservations regarding the decision and the process.

The meeting prior to the press conference

The following matters were discussed:

The ANDPP announced his decision to withdraw charges against Zuma. The Team are handed copies of the press statement explaining the reasons therefore and extracts from certain phone recordings.

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Discussion on whether Team should be present at press conference? Team mollified by inclusion of their recommendation in the statement. Decided - Team also.

ANDPP expresses thanks to the team

WH ditto. Expresses anguish again.

...

Concerns with process and decision

The Team wishes to place on record certain further concerns regarding the process and the merits of the decision:

The legal aspects of the motivation were not given to us for comment beforehand. In the few minutes before the press conference it was impossible to digest and comment on the legal justification given for the decision. Nor was there the opportunity utilised to run this reasoning past two counsel who were available and eminently qualified to advise on these issues.

In our view, the legal motivation provided for the decision is questionable and may be vulnerable on review. We do not now deem it necessary to undertake an exhaustive critique of the reasoning, since the die is now cast. However, we point out the following:

The reasoning relies heavily on the “abuse of process” doctrine in UK and Canadian law. There is no reference to any South African cases which endorse the application of this doctrine in South African law. We are concerned that this doctrine may have been inappropriately applied without due consideration of its applicability in our law.

In relying uncritically on this doctrine, we are concerned that a precedent may have been set which will come back to haunt the NPA in the future.

We are still of the view that the ultimate test should be whether the abuse in question would prevent the accused from having a fair trial, a question which was not even addressed.

The normal remedy for procedural unfairness, in circumstances where a trial has not even commenced, would be to remedy the procedure. We are of the view that the decision and the reasons given failed to draw the proper distinction between the procedure and the merits of the decision.

The two crucial questions that senior counsel both advised needed to be answered, were not. Namely, whether McCarthy’s manipulation improperly influenced the ANDPP’s decision and, if so, whether with ex post facto knowledge of all the circumstances he is still of the view that the decision to prosecute was correct. This failure appears to us to be fatal to the correctness of the decision.

The Team still does not have a settled, first-hand version, firstly, of the interaction between the ANDPP and McCarthy in the crucial periods leading up to the ANDPP’s instruction on 6 December 2007 to WD that the ANDPP has decided to delay his decision/announcement until after Polokwane so as not to prejudice/ or to be perceived to be prejudicing JZ’s election at Polokwane. Secondly, leading up to McCarthy’s instruction to WD on 21 December 2007 to proceed with summons immediately, and how the ANDPP’s confirmation under oath that it was his decision, in consultation with the ID and the Head: DSO, and the Team, to prosecute on 27 December 2007, fits with these events.

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