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

Case no. 19577/09

In the matter between:

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| **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 |

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**SUPPLEMENTARY FOUNDING AFFIDAVIT**

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I, the undersigned,

**JAMES SELFE**

do hereby make oath and declare as follows:

1. I am an adult male and the chairperson of the Federal Council of the Applicant. I am also a Member of Parliament representing the Applicant. I have deposed to a number of previous affidavits on behalf of the Applicant in this matter. I remain duly authorised to do so.

2. The contents of this affidavit are true and correct and fall within my personal knowledge, unless otherwise stated or apparent from the context. To the extent that I rely on information provided to me by others, or documents compiled by others, I verily believe such information to be factually correct and confirmatory affidavits will be obtained and filed, if possible. Any legal submissions or conclusions contained in this affidavit are made on the advice of the Applicant's legal representatives, which advice I believe to be correct.

**INTRODUCTION**

3. This matter relates to efforts to ensure that the Third Respondent – just like any other person – faces criminal charges when evidence of wrongdoing exists, and is given the benefit of his 'day in court' to challenge the allegations against him.

4. The allegations against the Third Respondent are serious, and could result in a conviction for corruption, racketeering and money laundering. The Applicant does not assert that the Third Respondent is guilty, but only that he should face the allegations that he received benefits in exchange for the improper use of his real or perceived political influence to affect the award of contracts for the acquisition of military equipment by the State (known colloquially as "*the arms deal*").

5. As dealt with in my founding affidavit, charges were originally brought against the Third Respondent in June 2005, after the conviction of his business associate, Mr. Shabir Shaik ("*Shaik*"). That case collapsed on 31 July 2006 as the Court was not prepared to allow the State a postponement to complete its investigation and finalise and indictment.

6. As I shall illustrate below, it is now evident that on 6 December 2007 the then incumbent of the office of the First Respondent[1] (serving on an acting basis), Adv Mokotedi Mpshe SC ("*Mpshe*"), decided afresh that charges be pursued against the Third Respondent. This decision was not made by Mpshe alone, but was guided by both senior management of the NPA and the team which would undertake the prosecution – known as the "*Bumiputera team*".

7. Matters were however complicated by two factors. First, as a practical matter an extensive indictment had to be finalised. Secondly, the Third Respondent was at the same time involved in a struggle for the leadership of the African National Congress ("*the ANC*"), running against the then President of the ANC and the country, Mr. Thabo Mbeki. That leadership battle was to be decided at a national meeting of the ANC to be held in Polokwane from 16 to 20 December 2007 ("*the Polokwane conference*").

8. As I shall further illustrate below, the prosecuting team argued that the charges should be launched as soon as the indictment was ready, regardless of the Polokwane conference. However, Mpshe himself decided that the reinstatement of the criminal proceedings should be held back until after the Polokwane conference. Quite legitimately, he wished to avoid any suggestion that the charges were timed to influence the events at that conference. Although Mpshe finalised an indictment on 14 December 2007, but it was held back.

9. The Third Respondent was elected as the President of the ANC at the Polokwane conference, and in that capacity was poised to take over as

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[1] When referring to "*the First Respondent*", I refer to the Office of the National Director of Public Prosecutions ("*NDPP*") and not to the individual occupying the position. I shall refer to the National Prosecuting Authority as the "*NPA*".

the President of the country at the next general elections. Shortly after the conference, on 28 December 2007, the indictment was served.

10. The Third Respondent sought by various means to end efforts to prosecute him. He first brought an application challenging the decisions to prosecute him, based in part on allegations that the decisions were tarnished by improper political motives. Mr. Justice Nicholson (in the High Court in Pietermaritzburg) initially set aside Mpshe's decision.[2] That judgment and order were overturned on appeal by the Supreme Court of Appeal ("*the SCA*").[3] The Third Respondent thereafter sought leave to appeal from the Constitutional Court, which was opposed by the NPA.

11. The Third Respondent's legal representatives also indicated that they would bring an application for the permanent stay of his prosecution, which was to be launched by 18 May 2009 (as per the arrangement evidenced in annexure **"JS 2"** to my founding affidavit).

12. Furthermore, in February and March 2009 the Third Respondent's legal representatives made oral and written representations to the First Respondent and his team, calling for the charges against the Third Respondent to be dropped. In my founding affidavit I explained that the Applicant's national leader, Ms. Helen Zille ("*Zille*"), sought access to these written representations in order to make her own representations why the charges against the Third Respondent should not be dropped. She was denied this access.

13. The First and Third Respondents have still refused to provide the Applicant with these written representations, which remained shrouded. However, as I shall show, it is now evident that a feature of the oral

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[2] Zuma v National Director of Public Prosecutions [2009] 1 All SA 54 (N).
[3] NDPP v Zuma 2009 (2) SA 277 (SCA) (per Harms DP).

representations by the Third Respondent's legal representatives was the explicit threat that if the NPA persisted in its prosecution, then embarrassing allegations about the actions of members of the NPA would be made public. The prosecution team quite correctly referred to these threats as "*blackmail*".

14. The record now shows that on 1 April 2009 a somewhat disconsolate Mpshe, who still served in the office of the First Respondent in an acting capacity, informed the senior management of the NPA that he had decided that the prosecution of the Third Respondent should be abandoned. This decision was not disclosed to the prosecution team, which remained of the view that the charges against the Third Respondent should be pursued.

15. At this point the NPA's senior management recognised that a factual and legal basis for this decision would have to be presented. Mpshe's decision and reasons were presented to the prosecution team on 6 April 2009, and immediately announced publicly. It is this decision which lies at the heart of this application.

16. As dealt with in my founding affidavit, the stated reasons for Mpshe's decision rely almost entirely on a series of intercepted telephone conversations and cellphone messages (SMSs) between the former head of the NPA's Directorate of Special Operations ("*DSO*"), Mr. Leonard Frank McCarthy ("*McCarthy*"), and others.

17. These recordings were first provided to Mpshe by the Third Respondent's legal representatives. They have, however, never explained the provenance of these recordings, or how they came into their possession. Mpshe later indicated that he had established that similar recordings were made by the National Intelligence Agency (as part of another investigation), which were also provided to him. On this

basis the recordings have come to be known in the media as the "*spy tapes*".

18. These recordings and transcripts have now also been provided to the Applicant. They largely consist of conversations and messages between McCarthy and Mr. Bulelani Ngcuka ("*Ngcuka*"), who had previously served as the first incumbent of the office of the First Respondent from 1998 to 2004. Both McCarthy and Ngcuka appear to have supported President Mbeki in the leadership challenge at the ANC's Polokwane conference. In the recordings and messages McCarthy and Ngcuka discuss, *inter alia*, whether President Mbeki's prospects would be strengthened if the indictment against the Third Respondent were to be served before, during or after the Polokwane conference. They appear to have concluded that it would be better if the indictment was served after the conference (as in fact happened).

19. A single SMS message from McCarthy to another member of the NPA, Mr. Faiek Davids ("*Davids*"), of 24 December 2007, also suggests that McCarthy remained part of a "*comeback strategy*" for President Mbbeki after his defeat at the Polokwane conference.

20. Mpshe's stated reasons (annexure **"JS 10"** to my founding affidavit) ultimately rely on the recordings as evidence of "*collusion*" between McCarthy and Ngcuka "*to manipulate the prosecutorial process before and after the Polokwane elections*". The alleged manipulation, Mpshe seeks to explain, relates to the "*timing of the charging*" for "*purposes outside and extraneous to the prosecution itself*".

21. In light of the record which has now been provided by the First Respondent, it is with respect simply not credible that Mpshe's stated reasons actually formed the basis for his decision.

22. In the first place, the NPA had staved off several attacks by the Third Respondent that the prosecution was tainted by politically motivated agendas. Nothing material had changed. On the contrary, the record confirms that:

22.1 Mpshe did not make his decision based on an assessment that his earlier decision to institute criminal proceedings against the Third Respondent was flawed, or tarnished by improper motives. Mpshe was satisfied that the decision to pursue criminal proceedings against the Third Respondent was properly made.

22.2 Mpshe did not make his decision based on an assessment that new information called the charges against the Third Respondent into doubt. He remained of the view that the charges against the Third Respondent remained meritorious and serious.

22.3 Mpshe did not make his decision based on any misgivings about the substantive content of the indictment containing the charges against the Third Respondent, or the manner in which the charges were framed.

22.4 Mpshe did not make his decision based on any concerns about the members of the prosecution team, or that the Third Respondent would face any demonstrable trial-related prejudice. Mpshe had complete confidence in the skill, integrity and neutrality of the team that had compiled the indictment and who would prosecute the charges against the Third Respondent. The prosecution team was in no way implicated in any of McCarthy's alleged skulduggery.

22.5 Mpshe and the NPA were advised by Advocates W Trengove SC ("*Adv Trengove*") and A Breitenbach SC ("*Adv*

*Breitenbach*") at the time that the strength of the case against the Third Respondent had to be a decisive consideration when considering the representations made by the Third Respondent's legal representatives. This advice was inexplicably ignored.

23. In the second place, while McCarthy may have wanted others to believe that he could influence the timing of the service of the indictment before or during the Polokwane conference, there is little to support his self-aggrandisement. In fact, even if it is accepted that McCarthy was willing or prepared to manipulate the process in this period, it is evident that he did not in fact do so.

23.1 The record illustrates that the timing of the service of the indictment was not left to McCarthy, and he did not dictate whether the indictment should be served before or after the Polokwane conference. Rather, the decision as to the timing of the service of the indictment was widely discussed amongst many people in the NPA, precisely because of the legitimate concern that an impression of political interference may arise. Ultimately the decision as to timing was made for practical reasons, and was made by Mpshe himself, who indicated that the indictment should be served after the ANC's Polokwane conference in early January 2008.

23.2 In the circumstances, McCarthy's malign motive did not influence the actual timing of the service of the indictment to support an agenda at the ANC's Polokwane conference. To say anything different, Mpshe would have to admit that he was little more than a leaf in the wind – in that he actually outsourced this decision to McCarthy, or was entirely led by McCarthy. This would be hard to credit, in that at the time that Mpshe made his

decision, McCarthy was not consulted and appears to have been on vacation.

24. In the third place, there is also little to support any contention that the timing of the service of the indictment after the Polokwane conference supported any non-prosecutorial, or political motive.

24.1 Once again, it was Mpshe's decision that the indictment be served in early January 2008. It was in fact served a few days sooner, on 28 December 2007. This accorded with the overall approach of the prosecution team, which favoured the approach that the indictment should be served sooner-rather-than-later.

24.2 McCarthy was party to the decision to serve the indictment at this time. But even if it is accepted that he remained part of a "*comeback strategy*" for President Mbeki, it is not evident how this slight acceleration of the service of indictment served that plan. Mpshe's reasons do not attempt to deal with this aspect.

25. In the circumstances, the record strengthens the inference I drew in the founding affidavit that the challenged decision is so inexplicable that there are good grounds to believe that it was taken for an ulterior motive, alternatively that it was taken in reliance on undisclosed considerations.

26. In making this argument, it is not the Applicant's intention to besmirch Mpshe. He was clearly operating under considerable pressure. He was also serving in his position in an acting capacity, and any hope of permanent appointment would lie in the hands of the Third Respondent himself, who stood on the brink of election as the President of the country.

27. Even if Mpshe was angered by the contents of the spy tapes, this could not justify his decision. Mpshe's concern could have been no more than this: Based on recordings and transcripts which the Third Respondent should not have had in his possession, and which were taken out of context, he (the Third Respondent) may have come to the factually incorrect conclusion that the timing of the service of the indictment against him was manipulated for political purposes.

28. This concern could not have rationally or reasonably led to Mpshe's decision of 6 April 2009. Yet because of this decision the Third Respondent was able to stand as the ANC's presidential candidate in elections on 22 April 2009, and again on 7 May 2014, unburdened by any criminal charges.

**THE PURPOSE AND STRUCTURE OF THIS AFFIDAVIT**

29. This affidavit supplements the review grounds with reference to the record filed in terms of Rule 53(1) of this Court's Rules.

30. In order to avoid unduly burdening this affidavit, I do not intend to attach documents from the Rule 53 record. I shall instead refer to the relevant documents, and ask that the documents be treated as incorporated by reference. For the sake of convenience, I identify the portion of the relevant documents in footnotes.

31. The structure of this affidavit, which is by necessity lengthy and detailed, is as follows:

    31.1 In the <u>first</u> part, I describe the protracted litigation that transpired since I deposed to the founding affidavit in this matter some five and a half years ago. Since then the Respondents have gone to great lengths to resist the production of relevant documentation and recordings. As a result the Applicant has had to take

extraordinary steps to extract the record – including two interlocutory applications, both of which went all the way up to the Supreme Court of Appeal. I provide this summary of events both in order to explain the procedural delays in this matter, and to avoid burdening this Court with all of the papers filed in the two interlocutory applications.

31.2 In the second part, I analyse the record filed by the First Respondent. As I shall explain, the record consists of a disparate collection of documents extracted from the NDPP over time. Despite these shortcomings, I shall attempt to 'piece together' the events described or referred to in the record.

31.3 In the third part, I analyse the content of the spy tapes, and the extent to which the recordings indicate any impropriety in the in the timing of the service of the charges against the Third Respondent.

31.4 Against this background I deal with the bases of review. In the fourth part I return to deal with the unreasonableness and irrationality of Mpshe's decision.

31.5 In the fifth part I demonstrate that the record further confirms Mpshe failed to take account of all relevant information. In particular, Mpshe placed insufficient weight on the strength of the case against Third Respondent, and the integrity of the prosecution team. In addition, the record shows that Mpshe was not presented with all the relevant information and facts regarding the recordings.

31.6 In the sixth part, I deal with the procedural fairness and procedural irrationality of Mpshe's decision.

31.7 In the seventh part, I show that when Mpshe took the challenged decision, he acted *ultra vires* his powers.

31.8 In the eighth part, I show that Mpshe was materially influenced by an error of law in that he relied on foreign jurisprudence not applicable in South Africa, some of which had even been overturned in its original jurisdiction at the time Mpshe relied on the judgments.

32. In all the circumstances it is submitted that the challenged decision falls to be set aside as an unlawful and invalid exercise of administrative power in terms of the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*"), or alternatively as an unlawful and invalid exercise of public power subject to the doctrine of the rule of law (enshrined in section 1(c) of the Constitution).

**PART 1: THE LITIGATION HISTORY**

33. As noted above, the Applicant sought to dissuade Mpshe from dropping charges against the Third Respondent. The problem was that the Applicant had no inkling as to the content of the Third Respondent's representations. It is obviously an impossible task to dissuade an official from acceding to representations which are kept secret.

34. In the circumstances the Applicant predicted (correctly as it turned out) that Mpshe would succumb to pressure and discontinue the prosecution. Preparatory steps were accordingly taken to launch review proceedings even before Mpshe announced his decision on 6 April 2009. The Applicant was accordingly in a position to launch an urgent review of the decision on 7 April 2009, just a day later.

35. The Notice of Motion contained a standard prayer, calling on the First Respondent to file the record of proceedings in respect of the decision, as required by Uniform Rule 53(1). At that stage the Applicant envisaged an expedited review, and called for the record to be filed by 24 April 2009.

36. But this did not happen. Instead, the State Attorney responded on behalf of the First Respondent in a letter dated 24 April 2009,[4] stating that there were two issues which prevented the filing of the record:

36.1 Firstly, it was indicated that the conditions under which the Third Respondent's legal representatives made representations to the NPA prevented disclosure. It was claimed that the representations were made on condition of "*confidentiality*" and on a "*without prejudice*" basis. The First Respondent suggested that this concern could be overcome if the Third Respondent was prepared to waive the conditions, alternatively if the Third Respondent was prepared to permit the filing of the record subject to suitable written confidentiality undertakings (a number of further proposals were made in this regard).

36.2 Secondly, it was stated that the First Respondent "*intends to raise the Applicant's locus standi and the reviewability of the decision as preliminary matters to be dealt with on an interlocutory basis together with the request to the Court to sanction any confidentiality arrangements that the parties agree upon or to give directions in the event that the parties fail to reach agreement ...*". The First Respondent contended that it would be convenient for these issues to be decided before

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[4] In order not to burden the record, I shall not annex the correspondence to this affidavit which relates to the two interlocutory applications.

extensive work was undertaken and unnecessary costs were incurred.

37. Thereafter, in a letter of 29 April 2009, the Third Respondent's attorneys predictably communicated his refusal to waive the conditions of confidentiality. The First Respondent's alternative proposal (filing the record with a written confidentiality undertaking) was not dealt with in the letter.

38. From this moment forward, the First Respondent took no decisive action to ensure that the record was filed. In essence, the First Respondent deferred to the Third Respondent's arguments as to why the record could not be filed. In a letter dated 8 May 2009, the First Respondent stated that the record would not be filed in the absence of a court order compelling it to do so.

39. In an attempt to expedite matters, the Applicant proposed, in a letter dated 12 May 2009, that the record be delivered to the Registrar without the Third Respondent's representations. I must emphasise that this was done purely in an attempt to ensure that the review proceedings proceeded. The Applicant at no stage conceded that the First Respondent was entitled to entertain representations from an accused on a confidential or 'without prejudice' basis, particularly if those representations led to the withdrawal of a prosecution.

40. The Applicant's attempt to speed up the review by calling for the reduced record was frustrated by strategic inaction. The First Respondent simply did not respond to the call for the reduced record. Furthermore, the interlocutory application in respect of the issues of standing and reviewability foreshadowed in the First Respondent's letter of 24 April 2009 was never brought.

41. The Applicant was forced to launch an application in terms of Rule 6(11) of this Court's Rules, to compel the First Respondent to file the record. This application was set down for hearing on 9 June 2009. An interlocutory application to intervene in the main application was also brought by Mr R M M Young ("*Young*") and CCII Systems (Pty) Ltd ("*CCII*") and set down for hearing on the same date.

42. Neither of the two interlocutory matters proceeded on 9 June 2009. Instead, a timetable was agreed to between the parties for the hearing of the two interlocutory applications, which was made an order of court.

43. In their answering affidavits in the Rule 6(11) applications, the First and Third Respondents did not confine their responses to the merits of the Rule 6(11) application and the intervention application. Instead a host of other issues were raised, namely:

    43.1 the Applicant's standing to bring the review application;

    43.2 the reviewability of the decision to discontinue the prosecution;

    43.3 whether a sitting President may be charged or prosecuted;

    43.4 the status of the appeal proceedings before the Constitutional Court relating to the meaning of section 179(5)(d) of the Constitution;

    43.5 whether the *"entire application is an abuse of process ... brought ... solely in order to gain political ground on the ANC";*

    43.6 whether the Third Respondent's fair trial rights will be impaired by a fresh decision to prosecute him; and if so, whether a review court would exercise the discretion it has in review proceedings against the setting aside of the impugned decision; and

43.7 whether there has been an unreasonable delay which would entitle the Third Respondent to a permanent stay of prosecution.

44. The Rule 6(11) application matter was heard by Ranchod J. The learned Judge accepted the submission, made on behalf of the First Respondent, that a political party such as the Applicant does not have a direct and substantial interest in a decision to discontinue the prosecution of Third Respondent. For unrelated reasons he refused the intervention application by Young and CCII.

45. The decision of Ranchod J was overturned on appeal by the Supreme Court of Appeal in the reported matter of **DA v Acting NDPP** 2012 (3) SA 486 (SCA). The order of Ranchod J was substituted as follows:

> *"1 The issues raised for separate adjudication by the respondents are determined as follows:*
>
> *1.1 The respondents' objection to the standing of the first applicant in the review application is dismissed with costs including the costs attendant on the employment of two counsel.*
>
> *1.2 The first respondent's decision of 6 April 2009 to discontinue the prosecution of the third respondent is held to be subject to review.*
>
> *1.3 In the Rule 6(11) application the first respondent is directed to produce and lodge with the Registrar of this Court the record of the decision. Such record shall exclude the written representations made on behalf of the third respondent and any consequent memorandum or report prepared in response thereto or oral representations if the production thereof would breach any confidentiality attaching to the representations (the reduced record). The reduced record shall consist of the documents and materials relevant to the review, including the documents before the first respondent when making the decision and any documents informing such decision.*

*1.4 The first and third respondents are ordered to pay the applicant's costs jointly and severally including the costs attendant on the employment of two counsel.'*

46. The SCA further directed that the above had to be complied with within 14 days of date of its judgment.

47. In making this order the SCA did not excuse the First Respondent from the obligation to provide a copy of the representations made by the Third Respondent's attorneys. In this regard the SCA held (at paragraph 33) as follows:

> "*...If the reduced record provides an incomplete picture it might well have the effect of the NDPP being at risk of not being able to justify the decision. This might be the result of Mr Zuma's decision not to waive the confidentiality of the representations made by him.*"

48. The judgment and order of the SCA was welcome to the Applicant, which, at that stage, believed that it would put an end to the dilatory tactics of the First and Third Respondents. Unfortunately, quite the opposite turned out to be the case.

49. The 14-day period for compliance, imposed by the SCA, expired on 10 April 2012. That day came and went by without the order being complied with and indeed without any communication from the office of the State Attorney. There was no request for an extension and there was no explanation for why the First Respondent failed to comply with the SCA's order.

50. The first communication from the State Attorney came in the form of a letter dated 12 April 2012, conveying the following:

50.1 The State Attorney was in the process of preparing copies of a reduced record (i.e. excluding the Third Respondent's representations).

50.2 A list of documents which, according to the State Attorney, comprised the reduced record was furnished.

50.3 The State Attorney indicated that there were, in addition, certain "*tape recordings*" which were in the process of being transcribed but that process had not been completed and would take additional time.

50.4 The State Attorney claimed that the First Respondent was obliged to afford the Third Respondent's legal team an opportunity to consider whether there was any objection to the disclosure of the transcripts. Only thereafter would the transcripts would be made available as a supplement to the record.

51. Copies of the documents listed in the above letter were lodged with the Registrar of this Court on 13 April 2012. The documents comprised little more than the Applicant's own submissions to the First Respondent before he took the challenged decision, and similar submissions by other persons. Nothing else was filed.

52. Needless to say, the representations of the objectors cast little light on the process and rationale for the decision taken by the First Respondent.

53. Over the next months the Applicant wrote further letters in which it sought clarity from the Respondents regarding the release of the recordings and transcripts. The response from the State Attorney was that the First Respondent was awaiting the representations of Third Respondent on the recordings and transcripts.

54. When it became apparent that no progress was being made, the Applicant launched a second interlocutory application, on

18 September 2012. In this application the Applicant sought orders, *inter alia*, directing that:

54.1 The record be produced and lodged by the First Respondent in terms of the SCA order quoted above;

54.2 The record had to include a copy of the electronic recordings and a transcript thereof;

54.3 The record had to also include any internal memoranda, reports or minutes of meetings dealing with the contents of the recordings and/or the transcript itself, insofar as these documents did not directly refer to the Third Respondent's written or oral representations; and

54.4 The incumbent of the office of the First Respondent, Adv Nomgcobo Jiba, be held in contempt of the SCA order.

55. In response the First Respondent took no view on whether the spy tapes and the transcripts should be released as part of the record (for which it was subsequently heavily criticised). As far as the memoranda, reports and minutes are concerned, First Respondent stated the following:

> "*[26] Further the NPA confirms that the contents of the conversations that had been intercepted and were transcribed were indeed dealt with in the memoranda, minutes and notes of meetings etc, by officials of the NPA in the process of internal discussion and consultation leading up to the decision by Adv Mpshe.*
>
> *[27] However, those memoranda, reports, minutes and notes all arose from and deal specifically with what was conveyed both in writing and orally in the representations submitted on behalf of the third respondent and on the basis of confidentiality. Those issues are* ***inextricably linked with the recordings or transcripts.*** *Thus all these fall within the ambit of the SCA*

*order and are covered by the limitation for the production of the record."*

56. In a judgment dated 16 August 2013 this Court (per Mathopo J) dismissed the application for contempt, but essentially granted the remainder of the relief sought by the Applicant and ordered that:

56.1 The First Respondent had to produce the recordings/transcripts as part of the record;

56.2 The memoranda and reports were to be furnished to the Applicant's attorneys, with the parts considered to be confidential to be marked as such; and

56.3 A mechanism was incorporated for the resolution of disputes about whether the marked parts were genuinely confidential.

57. On 6 September 2013, Mathopo J granted leave to the Third Respondent to appeal against his judgment and order to the SCA. The First Respondent did not take part in the subsequent proceedings before the SCA.

58. The judgment and order of Mathopo J was upheld by the SCA in **Zuma v Democratic Alliance and Others** (836/2013) [2014] ZASCA 101 (28 August 2014) save that the parties agreed that a retired judge, Mr. Justice NV Hurt, would be the final arbiter of which aspects of the memoranda and reports were confidential.

59. The redacted memoranda and reports evidenced the existence of further documents which had not been provided. In a letter of 16 September 2014 (copy annexed marked **"JS13"**), the Applicant's attorneys requested these documents. The documents were provided on 7 October 2014 under cover of a letter from the State Attorney (copy annexed marked **"JS14"**). These documents were subsequently

considered by Justice Hurt, who indicated that no part of these documents contained confidential information.

**PART 2: AN ANALYIS OF THE RECORD OF MPSHE'S DECISION**

60. The record of the decision sought to be reviewed in this matter consists of four parts:

60.1 **Part A** comprises the documents filed by First Respondent on 12 April 2012, in response to the first SCA decision. As noted, it consists of representations to the NPA before the challenged decision was taken, and responses to these submissions. This part of the record has been numbered as pages **A1** to **A47**.

60.2 **Part B** comprises the documents and recordings handed to Zille by the NPA on Thursday, 4 September 2014. The documents consist, in the main, of a transcript of the recordings of the spy tapes, as well as some handwritten notes. This part of the record has been numbered as pages **B1** to **B154**.

60.3 **Part C** comprises the internal memoranda and minutes redacted by Justice Hurt, numbered as pages **C1** to **C188**.

60.4 **Part D** comprises the documents provided to the Applicant on 7 October 2014, numbered as pages **D1** to **D464**.

61. It is evident from the manner in which the record has been provided, and the disorganised presentation of the documents, that no-one knows what served before Mpshe wher he made the challenged decision.

62. It is further evident that the First Respondent's claims of confidentiality were overbroad. Of the 652 pages presented to Justice Hurt, he redacted approximately 17 pages.

63. Despite the shortcomings of the record, the documents provided give an important insight into the relevant events. For the sake of convenience I deal with these events in three periods.

63.1 The first period runs from 2005 to 2007, before the spy tapes commence.

63.2 The second period commences at the beginning of November 2007 and ends in April 2008. It was in this period that the spy tapes were made, and that the decision was taken to reinstitute charges against the Third Respondent.

63.3 The third period commences in the beginning of 2009 and ends in April of that year. This covers the period during which the Third Respondent's legal representatives made oral and written representations to the First Respondent, and the period in which Mpshe made the challenged decision.

64. I have annexed hereto, marked **"JS15"**, printed calendars for the years 2007, 2008 and 2009, to assist with an analysis of the events over these years.

**THE PERIOD FROM 2005 TO 2007: BEFORE THE "SPY TAPES"**

65. The events in this period are described in the affidavit of Senior Special Investigator Johan du Plooy (*"SSI du Plooy"*), dated 9 July 2008, which is included in Part D of the record.[5] The affidavit was deposed to by SSI Du Plooy in opposition to the application by the Third Respondent challenging the decisions by Pikoli and Mpshe to prosecute him (referred to in paragraph 10 above).

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[5] A draft of this affidavit appears at R53 Record pp. D225-363

66. SSI Du Plooy's affidavit illustrates that over the years the Third Respondent has never dealt with the merits of the charges against him, but has instead challenged the charges against him on technical grounds. One of the repeated claims made by the Third Respondent was that his prosecution was part of a political conspiracy.[6] This was consistently denied by the NPA.

67. The following background facts are set out in the affidavit of SSI Du Plooy:

67.1 By mid-2001, investigators discovered an "*encrypted fax*" authored by a Mr Thétard, a representative of the Thint group of companies. This fax evidences an agreement concluded at a meeting in March 2000 in Durban with Shaik and the Third Respondent.[7] The Constitutional Court has stated that this fax indicates an offer of payment to the Third Respondent "*in exchange for his authority and influence, to protect and promote Thint in the so-called 'arms deal'*".[8]

67.2 Subsequent investigations reveal that certain of the offences had commenced as early as October 1995.[9]

67.3 The NPA decided to prosecute Shaik, certain companies in the Nkobi group of companies (linked to Shaik) and Thint (Pty) Ltd (a locally registered company forming part of the

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[6] See, for example, the comment by Downer and the prosecution team in the Internal Memorandum dated 3 March 2009 (Record C5, para 9.2 (my underlining): "*Bad faith and a political motive on the part of the NPA and successive NDPPs have been alleged as expected, and detailed in "Excursus B". The written representations do little more than expand upon, but not improve, the previous allegations in his various papers that have not found favour with the SCA. As his counsel admitted in court, the allegations are no more than Zuma's perceptions*".

[7] Record D239, Du Plooy Affidavit para 24

[8] S v Shaik 2008 (2) SA 208 (CC) at para 5

[9] Record D239, Du Plooy Affidavit para 24

Thint group). The investigating team recommended that the Third Respondent should also be prosecuted but at that stage Ngcuka (who then held the office of the First Respondent) and McCarthy took a different view. They decided and announced on 23 August 2003 that, notwithstanding the existence of a *prima facie* case against the Third Respondent, there was not a reasonable prospect of a successful prosecution against him.[10] Ngcuka made it clear, however, that this decision would be reconsidered should further evidence come to light.[11]

67.4 The decision of Ngcuka (and McCarthy) not to prosecute the Third Respondent was alleged to be proof of an ulterior motive on Ngcuka's part, namely that he was party to an alleged political conspiracy with the sole aim of destroying the Third Respondent's political career. Ngcuka[12] and McCarthy[13] comprehensively refuted these allegations.

67.5 The proceedings against Shaik continued, and he was convicted and sentenced to an effective 15 years imprisonment. As intimated above, the judgment of the Court implicated the Third Respondent, which caused the then NDPP, Pikoli, to announce that the Third Respondent would be prosecuted.[14]

67.6 However, the Third Respondent yet again sought to employ the "*political conspiracy*" defence. Whereas the conspiracy

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[10] Record D241, Du Plooy Affidavit para 30.2
[11] Record D241, Du Plooy Affidavit para 30.2
[12] Record D245, Du Plooy Affidavit para 32
[13] Record D241-4, Du Plooy Affidavit para 31
[14] Record D254, Du Plooy Affidavit paras 41 – 44

had previously been the decision not to charge him,[15] the Third Respondent now alleged a conspiracy in the decision to charge him (thus granting him his apparent wish of having his day in court).

67.7 The allegation of an ulterior motive was refuted McCarthy (who indicated the impact of the evidence and findings in the Shaik trial);[16] and Pikoli (who dealt comprehensively with allegations and insinuations of impropriety on his part for taking the decision to prosecute the Third Respondent.)[17]

67.8 On 26 July 2005 KPMG was mandated to conduct a thorough, independent forensic investigation in the matter of the prosecution of the Third Respondent, including an up to date analysis of all the payments from Shaik to the Third Respondent.[18] I shall revert to the findings of this investigation further below.

67.9 On 18 August 2005 search and seizure operations took place, authorised by Judge President Ngoepe (of the High Court in Pretoria).[19]

67.10 The Third Respondent and his legal representatives challenged the search warrants, which disrupted the NPA's

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[15] See Record C31, Internal Memorandum from the Bumiputera Team, dated 20 March 2009, paras12-14.
[16] Record D273, Du Plooy Affidavit para 55
[17] Record D277, Du Plooy Affidavit para 56. See, also, Record D338, Du Plooy Affidavit at para 195" *"[Third Respondent's surmise that Pikoli briefed the President is nothing more than unsupported and self-serving conjecture that does not even begin to cast doubt on Pikoli's sworn denial of any such briefing*".
[18] Record D287, Du Plooy Affidavit para 63
[19] Record D290, Du Plooy Affidavit para 66. The legality of these search warrants were challenged in the High Court in two separate cases which ultimately resulted in the judgment of the Supreme Court of Appeal in **Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions** 2009 (1) SA 1 (CC).

preparation for the criminal proceedings.[20] On 31 July 2006 those proceedings came before Mr. Justice Msimang in the High Court in Pietermaritzburg). The State applied for a postponement of the trial which was dismissed. When the State was unable to proceed, the matter was then struck from the Court's roll.[21]

67.11 In the judgment, Msimang J was very critical of the State's decision to embark upon the prosecution precipitously and in circumstances in which (the learned Judge held) the State ought to have realised that the outstanding investigation would not be concluded within a reasonable time.[22] In light of this, the NPA decided to complete all outstanding investigations and resolve the interlocutory (search warrant) appeals before a decision was to be taken on whether or not to recharge the Third Respondent and the Thint companies.[23]

67.12 The further investigations required further applications to the High Court to issue letters of request to Mauritius and the United Kingdom to obtain outstanding documentation. This in turn led to two new rounds of litigation, in respect of both requests, by the Third Respondent and the Thint companies.[24]

67.13 In the same period then President Mbeki suspended Pikoli as NDPP, on the basis of an irretrievable breakdown in the working relationship between him and the then Minister of Justice and Constitutional Development, Ms Brigette

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[20] Record D293, Du Plooy Affidavit para 73
[21] Record D295, Du Plooy Affidavit para 76
[22] Record D296, Du Plooy Affidavit para 81
[23] Record D296, Du Plooy Affidavit para 81
[24] Record D298, Du Plooy Affidavit para 84.

Mabandla ("*Minister Mabandla*"). The President appointed Mpshe as acting NDPP.[25]

67.14 On 11 October 2007, the Third Respondent's attorney, Mr. Hulley ("*Hulley*"), addressed a letter to Mpshe, observing that it had been reported that Mpshe's office was intent upon reviewing the case against the Third Respondent, and requesting an opportunity to make representations in this regard. Mpshe replied on 12 October 2007, stating that the "*Zuma matter*" was not a subject of any review.[26]

67.15 On 8 November 2007 the SCA dismissed all of the interlocutory applications brought by the Third Respondent (being the challenges to the search warrants and the requests for international assistance).

**THE PERIOD FROM NOVEMBER 2007 TO APRIL 2008**

68. In light of the further investigation, the KPMG report, and the SCA's decision, the decision to reinstitute charges against the Third Respondent was a formality.

69. Events in this period are evidenced by an e-mail message (dated 29 March 2009) from the leader of the prosecution team, Adv. William Downer SC ("Downer"), to Adv. Breitenbach.[27]

70. Downer notes that on 12 November 2007 he telephonically discussed the matter with McCarthy. Downer recommended that an immediate decision should be taken to pursue the prosecution. McCarthy raised a

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[25] Record D300, Du Plooy Affidavit para 89
[26] Record D301, Du Plooy Affidavit para 90
[27] Record D57, Downer email (29/03/2009), item 11

"*second approach*", namely that the decision should wait until after the ANC's Polokwane conference. Downer and McCarthy however agreed that "*in principle the first approach* [i.e. Downer's preferred course] *is best, especially taking into account the ticking clock and trial delay concerns*". This discussion is confirmed by Downer's contemporaneous notes, which are included in the record.[28]

71. Based on this discussion Downer and his team immediately commenced drafting an "*improved indictment*" in close contact with KPMG.[29]

72. It was known in this period that the Third Respondent would seek leave to appeal against the SCA's judgment to the Constitutional Court. However, Downer records that the prosecution team recommended that prosecution of the case as a whole should not be delayed any further, pending the appeal to the Constitutional Court.

73. This is confirmed by a "*formal application*" which the prosecution team made to Mpshe on 13 December 2007, in which they sought Mpshe's authorisation to also include charges under the Prevention of Organised Crime Act 121 of 1998 ("*POCA*"). This application forms part of the record.[30] It contains the prosecution team's recommendation that the decision to prosecute should <u>not</u> be delayed pending the appeal proceedings in the Constitutional Court.[31] In this regard the team anticipated that the Third Respondent would raise the "*defence*" of a "*political conspiracy*" against him.[32]

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[28] Record D45, Downer notes (12/11/2007)
[29] See also Record D301, Du Plooy Affidavit para 92
[30] Record D371-D399
[31] Record D376-377, POCA Application para 16 and 18
[32] See, Record D389, POCA Application at para 29 and Record D398, POCA Application at para 46:

74. As far as the decision to charge the Third Respondent on charges of corruption is concerned, the following is stated in the POCA application:

> "*In the result, the prosecution team is of the view that the way is now clear to take a decision on whether or not to prosecute Zuma and the Thint companies and if so, on what charges. This report is approached on the basis that the National Director has already confirmed the decision to prosecute the three suspects on at least two counts of corruption and that nothing that has occurred since this decision was taken has given any reason to review that decision. On the contrary, all obstacles to such a prosecution have now been removed and the State's case in the Shaik matter has now received the unqualified endorsement of both the SCA and the CC. Accordingly, this report is henceforth directed not so much at the question of <u>whether</u> the suspects should now be charged, but rather at whether a racketeering prosecution is justified and appropriate.*"[33]

75. On 14 November 2007 Downer met with Mpshe and the Deputy National Directors of Public Prosecutions ("*the DNDPPs*") to consider the recommendations of the prosecution team and to discuss "*the way forward*". Downer records that at this meeting it was "*resolved to proceed in principle with the POCA option*", and that Adv. Trengove be consulted regarding the indictment.

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"*[29] It is anticipated that they will continue to use every legal device and stratagem to prevent the matter coming to trial. These will include an application for a permanent stay of prosecution (and consequent appeals if this fails), attacks on bona fides and integrity of the prosecution team, the DOS and the NPA, the use of media to ramp up popular and political opposition to the prosecution and using any means available to delay the commencement of the trial.*"

...

"*[46] Finally, it is anticipated that the accused and their allies will try to make political mileage out of the racketeering charges as further support for their allegations that Zuma is the victim of a political conspiracy. In our view, however, this is not a factor that should enter the equation when deciding whether racketeering is an appropriate charge.*"

[33]Record D377, POCA Application para 19

76. Adv Trengove was consulted the same day, and also agreed "*in principle*" with the inclusion of POCA charges, and recommended the further inclusion of tax evasion charges.

77. On 20 November 2007 the prosecuting team made an application to Mpshe to authorise the centralisation of charges in terms of section 111 of the Criminal Procedure Act 51 of 1977 ("*CPA*"), read with section 22(3) of the National Prosecuting Authority Act 32 of 1998 ("*NPA Act*").[34] This confirms that at this stage at least an "*in principle*" decision had been taken to prosecute Third Respondent, of which the Third Respondent was aware. I say this as the following is stated in the application (with my emphasis added):

> "*It is recommended that the certificate be issued without reference to the prospective accused. It is understood that they have indicated that they will make representations once the decision to prosecute had been announced.*"[35]

78. On 21 November 2007 Downer and McCarthy again met in Cape Town, at which it was agreed that the finalisation of the indictment would be left to the prosecuting team's discretion.

79. On 29 November 2007 Downer met with Mpshe and the DNDPPs, at which he recorded that the prosecution was "*finally approved*". Following further discussion, the go-ahead was also given to proceed with charges under POCA.

80. At this meeting it was further noted that an "*updated*" report should be provided to Minister Mabandla in terms of section 33 of the NPA Act, to be available when she returned from abroad on 4 December 2007.[36]

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[34] Record D200 – D206
[35] Record D204, Section 111 Application at para 9
[36] Record D57, Downer email notes (29/03/2009), item 11. Section 33 of the NPA Act provides as follows:

Presumably such a report had been requested by Minister Mabandla to explain the decision to prosecute the Third Respondent.

81. Based on the decisions at the meeting of 29 November 2007, Downer met with Adv. Breitenbach on 30 November 2007. At this time they considered it "*do-able*" to arrange for the service of the indictment and a first appearance by 12 December 2007. They also decided that the indictment should be attached to the NPA's papers opposing the Third Respondent's application for leave to appeal in the Constitutional Court. Those papers were due by 14 December 2007.

82. On 3 December 2007 Mpshe sent a section 33 report (in his name) to Minister Mabandla, which forms part of the record.[37] The report confirms what was stated above, i.e. that the only real obstacle to the decision on whether to recharge had been the interlocutory applications. The report also states that it would be "*unnecessary and undesirable to await the outcome of any further appeal to the Constitutional Court before deciding on whether to proceed with the prosecution*".[38] It also stated that it would be necessary to inform the

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**33 Minister's final responsibility over prosecuting authority**

(1) The Minister shall, for purposes of section 179 of the Constitution, this Act or any other law concerning the prosecuting authority, exercise final responsibility over the prosecuting authority in accordance with the provisions of this Act.

(2) To enable the Minister to exercise his or her final responsibility over the prosecuting authority, as contemplated in section 179 of the Constitution, the National Director shall, at the request of the Minister-

(a) furnish the Minister with information or a report with regard to any case, matter or subject dealt with by the National Director or a Director in the exercise of their powers, the carrying out of their duties and the performance of their functions;

(b) provide the Minister with reasons for any decision taken by a Director in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her functions;

...".

[37] Record D364-D370

[38] Record D365, Section 33 Report at paras 5 and 6.

Constitutional Court of the decision to reinstitute the prosecution of the Third Respondent, including the details of the indictment.[39]

83. Significantly, the report goes on to state that Mpshe believed that "*it is now appropriate that the decision to charge the suspects on the charges indicated below should be made, as it has been*".[40] The following is stated in the report (my emphasis added):

> "*The prosecution team gave a final briefing to the Acting NDPP and the Deputy and Acting Deputy NDPPs during a meeting on 29 November 2007. They confirmed their earlier recommendations concerning the prosecution of Zuma and the Thint companies.*
>
> *In accordance with all of the above, the Investigating Director, Directorate of Special Operations, in consultation with the Head: DSO, me, the other Deputy and Acting Deputy NDPPs and the prosecuting and investigating team, have decided to institute prosecutions against Zuma and the two Thint companies on the charges indicated in the attached Indictment.*"[41]

84. On 3 December 2007 Downer also provided Mpshe with the draft indictment and supporting documents.

85. This timeline for a first appearance, as mooted by Downer and Adv. Breitenbach was, with hindsight. overly-ambitious:

85.1 First, the application for centralisation of the charges had not been finalised. In a telephonic discussion of 4 December 2007, Mpshe advised Downer that Adv. Trish Matzke of his (Mpshe's) office would "*settle the format*" of this application.[42]

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[39] Record D366, Section 33 Report at para 6f
[40] Record D367, Section 33 Report at para 7
[41] Record D369, Section 33 Report at paras 19 and 20
[42] Record D46, Downer notes of telephone conversation (4/12/2007); and Record D57, Downer email notes (29/03/20009), item 15

85.2 Secondly, in the same discussion[43] Mpshe indicated that he was "*waiting for the Minister*" with regard to the section 33 application.

85.3 Thirdly, although Mpshe had agreed that POCA charges be included, he would only sign an authorisation once the indictment was finalised.

86. In a telephonic discussion of 4 December 2007,[44] Mpshe for the first time raised the possibility with Downer of delaying the announcement of the prosecution until after the ANC's Polokwane conference. Downer's notes indicate that he objected and that he stated that the prosecution "*must proceed when the prosecutors are ready irrespective of political considerations*". He also emphasised that it was important that the indictment be finalised by 7 December 2007, in order that it could be attached to the NPA's papers in opposing the application for leave to appeal to the Constitutional Court. Downer's notes indicate that Mpshe responded that he had "*no choice*" as he still had to peruse the documents "*before he announces/makes the final decision*".

87. Taken in context, it is clear that Mpshe remained committed to the decision to prosecute, and that it was only the decision as to timing which remained a concern for him. This is confirmed by the fact that Mpshe made practical arrangements, including approval of the "*summons method of securing attendance of the accused in court*".

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[43] *Ibid*
[44] *Ibid*

88. On 6 December 2007 Downer again spoke to Mpshe telephonically. Downer's notes[45] indicate the following:

88.1 Mpshe noted that there was "*a 90% chance*" that he would prosecute in accordance with the draft indictment.

88.2 Mpshe indicated that he would "*only make the announcement next year*". He explained in this regard that he did not wish to be "*seen to be interfering with the Polokwane process*", and that he had taken account of a speech by President Mbeki which "*called for calm and stability prior to Polokwane*".

88.3 Mpshe stated that a supplementary affidavit would be filed in the Constitutional Court proceedings once he made his announcement.

88.4 Mpshe confirmed that he had consulted with Minister Mabandla the previous evening (i.e. 5 December 2007), which fulfilled his responsibility to her. But Mpshe was quick to add that the decision was his (Mpshe's) and no-one else's.[46] Downer responded by indicating that in his view the decision to wait was wrong.

89. In a memorandum of 6 December 2007, Downer formally recorded his reasons why he disagreed with Mpshe's decision to delay the

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[45] Record D48, Downer notes of telephone conversation (6/12/2007); and Record D57, Downer email notes (29/03/20009), item 16

[46] This is repeated in a memorandum at Record C42, DSO KZN Memorandum dated 2 April 2009, para 12

announcement of the decision to prosecute the Third Respondent (and Thint) until after the ANC's Polokwane conference.[47]

90. In the memorandum, Downer starts by stating that he accepts that Mpshe's decision to delay the announcement was "*final*", and that the memorandum was not intended to persuade Mpshe to "*change his mind*".[48] The memorandum was intended to formally record his views, which had already been expressed verbally to Mpshe.[49] The memorandum contains the following (with the benefit of hindsight) prophetic paragraphs:

> "*[6] We have also repeatedly motivated in the strongest possible terms why it is particularly important in the instant case that the prosecutorial decisions taken must be made purely for prosecutorial reasons. The present team, with minor changes, has been seized with this investigation since at least 2003 and has been giving the same advice to three successive incumbents to the office of the National Director, with varying degrees of success.*
>
> *[7] In every single instance where the incumbent NDPP has acted contrary to our advice, the results have been damaging to the case and to the NPA. It seems, however, that the lesson has not yet been learned that it is inadvisable for the prosecution to dabble in matters of politics, even with the best possible intentions. We fear that this instance will be no different.*
>
> *[8] Even if it (sic) accepted that considerations other than purely prosecutorial ones should be considered, which we dispute, the team is nevertheless of the view that to deliberately withhold from the public the fact that a decision has been taken to prosecute the suspects until after the election of the ANC leadership, for reasons which are unconnected with the prosecutorial process, is in conflict with the constitutional duties of the team and*

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[47] The memorandum appears at Record D209-D212; see also Record C42, DSO KZN Memorandum dated 2 April 2009, para 11
[48] Record D209, DSO KZN Internal Memorandum dated 6 December 2007, para 2
[49] Record D209, DSO KZN Internal Memorandum dated 6 December 2007, para 2

*the NPA. This is information which may be relevant to the democratic processes which are presently unfolding and we are of the view that the NPA may justifiably be criticized for allowing these processes to unfold without all the facts being known. We feel that we are thus placed in an indefensible situation that conflicts with our public duties.*

*[9] We have the greatest sympathy for the Acting NDPP's reluctance to be seen to interfere in the due political process that is about to unfold. We also appreciate the concerns relating to public order and stability: these may be particularly fragile now. It is our view, however, that if the decision to prosecute were to be announced in the normal course, as it would be in any other prosecution, the Acting NDPP has nothing to fear. The moment the normal processes are deviated from, however, the NPA exposes itself to criticism from one quarter or another which will be difficult to rebut.*

*[10] In the present case, there will never be a time when the same concerns will be any less pressing. The prosecution of very serious charges cannot be allowed to be subservient to these concerns.*

*[11] In the end, the prosecutorial imperative, enshrined in Section 179 of our Constitution should prevail. This is that the NPA must exercise its functions without fear, favour or prejudice. This is echoed in our oath in terms of section 32 of the NPA Act, our Mission Statement and the UN Guidelines on the role of prosecutors."*[50]

91. Significantly, McCarthy was not involved in the discussions between Mpshe and Downer regarding the timing issue. Downer's memorandum was however copied to McCarthy (as head of the DSO). Downer's notes record that thereafter McCarthy called him on 7 December 2007, and that he (McCarthy) wanted it to be clear that he "*had not been consulted*".[51] It is not clear why McCarthy had not been consulted. but is appears that it was probably because he was on leave

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[50] Record D210: DSO KZN Internal Memorandum paras 6-11
[51] Record D49, Downer notes of meeting of 6 December 2007.

from 6 to 10 December 2007.[52] As a result it is evident that McCarthy played no role in the decision to postpone the service of the indictment on the Third Respondent.

92. After 6 December 2007 the prosecution team finalised answering papers to be filed in the Constitutional Court proceedings, and finalised the indictment. [53]

93. It appears that a finalised indictment was provided on 14 December 2007, and that on the same date Mpshe formally signed POCA authorisation[54] – although the prosecution team was not aware of this fact.[55] This indicates that notwithstanding the decision to hold off service of the indictment, Mpshe remained of the view that criminal proceedings against the Third Respondent had to proceed.

94. As noted above, the ANC's Polokwane conference took place and on 18 December 2014 the Third Respondent was elected as the ANC's President, ousting President Mbeki from that position.

95. On 21 December 2007 McCarthy gave Downer the *"go-ahead"* for the prosecution to the prosecuting team.[56]

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[52] Record at B12, Conversation 7, line 10c
[53] Record D59, Downer email notes (29/03/2009), item 21
[54] Record D59. Downer email notes (29/03/20009), item 20. This later led to the conclusion that the prosecution was formally authorised on that date. See Record D60, Adv Breitenbach email (27/03/2009), item 2
[55] Record D59, Downer email notes (29/03/2009), item 20; Record C42, DSO KZN Memorandum dated 2 April 2009, para 10
[56] Record D59, Downer email notes (29/03/2009), item 23; and Record C42, DSO KZN Memorandum dated 2 April 2009, para 13. It appears from Record D218, email from Hofmeyr to Downer, dated 2 April 2009, that Mpshe's recollection was that:

- At the meeting of 29 November 2007 it was decided that the Head DSO (McCarthy) should take the decision
- McCarthy phoned Mpshe on or about 21 or 24 December 2007 to say he wants to proceed

96. It appears that McCarthy saw Mbeki during the evening on 21 December 2007 about being released from his contract and taking up a position with the World Bank.[57]

97. On or about on 21 or 24 December 2007, McCarthy called Mpshe and told him that he wanted to proceed with the prosecution,[58] but Mpshe informed McCarthy that he did not agree and that it should wait until after 1 January 2008 (as previously decided by Mpshe).[59]

98. However, in what appears to be a change of plan, Mpshe issued the instruction to the prosecution team on 27 December 2007, to reinstate the charges without delay.[60]

99. On Friday, 28 December 2007, the NPA announced the decision to prosecute the Third Respondent and the Thint companies.[61]

100. Ultimately, the decision to institute the prosecution was a "*multi-layered corporate decision*".[62] There was consensus that the Third Respondent should be re-charged as early as 29 November 2007,[63] but ultimately it was Mpshe's decision in line with that consensus.[64]

101. The above version is corroborated by an affidavit of SSI Du Plooy, dated 9 July 2008 (well before the spy tapes were brought to the attention of the NPA), which was compiled in response to the Third

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- Mpshe informed McCarthy that he does not agree, and that it should wait until after 1 January 2008 as previously agreed. But that as the Head DSO must take the decision, it was up to McCarthy to make the decision.

[57] Record C69, Interview with Ngcuka, para xix; Record D433. Hofmeyr undated notes unnumbered para 10
[58] Record D218, Hofmeyr email to Downer (02/04/2009)
[59] Record D218, Hofmeyr email to Downer (02/04/2009); and Record C43, DSO KZN Memorandum dated 2 April 2009, para 14
[60] Record D302, Du Plooy Affidavit para 93
[61] Record D302, Du Plooy Affidavit para 94
[62] Record C49, DSO KZN memorandum dated 3 April 2009 at par a 15
[63] Record C48, DSO KZN memorandum dated 3 April 2009 at par a 13
[64] Record C49, DSO KZN memorandum dated 3 April 2009 at par a 16

Respondent's application for orders declaring the decision to prosecute him to be unconstitutional and invalid,[65] before anyone had heard of the spy tapes. SSI Du Plooy explains as follows in his affidavit:

101.1 "*On 27 December 2007 it was decided that the accumulation of all the new evidence obtained as a result of the 2005 searches and the further investigation pursuant to the perspectives obtained during the Shaik trial and pursuant to the new documents, together with the consequent re-analysis of the old documents and evidence, provided a firm basis for the institution of the prosecution against the Applicant and the Thint companies. The NPA was also satisfied that the prosecution team's theory that the manner in which the offences were committed amounted to racketeering in contravention of section 2(1)(e) of POCA was justified by the available evidence. Mr Mpshe accordingly issued the instruction to the prosecution team to reinstate the charges without delay.*"[66]

101.2 It was the NPA's stance that "*although the subject matter of the decisions of Mpshe, Pikoli and Ngcuka was similar, the facts and the circumstances upon which the various decisions were taken, differed materially. At each successive stage the evidence against* [the Third Respondent] *has become more compelling and the legal impediments to charging him had been reduced*".[67]

101.3 In the period from 28 December 2007 to 9 July 2008 (the date of the Du Plooy affidavit) he NPA attempted to arrange for the commencement of the hearing of the trial from 4 August to 12 December 2008. These efforts were ignored or frustrated by the Third Respondent's attorney, Mr. Hulley, and Thint.[68]

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[65] Record D309, Du Plooy Affidavit para 106
[66] Record D361, Du Plooy Affidavit para 268
[67] Record D349, Du Plooy Affidavit para 227
[68] Record D300 – D309, Du Plooy Affidavit paras 89 – 104

101.4 In response to the Third Respondent's strategy of accusing the NPA of pursuing a politically motivated agenda, SSI Du Plooy stated as follows:

> "[Third Respondent] *would have the Court accept that this scurrilous accusations of political conspiracies should be entertained, irrespective of the truth or otherwise thereof, simply because he has made them. This statement is almost breathtaking in its folly and it merely has to be uttered for it to be rejected."*[69]

101.5 SSI Du Plooy summarised the approach of the NPA to the discretion not to prosecute on public policy grounds as follows:

> "*It is admitted that prosecution policy does provide for a discretion to decline to prosecute on public policy grounds. However, this is an exception to the norm that will only be applied where the public interest 'demands' that the offender not be prosecuted. (See Prosecution Policy page A6 et seq – Annexure "H"). However, this involves weighing up competing considerations such as the nature and seriousness of the offence(s), the interests of the broader community and the circumstances of the offender. In a case of such seriousness as the present and with such serious implications for society, the representations would have to be weighty indeed to warrant such a deviation from the general rule."*[70]

**THE PERIOD FROM JANUARY TO APRIL 2009**

102. Efforts to get the charges against Third Respondent dropped commenced already in 2008, and there was regular engagement between the defence team and management of the NPA.

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[69]Record D361, Du Plooy Affidavit para 268
[70] Record D333, Du Plooy Affidavit para 209.

103. In addition to Mpshe, the following persons were involved to varying degrees in the consideration of representations made by Third Respondent to withdraw the charges. I include their designations at the relevant time as far as I have been able to ascertain these from public sources.

103.1 Adv Thanda Mngwengwe ("*Mngwengwe*"), an Investigating Director with the DSO at the time that charges were re-instituted and the prosecutor under whose hand the indictment was filed, and the Acting Head: DSO at the time they were withdrawn;

103.2 SSI Du Plooy, to whom I have referred above. He was a Senior Special Investigator with the DSO who led the investigation;

103.3 Downer, who led the prosecuting team. He is a Deputy Director of Public Prosecutions ("*DDPP*") from Cape Town who was the lead prosecutor;

103.4 Adv Anton Steynberg ("*Steynberg*"), a DDPP from KZN who was a prosecutor on the case;

103.5 Adv George Baloyi ("*Baloyi*"), a DDPP from Gauteng who was a prosecutor on the case;

103.6 Adv Trish Matzke ("*Matzke*"), a DDPP or an Acting Special Director in the NDPP's office;

103.7 Adv Sibongile Mzinyathi ("*Mzinyathi*"), a DDPP and head of the National Prosecutions Service (NPS) in the NDPP's office;

103.8 Dr Silas Ramaite, a DDPP or Deputy National Director of Public Prosecutions ("DNDPP") in the NDPP's office; and

103.9 Mr Willie Hofmeyr ("*Hofmeyr*"), to the best of my knowledge a DNDPP in the NDPP's office.

104. In what follows, unless it is necessary to distinguish between them, I will refer to these persons as follows:

104.1 The persons referred to in paras 103.1and 103.2 as "*the DSO members*".

104.2 The persons referred to in paras 103.3 to 103.5 above as "*the regional prosecutors*";

104.3 The persons referred to in paras 103.6 to 103.9 as "*NPA management*".

105. The DSO members and the regional prosecutors together made up the prosecution (Bumiputera) team.

106. Despite the involvement of a range of people in the consideration of the facts and representations made by his legal representatives, the decision to withdraw the charges against Third Respondent was that of Mpshe. In taking his decision, however, he relied heavily on Hofmeyr.

107. It appears from the record that towards the end of 2008 the Bumiputera team anticipated the receipt of written representations to have the charges against the Third Respondent dropped.

108. On 5 December 2008, a memorandum from the Bumiputera team to Mpshe set out the appropriate approach to a consideration of such representations. Among other issues, the memorandum points out that such representations ought to be deposed to under oath by the Third Respondent, and fully address the merits of the case against him.

109. It is not clear when precisely the written representations were received. However, on 20 February 2009 the Third Respondent's legal representatives, being Adv. K Kemp SC and Hulley, made what was the first of a number of oral submissions to Mpshe and members of NPA management.[71] By this stage the written representations had not yet been received.

110. The oral representations went considerably beyond what was later contained in the written representation. In fact, their stated purpose was to make submissions without these being placed on record in writing. Mzinyathi records the statement that "[t]*here are things not in the papers, that is what we are about today*".[72]

111. It appears that among the matters raised were serious allegations of wrong-doing by former and current members of the justice sector, including most notably McCarthy, Ncguka and Pikoli, former Minister of Justice Penuell Maduna, and Hofmeyr and Downer, and many other prominent politicians and members of the intelligence services. The notes refer to the fact that Hulley advised he would have to take instructions whether to allow members of the NPA to verify the information.

112. It is apparent from the notes of that meeting that the allegations are used to place pressure on the NPA to avoid their release into the public domain. The notes record the oral submissions as follows:[73]

> "*In the permanent stay proceedings we will mention the issue of senior NPA (officials) involved in political machinations. Whether we win or lose, but people won't forget it.*"

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[71] It appears from contemporaneous notes that they were accompanied by someone identified only as Gabriel or Andrea, which I believe may be references to Adv Andrea Gabriel SC, a member of the Durban bar. Record at B77, Notes taken by Mzinyahti.
[72] Record at B77, Notes taken by Mzinyathi, third unnumbered para.
[73] Record at B79, Notes taken by Mzinyathi.

> *"Whether it* [the information underlying allegations of misconduct] *was lawfully obtained is beside the point, we will release it."*
>
> *"Whether the case can be objectively be proceeded with notwithstanding all these allegations, the fact of the matter is that all this will be in court papers."*

113. The prosecution team was not present when the first oral representations were made. The regional prosecutors appear to have been called in and briefed after the oral representations concluded. The regional prosecutors warned against any further engagement with Third Respondent's legal team.[74]

114. On 3 March 2009 the prosecution team addressed a memorandum to Mpshe, dealing with the representations.[75] Included in the memorandum is a comprehensive "*synopsis and analysis*" of the representations made on Third Respondent's behalf in respect of the merits of the case against him.

115. As I discuss in more detail below, the prosecution team indicated that the representations were incomplete, not deposed to under oath by Third Respondent and hence of limited probative value, were substantively unpersuasive and did nothing to weaken the State's case against Third Respondent.

116. The memorandum concludes:

> *"10. We accordingly recommend that the representations should be declined, for all the abovementioned reasons.*

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[74] Record at B80, Notes taken by Mzinyathi.
[75] Record at C1ff.

*11. 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.*

*12. Finally, the NPA must not discount the value of the forensic successes that it has achieved in this case, despite setbacks that at times have seemed insurmountable. The SCA and the CC have also gone to some trouble to appraise the issues in a sober fashion and the NPA has emerged with merit. To accede to the representation is a summary manner would abandon all the ground won by the expense of extraordinary effort and resources and with the approval of the highest courts in our country. A retreat for no good reason at this stage would not be explicable, understandable or defensible."*

(my emphasis)

117. I submit that the recommendation by the prosecution team, namely that the Court is the appropriate forum for a resolution of the issues raised, was obviously correct and reflected the only lawful approach.

118. On 6 March 2009, Hulley presented Mzinyathi and Hofmeyr with certain transcripts of intercepted telephone and SMS conversations, including ones that are said to suggest the involvement of "*TM*" (which I assume is a reference to then President Mbeki).

119. It is also evident that the Third Respondent's legal representatives referred to various other sensational and potentially embarrassing allegations, without any apparent link to the criminal proceedings against the Third Respondent. Thus, for instance:

119.1 Contemporaneous notes of the oral submissions refer to a recording of Mr Smuts Ngonyama (the influential former head of communications for the ANC who was considered close to President Mbeki) from October 2007, in which he supposedly discussed means of impressing the leadership, including the use of state agencies, "*leveraging certain judges*" or involving the

Chief Justice's son in a misdemeanour "*as leverage to influence him*".[76]

119.2 In addition, Mzinyathi and Hofmeyr were given a report dealing with one Bertha Kellerman which indicated "*intelligence information peddling*".

120. On 9 March 2009 a further meeting took place between the Third Respondent's legal team and Hulley, this time dealing in more detail with the intercepted telephone calls. It appears from Mzinyathi's notes[77] that he and Hofmeyr listened to the tape recordings of conversations between McCarthy and various other persons, including Ngcuka and Minister Mabandla. I assume these are the same recordings as those included in the spy tapes.

121. Furthermore, Mzinyathi's notes record that Hulley would "*also give us Luciano*", as well as either recordings or transcripts of discussions, including those between "*Luciano*" and McCarthy. The transcripts released as part of Mpshe's reasons include communication between McCarthy and "*Luciano*" who is described as a "*person in private intelligence*", but who is otherwise unknown to me.

122. On 11 March 2009 a third meeting took place between the same parties. Mzinyathi's notes indicate that the question was put to Hulley whether the prosecution team or Mpshe were implicated. The answer was that they were not.[78] There can be little doubt that Third Respondent's legal team would have taken any opportunity to implicate the prosecution team and Mpshe, and the absence of any such suggestion is significant.

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[76] Record B64ff, notes taken by Mzinyathi.
[77] Record B64ff.
[78] Record B66.

123. On 18 March 2009 a meeting took place where the members of head office presented the prosecution team with the contents of the intercepted communications and the further oral representation by Third Respondent's legal team.

124. The notes of that meeting by Matzke[79] state that "[w]e *are all ad idem that there is a case*" on the merits. In other words, NPA management (including Mpshe) and the prosecution team agreed that nothing contained in the intercepted communications cast doubt on the evidence against the Third Respondent.

125. Matzke's notes also reflect a deep concern by NPA management that wide-ranging allegations of political machinations would be included in the papers of an application for a permanent stay of prosecution, and thus come into the public domain.[80]

126. Later that day, members of the prosecution team met independently with Advs Trengove and Breitenbach. To the best of my knowledge, they had been appointed in terms of section 38 of the NPA Act to assist the prosecution team.

127. Their advice was that the decision whether to drop charges against Third Respondent had to be based on the strength of the case against him and the content of the intercepted communications had to be considered in that light. The pertinent question was whether the decision to prosecute Third Respondent was tainted by what appeared from the intercepted communications. If not, then the decision to prosecute should not be overturned.

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[79] Record B112ff.
[80] Record B114.

128. The prosecution team referred Mpshe to this advice repeatedly. Despite this, it is clear that the advice was ignored by Mpshe.

129. The advice of Advs Trengove and Breitenbach is first recorded in the memorandum dated 20 March 2009 from the prosecution team to Mpshe.[81] Adv Trengove is said to have advised that the "[t]*he 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.*"

130. On 20 March 2009 and again on 24 March 2009, members of the prosecution team interviewed Ngcuka.[82] Ngcuka conceded that he may have discussed the timing of charges against Third Respondent as well as other elements of the case, but denied any wrongdoing. He was neither asked, nor did he volunteer, any information that would lead to the reasonable conclusion that he interfered in or in any way influenced the decision to prosecute Third Respondent, or that there was any impropriety in the manner in which evidence against Third Respondent was obtained at any stage.

131. Further meetings between Mpshe and the senior management took place at least on 23 March 2009 and 24 March 2009 which did not arrive at any conclusions.[83] There are indications of a meeting scheduled for 27 March 2009, but no minutes or notes of this meeting are included in the Rule 53 record.

132. Over the same period, between 18 to 26 March 2009, the Applicant also addressed the correspondence already referred to in my founding affidavit at paras 77 to 86. This correspondence was before Mpshe,

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[81] Record C28ff.
[82] Record C57ff and C60ff. The recordal of the interview states 24 March 2008 but I assume this to be a typographical error.
[83] Handwritten notes that are largely illegible are included at Record C130ff.

but was only ever referred to in passing at a meeting between of 30 March 2009.[84]

133. The meeting on 30 March 2009 took place at the NPA's head office, and was attended by Mpshe, his management, and the prosecution team, with the stated purpose "*whether to accede to oral and written representations*".[85] I note the following aspects:

133.1 At various points, Ramaite, Downer and Baloyi point out that the allegations of a political conspiracy have no bearing on the decision to prosecute, because neither the prosecution team nor Mpshe are in any way implicated.[86] This is not challenged.

133.2 According to Mngwengwe's notes, Mpshe accepted that "*we are agreed on the merits – there is nothing further to discuss on the merits.*"[87]

133.3 Downer referred to the fact that the intercepted communications provided by Third Respondent's legal team could only have been illegally obtained. For members of the NPA to verify the contents (by comparing them to lawfully obtained recordings by state agencies) would amount to "*assisting" Zuma*". Mpshe agreed strongly with this view,[88]

133.4 Downer's notes refer to the intercepted communications as a "*red herring*".[89] Mzinyathi and Mngwengwe both expressly refer

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[84] The only mention of the Applicant's representations appears in the notes of Mzinyathi (Record C82), notes of Mzinyathi (Record C139), and Mngwengwe (Record C177).
[85] Notes were taken by Downer: record D27ff, Mzinyathi: record C82ff, Matzke: record C139ff, and Mngwengwe: record C177ff.
[86] For example at D35.
[87] Record C177.
[88] Record D36.
[89] Record D35.

to the oral representations as "*blackmail*",[90] intended to shock members of the NPA to such a degree that charges would be withdrawn without an assessment of their relevance to the merits of the case.[91]

133.5 Hofmeyr made the case for withdrawing the prosecution. He referred to the reputational risk to the NPA, and the possibility of his leaving the NPA if the prosecution of Third Respondent were to continue. This includes the following:

> "*The other thing is at the strategic level, at trying to save this organisation. The DSO was closed because of this case. The NPA is wobbling, with a few DPP's looking for other jobs. It is strategically unwise to say with all this info it took a court to finally show the NPA that this prosecution should proceed.*"

134. It also appears that on 30 March 2009 a letter was addressed to McCarthy, who by that stage had taken up a new positon at the World Bank. This letter has been omitted from the Rule 53 record.

135. On 31 March 2009, McCarthy responded[92] and requested more information regarding the intercepted communications before responding.

136. On the same day, there appear to have been at least two meetings among the NPA's management. The notes of those meetings[93] show that by this stage NPA's management was satisfied that the content of the recordings provided by Third Respondent's legal team could be verified against recordings obtained by the NIA, and ought to be taken at face value.

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[90] Record D35 and D43.
[91] Record D33.
[92] Record D217.
[93] Record B80ff, notes of Mzinyathi; record C164ff, notes of Matzke.

137. Hofmeyr and Mzinyathi were also instructed to engage Hulley to hand over the tapes to the NIA because "*this type of stuff cannot just be allowed to be in the public domain*". This betrays the fact that the NPA's management were principally concerned with ensuring that the recordings remained secret.

138. As noted above, Mpshe had previously shared the view that members of the NPA should not listen to the intercepted communications. Without any explanation, he changed his mind and engaged the Director General of the NIA to listen to certain of the intercepted communications.[94] This appears to have occurred on the evening of 31 March 2009. The reaction was immediate.

139. On 1 April 2009, Mpshe announced to the NPA management and Mngwengwe his decision to withdraw the prosecution. As appears from notes of the meeting on 31 March 2009,[95] Mngwengwe had been included at the instruction of Mpshe, to fulfil the statutory requirement of consulting with him. It is however clear that Mngwengwe[96] and the NPA management were presented with a *fait accompli.*

140. The notes of the meeting of 1 April 2009[97] unfortunately show clearly that in reaching his decision, Mpshe acted rashly and failed to apply his mind properly and fairly:

140.1 Mzinyathi records that Mpshe explanation that "*after listening to tapes... he got angry... he has decided to drop the charges*".

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[94] Record B83, notes of Mzinyathi.
[95] Record C164.
[96] Mngwengwe's notes of the meeting on 1 April 2009 are unfortunately cryptic, but there is no suggestion that Mngwengwe was either consulted by Mpshe before he took his decision.Record C173ff and C184ff.
[97] Record B75ff and B84ff, notes of Mzinyathi; record B123ff notes of Matzke.

140.2 Matzke records Mpshe as saying: *"I have come to a conclusion that whilst we were honestly working on this matter I decided I can't go on with this matter"*.

140.3 Mpshe concludes that "*we have sufficient to say process was influenced*", but does not substantiate this statement.

140.4 Ramaite questioned "*how & in what way did* [McCarthy] *abuse the process*".[98] This question, which ought to have been at the heart of the decision to withdraw charges (and had already been posed by Ramaite on 31 March 2009[99]) was not considered. much less answered.

141. Both Mzinyathi and Matzke's notes reflect that Mpshe's only concern at this stage was to find a way to motivate and substantiate the decision he has already taken.

142. Hofmeyr attempts to rationalise the decision by Mpshe, stating "*it is for legal reasons and for the organisation. This is the correct decision. This would lead the NPA to attack. This is not because we are weak. We need to think careful of what to say and how to package.*"

143. It is of grave concern that Matzke's notes of this crucial meeting appear to have been unilaterally redacted by the NPA.

143.1 Following Ramaite's pertinent question as to the alleged abuse of process, Mzinyathi comments are incomplete. The notes state as follows:

"*Dr S* [Ramaite] *is raising a very important issue.*

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[98] Record B126, notes of Matzke.
[99] Record C167.

*The questions to be asked here will be are they – manipulation / political interference / are the people talking inappropriately* [possible missing words]

*If you say they are manipulators then you must* [missing words]

*Mbeki & Mabandla are then in our telescope."*

143.2 Notes of statements by Hofmeyr are also incomplete:

"*I wanted to raise this also as a issue. We do not have enough to* [missing words]

*Might be said will be said that Ngcuka is* [missing words]

*Might* [missing words]

*Balance we need to strike is* [possible missing words] *inappr. relationship between BN & LM.*

*We might say -> must be further investigation."*

144. In all the circumstances I submit that the only inference is that Mpshe's unilateral decision to drop the criminal charges against Third Respondent was motivated by a sense of anger and disappointment, coupled with an overriding concern to keep the content of the intercepted communications from the public domain.

145. It was agreed that the prosecution team not be told of Mpshe's decision until shortly before the decision was to be announced.[100]

146. On 2 April 2009 a letter was addressed to McCarthy setting out 22 questions interrogating his conduct and his and others' political affiliations.[101] I am unable to discern the relevance of the majority of

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[100] Record B137, B75.
[101] Record D213.

the questions to the decision whether to drop charges against the Third Respondent. I am also unable to discern the purpose of the interrogatories, as Mpshe's decision had already been made.

147. Notably, none of the questions posed suggests that the NPA management was of the view that McCarthy improperly influenced the decision whether to prosecute the Third Respondent, and none of the questions suggest that the NPA management was of the view that McCarthy's conduct compromised the evidence against the Third Respondent.

148. It appears McCarthy responded, although his response is not part of the Rule 53 record. McCarthy appears to have declined to answer the wide-ranging questions put to him. He did however confirm that the decision to prosecute was taken by Mpshe and Mngwengwe. In the circumstances McCarthy's refusal to engage vague and unsubstantiated allegations was entirely reasonable.

149. Still unaware of Mpshe's decision on 1 April 2009, on 2 April 2009 the prosecution team addressed a further memorandum to Mpshe,[102] which records among other things the following:

149.1 At the meeting of 30 March 2009 there was general consensus that the State's case against the Third Respondent has not been affected, and that the only issue to be considered was the possible effect of McCarthy's misbehaviour.

149.2 McCarthy's attempts to influence the timing of charges against the Third Respondent were irrelevant: firstly, because the decision to postpone the charges until after the conclusion of the

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[102] Record C40,

Polokwane conference was that of Mpshe; and secondly because the decision to charge the Third Respondent as soon as possible thereafter was that of the prosecution team (which had maintained throughout that the Third Respondent be charged without delay).

149.3 Downer placed on record that Mpshe personally told him that the decision to delay the charges until after the Polokwane conference was his alone.

149.4 Hofmeyr was singled out as the only person in favour of withdrawing the prosecution.

150. Hofmeyr felt compelled to respond to the memorandum on the same day by email,[103] in which he attempted to explain the impact of McCarthy's actions.

151. The prosecution team responded in a memorandum of 3 April 2009,[104] in which it was reiterated that the decision to prosecute was a "*multi-layered corporate decision*", but that Mpshe had at various points confirmed on record that it was ultimately his decision. The memorandum further points out, plainly correctly, that the high point of the doubt cast by the intercepted communications is that it may have been due to McCarthy's influence that charges were brought on 28 December 2007, and not in the first week of January 2008. There is no indication why this short acceleration of charges would prejudice the Third Respondent, or any political motivations which were served.

152. On 6 April 2009 Mpshe convened a meeting with the prosecution team and the NPA management. At this meeting the prosecution team was

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[103] Record D218.
[104] Record DC46.

informed, for the first time, of Mpshe's decision to drop the charges against the Third Respondent. They were provided with a copy of Mpshe's reasons, which were provided in the same form tc the press shortly thereafter (annexure **"JS 10"** to my founding affidavit).

153. On 14 April 2009 the prosecution team placed their reservations with Mpshe's decision on record in a final memorandum.[105] The prosecution team remain steadfast in their view that the single most important question, namely whether the conduct of McCarthy had improperly influenced the decision to prosecute and was likely to prejudice the fairness of the trial, had been ignored.

154. The team also expressed reservations about the reliance by Mpshe on foreign jurisprudence not applicable in South Africa as a legal basis for withdrawing the charges.

**PART 3: AN ANALYSIS OF THE "SPY TAPES"**

155. The intercepted conversations span the period 4 November 2007 to 7 April 2008.[106] Transcripts of those recordings deemed relevant were prepared by Hofmeyr.

156. As noted above, Mpshe's decision suggests that the intercepted conversations evidence attempts to influence the timing of the service of the indictment before, and then after, the ANC's Polokwane conference. I deal with these periods separately.

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[105] Record C51.
[106] The transcripts appear at record B2-B52. It will be noted that there are 35 conversations which have been transcribed.

## ALLEGED ATTEMPTS TO INFLUENCE THE POLOKWANE CONFERENCE

157. As noted above, the conference took place between 16 and 20 December 2007. The result of the election as President of the ANC was made at 21h00 on Tuesday, 18 December 2007.

158. My analysis of the transcripts of the spy tapes in the build-up to the Polokwane conference is in turn divided into the periods before and after 6 December 2007. I do this as it was on this day that a final decision was made by Mpshe to postpone the announcement of the decision to prosecute Third Respondent until after Polokwane.

### Communication in the period from 4 November 2007 to 6 December 2007

159. Seven conversations were transcribed over the period 4 November – 6 December 2007. Of these, two are between McCarthy and businessman Mzi Khumalo ("*Khumalo*") and five are between McCarthy and Ngcuka.

160. The two conversations between McCarthy and Khumalo took place on 4 November 2007[107] and 9 November 2007.[108] The first call concerns arrangements for a dinner and the second is a congratulatory call from Khumalo to McCarthy regarding the NPA's victory in SCA.

161. In the first call, McCarthy says that the "*Scorpions aren't going to arrest someone before we meet...*".[109] It is not clear whether the "*someone*" is the Third Respondent, but nothing said during conversation relates to the timing of the prosecution at all.

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[107] Record at B2, Conversation 1
[108] Record at B5, Conversation 7
[109] Record at B2, Conversation 1, line 12a

162. The first of the five conversations between McCarthy and Ngcuka took place on 7 November 2007.

162.1 McCarthy makes reference to the editorial which appeared in the *Business Day* newspaper of Tuesday, 6 November 2007, and says that it is "*in line with your thinking*".[110] A copy of the editorial, entitled "*Silence of the Zuma camp*" is annexed hereto, marked **"JS16"**.[111] It is suggested that the "*silence*" amongst the Third Respondent's supporters, and the inability to capitalise on President Mbeki's misfortunes, may be because of the absence of criminal proceedings against the Third Respondent. The editorial states that "[p]*eople often urged Mbeki to take him down off his cross and pull the prosecutors back. Without prosecution, or what Zuma sees as persecution, he's no longer a martyr and looks kinda ordinary.*" The editorial then continues to state that "[p]*erhaps it's not that. Zuma's silence might just be a sort of respectful solidarity with a fellow former exile. A chap who recognises - even to the point of supporting Mbeki - that the last thing you can afford to do politically in the ANC right now is to threaten Jackie Selebi in any way.*"

162.2 During the same conversation, McCarthy mentions that he met "*a guy*" who said that he will speak to "*the man*". McCarthy's contact indicated that he (McCarthy) should not see "*the guy*" directly so that he has "*a shield ... if this issue comes up then he can say 'well i don't know what the f... you*

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[110] Record at B3, Conversation 2, lines 8b - 10

[111] The article was recorded and re-typed as it takes about two weeks for the National Library in Cape Town to arrange for a copy to be made of such an old newspaper. For understandable reasons, one is also not allowed to take a photo of such an article.

*are talking about*".[112] According to the annotations to the transcripts, the "*guy*" is believed to be the former Minister of Intelligence, Mr Ronnie Kasrils ("*Kasrils*").

162.3 Kasrils has publicly responded to the tapes by saying that he, as the Minister of Intelligence had a professional relationship with McCarthy; and all that McCarthy asked him was whether, politically speaking, it would it be wise to arrest Third Respondent on his way to Polokwane. Kasrils said that at the time, he had made it clear that he would not comment on whether Third Respondent should be charged or not. Kasrils said that if Third Respondent had been arrested at that time there would have been "*blood on the floor*" and "*it would have had huge riotous repercussions throughout the country.*" These statement appear from an article which appeared in the *Mail & Guardian* newspaper of 14 September 2014 (entitled "*No 'Political Interference' with spy tapes, says Kasrils*"), a copy of which is annexed hereto, marked **"JS17"**.

162.4 In the same vein, in an interview broadcast on the television programme "*Carte Blanche*" on 14 September 2014, Kasrils was asked when McCarthy approached him about the possibility of charging the Third Respondent. Kasrils answered:

> *"Very shortly before the Polokwane Conference, which was just before Christmas 2007. He came to me and he said 'Minister, I need some political insight. My prosecutors are urging me that we have the necessary evidence to charge Jacob Zuma.' And these guys were actually thinking about arresting and charging him between KwaZulu-Natal and Polokwane. I said to him*

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[112] Record at B3, Conversation 2, line 12a – 14e

*'Mr McCarthy, let's be very clear. I have nothing to do with urging you either way to charge or not. That's not for me – you people decide. If you're asking me for just an opinion... in this climate ...I would say you people are stark raving mad. Bedlam will break out ... it will turn into a riot and not only in Polokwane, it will affect the whole country."*[113]

162.5 This is important as if Mpshe had contacted Kasrils, it is clear that the conversation between McCarthy and Ngcuka had an innocent explanation.

162.6 McCarthy continues to talk about a "*judgment*" which "*is on us much quicker than what I thought*", and that "*our guy has slipped out into the media that he says he wants nothing to do with it*".[114] An annotation to the transcript suggests that this referred to Mpshe's statements that he would leave the head of the DSO would be left to make the decision whether to prosecute the Third Respondent. But, as explained above, Mpshe did in fact ultimately take this decision

162.7 Finally, McCarthy mentioned that he is having dinner with "*Mzi*", and invited Ngcuka to join. The annotation to the transcript suggests that this is a reference to Khumalo. This portion illustrates that McCarthy and Ngcuka had different ideas as to when action should be taken against the Third Respondent. Ngcuka mentions that Khumalo's "*view is completely opposite*" to his own, and that Khumalo agrees with the approach favoured by McCarthy. In this regard Ngcuka notes that Khumalo had expressed the view at another dinner party that if the SCA's judgment came out in

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[113] The interview is accessible at http://carteblanche.dstv.com/player/644564/
[114] Record at B4, Conversation 2, line 26a – 26d

the near future, and it favoured the NPA, then immediate action should be taken (*"let's do it now"*).[115]

163. The second conversation between McCarthy and Ngcuka also took place on 7 November 2007. The only possible relevance of this conversion is that Ngcuka indicates to McCarthy (in response to an invitation from McCarthy to see him) that he (Ngcuka) will *"wait until we hear what this other fellow is saying"* and that he (Ngcuka) *"can even see his, his people"*.[116] In the annotations, the question is raised whether the *"other fellow"* is Mbeki. This is, with respect, mere speculation.

164. The third of the conversations between McCarthy and Ngcuka took place on 9 November 2007, after the SCA's judgment.

164.1 After discussing the judgment, Ngcuka states that the Third Respondent had indicated he would take the matter *"up"* (presumably meaning on appeal to the Constitutional Court). McCarthy states that *"this does not mean that one has to hanger (?) on there, you know"*. Ngcuka agreed. McCarthy continued that he would see *"these guys"* (which according to the annotations is a reference to the prosecution team) to get *"a sense of their views"*; that it is *"a legal issue, that uh, we will get to the right decision ... but nothing will happen in a rush..."*.[117]

164.2 McCarthy added that *"it is not going to happen that we say to the guy? On Wednesday, come and appear on Thursday"*.[118]

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[115] Record at B4, Conversation 2, line 32a – 32e
[116] Record at B5, Conversation 3, line 14 – 18a
[117] Record at B7, Conversation 5, line 58 – 62
[118] Record at B8, Conversation 5, line 62a - b

165. This does not demonstrate any political motive regarding the timing issue. On the contrary, McCarthy acknowledges that it was a legal issue.

166. The fourth of the conversations between Ngcuka and McCarthy took place on 26 November 2007. In this conversation McCarthy indicates that he is on vacation at his apartment in Cape Town. There are two relevant portions:

166.1 First, after discussing the results of the provincial nominations for the ANC Presidency, Ngcuka says to McCarthy: "*So you're the only one who can just save this country from its madness*".[119] To this McCarthy was non-committal.[120] Thereafter, McCarthy enquired what the "*big man says*". Ngcuka answered that he did not know but that he (Ngcuka) "*will try to call him later tonight*".[121] In the annotations to the transcript, the "*big man*" is regarded as President Mbeki. This portion of the conversation is anodyne, in that McCarthy was merely enquiring how President Mbeki was handling the (obviously disappointing) results from the provincial nomination process. This has nothing to do with manipulation of the timing of the prosecution.

166.2 Secondly, at the end of the conversation McCarthy stated that he had taken Ngcuka's advice "*...up until Friday*", but that he "*then received a strong memorandum to say charge and charge now*". McCarthy indicated that the "*team says we have been f...ing around with this thing, and we are allowing ulterior considerations to play in, and it will become an impossibility*

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[119] Record at B10, Conversation 6, line 56
[120] Record at B10, Conversation 6, line 57
[121] Record at B10, Conversation 6, line 62 - 65

*later, we must take action and deal with it and 'finish and klaar' as Jackie Selebi said."*[122] This description accords with Downer's notes of his interaction with McCarthy, which culminated in McCarthy agreeing with Downer's suggestion that the prosecution should not be held in abeyance. Ngcuka did not respond and the conversation ended.[123]

167. The fifth conversation between Ngcuka and McCarthy took place on Thursday, 6 December 2007.

167.1 From this conversation, it is apparent that McCarthy was on leave at the time until Monday, 10 December 2007.[124] In this time he was not involving himself in work matters.

167.2 During the conversation McCarthy, in what was clearly a joke, indicated that his only contact in Kimberley (where Ngcuka found himself), was someone who "*we are on the verge of charging*".

167.3 The transcriber attributes the further statement to McCarthy that "*maybe that is the one we should go for (laughs), that will give us more votes*".[125] This statement was not made by McCarthy but by Ngcuka. By attributing it to McCarthy, the impression is created that he (McCarthy) would abuse the prosecuting power to obtain votes for President Mbeki.

168. Viewed in context, the conversations between McCarthy and Ngcuka do not evidence any political interference. Instead, the following is clear:

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[122] Record at B11, Conversation 6, line 93c – 97e.
[123] Record at B11, Conversation 6, line 93
[124] Record at B12, Conversation 7, line 10c
[125] Record at B12, Conversation 7, line 45 - 46

168.1 McCarthy initially favoured the view that the prosecution should be reinstituted immediately, while Ngcuka believed it should be held back.

168.2 McCarthy presented Ngcuka's view, but was persuaded by the prosecution team that the criminal proceedings should continue immediately, for good prosecutorial reasons.

168.3 Mpshe made the decision that the service of the indictment should be held back, contrary to the views of the prosecution team (and McCarthy). McCarthy was away at the time that Mpshe made his decision, and was obviously not consulted.

**Communications between 7 and 18 December 2007**

169. Seventeen conversations were transcribed over the period 7 December 2007 to the announcement of the result of the ANC presidential election on 18 December 2007 I deal with these thematically.

*Filing of NPA's papers in the Constitutional Court*

170. As noted above, the SCA dismissed interlocutory applications by the Third Respondent challenging the validity of search warrants, and requests for international assistance. The Third Respondent pursued an application for leave to appeal to the Constitutional Court, and the NPA was required to file answering papers by 14 December 2007.

171. By this stage, Mpshe had made the decision to hold back on the reinstitution of criminal proceedings. It was initially envisaged that the NPA's answering papers would attach a copy of the new indictment, but this was no longer possible.

172. In an SMS exchange of 12 December 2007, Ngcuka enquired when the NPA's papers would be filed. McCarthy indicated that the papers had "*stretched*", and that they would be filed on either 13 or 14 December 2007. Ngcuka responded that "*the sooner the better. Not later than tomorrow. It will assist a great deal.*"[126]

173. Later, on the same day, McCarthy called Ngcuka and the latter appears to suggest that the filing of the papers "*can be a devastating one for them*", which is presumably a reference to the Third Respondent and his supporters.[127] Ngcuka believed that the papers would *inter alia* ensure that "*people will wake up and say, 'Look, let us think what we are doing*".[128] McCarthy responded by saying: "*By Friday people are packing their bags, they won't even read the f...ing newspapers*".[129]

174. McCarthy continued that the team drafting the Constitutional Court papers was "*not leaving here until we finalise this tomorrow morning, and file by lunch time and give it to the media*".[130]

175. However, on the next day, Thursday, 13 December 2007, McCarthy had to accept that the papers could only be filed the next morning (on the Friday, 14 December 2007).[131]

176. All that appears from these conversations is thus that Ngcuka approached McCarthy to expedite the filing of the answering papers in the Constitutional Court proceedings, in the hope that these would elicit some negative publicity for the Third Respondent. McCarthy indicated the willingness to assist, but in truth had no ability to deliver.

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[126] Record at B13, Conversation 8, line 3
[127] Record at B13, Conversation 9, line 9b
[128] Record at B13, Conversation 9, line 9h
[129] Record at B13, Conversation 9, line 11a
[130] Record at B14, Conversation 9, line 12a – b
[131] See Record at B14, Conversation 10, line 4b

177. I would also note that the filing of papers in the Constitutional Court is an administratively burdensome task, in light of the fact that 25 copies must be provided. The copying alone takes time. This is accordingly another instance of McCarthy holding himself out as a person of influence, when in fact he had very little control.

*McCarthy and arrests at Polokwane*

178. The same applies to the second topic of the conversations. McCarthy wanted others to believe that he had the power to affect the proceedings at Polokwane by arresting the Third Respondent.

179. McCarthy's attempt to convey this image of himself is evident from a discussion with Ngcuka on Thursday, 13 December 2007. McCarthy stated that he was "*just checking the pulse of the securities*" and "*I thought I would call you once a day, twice a day even while you are on leave, to hear whether the position has not changed*".[132] Later in the conversation, McCarthy again asks whether "*the script has not changed yet?*" This was supposedly because he "*felt like going to Polokwane and charging there*".[133]

180. To the extent that McCarthy's suggestions of his role were intended seriously, they display little more than self-delusion. He must have known that he had no power to make good his threat.

181. The same applies to McCarthy's statement that "*you guys must just keep your heads open about the 'when' factor because I mean we will, we will, we will file our documents tomorrow, we will, uh, Mpshe's going on leave tomorrow and I will be acting. We will have our section 2*

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[132] Record at B14, Conversation 10, line 4a – b
[133] Record at B15, Conversation 10, line 23 – 25

*order and our, our ... you know we will have finalised the processing of the decision*".[134]

182. In any event, the offer by McCarthy to exercise these assumed powers was rebuffed by Ngcuka, and thereafter by Minister Mabandla. Ngcuka told McCarthy that nothing would change and that the announcement of the decision could not happen that weekend.[135]

183. Minister Mabandla took the same view. She called McCarthy on Friday, 14 December 2007, and was notably upset about the prospect of the "*old man*" (presumably the Third Respondent) being arrested before or during the Polokwane conference.

184. In her conversation with McCarthy, Minister Mabandla placed the matter in context and reminded him of the real reason why the announcement of the decision was postponed until after Polokwane as earlier articulated by Mpshe himself in his decision of 6 December 2007. The Minister told McCarthy that:

184.1 *"You know the country is agog, I don't want, I don't think we want to that there be a loss of life there."*[136]

184.2 *"But I also, we must find a way that you communicate that there is nothing that is being done that is being political or, or vindictive, and that is all you are doing."*[137]

184.3 *"You can't just come, as if you are not arresting a common thief and pick up a senior person from the street."*[138]

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[134] Record at B17, Conversation 10, line 52a – e
[135] Record at B17, Conversation 10, line 57a and line 61 – 63
[136] Record at B18, Conversation 11, line 15a – b
[137] Record at B19, Conversation 11, line 28a – b

*Comments about Haffejee*

185. The third topic concerns a statement by McCarthy to Ngcuka on 13 December 2007 that he (McCarthy) was told by the President to speak to "*Ferial*", which is presumably a reference to Ferial Haffajee ("*Haffajee*"), the editor of the *Mail & Guardian* newspaper at the time.

186. McCarthy notes that he asked Haffajee "*to quiet down a little*".[139] McCarthy also says that "*I met with her now and I conveyed those sentiments*".[140] Haffajee, who is now the editor of the *City Press* newspaper, responded to this portion of the spy tapes in that newspaper on 5 October 2014 (see annexure **"JS18"**: "*Editor's note: He ruined justice*").

187. In her response, Haffajee states that McCarthy's account of the conversation with her is "*false*" and "*designed to bolster the former Scorpions boss's sense of self-importance, along with the high he got from rubbing shoulders with politicians*". She further doubts whether former president Thabo Mbeki told McCarthy to speak to her.

188. Again, one would have expected that Mpshe would have taken this aspect up with Haffajee before relying on McCarthy's vainglorious self-promotion as evidence of political conspiracy. Mpshe did not do so.

*The 8-page fax*

189. The fourth topic concerns a fax McCarthy sent to Ngcuka on Friday, 14 December 2007, at approximately the same time that the NPA filed its papers in the Constitutional Court. The fax was obviously

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[138] Record at B20, Conversation 11, line 40e – f
[139] Record at B16, Conversation 10, line 31d – e
[140] Record at B16, Conversation 10, line 33a – 36

confidential because McCarthy requested Ngcuka to wait for it at the fax machine and to receive it personally. In annotations to the transcript the fax is described as a "*short summary of key newsworthy issues to* [Ngcuka] *for apparent distribution to the media*".[141]

190. The content of this fax has never been established. It is not part of the record. It is also not clear how a summary of such issues would have assisted Ngcuka in discrediting the Third Respondent shortly before the Polokwane conference.

*McCarthy and Davids regarding Hofmeyr*

191. The fifth topic arises from a conversation between McCarthy and Davids, of Sunday, 16 December 2007.

192. In this conversation they discussed the fact that Hofmeyr appears to have been unconvinced that the prosecution of Third Respondent should be reinstituted. It appears that Hofmeyr anticipated that the Third Respondent would win the ANC presidency at Polokwane, and that it would not serve the NPA well to be in open hostilities with the Third Respondent.

193. Davids relayed to McCarthy a discussion he had with Ngcuka and Hofmeyr in an airport lounge, in which Hofmeyr apparently accused President Mbeki of standing in the way of the NPA prosecuting the then Commissioner of Police, Mr. Selebi.[142] Ngcuka took umbrage at this statement. Davids reports that he later also indicated to Hofmeyr that the question was inappropriate.

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[141] Record at B21, Conversation 12
[142] Record at B24, Conversation 17, line 17k – l

194. McCarthy responded to Davids that Hofmeyr appeared to "*back*" the Third Respondent over President Mbeki. Hofmeyr was so confident that President Mbeki would lose the election that he offered McCarthy a bet with odds of 20-to-1 to this effect. [143] McCarthy shared the view that Hofmeyr was overly critical of President Mbeki, and spoke of how the Third Respondent was poised to take over.[144]

195. Davids regarded Hofmeyr as "*actively a Zuma-man*".[145] Davids reported that Hofmeyr had suggested at an executive meeting that they must get someone who was a little bit favourable to Third Respondent's side [146]

*Meeting with Mbeki*

196. The sixth topic during this period concerns arrangements for a meeting to be held between Mbeki and McCarthy after the Polokwane conference.

197. On Sunday, 16 December 2007, Ngcuka says to McCarthy "*I had a chat with this fellow now, he's going to call you immediately after the conference*" and "*I met him yesterday, so I need to chat to you about it*" [147] Again, on Monday, 17 December 2007, Ngcuka says to McCarthy, "*this one said he is going to call you ... when he comes back before he leaves for Christmas*".[148] But for the reasons set out below, the call (if it was a call from President Mbeki) was related to McCarthy's desire to meet to explain his plans to join the World Bank.

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[143] Record at B24, Conversation 17, line 26
[144] Record at B24, Conversation 17, line 33
[145] Record at B25, Conversation 17, line 40h
[146] Record at B24, Conversation 17, line 48a – c
[147] Record at B27, Conversation 18, line 22 - 24
[148] Record at B29, Conversation 22, line 11 and line 13

## ALLEGED MANIPULATION AFTER THE POLOKWANE CONFERENCE

198. There are 13 conversations which were transcribed after the results in Polokwane were announced on 18 December 2007. I deal with these thematically.

*Expressions of disappointment*

199. Approximately an hour and ten minutes after the result of the Polokwane elections was announced, Khumalo called McCarthy and the two of them commiserated about the result. However, it is obvious from analysing the conversation,[149] that McCarthy has no real knowledge of the inside workings of the ANC. His views rely on what he saw on television or read in the media.

200. It is in this context that his exaggerated remarks about his disappointment must be measured. McCarthy says: "*Let's be merry, and festive and we will live to regroup another day, let's wipe the blood off our faces. Hey, I feel bad about it, my wife says to me you look like you lost your mother*".[150] McCarthy may have felt bad about the result but his own actions had nothing to do with the outcome of the elections.

*Extricating himself from the NPA*

201. The second topic concerns the moves by McCarthy to extricate himself from the NPA.

202. In a conversation of Wednesday, 19 December 2007, Ngcuka stated to McCarthy that "*it is important that you sort out where you are going,*

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[149] The conversation appears at transcript Record B29 – B33, Conversation 23
[150] Record B33, Conversation 23, line 74a – d

*immediately ... and I think that the sooner you get out of that place the better for you*".[151]

203. This is no more than a statement of concern between friends. It does not indicate or evidence any political scheme.

*Timing of the prosecution*

204. In their conversation of 19 December 2007, McCarthy told Ngcuka that they (presumably the NPA) "*want to move on Friday*"[152] (21 December 2014), but that they have become accustomed to checking with everyone whether they think it is fine.[153]

205. McCarthy then says that he does not know "*whether that other call you referred to will ever come, I think these guys feel humiliated and the longer we delay, the worse it becomes. We make it impossible for ourselves to act if the guy wants to meet and um ... and just do it.*"[154]

206. McCarthy further mentions that "*there is a view that we should do some planning with the police for whatever reason, but I mean then, involving them is as much as, as good as telling everyone we are doing it*".[155]

207. These general statements cannot be relevant to any alleged political conspiracy regarding the timing of the service of the indictment.

*Meeting with President Mbeki*

208. The fourth topic is the meeting between McCarthy and Mbeki which took place on Friday, 21 December 2007. It appears that Mpshe later

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[151] Record at B34, Conversation 25, line 20b – 22
[152] Record at B36, Conversation 26, line 1 and line 4
[153] Record at B36, Conversation 26, line 6a
[154] Record at B37, Conversation 26, line 8a – d
[155] Record at B37, Conversation 26, line 10a

saw this meeting as evidence of President Mbeki's involvement, or that McCarthy was taking instruction from President Mbeki. This perception was plainly wrong, in that the meeting concerned McCarthy's imminent move to the World Bank.

209. The meeting was arranged on Wednesday, 19 December 2007 in a conversation between Minister Mabandla, McCarthy and later with President Mbeki.[156]

210. In his conversation with Minister Mabandla, McCarthy indicated that he wanted to discuss "*things*" with her, including the case against the Third Respondent.[157]

211. It is understandable that McCarthy wanted to inform the Minister about the intention to "*move*" on the Third Respondent. The Minister had required a section 33 report, and had an interest in remaining informed as to developments.

212. McCarthy requested an hour of the Minister's time,[158] but during the course of the conversation the telephone was handed to then President Mbeki, who informed McCarthy that the Minister told him some time back that he (McCarthy) had asked to see President Mbeki.[159] President Mbeki then says that he "*should be able to call* [McCarthy] *back on Friday*".[160]

213. In a voicemail from McCarthy to Davids on Monday, 24 December 2007, McCarthy notes that he had seen President Mbeki the previous Friday (21 December 2007).

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[156] Record at B37, Conversation 27
[157] Record at B37, Conversation 27, line 5
[158] Record at B38, Conversation 27, line 38
[159] Record at B38, Conversation 27, line 25
[160] Record at B38, Conversation 27, line 35

214. In this message McCarthy also states that he is "*a Thabo man, I mean we are still wiping the blood from our faces, or the egg or egg and blood. ... We're planning a comeback strategy, ... and once we've achieved that, we will clean up all around us my friend.*"[161]

215. It is apparent that this is another instance of McCarthy's exaggeration of his role. It is clear that his meeting with President Mbeki concerned McCarthy's departure from the NPA.

216. In the absence of an explanation from McCarthy regarding his meeting with President Mbeki, there is nothing to gainsay Ngcuka's explanation for the meeting. Ngcuka was pertinently asked the question by the NPA if he knew "*of any contact that Adv McCarthy had with the then President before and after the Polokwane Conference and what was discussed between them?*"

217. Ngcuka answered as follows:

> "*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 McCarthy 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 McCarthy's departure from the NPA and his appointment by the Bank. Adv McCarthy had requested him to facilitate the meeting with the President because he had been unsuccessful in his own attempts to meet Mr Mbeki.*"[162]

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[161] Record at B39, Conversation 29, line 1

[162] Record at C69, Memorandum on Interview with Ngcuka on 24 March 2008, para xix. See also Record C58, Memorandum on the Consultation with Mr B T Ngcuka on 20 March 2009, at para 3: "*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. [Ngcuka] was a referee of Adv McCarthy in his World Bank job application, and had recommended him when approached by the Bank*".

218. Ngcuka's explanation is further corroborated by the following:

218.1 McCarthy's move the World Bank is mentioned already in November 2007. Ngcuka believe that it was "*still a long way*" but McCarthy said that "*the thing is happening in January boss, we even discussed it*".[163]

218.2 This move required high level support for McCarthy. In a conversation with Minister Mabandla on 29 December 2007, McCarthy attempted to give her feedback about his "*intentions for the future*", and his meeting with President Mbeki[164]. The Minister interrupted him and talked about the need to bring proceedings against the Third Respondent relatively soon to avoid the appearance of a conspiracy.

218.3 On 3 April 2008, McCarthy reported to Ngcuka that he had been "*approached by the World Bank, for this position to head up the IMT, previously you know. So they approached me again and we went through a whole process of interviews*".[165] In this context, McCarthy referred back to the previous meeting with Mbeki and stated: "*I am trying to see the President this weekend because I said to* [Robert Zoellick, the President of the World Bank], *you know when I saw the President, I told him that you will call him I just want to see the President first but I, he*

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Even Hofmeyr admits that the meeting with Mbeki was in part about securing his support for the position at the World Bank. Record at D435, Undated notes of Hofmeyr, at unnumbered para 4

[163] Record at B3, Conversation 3, line 23-24

[164] Record at B40, Conversation 30, line 5a – 7c

[165] Record at B50, Conversation 34, line 8a - c

*definitely wants to speak to* [Trevor Manuel, then Minister of Finance]."[166]

218.4 On 7 April 2008, McCarthy sought to explain his difficulties to Ngcuka in trying to get hold of the Minister and the President. McCarthy says that he tried to call the Minister because he just wants "*to say that the World Bank wants to have a conversation with her and the President...*".[167] He also says "*I want the big man's blessings*".[168] Ngcuka reminds him that "*They are going to release you, that's in December, they have known that...*".[169]

219. Nevertheless, in notes taken by Adv Mzinyathi at the crucial meeting between Mpshe and his senior management of 1 April 2009, Mpshe seems confused about Mbeki's role and what this meant.

220. At the outset a question is posed by Ramaite whether the spy tapes indicate that Ngcuka and McCarthy "*are the only players in the conspiracy/manipulation*"; or whether they were "*also going to approach former President Mbeki?*" Mpshe is recorded as answering that Ngcuka and McCarthy were "*the only important players in the tapes*", and that others were only mentioned.[170]

221. A short time later Mpshe then expressed his anger at McCarthy, and that he had concluded that he couldn't go on with the case against the Third Respondent. In so doing "*he has no doubt that the President* [Mbeki] *may have been a player behind the curtains*" and that he drew "*inferences about the involvement of Mbeki e.g. the fact that*

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[166] Record at B51, Conversation 34, line 21a - d
[167] Record at B52, Conversation 35, line 8
[168] Record at B52, Conversation 35, line 16
[169] Record at B52, Conversation 35, line 19c
[170] Record B75, Notes taken by Mzinyathi at 1 April 2009 meeting, unnumbered paragraph 1

[McCarthy was told] *you are on your own, i.e. you have no president to protect you*".[171]

222 Mpshe's inferences are hard to justify, and are speculative at best. There was no evidence before Mpshe that President Mbeki was "*pulling the strings*":

222.1 The transcripts of telephone conversations contain references to the need to meet or discuss with "*the man*"; the "*other fellow or guy*". The annotations suggest that these are references to President Mbeki, but this is speculative.[172]

222.2 There is no evidence at all of any meeting between McCarthy and President Mbeki before the ANC's Polokwane conference, or any covert political instruction from President Mbeki dictating to McCarthy the timing of the service of the indictment against the Third Respondent.

222.3 McCarthy only met with President Mbeki on 21 December 2007, after the Polokwane conference. As noted above, this meeting was clearly for other purposes.

222.4 McCarthy gave the "*go ahead*" for the prosecution on the same day (21 December 2007) as he saw Mbeki.[173] But the instruction must have been before McCarthy saw Mbeki (as he only saw Mbeki in the evening)[174].

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[171] Record at B75, Notes of Mzanyathi unnumbered para 3
[172] Record at B53, conversation 1, annotation
[173] Record at B60, annotations
[174] Record at D433, Undated notes of Hofmeyr, at unnumbered para 10

223. At the announcement of the challenged decision, Mpshe stated that there is "*no trace that [Mbeki] was involved in the transcripts*".[175] This does not accord with his earlier statements and inferences. In the circumstances the inference is irresistible that, despite his statement, Mpshe was unduly swayed by his impression that McCarthy was acting at the behest of President Mbeki for overtly political reasons.

*McCarthy and Minister Mabandla*

224. The fifth issue emerges from the lengthy conversation between McCarthy and Minister Mabandla of 29 December 2007, just after the announcement of the decision to charge Third Respondent. The main topic of this conversation was Minister Mabandla's proposed response to the Third Respondent's supporters, who predictably claimed a political conspiracy. Against this background:

224.1 Minister Mabandla felt that the prosecution should proceed as soon as possible.[176] President Mbeki had communicated to her a concern about a big gap between the announcement of the prosecution and the date on which the trial was set down (in August 2008).[177] President Mbeki felt that the allegations of a political conspiracy needed to be corrected and the truth be told.[178]

224.2 McCarthy conveyed the view that "*we will start a war of words if we say anything public at this point*", and that nothing would be gained by making any public comment, "*because there is just*

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[175] Record B76, Notes taken by Mzinyathi at 1 April 2009 meeting, unnumbered paragraph 11
[176] Record at B40, Conversation 30, line 12a, 16; Record at B41, Conversation 30, line 28b-c
[177] Record at B41, Conversation 30, line 30a-b.
[178] Record at B43, Conversation 30, line 52a-b. See also Record at B42, Conversation 30, line 47m-n.

*populist noise about it and secondly, these same issues will ... become pertinent in the trial*".[179]

224.3 McCarthy stated that "*the President knows ... that he has nothing to do with this case*".[180] He also stated that "*the first time Minister got to know about it was when I told Minister, I think I said like we spoke to you on Thursday evening and I said we are going to issue subpoena tomorrow*".[181] Minister Mabandla says "*but I think that you have all the freedom to do your work*".[182]

224.4 McCarthy expressed his concern that Mpshe had a statement on 18 December 2007 (i.e. on the day that the Third Respondent was elected as President of the ANC) that "*he has looked at the case, there is a very, very strong case...and the decision is imminent*".[183] McCarthy indicated that "*Billy Downer will now have to explain* [this statement by Mpshe] *in trial*".[184]

224.5 McCarthy thereafter changes his mind and conveys the view that President Mbeki should say something through his spokesperson[185] to record that "*his office hasn't been involved in this at any level*".

224.6 McCarthy further notes that he had "*seen* [President Mbkei] *5 times in my life*", and that President Mbeki "*is very procedural*

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[179] Record at B42, Conversation 30, line 47f - h
[180] Record at B43, Conversation 30, line 57
[181] Record at B44, Conversation 30, line 57cc- ff
[182] Record at B45, Conversation 30, line 71
[183] Record at B45, Conversation 30, line 80h and 80j
[184] Record at B45, Conversation 30, line 80n
[185] Record at B46, Conversation 30. line 92a

*when it comes to these things*". In fact, McCarthy "*could not believe that he has never asked me about it*".[186]

224.7 Minister Mabandla conveyed that "*people really now are believing there is a political conspiracy and I don't know of any and I am quite confused*".[187]

225. This conversation undermines, rather than supports, any suggestion that McCarthy acted politically or for politically determined motives.

**CONCLUSIONS ON THE TRANSCRIPTS**

226. In the circumstances, the intercepted communications do not support Mpshe's stated reasons. I can do no better than to adopt the reasoning of the prosecuting team, led by Downer, as set out in their memo to Mpshe, dated 2 April 2009:

226.1 To the extent that McCarthy was part of an alleged conspiracy to prejudice Third Respondent, on instructions from Mbeki or otherwise, by withholding the decision to prosecute until after Polokwane, then this does not matter. This is so because the decision to withhold the service of the indictment was made by Mpshe, and remains untainted.[188]

226.2 If McCarthy was part of an alleged conspiracy to prejudice Third Respondent 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

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[186] Record at B47, Conversation 30, line 92f – 94c
[187] Record at B47, Conversation 30, line 114-b-c
[188] Record C43, DSO KZN Memorandum dated 2 April 2009, para 15

prosecute as soon as possible, for good prosecutorial reasons.[189]

**PART 4: IRRATIONALITY / UNREASONABLENESS**

227. The basis for Mpshe's decision rests on the assertion that the prosecution of the Third Respondent was impossibly compromised by the existence of indications that McCarthy may have been prepared to manipulate the timing of the service of the indictment for political ends. In light of the facts above, this conclusion is indefensible.

227.1 Mpshe could not have rationally come to the conclusion, based on the material before him, that McCarthy actually manipulated the timing of the service of the indictment for political ends in the build up to the ANC's Polokwane conference. As stated repeatedly, the decision as to timing of the service of the indictment was taken by Mpshe, at a time when McCarthy was on vacation.

227.2 Mpshe could also not have come to the conclusion, based on the material before him, that McCarthy attempted to manipulate the timing of the service of the indictment in the build up to the Polokwane conference. McCarthy portrayed himself as a man of influence, but there is no indication that this was true, or that he actually ever took any action to do so before the Polokwane conference.

227.3 Mpshe could also not have rationally concluded, based on the material before him, that McCarthy improperly interfered with the

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[189] Record C43, DSO KZN Memorandum dated 2 April 2009, para 16

timing of the service of the indictment after the Polokwane conference for malign political ends.

227.4 Mpshe could not have concluded, based on the information before him, that the timing of the service of the indictment would cause any trial prejudice to the Third Respondent. The prosecution team played no part in the alleged political conspiracy against the Third Respondent. In any event, even if there was any notional or potential trial prejudice to the Third Respondent, this could and would be adequately dealt with in the proceedings for a permanent stay of prosecution, or in the criminal trial itself.

227.5 Mpshe could not have concluded, based on the information before him, that the spy tapes would create any legitimate impression in the mind of the Third Respondent, that his prosecution was fuelled by a political conspiracy. The Third Respondent has never explained how he came into possession of the intercepted telephone calls and messages, and can hardly be seen to assert that the tapes, taken out of context, led to any conclusion. In any event, any impression that the Third Respondent may have formed could have been easily answered as incorrect.

227.6 Mpshe could also not have concluded that, based on the information before him, that the charges were of insufficient importance to justify prosecution resources.

228. In the circumstances it is submitted that there was simply no rational connection between the information which served before Mpshe, the purpose of his powers, and the decision that he made.

229. To the extent that the decision constitutes administrative action in terms of PAJA, it is submitted that the decision also falls to be set aside as unreasonable, in the sense that no reasonable person could have reached the decision that he did.

**PART 5: RELEVANT CONSIDERATIONS WERE IGNORED**

**THE STRENGTH OF THE CASE AGAINST THE THIRD RESPONDENT**

230. In my founding affidavit I discussed the strength of the criminal case against the Third Respondent, and stated that because of the continued strength of that case, the challenged decision falls to be reviewed on several grounds, including that it was irrational, unreasonable and that insufficient weight, if any, was given to the merits of the case against the Third Respondent.

231. Without access to the oral and written representations, and the record of Mpshe's decision to drop the charges on the strength of those representations, at that stage of the litigation I was only able to point to the considerable evidence against the Third Respondent based on information in the public domain as well as the fact that, in his reasons, Mpshe stated that a consideration of the merits did not "*militate against a continuation of the prosecution*".[190]

232. The Rule 53 confirms my submission in the founding affidavit that nothing contained in the representations, including the intercepted communications, served to weaken the considerable case against the Third Respondent.

233 Surprisingly, the indictment and summary of substantial facts did not initially form part of the Rule 53 record. When requested, draft copies

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[190] Page 2 of the reasons annexed as 'JS10' to my founding affidavit, record page 121.

were provided.[191] I have obtained copies which I believe to be the final versions from the internet, and will refer to these below where indicated.

234. It is notable that in the State Attorney's covering letter relating to the documents forming bundle D of the record ("**JS2**") no mention is made of the indictment and the summary of material facts. These documents served before Mpshe when he authorised the prosecution in December 2007, but it would appear that he did not consider them again when he made his decision to discontinue the prosecution in April 2009.

235. As will be argued more fully at the hearing, Mpshe's decision paid almost no regard to the factors which ought to have been determinative – including the nature and seriousness of the charges against the Third Respondent, the merits of the State's case against him, and the likely consequences of the abandonment of case.

236. In addition to the indictment and summary of substantial facts, I have considered the KPMG report to which SSI Du Plooy refers in his affidavit, discussed above at para 67.8. KPMG is a company providing audit, tax, and advisory services worldwide. The report referred to is entitled: "*The State versus Jacob G Zuma and others; Forensic Investigation; Draft report on factual findings*".

237. The report is bulky and so as not to unduly burden these papers, I will not attach the full report. It should be well-known to all of the parties, and is freely available. The KPMG report has been the subject of much media attention, and an electronic version has been published online by the *Mail & Guardian* newspaper.

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[191] Record D63 and D142.

238. The KPMG report constitutes the forensic basis for a significant portion of the case against the Third Respondent. The annexure of payments that accompanies the final indictment (attached as annexure "**JS19**"), and the summary of substantial facts, were derived from the KPMG report.

239. In the indictment and summary of substantial facts, the accused include the Third Respondent, Shaik, entities in the Nkobi group, and local subsidiaries of the Thint group. These documents allege that the Third Respondent engaged in corruption, racketeering and money laundering, by receiving benefits in exchange for the improper use of his real or perceived political influence to further the business of the Nkobi and Thint groups.[192]

240. The Third Respondent is also accused of fraudulently failing to declare benefits to Parliament and making fraudulent misstatements to Parliament,[193] and of failing to declare his income for tax purposes.[194]

241. In the memorandum of 5 December 2008, Downer helpfully summarises the state's case[195] as follows:

> "*The state alleges, in essence, an overriding and pervasive scheme of corruption that was designed to assist the entire Shaik/Nkobi empire in all its business of whatever nature. It was also designed to be of extraordinary duration and ultimately to keep Zuma, as the holder of the highest offices, on the Nkobi payroll indefinitely as a beneficiary of Nkobi's success in whatever form, be it as stipendary beneficiary or a nominee shareholder, or a shareholder. The mode of conferring benefits to Zuma extended to the ANC and Zuma in his capacity as the highest office-bearer of the ANC which was also to be an eternal beneficiary in the extended scheme of corruption.*"

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[192] Counts 1 to 6.
[193] Counts 7 to 9.
[194] Counts 10 to 18.
[195] Record D6.

242. More specifically, the State's case was that the Third Respondent used his powers as MEC and/or Deputy President of the ANC, or represented that he would so use his powers, to further the private business interests of Shaik and the Nkobi group, in particular by doing the following:[196]

242.1 Facilitating the Nkobi group's shareholding in African Defence Systems (Pty) Ltd ("ADS") along with Thint, knowing that ADS would go on to be awarded significant contracts in the arms deal.

242.2 Protecting the Thint group from investigations into irregularities that occurred during the award of contracts in the arms deal.

242.3 Representing to the Nkobi group's potential business partners, including Thint, that the Third Respondent would use his influence to further the Nkobi group's interests in business transactions unrelated to the arms deal.

242.4 This is generally described in the indictment as follows:

> "*84. Nkobi's main business was to enter into joint ventures with local and foreign companies with a view to obtaining lucrative government contracts. Shaik made it clear that Nkobi's role in joint ventures with other partners was to provide political connections (as opposed to financial resources or technical expertise). It was generally well understood that the political connection was so strong from Shaik's side that there was no need for Nkobi to provide the money or the expertise. Shaik's political connections included pre-eminently his connection with accused 1, which in turn was founded also on accused 1's financial dependence on Shaik. Accused 1 well knew that Shaik's ability to continue financially supporting him depended on Shaik's business*

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[196] Record D91 to D98.

*success, including his success with accused 2 and 3 and their joint ventures."*[197]

243. The benefits flowing to the Third Respondent from this allegedly corrupt scheme included a series of direct and indirect payments amounting to R 4 072 499.85, which were made from Shaik and the Nkobi group to and on behalf of the Third Respondent over the period October 1995 to July 2005 (as detailed in the schedule of payments).[198]

244. The KPMG report provides a comprehensive analysis of these source and the beneficiaries of these payments. They originated either from Shaik personally or from companies in the Nkobi group. KPMG concludes that due to cash flow challenges, payments were made from whatever account was able to sustain the expense. I attach an extract of the KPMG report under the heading 11.3 Sources of Payments, marked "**JS20**".

245. The beneficiaries of the payments were the Third Respondent personally or members of his extended family. I attach an extract of the KPMG report under heading 11.4 Beneficiaries of Payments, marked "**JS21**".

246. The payments made no legitimate business sense, in that neither Shaik, the Nkobi group, nor the other relevant entities through which payments were routed could afford the payments since they were in a "*cash-starved*" position. The State avers they were intended as bribes by all involved parties.

247. Shaik also provided significant cash facility benefits and advisory benefits to the Third Respondent free of charge or interest, which the latter could not have obtained commercially. This included some

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[197] Record D88/9.
[198] Record D120.

R1 340 000 for the initial renovations to what is referred to in the indictment as "[the Third Respondent's] *traditional residential village estate at Nkandla*". While payments for the renovations were ostensibly characterised as loans, the State averred that the Third Respondent was in no position to repay such funds.[199]

248. The memorandum of 3 March 2009 includes the following conclusion:

> "*7. A more detailed critique of Zuma's representations regarding the merits is contained in the attached synopsis. Our conclusion is that even in respect of those issues regarding the merits that Zuma does address, there is no adequate answer to the State's allegations. The representations do not alter any of the motivations that have existed since 2005 which justify the decisions to prosecute [Zuma] and Thint. Nothing has changed, essentially. If anything, Zuma's representations confirm the structure of the general corruption and then bolster the state's case by differing in some material respects from Shaik's evidence, such as* [... the balance was redacted by Justice Hurt]."

249. The memoranda show that the investigation team thereafter repeatedly referred Mpshe to the advice of Advocates Trengove and Breitenbach (with whom the investigation team agreed) which posed two questions:

249.1 Could Mpshe say that his decision to prosecute in 2007 was not improperly influenced by McCarthy's motives?

249.2 Could Mpshe be satisfied, "*with ex post facto knowledge of Adv McCarthy's shenanigans*", that the decision was on the merits the correct one?

250. Mpshe was advised that if his answer to either or both of these questions was affirmative, the prosecution ought to be continued.

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[199] Record D87.

251. What appears plainly from the Rule 53 record is that Mpshe did not consider these two questions. In respect of the first question, there is no inkling that this decision taken by Mpshe was tarnished by any political motives.

252. If Mpshe was to grapple with the second question, he would have had to consider the State's case as it appeared in the indictment, the summary of facts, and the KPMG report. This did not happen.

253. Mpshe also never called into doubt, or questioned the prosecution team's conclusion that both questions had to be answered in the affirmative.

**MPSHE WAS NOT REFERRED TO ALL RELEVANT EVIDENCE**

254. The Rule 53 Record is in a parlous state, which reflects the manner in which the decision to drop the charges against Third Respondent was taken. The only objective was to find a basis to justify a decision which Mpshe had already taken.

255. In the rush, the procedures which were followed leave a lot to be desired. More particularly:

255.1 Given the importance of the decision, one would have expected that minutes would be kept of meetings. But this was not done. The discussion at meetings must thus be pieced together from the hand written notes made by the participants.

255.2 Mpshe should have set a deadline for the collation of all the representations; comments and opinions; and then considered same with reference to advice, if necessary. Instead, important information (such as the letter from McCarthy dated 2 April

2009) only reached Mphse after he had already taken a decision.

255.3 There is at least one further important document sent to Mpshe after 1 April 2009 which the NPA has not filed of the record, which is an email from Adv Anton Steynberg to Mpshe, Downer and Hofmeyr, dated 3 April 2009 (copy annexed marked **"JS22"**).

256. The First Respondent seems to have no idea what was considered. In addition, there are a number of documents which one would have thought should be part of the record but which are nowhere to be found, many of which are referenced in the annotations to the transcripts:

256.1 The editorial of 7 November 2007 of the *Business Day* newspaper, which was relied on as expressing the view that it would support President Mbeki at the Polokwane conference if the Third Respondent was not facing criminal charges.[200]

256.2 The 8-page document faxed to Ngcuka by McCarthy on 14 December 2007.[201]

256.3 The editorial of 8 November 2007 of the *Business Day* newspaper, which refers to a book by Mark Gevisser in which it is stated that President Mbeki asked the Third Respondent to

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[200] See there reference to the editorial at Record B3, annotations

[201] See there reference at Record B56, annotations. It is clear that the author of the annotations had the document. It is also clear that an attempt was made to retrieve the fax from the machine. See Record B64, Mzinyathi notes of meeting 16/3, unnumbered para 1. See,also C 64. Interview with Ngcuka on 24 March where the latter offers a completely different possible version of what the fact could have been about.

resign before the statement was made that there was *prima facie* evidence of his guilt.[202]

256.4 The documents sent by McCarthy to Ngcuka on 15 and 16 December 2007.[203]

256.5 The documents, recordings and videos presented to or referred to at the meeting with Hulley on 6 March 2009, more particularly, transcripts of the Powell conversations; SMS messages between McCarthy and Kasrils;[204] SMS messages confirming a meeting with Mbeki; the video of Smuts Ngonyama at the end of October 2007; and a long report of Bertha Kellerman.[205]

256.6 The documents or recordings presented to or referred to at the meeting with Hulley on 9 March 2009, more particularly, the conversations between McCarthy and Kasrils; SMS messages between Trevor Fowler ("Fowler") and McCarthy about when material should be leaked to the media about the Third Respondent's late wife (who committed suicide);[206] discussions between Bheki Jacobs ("*Jacobs*") and Ngcuka; discussions between Fowler and Ngcuka; and discussions between McCarthy and Jacobs. [207]

256.7 The documents or recordings presented to or referred to at the meeting with Hulley on 9 March 2009, more particularly, discussions between McCarthy and Du Plooy regarding the filing

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[202] See there reference to the article at Record B3, annotations
[203] Record C116, Notes made by Hofmeyr on the Oral Representations of 20 February 2009, para 17e
[204] See also Record B153 at the bottom of the page.
[205] Record B64, notes taken by Mzinyathi at meeting 6/3
[206] This discussion apparently took place on 12 December 2007. See Record B79, Notes taken by Mzinyathi at 20/2 meeting
[207] Record B64-6, notes taken by Mzinyathi at meeting with Hulley 9/3; Record B79, Notes taken by Mzinyathi at 20/2

of a document in Durban; a conversation between McCarthy and Fowler; a long discussion between Luciano and McCarthy about the investigations against the Third Respondent and Selebi; a mail message from McCarthy to Jacobs.[208]

256.8 Mpshe's email to McCarthy on 24 March 2009, as well as a letter dated 30 March 2009. McCarthy's response in April 2009, in which he apparently stated that "*he did not take the decision. Thanda and Mpshe did that*".[209]

256.9 What appears to be intercepted conversions between Downer and the investigative journalist Sam Sole, on 4 June 2008; 5 June 2008, 13 June 2008; 18 June 2008, 19 June 2008, 30 June 2008.[210]

256.10 The answers given by Davids to Hofmeyr and Mngwengwe.[211]

**PART 6: PROCEDURAL UNFAIRNESS**

257. It is submitted that the process followed by Mpshe was not rational and thus contrary to the rule of law, alternatively, the decision was not procedurally fair and thus contrary to PAJA. In this regard I refer to the following irregularities, viewed individually alternatively cumulatively:

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[208] Record B66, notes taken by Mzinyathi at meeting with Hulley 11/3
[209] Record B76, Notes taken by Mzinyathi at 1 April 2009 meeting, unnumbered paragraph 4
[210] Record B63, Notes taken by Mzinyathi at 31 March 2009 meeting, unnumbered paragraphs 9 – 11. See, also Record at D458-9, Undated notes of Hofmeyr,
[211] Record B76, Notes taken by Mzinyathi at 1 April 2009 meeting, unnumbered paragraph 5

## REPRESENTATIONS NOT UNDER OATH BY THE ACCUSED

258. The written representations received by the First Respondent were made under oath by Hulley.[212] The prosecuting team noted that this was contrary to the ordinary practice that representations at the instance of the defence are best made under the oath of the accused. According to the prosecution team, the consequence is that:

> *"Deviation from this standard diminishes somewhat the weight of the representations. In a nutshell, they are unsworn, untested and self-serving and must accordingly be treated with circumspection."*

259. The so-called oral representations stand on a different footing altogether. These representations were not under oath and not in writing. As recorded by the prosecuting team:[213]

> ***"Allegations of conspiracy made orally***
>
> *The form of these representations is extremely unfortunate and it places the team 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.*

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[212] Downer and Bumiputera Team Internal Memorandum 3 March 2009 (C2, para 5). See, also, C12, where the team remarks that: "*The NPA normally insists on the reps being under the oath of the accused*".

[213] Downer and Bumiputera Team Internal Memorandum 3 March 2009 (C6-7, para 9.4)

*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 allegations must be treated with a healthy dose of scepticism.*

*The only way in which this matter can be satisfactorily resolved in all the circumstances is through resolution by an independent court of law in a public hearing. It is inappropriate for the NPA to determine this issue behind closed doors in a process which is secret and completely lacking in transparency."*

260. The process followed was irregular for two reasons. Firstly, representations can only be taken seriously if the accused is prepared to commit him or herself to the contents under oath.

261. Secondly, oral representations should never be entertained because it makes it impossible for the NPA to justify and explain a decision to accede to such representations when called upon to do so. By entertaining unsworn, and partly oral representations, the NPA made it impossible for itself to account for the decision taken.

**RECEIVING REPRESENTATIONS ON A SECRET BASIS**

262. The Applicant accepts that representations from an accused must be considered confidential, until they lead to a decision to discontinue a prosecution. Then an interested and affected person must be able to gain access to the representations, whether it be by way of review proceedings or otherwise.

263. It is intolerable that, in a constitutional State founded on the values of accountability, responsiveness and openness, the NPA can assist an accused in protecting the confidentiality of representations, even when the decision to discontinue the prosecution is challenged.

264. This is all the more intolerable in this case. The Third Respondent and his legal representatives openly employed threats against the NPA that

if criminal proceedings continued, embarrassing and compromising information and evidence would be divulged. In the absence of the representations, it is forever obscured what threats were made, and the extent to which these irrelevant considerations influenced Mpshe's decision.

**THE INPUT OF MCCARTHY (AND OTHERS) NOT OBTAINED**

265. In Part D of the record there is a letter from McCarthy to Mpshe, dated 31 March 2009,[214] and a response from Mpshe to McCarthy, dated 2 April 2009.[215]

266. It is apparent from McCarthy's letter that Mpshe's office sent an email to him on 24 March 2009, as well as a letter dated 30 March 2009. These documents have not been provided as part of the record.

267. The content of Mpshe's earlier letters can, however, be discerned from McCarthy's response, in which he states the following:

267.1 He is unaware of the contents of the oral representations.

267.2 In order to respond he would need clarity on the lawfulness of the recordings in question, the basis on which they were made, and whether they were authorised by a Judge of the High Court.

267.3 He required access to a complete set of the recordings with dates, times, identities of parties and subject matters allegedly discussed, in order to properly deal with the context of the discussions. Furthermore, he needed information as to the propriety, chain of custody and authenticity of the recordings in

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[214] Record at D217
[215] Record at D213

question; an opportunity to listen to the audio recordings, verified by an accurate transcript thereof; and access to other aspects of the written and/or oral representations that may warrant a response. In the absence of the critical information requested by him and whilst holding himself available to assist as best he can in the circumstances, McCarthy recorded that he had to reserve his rights.[216]

268. Mpshe's response, dated 2 April 2009, was simply to say that the representations were made to the acting NDPP on a "*without prejudice*" basis and that they are "*classified*". For these reasons, Mpshe claimed he was not in a position to supply McCarthy with the written, oral, and/or audio recordings.

269. Mpshe further referred to paragraph 3 of his letter dated 30 March 2009 (which we do not have) indicating that McCarthy had to have an opportunity to respond. Mpshe attached a series of questions to McCarthy for his "*urgent attention and response*".

270. McCarthy submitted a response in which he apparently stated that "*he did not take the decision. Thanda and Mpshe did that*".[217] This response is also not part of the record.

271. It is submitted that Mpshe's effort to obtain the views of McCarthy on the spy tapes and the transcripts were wholly inadequate:

271.1 After receiving a letter from Mpshe's office on 24 March 2009, McCarthy phoned Mpshe on his cell phone and left a message. The message has not been divulged, although it is clear that Mpshe did not return the call. The

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[216] Record at D217
[217] Record B76, Notes taken by Mzinyathi at 1 April 2009 meeting, unnumbered paragraph 4

same happened after McCarthy received Mpshe's letter of 30 March 2009. He again called the NPA offices and then also left two voice messages for Mpshe on his cell phone, neither of which was returned.

271.2 It was reasonable of McCarthy to request a copy of the transcripts, the audio recordings and the other information set out in his letter dated 31 March 2009, as well as a reasonable opportunity to assess same and to respond thereto. McCarthy could not be expected to provide his views in the short time given to him and without access to the requested information, particularly the audio recordings.

271.3 Mpshe was obviously not interested in seriously entertaining McCarthy's views. Questions were thus posed to McCarthy after Mpshe had taken his decision.

272. Furthermore, Mpshe should have obtain the views of several others, including Kasrils, Hafferjee, Mbeki and Davids, to verify or explain statements made in the spy tapes. No effort was made at all.

**THIRD PARTIES WERE NOT AFFORDED A PROPER HEARING**

273. As explained above, Mpshe wrote to Zille on 20 March 2009, welcoming representations from the Applicant.[218]

274. In response, the Applicant requested Mpshe to provide it with the representations made by Third Respondent and the ANC.[219] Mpshe refused.[220]

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[218] Record at A5

275. In the circumstances, the invitation to the Applicant to file submissions was hollow. Even if Mpshe was still required to protect the confidentiality of the representations filed on behalf of the Third Respondent, he should at the very least have made known the portions of the transcripts upon which he based his decision, and which were attached to his decision of 6 April 2009.

276. In the absence of this information, the Applicant and others had to speculate on the basis on which Mpshe might discontinue the prosecution.[221]

277. Ultimately, the Applicant was prevented from addressing Mpshe on the crux of what he was about to consider. This was irrational and procedurally unfair.

**PROSECUTING TEAM NOT AFFORDED OPPORTUNITY TO COMMENT**

278. As set out above, the prosecution team submitted several internal memoranda to Mpshe in an attempt to dissuade him from acceding to the representations to discontinue the prosecution. It is apparent from these memoranda and notes taken during meetings, that the team was never informed that Mpshe intended to take a decision to discontinue the prosecution or that the basis of such a decision would be the alleged abuse of process by McCarthy.

279. The crucial decision was taken in the team's absence at the meeting of NPA management on 1 April 2009.[222] The decision was final and it

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[219] See Record at A6, Letter from Zille to Mpshe dated 22 March 2009; Record at A8, Letter from Zille to Mpshe dated 26 March 2009 (last paragraph on page); as well as Record at A9, third paragraph from bottom; A12 at paragraph 3; A15 at paragraph 21.
[220] Record at A7, Letter from Mpshe to Zille, date unknown
[221] Record at A9, Letter from Zille to Mpshe, dated 26 March 2009, second paragraph from the bottom.
[222] Record at B75

agreed that a press release would go out announcing the decision, by 11h00 on Monday, 6 April 2009.[223]

280. The important memorandum of the prosecuting team dated 2 April 2009 could have had no impact, as by this stage the decision had been taken. The prosecuting team was kept in the dark. This was recorded by the prosecuting team in their memorandum dated 14 April 2009 as follows:

> *"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."*[224]

281. Mpshe sought to shield himself from the comments and contributions of the prosecuting team regarding the intended decision.[225] This was irrational.

## PART 7: THE NDPP WAS NOT AUTHORISED TO TAKE THE DECISION

282. At para 10.6 of my founding affidavit, I referred to the fact that it appeared that the decision to discontinue the prosecution had not been made by the responsible DPP, as required by the NPA Act, but by Mpshe himself.

283. In his reasons, Mpshe stated the following:

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[223] Record B76, Notes taken by Mzinyathi at 1 April 2009 meeting, unnumbered paragraph 3
[224] Record at C54, Memorandum dated 14 April 2009 at paragraph 5.1
[225] The latter appears more likely. Hofmeyr suggested, at the crucial meeting of 1 April 2009, that "*We need to strategize on how to approach the team and need to have a proper discussion with them*". Record B75, Notes taken by Mzinyathi at 1 April 2009 meeting, unnumbered paragraph 5. No such discussion ever took place.

> *"All members of the senior management and the prosecuting team participated in this discussion, and ultimately I take full responsibility for the decision I make."*[226]
>
> and
>
> *"I have come to the difficult conclusion that it is neither possible nor desirable for the NPA to continue with the prosecution of Mr Zuma".*[227]

284. From this I inferred that the decision to discontinue the prosecution was an original decision taken by Mpshe alone.

285. This conclusion is now undeniable. The regional DPP responsible for the prosecution of the Third Respondent at the time the challenged decision was taken was, to the best of my knowledge, Ms Shamila Batohi ("Batohi") who left that post in November 2009.

286. Batohi was not involved in the decision to drop charges against the Third Respondent at all.

287. The Director under whose hand the indictment was issued is Mngwengewe. He was informed of Mpshe's decision on 1 April 2009 and did not independently apply his mind to the matter, nor did he take a decision in relation thereto.

288. The decision to withdraw the prosecution was accordingly not made by the person lawfully authorised to take the decision and was accordingly taken unlawfully. It falls to be reviewed under the constitutional principle of legality as well as in terms of section 6(2)(a)(i) of PAJA.

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[226] Page 2 of the reasons annexed as 'JS10' to my founding affidavit.
[227] Page 12 of the reasons.

**PART 8: ERROR OF LAW**

289. The question whether proceedings against the Third Respondent could continue was already before this Court in an application for a permanent stay of the prosecution. If the Third Respondent claimed any prejudice, he could have raised this in those proceedings, or in the subsequent criminal trial itself.

290. I am advised that the correct position in our law is that Mpshe was neither entitled to pre-judge the outcome of the anticipated application for a stay of prosecutions, nor to pre-judge the findings of the trial court. Yet this is precisely what he did.

291. The legal basis on which Mpshe ultimately relied in his written reasons rests on the so-called abuse of process doctrine. I am advised that Mpshe's reliance on this doctrine was fundamentally flawed:

291.1 The doctrine applies in the context of an application for stay of proceedings, not to an administrative, extra-judicial decision whether to withdraw charges against an accused.

291.2 In that context, the first and central question is whether the accused will received a fair trial regardless of prior prosecutorial misconduct.

291.3 If so, a court will only order a stay of prosecutions in exceptional circumstances. The determination is one that falls squarely within the judicial discretion.

291.4 I am advised that an illustrative case where the doctrine has found application is the judgment of the Court of Final Appeal of the Hong Kong Special Administrative Region, in **HKSAR v Lee Ming Tee** (2003) 6 HKCFAR 336; [2004] 1 HKLRD

513 (judgment of 22 August 2003). In that case the Court held (per Sir. Anthony Mason NJP) as follows:

> "*184. Although the question is debatable, the better view is that an abuse of process does not exist independently of, and antecedently to, the exercise of a judicial discretion. The judicial decision that there is an abuse of process which requires the grant of a stay is itself the result of the exercise of a judicial discretion. It is for the judge to weigh countervailing considerations of policy and justice and then, in the exercise of the discretion, decide whether there is an abuse of process which requires a stay.*"
>
> and
>
> "*187. In* [exercising its discretion] *the Court must take account of the important public interest in the detection and punishment of crime, more particularly serious crime, as a result of which the investing public has suffered loss. The Court must take account also of the public expectation that persons charged with serious criminal offences will be brought to trial unless there is some powerful reason for not doing so. On the other hand, the Court must have regard to preserving the integrity of the criminal justice system. The Court must also consider the serious burden imposed upon the defendant of facing yet a second lengthy trial.*"

292. Full argument on the application of this doctrine in South African context will be addressed to the Court at the hearing.

293. I am advised that Mpshe inexplicably declined to follow the direct authority of the SCA (per Harms DP)[228] that the worst motive will not make a prosecution wrongful unless reasonable and probable grounds for prosecuting are absent.

294. This is all the more peculiar in the current case, in which Mpshe himself immediately concedes that there is no suggestion that charges against

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[228] Referred to in footnote 3 above.

the Third Respondent were brought in order to serve an ulterior purpose.[229]

295. The decision accordingly falls to be set aside under the constitutional principle of legality, as well as PAJA, in that Mpshe was materially influenced by an error of law.

**CONCLUSION**

296. In all the circumstances, the DA submits that a proper case has been made out for the relief sought in the Notice of Motion, including the costs of three counsel.

JAMES SELFE

The deponent has acknowledged to me that he knows and understands the contents of this affidavit, which affidavit was signed and sworn to before me at the address below on the 6TH day of **NOVEMBER 2014** in accordance with Regulation No R1258 dated 21 July 1972 as amended by Government Notice R1648 dated 19 August 1977, as further amended by Government Notice R1428 dated 11 July 1980 and by Government Notice R774 dated 23 April 1982.

COMMISSIONER OF OATHS

[229] Record B146.

FERGUS GEORGE CAMERON REID.
ADVOCATE OF THE HIGH COURT
COMMISSIONER OF OATHS
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