IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no: CCD30/2018

In the matter between:

THE STATE

and

JACOB GEDLEYIHLEKISA ZUMA **FIRST ACCUSED**

THALES SOUTH AFICA (PTY) LTD **SECOND ACCUSED**

JUDGMENT IN RESPECT OF THE FIRST ACCUSED'S PLEA IN RESPECT OF SECTION 106(1)*(h)* AND 106(4) OF THE CRIMINAL PROCEDURE ACT, 1977

Koen J

Introduction

[1] The first accused, Mr Jacob Gedleyihlekisa Zuma (Mr Zuma), and the second accused, Thales South Africa (Pty) Ltd (Thales), face various charges, as set out in the indictment.[1] They have both pleaded not guilty to all the charges. In addition, Mr Zuma

[1] The criminal trial commenced on 17 May 2021. The former legal representatives of Mr Zuma, Mabuza Attorneys, formally requested leave to withdraw as his legal representatives. Mr Masuku SC, with him Mr Buthelezi and Mr Xulu instructed by B.M. Thusini Incorporated appeared as Mr Zuma's new legal representatives. They placed on record that Mr Zuma was ready to proceed with the trial. In the light of that recordal, the withdrawal of Mabuza Attorneys would not cause a hiatus and hence any interruption in the trial proceedings that could prejudice either Mr Zuma, or Thales, or the prosecution. Leave to withdraw as Mr Zuma's attorneys was accordingly granted to Mabuza Attorneys. The trial thereafter commenced with the State being represented by Mr Downer SC, Mr Du Plooy and Mr Singh, Mr Zuma being represented as aforesaid, and Thales being represented by Mr Roux SC and Ms Jackson.

raised a plea in terms of s 106(1)*(h)* of the Criminal Procedure Act 51 of 1977 (the CPA) ('the special plea'). In the special plea he contends that the lead prosecutor of the prosecuting team representing the State, Mr William John Downer SC (Mr Downer), 'has no title to prosecute' as contemplated in s 106(1)*(h)*, and 'should be removed as the prosecutor in this case.'[2] He further demands that in the event of it being found that Mr Downer lacks title to prosecute, that he (Mr Zuma) be acquitted of all the charges in terms of section 106(4) of the CPA.

[2] Section 106 of the CPA provides:

'(1) When an accused pleads to a charge he may plead –

(a) that he is guilty of the offence charged or of any offence of which he may be convicted on the charge; or

(b) that he is not guilty; or

(c) that he has already been convicted of the offence with which he is charged; or

(d) but he has already been acquitted of the offence with which he is charged; or

(e) that he has received a free pardon under section 327(6) from the State President for the offence charged; or

(f) that the court has no jurisdiction to try the offence; or

(g) that he has been discharged under the provisions of section 204 from prosecution for the offence charged; or

(h) that *the prosecutor has no title to prosecute*; or

(i) that the prosecution may not be resumed or instituted owing to an order by a court under section 342A(3)*(c)*.

(2) Two or more pleas may be pleaded together except that a plea of guilty may not be pleaded with any other plea to the same charge.

(3) An accused shall give reasonable notice to the prosecution of his intention to plead a plea other than the plea of guilty or not guilty, and shall in such notice state the ground on which he bases his plea: Provided that the requirement of such notice may be waived by the attorney–general or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.

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[2] Para 1 of the plea explanation in terms of section 106(1)*(h)* and 106(4) of the Criminal Procedure Act 51 of 1977 (CPA). The request that Mr Downer SC should be 'removed as a prosecutor in this case' is repeated also elsewhere in para 1, and in para 4 of the special plea.

(4) *An accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence*, or an accused on behalf of whom a plea of not guilty is entered by the court, *shall, save as is otherwise expressly provided by this Act or any other law, be entitled to demand that he be acquitted* or be convicted.' (emphasis added)

[3] This judgment deals in the main with the special plea. From the time that the trial was to have commenced on 17 May 2021, until the special plea was argued on 21 and 22 September 2021, a number of postponements occurred. It is necessary that I deal with those briefly, more particularly, where appropriate and necessary, setting out some of the reasons which caused me to have acceded to the adjournments and to issue certain directions. In dealing with these events in the chronological sequence in which they occurred, some aspects relevant to the adjudication of the special plea will also be referred to.

The procedure followed for adjudicating the special plea

[4] Section 106 of the CPA does not prescribe a specific procedure to be followed for the adjudication of the special plea. Section 106(3) simply requires that reasonable notice be given to the prosecution of the intention to raise the special plea. No such notice had been given when the trial was due to commence on 17 May 2021. On that day Mr Zuma's counsel, Mr Masusku SC requested that the matter be adjourned to 26 May 2021 to allow the requisite notice required by s 106(3) to be given to the State. Mr Masuku confirmed that what was sought was not a recusal of Mr Downer but a determination that Mr Downer did not have 'title to prosecute' as contemplated by s 106(1)*(h)*. It was agreed that the requisite notice would be filed by 19 May 2021. On that basis the State agreed to the adjournment. Thales placed on record that it was ready to proceed.

[5] On 19 May 2021 a filing notice,[3] to which was annexed a 'Plea in terms of section 106(1)*(h)* and 106(4) of the Criminal Procedure Act 51 of 1977' dated 17 May 2021, and 'A plea explanation in terms of section 106(1)*(h*) and 106(4) of the Criminal Procedure Act 51 of 1977', were filed. The 'Plea' comprised a four-page document signed by Mr

[3] The notice bears the Registrar's stamp dated 20 May 2021.

Zuma, his counsel and attorney. The plea explanation took the form of an affidavit by Mr Zuma with annexures, attested on 19 May 2021, comprising some 1449 pages. The grounds on which it would be contended that Mr Downer lacks title to prosecute are contained in the notice and, more particularly, the affidavit.

[6] On 26 May 2021 both accused pleaded not guilty.[4] In addition, the special plea of which notice had been given, was entered.[5]

[7] The affidavit referred to in the written special plea (the founding affidavit) is signed by Mr Zuma and sets out the grounds on which he intends relying. In content it is the exact same affidavit that had been annexed to the notice which had been delivered previously, when notice was given of his intention to raise the special plea. The issues raised by the special plea are accordingly to be found in the written special plea signed by Mr Zuma, which incorporates the founding affidavit. The founding affidavit sets out the evidence in respect of the grounds relied upon. The founding affidavit did not contain any request for *viva voce* (oral) evidence to be adduced, or that the special plea be dealt with by way of a trial.

[8] The parties approved of this procedure initiated and adopted by Mr Zuma, if not expressly, then at least tacitly. This court also approved of the procedure for the identification of the issues in dispute and the facts in support of the contentions of the parties in the special plea, by granting a consent order on 26 May 2021, which also fixed dates for the exchange of an answering affidavit by the State,[6] and a replying affidavit, by Mr Zuma.[7] The trial was adjourned to 19 July 2021 for the adjudication of the special plea on that basis.

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[4] The pleas entered have been referred to in paragraph 1 above.
[5] Which became exhibit D. It is in identical terms to the notice filed previously and signed by Mr Zuma and all his counsel.
[6] Being 2 June 2021.
[7] Being 9 June 2021.

[9] The answering and replying affidavits were duly filed. Altogether, the affidavits with annexures comprise some 4 230 pages. It was also ordered at that time, by consent, that Mr Zuma's heads of argument be filed by 5 July 2021 and those of the State by 12 July 2021. Mr Zuma's heads were filed a week late, together with that of the State, on 12 July 2021. No application for condonation for the late filing of Mr Zuma's heads was filed, but no objection was raised by the State. The heads filed are comprehensive, and in the case of Mr Zuma more in the nature of a wide ranging written argument, rather than heads of argument. The special plea was ready to be adjudicated on 19 July 2021, based on the contents of the written plea signed by Mr Zuma and the affidavits that were exchanged.

The events following the decision in *Secretary of the State Capture Commission v Zuma*.[8]

[10] On 29 June 2021, the Constitutional Court delivered judgment in the matter of *Secretary of the State Capture Commission v Zuma*. This judgment provided for the imprisonment of Mr Zuma for a period of 15 months for contempt of court. The Constitutional Court directed Mr Zuma to submit within 4 days of date of judgment. If he did not then the Minister of Police was to take steps to have Mr Zuma taken into custody, within 3 days of the expiry of that period, that is by 7 July 2021. On 3 July 2021, the Constitutional Court however agreed to hear a rescission application in respect of its order, on Monday, 12 July 2021. An application for an urgent interdict to prevent Mr Zuma's incarceration was argued in this division on Tuesday, 6 July 2021. Those proceedings, like the proceedings before the Constitutional Court, took the form of a virtual hearing. Judgment was reserved until Friday, 9 July 2021. A further application was brought outside court hours on Wednesday evening, 7 July 2021, to prevent the arrest and incarceration of Mr Zuma. That was dismissed. Mr Zuma was committed to the Correctional Service Centre at Estcourt shortly before midnight on 7 July 2021. On Friday, 9 July 2021, the judgment in the interdict application, which was reserved on 6 July 2021, was delivered. The application for the interdict was dismissed with costs.[9]

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[8] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and others* [2021] ZACC 18, 2021 (5) SA 327 (CC), 2021 (9) BCLR 992 (CC).

[9] *Zuma v Minister of Police and others* [2021] ZAKZPHC 40, [2021] 3 All SA 967 (KZP).

[11] During this time various cargo trucks travelling on the N3 highway from Gauteng to Durban were blocked and set alight at Mooi River, KwaZulu-Natal, and the trucks and their cargo destroyed.

[12] The aforesaid facts and those set out immediately below, have acquired such notoriety that judicial notice may be taken thereof.

[13] On Sunday evening, 11 July 2021, the President of the Republic of South Africa, Mr Ramaphosa, in announcing the response of the South African government to the ongoing third wave of the COVID-19 pandemic spreading across the country, extended the adjusted level 4 lockdown regulations provided for in the Disaster Management Act 57 of 2002, for another two weeks.

[14] By Monday, 12 July 2021, widespread violence and disruptions to ordinary civil life of previously unimaginable proportions occurred. The violence had spread from the initial torching of the trucks to elsewhere in KwaZulu-Natal, including Pietermaritzburg, and also Gauteng. It resulted in large scale looting, violence and the destruction of many businesses and structures. It was reported that more than 300 people had died. The central business district of Pietermaritzburg, where the High Court is situated and the hearing of the special plea was to proceed, had become inaccessible. The N3, which would also give highway access from Estcourt to Pietermaritzburg for the transport of Mr Zuma, and from Gauteng for counsel travelling from there to KwaZulu-Natal, was closed. Flights to the Pietermaritzburg airport were cancelled. Shops that were not looted or destroyed, were closed. Even in the days after the looting had abated and some remaining grocery shops had reopened, members of the public had to queue outside shops for basic necessities, and in many instances, were limited to the number of items they would be allowed to purchase. It was feared that the possibility of bulk buying by terrified members of the public could result in a food scarcity. The South African National Defence Force was activated. The Durban and Pietermaritzburg High Courts were both closed to the public from that Monday.

The directive of 15 July 2021

[15] At past court appearances, when the trial of Mr Zuma was enrolled, the court room was always well populated, and crowds gathered outside the court. Many of the persons making up these crowds would often not wear masks or maintain the prescribed social distancing.

[16] Concerned by the adjusted level 4 lockdown being extended, the spread of the third wave of the COVID-19 pandemic, the widespread violence and looting in the Pietermaritzburg central business district, the inaccessibility of the N3 as an access route to Pietermaritzburg, the inaccessibility of the Pietermaritzburg High Court, and the absence of flights to Pietermaritzburg, I considered the possibility of approaching the parties to ascertain their attitude to having the hearing of the special plea proceeding virtually. I addressed an email to the parties inviting their views, by midday on Thursday, 15 July 2021, as to whether the hearing scheduled for 19 July 2021 should proceed virtually. As I would still have to gain access to the Information Technology (IT) staff at the Pietermaritzburg High Court to set up such a virtual hearing, and it was uncertain whether the High Court building would be accessible, it was even suggested that it might be prudent in the alternative to adjourn the matter for a week, depending on the availability of counsel in the next week.

[17] The State and the representatives for Thales promptly agreed to a virtual hearing. Mr Thusini, Mr Zuma's attorney, replied that he would respond before 15 July 2021. He responded after midday on 15 July 2021, stating that Mr Zuma would seek a postponement of the matter. In the interim, part of the N3 had been reopened but the section between Harrismith to Cedara, just north of Pietermaritzburg, which includes Estcourt, remained closed. By Thursday access could be gained to the High Court and I arranged to meet with the IT staff on the Friday. As no specific objections had been raised to the hearing proceeding virtually I directed shortly after the midday cut-off, that the hearing would proceed virtually.

The hearing of 19 July 2021

[18] On 16 July 2021 I received a request from Mr Thusini, the attorney for Mr Zuma, for directions for the service of an urgent application for a postponement of the hearing of the special plea on 19 July 2021. The State agreed to accept service by midday on Saturday 17 July 2021. I issued a directive regulating that process.

[19] In the urgent application launched on Saturday, 17 July 2021, Mr Zuma claimed the following relief:

'1. Declaring that the trial of the accused's plea on the virtual platform is inconsistent with the rights of the accused in section 35(3) of the Constitution;

2. That the trial and all other related proceedings between the State and Jacob Gedleyihlekisa Zuma and One Other, are adjourned in terms of the provisions of section 168 of the Criminal Procedure Act, 51 of 1977 to the date to be arranged and agreed upon by the parties or to the date determined by this Honourable Court.'

[20] On 19 July 2021, I heard argument regarding the adjournment. These proceedings proceeded virtually without objection. On 20 July 2021 I granted the following order:

'1. The trial is adjourned to 10 to 13 August 2021 for the adjudication of the issues raised in the special plea in terms of section 106 (1)(h) of the Criminal Procedure Act 51 of 1977.

2. The ruling in respect of the relief claimed in paragraph 1 of the Notice of Application dated 17 July 2021 is adjourned to 10 August 2021.

3. The directive of 15 July 2021 ("the directive") that the hearing of the special plea will proceed by way of a virtual hearing, shall continue to apply unless revoked or revised as provided below.

4. The parties and the Department of Correctional Services are each invited to provide a list, in point form and not exceeding two pages of double-spaced typing, of any considerations and/or prejudice which might result, which they consider relevant to the decision whether the directive should be revoked or revised.

5. The list of considerations and possible prejudice referred to in paragraph 4 above must be compiled with reference to the circumstances that will prevail or are anticipated to prevail as from 9 August 2021.

6. The lists referred to in paragraph 4 above must be transmitted to the judge's registrar per email on or before 2 August 2021.

7. The Registrar is directed to transmit a copy of this order per email to the Head of the Correctional facility at Estcourt where Mr Zuma is currently detained.
8. Any revision of the directive, or the revocation thereof, shall be communicated to the parties by email on 4 August 2021.
9. In view of the special plea not concerning accused 2, Mr Durand will continue to be excused, if he so wishes, from attending the hearing on 10 August 2021, on the understanding that he will attend again when required to do so.'

[21] I did not provide reasons at the time, but below set out briefly my reasons for the directive and for granting the adjournment.

[22] The affidavit in support of the application, deposed to by Mr Thusini, advanced as a basis for the postponement, the alleged violation of Mr Zuma's fair trial rights in terms of section 35(3)*(c)* and *(e)* of the Constitution, and a complaint that his legal representatives, due to the extraordinary circumstances that had arisen in the preceding week, and which prevailed and which were unprecedented, had not been able to consult properly with him on the recent developments. At the hearing, reliance was also placed on an alleged infringement of s 35(3)*(f)* of the Constitution.

[23] Section 35(3) of the Constitution provides:
'(3) Every accused person has a right to a fair trial, which includes the right –
(a) to be informed of the charge with sufficient detail to answer it;
(b) to have adequate time and facilities to prepare a defence;
(c) *to a public trial before an ordinary court*;
(d) to have their trial begin and conclude without unreasonable delay;
(e) *to be present when being tried*;
(f) *to choose, and be represented by, a legal practitioner, and to be informed of this right promptly*;
(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
(i) to adduce and challenge evidence;

(j) not to be compelled to give self-incriminating evidence;

(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;

(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(o) of appeal to, or review by, a higher court.' (emphasis added)

[24] Mr Zuma's application for the adjournment was opposed by the State. Thales adopted a neutral stance. I was persuaded, in the exercise of my discretion, to grant the adjournment, having regard to the practicalities of the situation, the unusual events which had intervened from 9 July 2021, the fact that the matter had originated some 15 years ago, and that the adjournment would be for only three weeks, an insignificant delay in the overall scheme of the trial. Such a postponement appeared to be necessary and reasonable in the interests of justice in the circumstances, when weighed against the potential curtailment of Mr Zuma's rights to consult properly with his legal representatives. The dates of the adjournment were agreed amongst the parties.

The directive of 4 August 2021

[25] Mr Zuma's brother had in the interim sadly passed away. Mr Zuma was granted compassionate leave of absence by the Department of Correctional Services to attend his brother's funeral in the Nkandla area on Thursday, 22 July 2021. He was, by all accounts, able to leave the Correctional Centre in Estcourt, attend the funeral and returned safely without any incident, or any further unrest arising. On Sunday evening, 25 July 2021, the President again addressed the nation and relaxed the COVID-19 lockdown regulations to adjusted level 3. The violence and looting around Pietermaritzburg had ceased, calm was restored, and a major clean-up process had commenced. The

circumstances, except for the ongoing COVID-19 pandemic, which is seemingly likely to prevail still for some time, had changed considerably.

[26] Pursuant to paragraphs 4, 5 and 6 of my order of 20 July 2021, Mr Zuma filed a list of considerations and possible prejudice for my consideration in deciding whether to revoke the previous directive I had issued regarding a virtual hearing. It read:

'1. We are instructed to specifically point out that the 1st accused's departure point is that, for all the reasons raised in argument, he remains of the view that: there is no legal justification, in terms of section 36 of the Constitution, to direct that what are essentially criminal trial proceedings can be conducted virtually, in his physical absence, without his consent and outside of the limited context of bail, postponement or similar proceedings. To do so would be unconstitutional and illegal, irrespective of the situation in the particular case, a particular date or particular circumstances which may or may not prevail on 9 August 2021.

Point – form list of factors, as ordered

2. However and in the unlikely event that a constitutionally and/or legal ground to do so may be found to exist, which is denied, then the following list of factors which still nevertheless militate against such a procedure:

a. The 1st accused hereby specifically refuses to grant his consent thereto;

b. It remains extremely difficult, both from logistical and financial point(s) of view, to conduct a physical consultation between him and his full legal team. He is in Estcourt and the team is spread throughout South Africa. The possibility of interception also limits his rights to legal representation (section 35(3)(f))

c. The section 106(1)(b) plea process is, by definition, a very unique and specialised "trial-within-a-trial" type of proceedings, which automatically requires seamless interaction between the accused and his representatives, as with all other accused persons;

d. He specifically wants to observe the court and counsel for the other side in real time, like all other accused persons in the same position. That is why other criminal trials were postponed.

e. Some of his close relatives and/or supporters who would have been present in a <u>public and ordinary court room</u> (see section 35(c) of the Constitution) may not have access to electronic devices or even television broadcasts. In any event, we are now at level 3, the unrest has subsided and the courts are functioning as before.

f. Should there be a need for an interpreter it may prove logistically difficult for the accused to follow the proceedings.

3. Finally, serious doubt has been internationally cast on the appropriateness of virtual criminal proceedings.

4. We therefore respectfully submit that the directive of the court ought properly to be reversed as it will unduly and invariably prejudice the 1st accused.' (footnote omitted)

[27] The State filed a list which provided as follows:

'1. The State believes that the hearing of the first accused's special plea can, and must proceed on 10 August 2021, whether virtually or in-person.

2. A virtual hearing of oral argument on the special plea on 10 August is possible and will be satisfactory in every respect. The parties and their legal representatives and the public (through the broadcasting of a live feed) will be able to observe the proceedings. As with the previous hearing, arrangements can be made with the Estcourt Correctional Centre for a virtual link for the first accused; and that he may consult with his legal team, both in the run-up to the hearing and during the hearing.

3. As to an in-person hearing, the security services have advised the NPA that if an in-person hearing were to take place on 10 August they will take all reasonable steps to ensure that happens peacefully. They have not given any assurance that they will succeed. Supporters of the first accused are presently being mobilised on social media to gather in their numbers in Pietermaritzburg on 10 August. In addition, the daily Covid-19 infection rate in KZN is presently rising. The course of third wave in other parts of the country suggests this is likely to continue or not to abate materially.

4. There is no good reason not to opt for a virtual hearing of the oral argument on 10 August and to assume the risks attendant on an in-person hearing.

5. If, after hearing the oral argument, this Court decides to refer any issues raised by the special plea to oral evidence, the hearing format can be revisited. The issue of a virtual hearing of oral evidence, either on the special plea or later in the trial, need not and cannot be determined now. Every such decision must be made in the light of the then prevailing and anticipated facts and circumstances.'

[28] The Acting Regional Commissioner: KwaZulu-Natal Region of the Department of Correctional Services filed a list on 3 August 2021 stating the following:

‘1. The court is hereby requested to take the following considerations on carrying out the Directive of 15 July 2021 wherein the hearing of the special plea will be held virtually on the 10 August 2021:
1.1 That Remand Audio Visual is available and functional at Estcourt Correctional Centre.
1.2 That other virtual platforms such as Zoom, Microsoft Teams, and Webex are available and operated from a laptop at Estcourt Correctional Centre.
1.3 That the Department will be able to connect Mr Zuma from Estcourt Correctional Centre with the court from 08H00 on the trial dates.
1.4 The Department will set up a satellite telephone for communication between Mr Zuma and his legal representatives during court appearances.
2. The Department will be in a position to transport Mr Zuma to the Pietermaritzburg High Court to appear in person should the court issue such a Directive.’

[29] Thales filed a notice expressing itself in favour of a hearing via a virtual platform but considered it inappropriate in view of it not having been directly involved, to advance reasons for a virtual hearing other than to express their preference for it.

[30] In light of these submissions and the changed circumstances, I determined that the hearing for 10 August 2021 should no longer proceed virtually, but in person, as the preferred default position. Personally, I consider a hearing in open court preferable for a number of reasons, specific to my experience, which includes the observation of non-verbal cues of all the parties involved, transparency, due observance of the decorum of the court, and openness. Further, the circumstances were no longer such that a virtual hearing was required.

[31] On 4 August 2021 I accordingly advised the parties per email, as I had undertaken to do, that:
‘1. The hearing of the plea in terms of s106(1)(h) of the Criminal Procedure Act 51 of 1977 set down from 10 August 2021, shall proceed in open court at the High Court in Pietermaritzburg.
2. The currently applicable Disaster Management (Covid) regulations, particularly those regarding the wearing of facemasks, maintaining social distancing, and the restriction on the number of attendees at indoor venues, must at all times be adhered to strictly.
3. The directive previously issued on 15 July 2021 is hereby revoked.

4. This directive is subject to amendment at any stage should circumstances arise which make it desirable to do so.'

[32] In the light of that communication and the hearing of the special plea no longer proceeding virtually, the relief claimed in paragraph 1 of the notice of application for the previous adjournment had become academic. It was simply adjourned sine die. That then cleared the path for a consideration of the merits of the special plea on 10 to 13 August 2021.

The hearing of 10 to 13 August 2021

[33] On the public holiday, Women's Day, Monday, 9 August 2021 I was formally advised that at the end of the previous week, Mr Zuma had been admitted to a hospital outside the Estcourt Correctional Centre where he was previously detained, that he would not attend court on Tuesday, 10 August 2021, and that application would be made for the hearing of the special plea to be opposed. The parties had agreed, and I issued a directive in accordance with their agreement on 9 August 2021 in the following terms:

'1. The proceedings on 10 August 2021 will be held virtually, not in person, and in the absence of Mr Zuma, who, as informed by the Estcourt Correctional Centre, is currently an in-patient in hospital under the care of the Presidential Medical Unit of the South African National Defence Force.

2. On 10 August 2021 Mr Zuma shall apply for a postponement of the criminal proceedings to a future date ("the postponed date"), which shall be within a reasonably short period depending on the availability of all concerned.

3. The application shall be supported by an affidavit by a medical practitioner treating Mr Zuma.

4. If, on the postponed date, Mr Zuma applies for a further postponement, his application shall be supported by the *viva voce* evidence of a medical practitioner treating him, who may be cross-examined by the State, and the State may adduce rebutting *viva voce* evidence, either there and then, or at an adjourned hearing.'

[34] On 10 August 2021 an application for the adjournment of the proceedings scheduled for that day was issued. The founding affidavit to that application deposed to by Mr Zuma's attorney, Mr Thusini, on 9 August 2021 explained that:

'On 6 August 2021, the First Accused was admitted to hospital to undergo extensive medical evaluation and care. I annex a letter (FA2) from Brigadier General (Dr) MZ Mdutywa (General Officer Commanding Area Health Formation) of the SA Military Health Service dated 8 August 2021 addressed to the Head of the Centre (Estcourt Correctional Centre) wherein a fuller context of the First Accused's hospitalisation is explained.'

[35] Brigadier-General (Dr) Mdutywa) is the official who had been officially assigned to lead the medical team attending to Mr Zuma. He deposed to a confirmatory affidavit, dated 8 August 2021, confirming the contents of Mr Thusini's affidavit. The letter of Brigadier General (Dr) Mdutywa dated 8 August 2021 reads as follows:

'MEDICAL SUPPORT TO THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND FORMER PRESIDENTS

1. The above matter refers.
2. The South African National Defence Force is responsible for medical support to the current President of the Republic of South Africa, the former Presidents of the Republic and the Deputy Presidents of the Republic of South Africa through the office of the Surgeon General who is the Surgeon General of the South African National Defence Force who commands the Presidential Medical Unit situated at Bryntirion Estate (Government Complex).
3. The Former President Jacob Gedleyihlekisa Zuma has been under the care of the unit since he was appointed the Deputy President of the Republic of South Africa in 1999 and the healthcare is continuous. On 28 November 2020, the President was put under active care and support after he suffered a traumatic injury.
4. This is to inform you that Mr Zuma has been admitted to hospital as of the 06 August 2021. He is undergoing extensive medical evaluation and care as a result of his condition that that needed an extensive emergency procedure that has been delayed for 18 months due to compounding legal matters and recent incarceration and cannot be delayed any further as it carries a significant risk to his life. The medical team is actively monitoring his progress and will inform you soon as to the prognosis and outcome thereof through a medical report.
5. We trust that the court processes will accommodate this urgent health programme such that we can be able to work swiftly to restore his health. The minimum proposed period of care is six months during which periodic reports will be communicated to advise on possible availability of any further engagements on your end.

6. We further appeal that you treat this information with the confidentiality it deserves.'

[36] An affidavit, described as 'The State's affidavit regarding the postponement of the proceedings on 10 August 2021', was also filed by Mr Downer, and confirmed by his colleague in the NPA, Ms Deneshree Naicker, insofar as it dealt with matters in her personal knowledge and not in Mr Downer's knowledge. It recorded, inter alia: that the Acting Regional Commissioner of Correctional Services in KZN had advised Ms Naicker that Mr Zuma would not be brought to court as per the requisition request of the NPA, as he was hospitalised in Pretoria; and that on Sunday 8 August 2021 at 14h24 Ms Naicker, the Director of Public Prosecutions, KZN (Ms Zungu) and Mr Downer had received an email from the Head of the Correctional Centre where Mr Zuma had been detained, attaching the aforesaid letter from Brigadier General (Dr) Mdutywa. Mr Downer's affidavit recorded that the State was not satisfied with the vague generalities in the letter regarding Mr Zuma's 'condition', 'extensive emergency procedure' and the 'minimum proposed period of care of six months'.

[37] Presented with the fait accompli that Mr Zuma would not attend court on 10 August 2021 due to his hospitalization, the parties agreed, and during a virtual hearing on 10 August 2021 I accordingly granted the following order without opposition:

'1. The matter is postponed to 09 and 10th September 2021

2. The medical report in respect of Mr Zuma is to be delivered by not later than 20 August 2021

3. It is directed that the State may appoint a medical practitioner of its choice to examine Mr Zuma, and if necessary to give evidence, as to his fitness to attend court and stand trial.'

[38] The order of 10 August 2021 was not complied with strictly, at least insofar as the medical report in respect of Mr Zuma, was not delivered timeously. Indeed, I have not had sight thereof to date.

The hearing of 9 and 10 September 2021

[39] On 8 September 2021, Mr Zuma filed a notice of application supported by a supplementary affidavit deposed to by his attorney, Mr Thusini (the supplementary evidence affidavit) raising, in addition to what was alleged in the original special plea, two

further alleged acts of misconduct said to be 'inimical to the title or authority to prosecute as that term is intended to mean in section 106(1)(h) of the CPA'. These further acts are (a) the 'recent deliberate leaking of the medical report of Mr Zuma's medical situation to the media, coupled with the NPA's stance on that medical report'; and (b) the 'unlawful attempted physical examination of Mr Zuma.' This supplementary evidence affidavit recorded that Mr Zuma had been 'released from custody on medical parole due to his deteriorating ill health and on the determination by the statutory parole board that he is not fit to serve a custodial sentence', from Sunday 5 September 2021.

[40] The State agreed to time limits to file an answering supplementary affidavit. An order was accordingly granted on 9 September 2021, with the following being material to this judgment:

'1. The matter is adjourned, in the absence of the first accused and the representative of the second accused, to 10h00 on **21** and **22 September 2021**, in open court in Pietermaritzburg, for:

1.1 the first accused's special plea in terms of section 106(1)(h) and (4) to be heard;

1.2 if the first accused applies for a further postponement, his application for a further postponement to be heard, which will include the necessary evidence on both sides being led.

2. In respect of the application for leave to supplement, it is directed that:

2.1 the State shall deliver its answering affidavit on or before 16 September 2021;

2.2 the first accused shall deliver his replying affidavit, if any, on or before 13h00 on 20 September 2021.

3. . . .'

The hearing of 21 and 22 September 2021 in the absence of Mr Zuma

[41] The State's answering affidavit to the supplementary evidence affidavit was filed timeously in accordance with the order of 9 September 2021. The replying affidavit was transmitted to my Registrar only in the afternoon before the special plea was to be heard.

[42] The replying affidavit by Mr Thusini, supported by a confirmatory affidavit from Lieutenant-General Dr Zola Dabula, the Surgeon-General of the South African National Defence Force who is described as 'the Head of the treating doctors', recorded that the

State and Mr Zuma's medical advisers had not reached agreement as to Mr Zuma's fitness to attend court and stand trial, and that 'due to the advice of his doctors he will remain within the Gauteng province so as to be within their reach until they determine that he may return to his house in the province of KwaZulu-Natal', and concluded:

'29. In the circumstances the obvious and sensible thing to do is to give the medical practitioners sufficient time and space to succeed or fail to issue such a joint report with or without a consensus viewpoint on the pivotal question of Mr Zuma's fitness to stand trial.

30. Until then the matter must proceed with the long overdue hearing of the section 106(1)(h) plea proceedings which ought properly to be concluded irrespective of the outcome of the separate medical processes. It is thus (sic) prudent, pragmatic and efficient approach which is favoured by Mr Zuma.

31. Accordingly, Mr Zuma is not seeking a postponement of the matter. With the leave of the court, if necessary, arrangements which are suitable to him will be made by his legal and/or medical teams to cater for the prejudice which he would otherwise suffer from the matter being argued in his physical absence.'

[43] The relevant parts of s 159 of the CPA provide:

'(2) If two or more accused appear jointly at criminal proceedings and –

(a) the court is at any time after the commencement of the proceedings satisfied, upon application made to it by any accused in person or by his representative –

(i) that the physical condition of that accused is such that he is unable to attend the proceedings or that it is undesirable that he should attend the proceedings; or

(ii) that circumstances relating to the illness or death of a member of the family of that accused make his absence from the proceedings necessary; or

(b) any of the accused is absent from the proceedings, whether under the provisions of subsection (1) or without leave of the court, the court, if it is of the opinion that the proceedings cannot be postponed without undue prejudice, embarrassment or inconvenience to the prosecution or any co- accused or any witness in attendance or subpoenaed to attend, may –

(aa) in the case of paragraph *(a)*, authorize the absence of the accused concerned from the proceedings for a period determined by the court and on the conditions which the court may deem fit to impose; and

(bb) direct that the proceedings be proceeded with in the absence of the accused concerned.'

[44] In the light of the allegation in the replying affidavit, confirmed by the Surgeon-General, that Mr Zuma, on the professional advice of his doctors was required 'to remain within the Gauteng province so as to be within their reach', it was clearly an instance where the physical condition of Mr Zuma was such that he was 'unable to attend the proceedings or that it was undesirable that he should attend the proceedings,' as contemplated in s 159(2)*(a)*(i). It was furthermore plainly convenient that the proceedings in terms of s 106(1)*(h)* and s 106 (4) be proceeded with in his absence, as Mr Zuma also contended in the paragraphs from the replying affidavit of Mr Thusini quoted above. The hearing of the special plea was long overdue. The delays in having the special plea heard has inconvenienced the State representing the general public. The adjudication of the special plea has to precede the hearing of the trial. The delay in the determination thereof therefore inevitably delays the trial in respect of Thales and also results in inconvenience and undue prejudice also to Thales. Mr Zuma is also entitled to a speedy hearing. The requirements of s 159(2)*(a)*(i) of the CPA being satisfied, I determined that the special plea could and should proceed in the absence of Mr Zuma. I accordingly authorised the absence of Mr Zuma, and excused him from further attendance. Mr Mpofu, on enquiry, confirmed that Mr Zuma waived any right to be present during the special plea proceedings.

[45] The matter could finally proceed to argument on the affidavits exchanged, subject to any possible material disputes of fact, being referred for the hearing of oral evidence.

Oral evidence and determining the special plea by 'trial', as opposed to on affidavit

[46] Before considering the merits of the special plea on the affidavits, it is necessary to refer briefly to an argument, advanced on behalf of Mr Zuma, that the special plea had to be determined by trial proceedings, as opposed to on the affidavits. This was sought, both as an extension of the argument that the special plea should be referred to oral evidence, and as part of an argument that the special plea could only, as a matter of law, be determined by way of a trial.

[47] It was only from the time when the replying affidavit to the special plea was filed, that Mr Zuma had requested that *viva voce* evidence be received in support of his special plea. The contention that the special plea could only be determined by way of a trial, with oral evidence, was pursued by Mr Mpofu from the bar at the hearing on 19 July 2021. Mr Mpofu invoked the provisions of s 108 of the CPA in support of that contention.

[48] Section 108 provides that '[i]f an accused pleads a plea other than a plea of guilty, he shall, subject to the provisions of sections 115, 122 and 141(3), by such plea be deemed to demand that the issues raised by the plea *be tried*.' (emphasis added)

[49] Mr Mpofu submitted with reference to s 35(3)*(e)* of the Constitution, which provides that an accused is entitled to be present when being 'tried', that 'tried' in s 108 means a trial with oral evidence, hence that the special plea required that oral evidence be led, as opposed to evidence being adduced on affidavit, which would then also allow for Mr Zuma's request that Mr Downer be available to be questioned generally on his past involvement in Mr Zuma's prosecution and the other complaints raised by Mr Zuma.

[50] If that interpretation of s 108 is correct, then the affidavits filed, or at a minimum, the answering affidavit with annexures and the replying affidavit with annexures, would have been unnecessary, and a waste.

[51] By the time the supplementary evidence affidavit, referred to above, had been filed on 8 September 2021, Mr Zuma's demand for a trial hearing had become somewhat attenuated, and an adjudication of the special plea on the affidavits was favoured. In the supplementary evidence affidavit, Mr Thusini stated:

'I am advised that this application will be approached by the application, *mutatis mutandis*, of the principles set out in Rule 6(5)(e) of the Rules of Court, read with sections 106 and 115 of the CPA, as well as section 173 of the Constitution. If necessary, legal argument will be advanced in this regard.'

[52] A number of observations need to be made in respect of the aforesaid arguments for a trial and that oral evidence be received, rather than the special plea being decided on affidavit. Firstly, Mr Zuma never expressed the wish to adduce oral evidence in either his notice of the special plea, nor the special plea itself, nor in his founding affidavit, it being raised for the first time in reply. Secondly, that 'tried', in my view, does not denote only a trial with oral evidence, but would include a legal adjudication of the special plea by any appropriate process this court might approve, obviously with due observance of Mr Zuma's constitutional rights. Thirdly, that the special plea was raised in the terms in which it was pleaded, namely with reference to the subsection under which it was raised and identifying the evidence in support thereof so that this court and the State would know on what grounds it was based. If, for example, the special plea has no merit and is without any factual basis, then there should be no reason why, after hearing argument and following such procedure as this court approves in regulating the proceedings before it, as it is entitled to do pursuant to the provisions of s 173 of the Constitution,[10] the special plea should not be dismissed summarily on the contents of the special plea and founding affidavit alone.

[53] In this instance, the interests of justice clearly demand that the special plea be dealt with as expeditiously as possible. The charges go back to events which occurred more than 15 years ago. All the parties are desirous of achieving finality. It made good sense that the special plea be tried by the exchange of, and in the light of the contents of the affidavits, agreed to be exchanged between Mr Zuma and the State. An oral hearing is not required, neither on the wording of s 106(1)*(h)*, s 108 of the CPA, or the law generally. If any real disputes of fact on material issues in the special plea were to arise on the affidavits, then those disputed factual issues, if properly identified, could be dealt with, if needs be, by an appropriate reference of the disputed issues only to oral evidence, or alternatively to trial.

[10] Section 173 provides for the inherent power of the superior courts, as follows: 'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[54] It is for the court to determine the appropriate procedure, depending on the facts of each case, for adjudicating a special plea. Hence, for example, in *S v Moussa,*[11] on which reliance was placed by Mr Mpofu, the court, after a plea in terms of s 106(1)*(h)* of the CPA was tendered, ordered that the special plea should be dealt with separately and upfront in a manner germane to a so-called 'trial within a trial', with the leading of oral evidence. That was an appropriate direction, having regard to the factual issues in dispute in that case. The special plea in the trial before this court has to be tried according to the procedure determined and sanctioned by the order which I granted providing for the exchange of affidavits, that is on the affidavits.

[55] There is no reason in logic, law or fairness, why the special plea should not be tried on the contents of the affidavits, particularly where that mode of placing relevant evidence before the court in respect of the special plea, was chosen by Mr Zuma at the outset, content to do so on affidavit, and with no assertion being expressed of a desire to lead viva voce evidence as in a trial. The State agreed to such procedure and the procedure was sanctioned by the order this court granted.

[56] Whether Uniform rule 6(5)*(g)* and the principle in *Plascon Evans*[12] will find application in the adjudication of the special plea should a real dispute of fact in respect of a material issue arise, is a debate possibly to be considered elsewhere. But that the hearing of the special plea could and should be determined on the issues arising from the affidavits, was clearly competent and proper.

[57] But even in the alternative, if I was wrong and s 108 of the CPA was somehow to be interpreted to require and permit the special plea to be 'tried' only by the leading of *viva voce* evidence, and not by affidavit, then I consider the position to be as follows: Mr Zuma was required to raise the special plea and to provide details thereof when the

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[11] *S v Moussa* [2021] ZAGPJHC 61 para 20. Significantly, it was found that although the prosecutrix abused her position as prosecutrix, it could not be found that the institution or continuation of the prosecution would constitute an abuse of the court processes, that the accused had not shown that the prosecution was conducted for an ulterior motive or was vexatious or frivolous or designed to oppress the accused, and most importantly, did not affect the title to prosecute.

[12] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

special plea was entered with sufficient particularity so this court and the State would be properly appraised of the exact nature of the special plea and the grounds therefor. That could be done by the filing of a notice setting out the detailed grounds for raising such a plea. That is what Mr Zuma in fact did in the special plea. He furthermore chose to amplify the grounds for the special plea in his detailed founding affidavit. Nothing would preclude the special plea being tried on his version, assuming the correctness of the grounds advanced in support of his plea for the purposes of argument, and a conclusion being reached, as a matter of law, as if on exception in a civil matter, that such grounds do not begin to make out a case that Mr Downer lacks the title to prosecute.

[58] In conclusion on this issue, it is significant that in the application for supplementary evidence filed on 7 September 2021, Mr Zuma supported the adjudication of the special plea on the affidavits, when he gave notice that he would seek

'an order granting leave *to admit into evidence the First Accused's supplementary affidavit* filed in terms of section 115 of the Criminal Procedure Act 51 of 1977 (the CPA) in so far as it relates to the additional plea brought in terms of section 106(1)(h) read with section 106(4) of the CPA' (emphasis added).

The affidavit of Mr Thusini, Mr Zuma's attorney, filed in support of that application, does state that the supplementary 'affidavit evidence is tendered only insofar as the section 106(1)(h) plea was introduced on paper but without abandoning the right of the accused to have his plea tried by leading of oral evidence'. He however also stated that he is 'advised that this application will be approached by the application or adaptation, mutatis mutandis, of the principles set out in Rule 6(5)(e) of the Rules of Court, read with sections 106 and 115 of the CPA, as well as section 173 of the Constitution.' Those concessions of law are probably correctly made.

[59] The argument that there should be a reference to trial, in respect of what were referred to as issues in respect of which the matter could not be decided on the facts admitted by the State on the affidavits, was again raised by Mr Mpofu when arguing the special plea on 22 September 2021. Mr Trengove SC for the State pointed out that there has not been any attempt to identity these issues, and that Mr Zuma was content to claim

a general referral to trial. Mr Mpofu's retort was that the issues were identified, being the issues remaining and in respect of which the facts were not admitted by Mr Downer. In my respectful view that is not an answer to the problem. A referral to oral evidence does not refer to issues, but requires an identification of factual evidence that might underlie the material issues, which are disputed. No specific factual disputes were identified.

[60] What one is left with is that the parties were agreed that the adjudication of the special plea should proceed on the affidavits exchanged. That is undoubtedly a correct position in law having regard to the wide powers a court has in terms of s 173 of the Constitution to protect and regulate its own process, and to develop the common law, taking into account the interests of justice.

Section 106(4) of the CPA and oral evidence

[61] There is one final aspect to consider in the context of a possible need for a referral to oral evidence. During his address in court Mr Mpofu stated that if the special plea was upheld, that Mr Zuma wanted to lead evidence to demonstrate the particular nature of the prosecutorial bias, to justify his demand for an acquittal pursuant to s 106(4) of the CPA. This followed in the context of his submission that not every finding that a prosecutor has no title to prosecute, resulting in his/her removal, would entitle an accused to an acquittal. It was reasoned that if left unqualified, where it is found that a prosecutor lacks title because he or she does not have the academic or other qualifications or authority required to be a prosecutor, a murderer who fortuitously finds himself to have such an 'unqualified' prosecutor prosecuting his trial could successfully raise a plea in terms of s 106(1)*(h)* and then demand to be acquitted. That would offend one's sense of justice. Mr Mpofu accordingly submitted that s106(4) envisages a range, or continuum, of instances where a plea of a lack of title might succeed, and that whether an acquittal of the accused should indeed follow, will require that evidence be led to justify such an order. It was submitted that Mr Zuma requires such an opportunity, as he believes that he should be entitled to an acquittal.

[62] Even ignoring a consideration of the principles relating to *autrefois acquit* for the moment, this argument by Mr Mpofu need not be considered further. The plain meaning of s 106(4) does not contemplate such a range of instances, or a court having a discretion, depending on the facts giving rise to the particular lack of title of a prosecutor, to either acquit an accused, or not. On the plain wording of s 106(4), if any plea, other than a plea that the court lacks jurisdiction succeeds, the accused shall 'be entitled to demand that he either be acquitted or convicted.' Whether a subsequent prosecution could then be successfully met by a plea of *'autrefois acquit'*, is an issue beyond the scope of this judgment. But that on the ordinary meaning of the provisions of s 106(4), an accused who has successfully established the jurisdictional requirement set by s 106(4) that the prosecutor in his/her criminal trial lacks the title to prosecute, can demand, without any qualification, to be acquitted, is a significant legal consequence which not only affects a proper interpretation of s 106(4) but also, in context, affects the meaning to be attributed to the words 'title to prosecute' in s 106(1)*(h),* to prevent such an absurd result. This will hopefully become more apparent when considering the meaning to be attributed to 'title' in the phrase 'title to prosecute' below.

[63] What is however very clear, is that before s 106(4) can possibly find application, the special plea must succeed. If the special plea fails, then there is no scope for the provisions of s 106(4) to apply.

Oral evidence on real disputes of fact concerning material issues

[64] I shall consider whether there is a need for oral evidence if there are real disputes of fact, not disputes arising from mere conjecture, suspicion or speculation, in regard to issues which are material to the proper adjudication of the special plea, in my evaluation of the argument for a secondary and wider interpretation of the phrase 'title' below. I have concluded that there is no need for oral evidence, for reasons which will be articulated. In my primary findings on the meaning of the phrase 'title to prosecute' I shall proceed on the basis of accepting, purely for the purpose of the preliminary findings in this judgment, that the factual submissions advanced by Mr Zuma are correct. The legal effect, conclusions and inferences to be drawn from facts thus assumed to be correct for the

purposes of argument, are obviously for this court to determine. The inferences and conclusions sought to be drawn by r Zuma from any facts, no matter how honestly held by him, are plainly not binding on this court.

The complaints raised by Mr Zuma in support of the special plea

[65] Before dealing with the interpretation of the phrase 'title to prosecute' it is necessary to provide the reader of this judgment with a precis of the complaints raised by Mr Zuma in support of his special plea.

[66] The parts of Mr Zuma's special plea material to this judgment, which set out the grounds of complaint, read as follows:

'PLEA IN TERMS OF SECTION 106(1)(h) AND 106(4) OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

1. I give notice of my intention to raise a further plea in terms of section 106(1)(h) of the Criminal Procedure Act 51 of 1977 that, for reasons that are set out in the plea explanation, Mr Downer SC should be removed as the prosecutor in this case as he has no title to prosecute. There are facts and circumstances involving the conduct of Mr Downer SC and the NPA generally relevant to the protection and interpretation of *my rights under section 35(3) of the Constitution* for which it is necessary that Mr Downer SC be removed as a prosecutor in the case.

2. Furthermore, there are facts and circumstances that give me a reasonable apprehension that Mr Downer SC has conducted himself in this case in a manner that *lacks the independence and impartiality* that is necessary for a lawful prosecution. Examining his role in the totality of the facts and circumstances of this case, Mr Downer has failed to uphold the standards of *prosecutorial independence and impartiality needed to ensure that my trial is fair and conducted in accordance with the Constitution and common law.*

3. In any event, Mr Downer has played a role that makes him *an essential witness* on the issue of whether there was political interference, the nature of which violates *my fair trial rights*. For example, he files an affidavit in support of the Democratic Alliance's application to review and set aside a decision by the National Prosecuting Authority (NPA) to terminate my prosecution on the basis set out in the affidavit of Hofmeyr, the National Deputy Director of Public Prosecutions and Adv Mpshe, who had served the NPA as the Acting National Director of Public Prosecutions. His opposition to the NPA's basis for defending the termination of the prosecution decision places hin in a position of *a prosecutor who is neither independent nor impartial* in relation to my rights to a

fair trial or the obligation of the State to ensure that I enjoy *a fair trial*. His opposition of the NPA's evidence that my prosecution would not be fair as required in terms of section 35 of the Constitution, because it had been exposed to unlawful political manipulation, disqualifies him from prosecuting me. The evidence of the NPA that my prosecution would not be fair as a consequence of criminal and unlawful political interference disqualifies Mr. Downer from conducting *a fair prosecution*. In any event, Mr. Downer's determination to conduct this prosecution in the face of the evidence of the NPA relating to the criminal and unlawful political interference and manipulation of my prosecution means that *he lacks the independence and impartiality* required to conduct a lawful prosecution.

4. In the event that my plea to have Mr Downer removed in terms of section 106(1)(h) of the Criminal Procedure Act, 51 of 1977 ("CPA") is successful, I am entitled to be acquitted in terms of section 106(4) of the CPA on the basis that no fair trial may be conducted under the circumstances set out in the plea explanation.

5. I set out my grounds of this plea under section 106(1)(h) of the Criminal Procedure Act in my affidavit attached herein as "JZG1" .' (emphasis added)

[67] The founding affidavit contains a scattering of allegations in support of the special plea. When I enquired from Mr Mpofu which specific grounds, or facts and circumstances, were relied upon, he confined them to the twelve instances that had been identified by the State in its heads of argument, to which, he said, should be added the further two grounds of complaint introduced in the supplementary evidence affidavit. The twelve instances identified by the State in its heads are:

(a) Mr Ngcuka's refusal to authorise searches of Mr Zuma's properties;
(b) Mr Ngcuka's decision not to prosecute Mr Zuma;
(c) Mr Downer's dismissal of the Public Protector's report;
(d) Mr Downer's conduct in the Shaik trial;
(e) Nicholson J's findings of political interference;
(f) Mr Mpshe's April 2009 decision and Mr Hofmeyr's affidavit;
(g) Mr Downer's public reaction to Mr Mpshe's decision;
(h) Mr Downer's affidavit in the Spy Tapes matter;
(i) 'Browse Mole', Mr McCarthy and foreign intelligence services;
(j) Mr Downer's failure to report political interference;

(k) Mr Downer's alleged leaks to the media;

(l) Mr Downer's insistence that Mr Zuma be prosecuted;

The further two grounds in the Supplementary evidence affidavit[13] are:

(m) The leaking of confidential medical information;

(n) The unlawful attempted physical examination of Mr Zuma.

The issues for determination

[68] It is trite law, reaffirmed by the Supreme Court of Appeal in *NDPP v Zuma*,[14] that a judgment must be confined to the issues properly before the court; it must not decide matters not germane or relevant; it must not create new factual issues, nor make gratuitous findings against persons who were not called upon to defend themselves; and it must distinguish between allegation, fact and suspicion.[15]

[69] The issue for determination before this court is the special plea that Mr Downer allegedly lacks title to prosecute, as provided in s 106(1)*(h)* of the CPA, and nothing more. That is the only relief claimed and in respect of which notice was given.

[70] Such determination will involve as a primary sub issue, the interpretation of s 106(1)*(h)* and more specifically the meaning to be given to the word 'title'; specifically whether it should be assigned a narrow meaning of a prosecutor's standing or authority to prosecute, which Mr Zuma has not disputed Mr Downer satisfies, or whether the word 'title' should be given an extended or wider meaning, as contended for by Mr Zuma, to include lack of objectivity and independence of the prosecutor, bias, and whether the NPA

[13] In the supplementary evidence affidavit filed on 7 September 2021 Mr Zuma complained of 'prosecutorial misconduct on the part of Mr Downer and/or the NPA', alleging specifically that 'Mr Downer, aided and abetted or enabled by the NPA, has engaged or is suspected to have engaged in two specific acts of misconduct', which are allegedly 'inconsistent or inimical to the title or authority to prosecute as that term is intended to mean in section 106(1)(h)of the CPA', which 'demonstrates a continuous pattern deliberately designed to mire Mr Zuma's prosecution in prejudicial media and public controversy with the effect that Mr Zuma is treated as if he is guilty of the crimes without leading any evidence', namely, the 'recent deliberate leaking of the medical report of Mr Zuma's medical situation to the media, coupled with the NPA's stance on that medical report.'

[14] *National Director of Public Prosecutions v Zuma (Mbeki and another intervening)* [2009] ZASCA 1, 2009 (2) SA 277 (SCA), [2009] 2 All SA 243 (SCA).

[15] *National Director of Public Prosecutions v Zuma (Mbeki and another intervening)* [2009] ZASCA 1, 2009 (2) SA 277 (SCA), [2009] 2 All SA 243 (SCA) para 15.

and/or the prosecutor has acted in a manner which might violate Mr Zuma's rights to a fair trial. If that primary sub issue is answered in favour of the State, then it is the end of special plea and the present enquiry. If that issue is answered in favour of Mr Zuma and a wider meaning of the word 'title' is accepted as the correct interpretation, then the following subsidiary issues arise for consideration, namely: whether the factual grounds contended for by Mr Zuma have been established for such a plea to succeed; and if so, whether it will then follow that Mr Zuma is entitled to be acquitted in terms of s 106(4).

The primary issue: the meaning of 'the prosecutor has no title to prosecute'

The term 'prosecutor' in s 106(1)(h) means the person and not the State/NPA

[71] It is convenient and necessary to start the discussion of what is meant by the words 'title' in the phrase that the 'prosecutor has no title to prosecute', by stating what 'prosecutor' has been held not to mean.

[72] In *Ndluli v Wilken NO*[16] the Appellate Division unanimously held that in a case of a prosecution at the instance of the State, like the present, the word '*prosecutor*' in s 106(1)*(h)* refers not to the State, but to the person who acts as prosecutor in the court;[17]

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[16] *Ndluli v Wilken NO en Andere* 1991 (1) SA 297 (A).

[17] *Ndluli v Wilken NO en Andere* 1991 (1) SA 297 (A) at 305H-306C. It was said that: 'In die algemene spreektaal sowel as in die uitsprake van ons howe word 'n verwysing na "die aanklaer" of "the prosecutor" by strafsake gesien as 'n verwysing na die persoon wat in die hof optree, en nie as 'n verwysing na die Staat nie. In die Wet vind ons in art 4 'n verwysing na 'n "Staatsaanklaer" wat in 'n laer hof deur die Prokureur-generaal aangestel kan word om as sy verteenwoordiger vervolgings ten behoewe van die Staat waar te neem, maar daarna vind ons feitlik deurgaans verwysings slegs na 'die aanklaer' (sien bv arts 54(1), 62, 63(1), 75(2), 85(1), 112(1) en (3), 113, 119, 122(3), 128, 130, 166(1) en (2) en nog talle ander). Om nader by die artikel onder bespreking te kom vind ons in art 105 die bepaling dat:

"105. Voordat die verhoor van 'n beskuldigde 'n aanvang neem, word die aanklag deur die aanklaer aan hom gestel en word hy...deur die hof aangesê om onverwyld ooreenkomstig art 106 daarop te pleit."

Die verwysing na 'die aanklaer' in hierdie artikel is klaarblyklik na die persoon wat in die hof optree om die saak teen die beskuldigde te voer. Onmiddellik daarna volg art 106 wat bepaal dat:

"106(1) Wanneer 'n beskuldigde op 'n aanklag pleit, kan hy pleit -

...

(h) dat die aanklaer nie bevoeg is om te vervolg nie."

Daar skyn vir my, onder hierdie omstandighede, geen rede om in art 106 'n ander betekenis aan die woord "aanklaer" te heg as die betekenis wat dit in art 105 en in al die ander artikels in die Wet waarna ek verwys het, dra nie. (*Principal Immigration Officer v Hawabu and Another* 1936 AD 26 and *Minister of the Interior v Machadodorp Investments (Pty) Ltd and Another* 1957 (2) SA 395 (A) op 404D - E.) Na my mening dus verwys die word "die aanklaer" in art 106(1)(h) by 'n vervolging van Staatsweë nie na die Staat nie, maar

and that the objection in a special plea under s 106(1)*(h)* is an objection to the right, title and interest, or the authority of that person, to act as prosecutor in the case.[18] In terms of the legal principle of *stare decisis* (adherence to decided precedents) I am bound by the decision in *Ndluli,* even if I was to believe that it might be wrong,[19] which I do not.

[73] In paragraph 31 of his replying affidavit Mr Zuma concedes that our courts have held that the reference to 'prosecutor' in s 106(1)*(h)* is not to the State, but to the person who acts as prosecutor. That is undoubtedly a correct concession of law.

[74] Notwithstanding that concession and the clear statement in *Ndluli*, there are numerous allegations in the affidavits of Mr Zuma that the State/National Prosecuting Authority (NPA), as entity, as opposed to Mr Downer (as natural person and prosecutor), has been disqualified from prosecuting him, because of alleged political interference by others, or on the basis of some other complaint. These complaints against or in respect of the State, the NPA and officials of the NPA other than Mr Downer, assuming them to be established, are, following *Ndluli*, not grounds to which regard may be had under the rubric of the special plea raised in this matter, whether on a narrow or strict interpretation of 'title to prosecute'.

[75] Mr Mpofu argued that there is not a 'Chinese Wall' between the conduct of the State and Mr Downer, and that the conduct of other officials in the NPA could be relevant where there is some overlap with the conduct of Mr Downer. The conduct of possible rogue elements in the NPA, and the conduct of Mr Downer must however be kept separate. The special plea has as its purpose the removal of Mr Downer from the prosecution because he lacks title to prosecute. The conduct of other functionaries in the State, more particularly previous National Directors of Public Prosecution, such as Mr

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na die persoon wat in die hof as aanklaer optree. Die beswaar wat so 'n pleit inhou is 'n beswaar teen die reg of die bevoegdheid van daardie persoon om as aanklaer in die saak op te tree.'

[18] *Ndluli v Wilken NO en Andere* 1991 (1) SA 297 (A) at 306C-D and F-H.

[19] Judicial decisions are a source of law. Hahlo and Kahn *South Africa The Development of its Law and Constitution* page 29ff. Every South African court 'is absolutely bound by the decisions of courts superior to it. Thus a single judge must follow a decision of a full bench (court of three or more judges) or two judge court of its own division . . . and a decision of the Appellate Division ...'

Ngcuka, Mr Pikoli, Mr Mpshe and Mr Abrahams, or senior employees of the State such as Mr McCarthy and Mr Hofmeyr, or Ministers of State, such as Dr Maduna, is not the conduct of Mr Downer and is not to be imputed vicariously to Mr Downer. To do so would be to violate the *ratio decidendi* (reason for the decision) in *Ndluli*. The conduct of these other officials might, at best, be relevant only to the extent that Mr Downer personally might be implicated on a wider interpretation of the term 'title', an issue to which I shall return when considering Mr Zuma's alternative argument for a wider interpretation of the word 'title' below.

[76] Complaints raised against the State/NPA which might have affected Mr Zuma's trial rights, could at the stage before the commencement of the trial, at best have entitled Mr Zuma to a permanent stay of prosecution, or some similar relief. That is not an issue before this court. Mr Zuma's contention that the State/NPA is incapable of providing him with a constitutionally fair trial *per se* has already received the attention of a full court of this division in *S v Zuma*[20] (the permanent stay application), when Mr Zuma's application for a permanent stay of prosecution, on the grounds advanced in that application, many of which overlap with grounds now advanced in relation to the conduct of other functionaries of the State/NPA, was dismissed. I am bound by the *rationes decidendi* (reasons for the decisions) in that judgment.

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[20] *S v Zuma and another, Thales South Africa (Pty) Limited v KwaZulu-Natal Director of Public Prosecutions and others* [2019] ZAKZDHC 19, 2020 (2) BCLR 153 (KZD). An application for leave to appeal that judgment was dismissed. The petition to the Supreme Court of Appeal against the refusal of leave to appeal was also dismissed. I am advised that an application to the CC was brought but not persisted with. The judgment of the full court accordingly stands. It has been suggested in the heads of argument that there is no legal provision for a full court to have been constituted to hear the permanent stay application and that the Judge President of this division had acted irregularly in constituting such a court: accordingly that the judgment is a nullity. An objection to the constitution of the full court was raised in the application for leave to appeal, but was not persisted with, for reasons unknown. It could also thereafter have been pursued as a ground for appealing the judgment of the full court, in a petition to the SCA. A petition to the SCA was pursued, but dismissed. It is not for me to second guess the reasoning of the full court. Indeed, I am bound by its decisions in accordance with our system of *stare decisis*, even if I believe it might be wrong. A further alternative argument that has been raised is that the judgment of the full court is a judgment in a civil case, not a criminal case, and hence that issue estoppel would not apply to findings of the full court in the present criminal trial. As a further alternative it is also argued that even if issue estoppel could arise, it could not be applied against an accused, but only the State. These additional arguments will be answered below when dealing with issue estoppel. The court hearing the stay application was constituted as it was because of the complexity of the matter and the seriousness thereof. In my view it clearly decided an issue in a criminal matter, relevant to this criminal trial.

[77] The findings of the full court notwithstanding, should any of these complaints, or any other complaints material and relevant to any issue in the trial, impair Mr Zuma's fair trial rights arise during the trial, then they can be revisited to ensure that, at the end of the trial, Mr Zuma will have received a constitutionally fair trial. But that is something to consider during the trial only when the materiality of any such allegations in respect of issues and evidence revealed to be relevant, are established. Any infringement of fair trail rights, which is the true basis of Mr Zuma's complaints, is best determined when the evidence in the criminal trial has been heard, digested in the light of conflicting evidence, and the credibility to be attached to the evidence has been properly assessed. This was also the conclusion reached by the SCA in *Zuma v Democratic Alliance*[21] (the Spy Tapes judgment). The possible infringement of fair trial rights does not arise for consideration under the special plea.

[78] In conclusion on this issue, there was a suggestion by Mr Mpofu during argument that *Ndluli* is no longer good law because it was decided before the advent of our Constitutional democracy, and therefore did not reflect the constitutional values enshrined in the Constitution. It is correct that *Ndluli* was decided before the Constitution came into effect, but I have no doubt that it is still good law on the meaning of the word 'prosecutor', in the phrase 'the prosecutor has no title to prosecute'. Instances of material prosecutorial misconduct by officials representing the State or the NPA as an institution, if not due to unlawful conduct by functionaries which can legitimately be set aside on review, should be challenged by way of an application for a permanent stay of prosecution, but do not arise for determination under a special plea in terms of s 106(1)*(h)* of the CPA, which is a procedure peculiar to the prosecutor, as I shall endeavour to demonstrate.

Objecting to a particular prosecutor

[21] *Zuma v Democratic Alliance and others; Acting National Director of Public Prosecutions and another v Democratic Alliance and another* [2017] ZASCA 146, 2018 (1) SA 200 (SCA), [2017] 4 All SA 726 (SCA), para 17.

[79] Objections to a particular prosecutor prosecuting in a particular criminal trial might vary in nature and could conceivably take various forms, depending on the facts of each case, and the type of prosecutor involved.

[80] South African law recognises various categories of prosecutors. The majority are public prosecutors employed by the State, who derive their authority/title to prosecute from legislation and their appointment to the position of public prosecutors representing the State; others are private prosecutors, acting in terms of s 7 of the CPA where the Director of Public Prosecutions (DPP) declined to prosecute particular charges and has issued a certificate of *nolle prosequi;* or are prosecutors appointed in terms of s 8 of the CPA who undertake prosecutions on behalf of statutory bodies upon whom the right to prosecute is expressly conferred by law to 'institute and conduct a prosecution in respect of such offence,' as in the case of, for example, municipalities.

[81] Objections to a particular prosecutor prosecuting in a trial may include, to mention a few, that the prosecutor lacks title to prosecute, for example, because he or she has not been properly appointed to the position of public prosecutor; or has not been properly authorised to prosecute on behalf of, for example, a municipality; or, in the case of a private prosecutor, that he or she is not vested with the standing required by s 7 of the CPA to act as prosecutor; or that the particular authority required to pursue a charge in respect of a particular offence, such as the authority required by s 2(4) of Prevention of Organised Crime Act (POCA),[22] has not been granted to the prosecutor; or, may be on the basis that the prosecutor has been guilty of particular conduct which would result in the accused not receiving a constitutionally fair trial, hence justifying his/her removal or recusal. This list is not exhaustive.

The meaning of 'title' in the context of s 106 and the CPA

[22] Act 121 of 1998. S 2(4), read with sections 1 and 2 of the Prevention of Organised Crime Act 121 of 1998 (POCA) provides that:
'A person shall only be charged with committing an offence contemplated in subsection (1) if a prosecution is authorized in writing by the National Director.'
The offences in subsection (1) include racketeering.

[82] The meaning of the word 'title' in s 106(1)*(h)* must be considered in the light of the ordinary meaning of the word, in the context in which it appears in the CPA, interpreted purposively, and with due regard to previous decisions in which it had been judicially considered.[23] The context would also include having regard to the different types of prosecutor in our law to whom the provisions of s 106(1)(*h*) uniformly has to apply.

Private prosecutors – s 7 of the CPA

[83] Dealing firstly with private prosecutors, a private prosecutor must, pursuant to s 7 of the CPA, establish a 'substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence';[24] or the prosecutor must be 'a husband, if the said offence was committed in respect of his wife'[25]; or 'the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence'[26], or must be 'the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward'.[27] The private prosecutor must have that standing/title to prosecute.

[84] In its ordinary meaning, the word 'title' connotes the *locus standi* (legal standing) to act,[28] such as the aforesaid prerequisite of standing require of private prosecutors.[29]

[85] It is accordingly not surprising that the special plea of 'no title to prosecute' has historically been invoked and raised successfully mainly in private prosecutions, as in *Williams v Janse van Rensburg (2)*.[30] By the very nature of the interest/standing a private

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[23] *Minister of Police v Khoeli* (241/2020) [2021] ZASCA 146 (18 October 2021) relying on *Natal Joint Municipal Pension Fund v Endumeni Municipality* [201] ZASCA 13; [2012} 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.
[24] Section 7(1)*(a)* of the CPA.
[25] Section 7(1)*(b)* of the CPA.
[26] Section 7(1)*(c)* of the CPA.
[27] Section 7(1)*(d)* of the CPA.
[28] A Kruger *Hiemstra's Criminal Procedure* (May 2021 – Service Issue 14) at 15-20.
[29] *Philips v Botha* 1995 (2) SACR 228 (W) and on appeal*, Philips v Botha* 1999 (2) SA 555 (SCA), although the SCA did not refer to s 106(1)(h) but also considered an abuse of process.
[30] *Williams and another v Janse van Rensburg and others (2)* 1989 (4) SA 680 (C) 682. In that matter the defence applied for a dismissal of the case on the ground that the two prosecutors were prosecuting in the

prosecutor is required to have, to have 'title to prosecute', it invariably follows that he/she can never be completely objective and independent in the sense one would expect of a presiding judicial officer. Indeed, the private prosecutor may even be the complainant.[31] The requirement of such standing or 'title', which effectively means that every such private prosecutor is required to have what is a direct and substantial interest in the case they prosecute, is wholly incompatible with notions of independence and impartiality. If a lack of such independence and impartiality was to negate a prosecutor's 'title to prosecute', then most, if not all private prosecutors would have 'no title to prosecute' as contemplated in s106(1)*(h)*. That would be an absurd interpretation. Plainly, a lack of independence and impartiality on the part of a prosecutor cannot, as a statement of general principle, mean that a prosecutor otherwise authorised and having the locus to prosecute, would be deprived of that 'title' by the very interest and standing he or she is required to have.

[86] Included under this heading would also be objections that a private prosecutor may not join in a prosecution pursued by another private prosecutor against an accused in respect of which he has also been appointed as a private prosecutor but on a separate albeit similar count, because he lacks the standing/title in respect of that prosecution.[32]

Other statutory prosecutors – s 8 of the CPA

[87] As regards other statutory prosecutors contemplated in s 8 of the CPA, similar considerations apply. The prosecution conducted by such a prosecutor must relate to the offences in respect of which the statutory body has the right, expressly conferred by law, to 'institute and conduct a prosecution'[33] otherwise, the prosecutor would have no standing/title to prosecute that offence. By the very nature of the appointment and function of these prosecutors however, they act on behalf of and are required to promote the best interests of their employer, for example, a municipality. They pursue the prosecutions

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same charges or counts when it was clear that only one of them had been injured in respect of each count. This was held to be a point which falls within the contemplation of s 106(1)(*h*).

[31] *Gouriet v Union of Post Office Workers* [1977] UKHL 5; [1978] AC 435 (HL) 477; [1977] 3 All ER 70 referred to in *Porritt and another v National Director of Public Prosecutions and others* [2014] ZASCA 168, 2015 (1) SACR 533 (SCA), [2015] 1 All SA 169 (SCA) para 16. That right was described by Lord Wilberforce as a 'valuable constitutional safeguard.'

[32] *Williams and another v Janse van Rensburg and others (3)* 1989 (4) SA 884 (C).

[33] Section 8(1) of the CPA.

they are authorised to institute with the proceeds of fines recovered pursuant thereto, being for the benefit of their employer. This provides them with a financial interest in the outcome of the prosecution. They would thus also not be independent and objective. But that would not deprive them of the 'title to prosecute.'

An 'independent and impartial' prosecutor

[88] It follows from the above, that a right to an independent and impartial prosecutor is incompatible with prosecutions by private and statutory prosecutors,[34] by the very nature of those prosecutions. A lack of independence and impartiality on the part of a private or statutory prosecutor, could not amount to a lack of 'title to prosecute', otherwise every private and statutory prosecutor would lack the 'title to prosecute.'

Public prosecutors

[89] The same principle applies to public prosecutors employed by the State. Section 106(1)*(h)* draws no distinction between public and other prosecutors (private and statutory). Hence, as a matter of consistent statutory interpretation, viz-a viz public prosecutors, a lack of independence and impartiality would also not amount to a lack of title. The lack of 'title to prosecute', provided for unqualified in s 106(1)(*h*), cannot, at the level of interpretation, mean a lack of independence and impartiality in respect of one type of prosecutor, that is public prosecutors, but not others, that is private prosecutors.

[90] Public prosecutors derive their standing from s 179 of the Constitution and the provisions of the National Prosecuting Authority Act 32 of 1998 ('the NPA Act').

Section 179(1), (2) and (4) of the Constitution provides:

'Prosecuting authority. — (1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of—

(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

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[34] *R (on the application of Haase) v Independent Adjudicator* [2008] EWCA Civ 1089 para 24 also referred to in *Porritt and another v National Director of Public Prosecutions and others* [2014] ZASCA 168, 2015 (1) SACR 533 (SCA), [2015] 1 All SA 169 (SCA) para 16.

(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.
(3) . . .
(4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.'

[91] The Act of Parliament and national legislation envisaged by section 179(1) and (4), is the NPA Act. Section 2 of the NPA Act provides that the NPA is the single national prosecuting authority established in terms of s 179 of the Constitution. Section 4 of the NPA Act provides that the NPA comprises the National Director of Public Prosecutions (NDPP), Deputy National Directors of Public Prosecutions (Deputy NDPP), Directors of Public Prosecutions (DPPs), Deputy Directors of Public Prosecutions (Deputy DPPs) and prosecutors. Section 20(1) of the NPA Act provides:

'The power, as contemplated in section 179(2) and all other relevant sections of the Constitution, to—

(a) institute and conduct criminal proceedings on behalf of the State;

(b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and

(c) discontinue criminal proceedings,

vests in the *prosecuting authority* and shall, for all purposes, be exercised on behalf of the *Republic*.' (emphasis in original)

[92] Public prosecutors derive their authority to prosecute from their appointment. Hence, an advocate acting on behalf of a Director of Public Prosecutions (DPP) can always be asked to present his or her delegation.[35] Public prosecutors do not however have to establish a legal interest in the subject matter of the prosecution, to vest them with the title to prosecute. They represent the interest of the general populace in the prosecution of crime. Although the regularity of their appointment might affect their 'title to prosecute', their professional enthusiasm in the prosecution they pursue, believing passionately in their cause, and pursuing it with all the zest and zeal of a dedicated and conscientious prosecutor presenting the case of the State and the general populace, and,

[35] A Kruger *Hiemstra's Criminal Procedure* (May 2021 – Service Issue 14) at 15-20.

to that extent being perceived as not independent and objective, does not result in a lack of 'title to prosecute.' Of that, there can be no doubt. Complete independence and objectivity, or a lack of bias, as with a presiding officer, is not what our law and courts require of prosecutors, as I shall endeavour to show when considering the case law on the interpretation of s 106(1)*(h)* below.

[93] The title to prosecute, in the context of public prosecutors, at best include their authority to prosecute, such as whether they have been properly appointed, or are suitably qualified, or possibly whether they have the required authorisation in instances where, although entitled to prosecute generally, an additional specific authority might be required to authorise the prosecutor to pursue a specific charge. Examples of the latter would include instances of entrapment where the entrapment had to be authorised in terms of s 252A(4) of the CPA, or prosecutions under the provisions of the POCA, where specific authority is required in terms of s 2(4) authorising the prosecutor to prosecute that charge. I say 'at best', based on the statement in *Hiemstra's Criminal Procedure*[36] in the commentary on s 106(1)(h), that:

'[t]he plea could *possibly* also be used where there are certain prerequisites in terms of a statute which have to be complied with before a prosecution can take place. An example is *R v Giuseppe and Others* 1943 TPD 139 where prisoners of war were charged without the detaining power's first giving notice to the representative of the protecting power, as required by the Geneva Convention.' (emphasis added)

[94] It could never have been intended, for example, that if one of the many prosecutors employed by the NPA, even in a specific case, like the present, where the State is represented in the trial by Mr Downer, and other prosecutors, that if one of them might have some defect attached to his/her appointment(s) as public prosecutor, but could be replaced by another prosecutor in the employ of the NPA who is properly appointed, or the prosecution continue with the remaining prosecutors only, that such a 'defect' in the appointment of one would amount to a lack of title to prosecute on behalf of the other prosecutors, resulting in the accused being entitled to demand, in terms of s 106(4), that

[36] A Kruger *Hiemstra's Criminal Procedure* (May 2021 – Service Issue 14) at 15-20.

he be acquitted, no matter how serious the charges may be. That alone militates against an interpretation that the absence of authorisation would result in a lack of title to prosecute. However, the aforesaid interpretation of a lack of title to include a lack of specific authorisation to prosecute appears to have been accepted in our law and is now a principle to which I am bound in accordance with our system of *stare decisis*. Whether a lack of specific authorisation to prosecute a specific charge has correctly been accepted as affecting 'title to prosecute', is not an issue arising for determination in this judgement, as it is not in dispute that the necessary authority which Mr Downer requires to prosecute the charges against Mr Zuma has been granted. My aforesaid comments and guarded criticisms are accordingly made merely in passing to emphasise my interpretation of 'title to prosecute' as being a plea relating to the standing of the prosecutor, and nothing wider.

[95] What is however significant, at an interpretation level, is that the provisions of s 106(1)*(h)* have been applied and can be applied successfully to challenge whether a state prosecutor has been properly appointed or has the necessary authorisation. That is possible, without straining the interpretation of the word 'title', thus giving effect to the principle of legality, but without resulting in an interpretation absurdity that all private prosecutors will lack the 'title to prosecute' because of their non-independent or non-objective interest in the prosecutions which they are conducting.

[96] There is no dispute that complaints falling within the category where there is a lack of authority to prosecute, may properly be raised under s 106(1)*(h)* of the CPA, and if upheld, will result in the removal of the prosecutor. Whether it might also be possible to pursue such a challenge in a separate substantive application for appropriate declaratory and consequential relief, prior to an accused being called upon to plead, is an issue which need not be decided in this judgment, although, in principle, there appears to be no reason why that would not be possible. The present is however not an instance, as in *Porritt v National Director of Public Prosecutions*[37] where the appellants relied on s 106(1)*(h)*of the CPA, but it had also been agreed between counsel for the parties that a separate

[37] *Porritt and another v National Director of Public Prosecutions and others* [2014] ZASCA 168, 2015 (1) SACR 533 (SCA), [2015] 1 All SA 169 (SCA).

application for the removal of the prosecutor was also an issue before the court, and the SCA entertained such an application, as separate and distinct from the special plea. Instances of prosecutorial misconduct or an abuse of process may to be pursued in a separate application for relief that might be appropriate, which relief might include the removal of the prosecutor. But it is a process distinct and separate from the adjudication of a special plea in terms of s 106(1)(*h)*of the CPA.

The meaning of 'title to prosecute' judicially considered.

[97] Judicial pronouncements to which I have been referred, or which I have identified, are consistent with the above interpretation of the word 'title.'

[98] Mr Mpofu referred to the decision in *Delport v S.*[38] In that judgment the SCA assumed for the purposes of the judgement, in favour of the appellants without deciding the point, that the appointment of the prosecutors was irregular for want of strict compliance with the relevant provisions of the NPA Act. It was also assumed that the appellants were entitled to invoke s 106(1)*(h)*, as it happened on the facts of that case, midway through the trial. *Delport* accordingly did not deal with what s 106(1)*(h)* encompasses or what is meant by 'title to prosecute'. Assumptions had, for the purposes of the judgment, been made in favour of the appellants.

[99] In *Porritt*[39] the appellants invoked the provisions of s 106(1)(*h*) to challenge the 'title' of the prosecutors in their trial, on the basis that the prosecutors were perceived to be biased. The NPA had appointed two prosecutors, Mr Coetzee SC, who was an advocate in private practice, and Mr Ferreira, who was a senior Deputy Director of Public Prosecutions at the Specialised Commercial Unit, formerly the Scorpions and subsequently the Hawks. At the commencement of the trial the accused tendered a plea in terms of s106(1)*(h)* alleging that these prosecutors lacked title to prosecute. Two grounds were advanced in support of that plea. The first ground was an alleged lack of

[38] *Delport and others v S* [2014] ZASCA 197, 2015 (1) SACR 620 (SCA), [2015] 1 All SA 286 (SCA).
[39] *Porritt and another v National Director of Public Prosecutions and others* [2014] ZASCA 168, 2015 (1) SACR 533 (SCA), [2015] 1 All SA 169 (SCA).

authority to prosecute for want of compliance with s 38 of the NPA Act. The second was that the appointment of the two prosecutors was in breach of the accused's fair trial rights as encompassed in s 35(3) of the Constitution, specifically that they would not serve impartially and carry out their duties without fear, favour or prejudice – complaints of the very nature raised by Mr Zuma. The trial court dismissed the plea on the first ground, but upheld it on the second ground, that is for the breach of the accused's fair trial rights based on the prosecutors not being impartial. Although the trial court upheld the s 106(1)(*h*) plea on the second ground, for a breach of fair trial rights, it nonetheless rejected the contention by the accused that it followed that they were entitled to demand an acquittal in terms of s 106(4).

[100] It is against that background that the State in *Porritt* had applied successfully before the trial court for the reservation of points of law in terms of s 319 of the CPA, which it wanted to pursue before the SCA. The point of law persisted with before the SCA was the legal test to apply, 'either in terms of s 106(1)*(h)* of the CPA, or the common law, for the removal of a prosecutor'.[40] The State contended that the trial court had applied an incorrect test in finding that the prosecutors should be removed on the ground of an alleged lack of independence or objectivity.

[101] The appellants, on the other hand, appealed to the SCA contending that the trial court, having upheld their plea in terms of s 106(1)*(h)*, erred in not acquitting them in terms of s 106(4). Their appeal was rightly dismissed, for reasons irrelevant to this judgment.

[102] The question of law reserved, was answered in favour of the State, the order of the trial court was set aside, and was substituted with an order that:

'The application by the appellants for the removal of Advocates Coetzee and Ferreira is dismissed'.

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[40] *Porritt and another v National Director of Public Prosecutions and others* [2014] ZASCA 168, 2015 (1) SACR 533 (SCA), [2015] 1 All SA 169 (SCA) para 6. A second question of law was also reserved, namely whether the test was correctly applied by the trial court. Counsel for the NPA, however, conceded this was not a question of law, but one on the facts, and the SCA observed that in any event, in view of the fact that a wrong test was applied by the trial court, this second question did not arise.

The basis for the aforesaid substituted order included not only that the alleged breach of the appellants' fair trial rights because of a lack of independence, did not amount to the prosecutors having 'no title to prosecute', contrary to what the trial court had found, but also that the separate application for the removal of the prosecutors, which had not been the basis of the trial court's decision, but which counsel agreed the SCA should consider, failed on its merits.

[103] The SCA found 'that the removal of the prosecutors was not grounded on a lack of title in terms of s 106(1)*(h)* of the CPA and the appellants were therefore not entitled to demand an acquittal in terms of s 106(4) of the CPA'.[41]

[104] In adversarial criminal proceedings, such as ours, it is inevitable that prosecutors will be partisan. Their role in criminal prosecutions makes it inevitable that they will be perceived to be biased.[42] In *S v Van Der Westhuizen*[43] it was said that:

'In our practice it is not the function of a prosecutor disinterestedly to place a hotchpotch of contradictory evidence before a court and then leave the court to make of it what it wills. On the contrary, it is the obligation of a prosecutor firmly but fairly and dispassionately to construct and present a case from what appears to be credible evidence, and to challenge the evidence of the accused and other defence witnesses with a view to discrediting such evidence, for the very purpose of obtaining a conviction. That is the essence of a prosecutor's function in an adversarial system and it is not peculiar to South Africa.' (footnotes omitted)

[105] The test in respect of the apprehension of bias of a prosecutor is not that which applies to a judicial officer, formulated by the Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union*.[44] As pointed out in *Porritt*

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[41] *Porritt and another v National Director of Public Prosecutions and others* [2014] ZASCA 168, 2015 (1) SACR 533 (SCA), [2015] 1 All SA 169 (SCA) para 8.
[42] *Porritt and another v National Director of Public Prosecutions and others* [2014] ZASCA 168, 2015 (1) SACR 533 (SCA), [2015] 1 All SA 169 (SCA) para 13.
[43] *S v Van Der Westhuizen* [2011] ZASCA 36; 2011 (2) SACR 26 (SCA) para 11.
[44] *President of the Republic of South Africa and others v South African Rugby Football Union and others* [1999] ZACC 9, 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) para 48; *Porritt and another v National Director of Public Prosecutions and others* [2014] ZASCA 168, 2015 (1) SACR 533 (SCA), [2015] 1 All SA 169 (SCA) para 11.

v National Director of Public Prosecutions,[45] the tests are fundamentally different and it is not axiomatic that a perception of bias held against a prosecutor will lead to an accused not having a fair trial.

[106] The SCA cautioned *obiter* (in passing) that its findings did not mean that a prosecutor can never be disqualified on the ground of bias or apprehension of bias, but that will be in instances, which the court illustrated with reference to the decision in *Smyth v Ushewokunze*,[46] where the prosecutor's bias affects the accused's right to a fair trial. In *Smyth,* an application based on provisions of the Zimbabwean Constitution, and not on a provision equivalent to our s 106(1)(*h*), the prosecution was found to be conducted in a manner which was 'vindictive and at times patently dishonest and the court is deliberately misled', resulting in an 'inherent danger of unfairness to the [accused] attendant upon the first respondent prosecuting at the trial.' The Zimbabwe Supreme Court was satisfied that it was shown that the accused's right to a fair trial was in jeopardy.[47] In similar vein, the SCA in *Porritt*, with reference to the Constitutional Court's judgement in *S v Shaik,* concluded that:[48]

'The protection of an accused person, therefore, lies not in a general standard of independence and impartiality required of all prosecutors, but in the right to a fair trial entrenched in s 35(3) of the Constitution. That right was described in *S v Shaik* in these terms:

"The right to a fair trial requires a substantive, rather than a formal or textual approach. It is clear also that fairness is not a one - way street conferring an unlimited right on an accused to demand the most favourable possible treatment. A fair trial also requires 'fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime."' [49]

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[45] *Porritt and another v National Director of Public Prosecutions and others* [2014] ZASCA 168, 2015 (1) SACR 533 (SCA), [2015] 1 All SA 169 (SCA).
[46] *Smyth v Ushewokunze and another* 1998 (3) SA 1125 (ZS) at 1132A-1134B.
[47] *Smyth v Ushewokunze and another* 1998 (3) SA 1125 (ZS) at 1134B-C.
[48] *Porritt and another v National Director of Public Prosecutions and others* [2014] ZASCA 168, 2015 (1) SACR 533 (SCA), [2015] 1 All SA 169 (SCA) para 14. See *S v Shaik* [2007] ZACC 19, 2008 (2) SA 208 (CC) para 43.
[49] *S v Shaik* [2007] ZACC 19; 2008 (2) SA 208 (CC) para 43.

[107] The central objective is to bring about substantial fairness in the 'ensuing criminal trial (which) will be a matter to be decided by the trial court.'[50]

[108] Whether an accused will ultimately receive a fair trial, is a question to be answered on all the evidence.[51] It is probably most appropriately decided, although this is solely in the discretion of the trial court, at the end of the trial.[52] If the alleged lack of objectivity or independence, whether due to alleged political interference, or influence by outside intelligence agencies, or any other cause, is such that an accused will not receive a constitutionally fair trial, then a variety of remedies might be available, in the discretion of the court, in terms of s 172(1)(b) of the Constitution, as the circumstances may demand. But the remedy does not lie in s 106(1)(*h*). It has nothing to do with the prosecutor's 'title to prosecute.' And if the fair trial rights of the accused are unaffected, then there is no need to remove the prosecutor.

[109] Mr Mpofu endeavoured to distinguish *Porritt,* on the basis that what the appellants in *Porritt* sought was a 'removal' of the prosecutors, and not the adjudication of a special plea on a wider meaning of the words 'title to prosecute'. I do not believe that to be a valid point of distinction, for inter alia the following reasons:

(a) The trial court in *Porritt* had upheld the special plea on the basis of a breach of the accused's fair trial rights in s 35(3) of the Constitution that the prosecutors would not be impartial as required by the provisions s 32(1) of the NPA Act. On appeal, the SCA answered the question of law posed, by finding that these were not instances of a lack of title. That disposed of the word 'title' having a wider meaning to include a lack of impartiality or a lack of independence, or conduct in conflict with the requirements of the NPA Act..

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[50] *Porritt and another v National Director of Public Prosecutions and others* [2014] ZASCA 168, 2015 (1) SACR 533 (SCA), [2015] 1 All SA 169 (SCA) para 18 quoting with approval from *Director of Public Prosecutions, Western Cape v Killian* 2008 (1) SACR 247 (SCA) para 28; *R v Sole* 2001 (12) BCLR 1305 at 13332F-H.

[51] In the permanent stay judgment, an order was sought on the basis that Mr Zuma would be denied a constitutionally fair trial, on the basis of inter alia alleged political interference.

[52] *S v Zuma and another, Thales South Africa (Pty) Limited v KwaZulu-Natal Director of Public Prosecutions and others* [2019] ZAKZDHC 19, 2020 (2) BCLR 153 (KZD).

(b) Insofar as there was a separate application, additional to the special plea in terms of s 106(1)*(h)* before the SCA in *Porritt* by the agreement of counsel, not involving what 'title to prosecute' might mean, which is not the position in the proceedings before me, the SCA on the facts, was still not persuaded that the prosecutors should be removed merely because of a lack of independence or objectivity.

(c) In the special plea before me Mr Zuma expressly asked for the 'removal' of Mr Downer, just as the accused in *Porritt* had sought the 'removal' of the prosecutors pursuant to a plea in terms of s 106(1)*(h)*. There is no point of distinction between *Porritt* and the special plea before me. *Porritt* had also relied on s 106(1)*(h)*. Mr Zuma relies exclusively on s 106(1)*(h)*. *Porritt* is directly in point on the issue of the application and interpretation of s 106(1)*(h)*. The judgment of the SCA set itself against treating allegations of a lack of impartiality, or a lack of independence, or a conflict with the requirements of the NPA Act, or any conflict with prosecutors carrying out their duties without fear, favour or prejudice, or a general breach of an accused's fair trial rights, as relevant considerations influencing a decision regarding whether a prosecutor has title to prosecute.

(d) In answer to the appellants' counsel's submission that where a prosecutor is found to be biased, his or her removal may be said to be based on his or her lack of title to prosecute which would entitle the appellants to demand an acquittal in terms of s 106(4), Tshiqi JA emphatically stated, 'In my view, that cannot be so.'

[110] In *Delport,* the court of first instance, had, with reliance on the principle enunciated in *Bonugli v Deputy National Director of Public Prosecutions,*[53] which on the facts of that case held that there was a reasonable apprehension that the prosecutors would not act without fear, favour or prejudice and that the rights of the accused to a fair trial would be infringed if the prosecution continued with the two prosecutors prosecuting, set aside the appointment of the two prosecutors. It is significant to note that the removal of the prosecutors in *Bonugli* had not been sought on the basis of them having no title to prosecute as contemplated in s 106(1)*(h).* Their removal was sought on the basis that

[53] *Bonugli and another v Deputy National Director of Public Prosecutions and others* 2010 (2) SACR 134 (T).

their appointment was in conflict with the provisions of s 35(3) of the Constitution, which would affect their fair trial rights, and would therefore be unlawful. That is different to what is claimed in the special plea. But that point apart, the findings in *Bonugli* have in any event since been implicitly overruled by the SCA in *Porritt*, as the SCA rightly observed in *Delport*.[54]

[111] The SCA held in *Porritt* that the protection of an accused person lies not in a general standard of independence and impartiality required of all prosecutors, but in the right to a fair trial entrenched in s 35(3) of the Constitution.[55] As was also remarked in *Delport*,[56] the question in regard to irregularities is always whether they have resulted in a failure of justice, as irregularities do not in and of themselves lead to a failure of justice.[57] In *Delport*, the fact that the appellants had not claimed that they suffered any trial related prejudice was held to be fatal, albeit that their appeal was struck from the roll for other reasons. In *Moussa*,[58] referring to the above principle in *Porritt*, the court held that whether a trial is fair usually falls to be determined on a case-by-case basis, and stressed that courts will be astute to ensure that the constitutional guarantees of prosecutions without fear, favour or prejudice, and fair-trial rights, are met.[59] The SCA in *Porritt* concluded, quoting with approval from its decision in *Director of Public Prosecutions, Western Cape v Killian*[60] that:

'The question remains whether the prosecutor's . . . role in this case created a substantive unfairness *per se . . .* Whether fulfilment of that . . . role does involve or bring about substantive unfairness in an ensuing criminal trial will be a matter to be decided on the facts of each case by the trial court.'

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[54] The SCA in *Delport and others v S* [2014] ZASCA 197, 2015 (1) SACR 620 (SCA), [2015] 1 All SA 286 (SCA) para 38 remarked that '[a]ppellant six, has now withdrawn his appeal to this court in light of its recent ruling in *Porrit v NDPP* which implicitly overrules the high court's ruling in *Bonugli* and removes any legal basis for challenging the prosecutors' title on the ground of perceived bias because of their association with SARS.'

[55] *Porritt and another v National Director of Public Prosecutions and others* [2014] ZASCA 168, 2015 (1) SACR 533 (SCA), [2015] 1 All SA 169 (SCA) para 14.

[56] *Delport and others v S* [2014] ZASCA 197, 2015 (1) SACR 620 (SCA), [2015] 1 All SA 286 (SCA) para 35.

[57] *Cf Williams and another v Janse van Rensburg and others (2)* 1989 (4) SA 680 (C) at 683D-684B.

[58] *Moussa v The State and another* 2015 (2) SACR 537 (SCA), [2015] 2 All SA 565 (SCA)

[59] *Moussa v The State and another* 2015 (2) SACR 537 (SCA), [2015] 2 All SA 565 (SCA) para 29.

[60] *Director of Public Prosecutions, Western Cape v Killian* 2008 (1) SACR 247 (SCA) para 28.

[112] Thus, following *Porritt*,[61] if an accused believes the prosecutor assigned to their case will not exercise, carry out or perform their powers, duties and functions in good faith, impartially and without fear, favour or prejudice, or that the prosecutor is an essential witness in the case, then the accused may bring a substantive application to the court for an order that the prosecutor be removed and replaced. What the accused cannot achieve, however, is to seek such removal by the device of entering a special plea in terms of s 106(1)*(h)* of the CPA.

[113] The principle of *stare decisis* (binding precedent) in our law means that I am bound by the *ratio decidendi* of the judgment of a higher court, for example, the Constitutional Court, the Supreme Court of Appeal or a full court of this division, even if I believe it to be wrong. I am bound by the decision of the Supreme Court of Appeal in *Porritt.* The principles established in *Porritt* are not distinguishable from what is before me.

[114] The decision in *Porritt* is dispositive of the interpretation of the provisions of s 106(1)*(h)* and the merits of the special plea raised by Mr Zuma. Lack of title to prosecute is confined to instances of a lack of standing in the sense of a legally recognised interest, or the required authority, which a particular prosecutor requires to entitle him or her to prosecute an accused.

Mr Zuma's alternative causes of action

[115] Mr Zuma correctly does not dispute that the meaning of 'title' in s106(1)*(h)*, in what has been termed the narrow sense above, would include the qualifications and authority of a person to be appointed as a public prosecutor. He however alleges further, in the alternative, that in the event of the word 'title' in s 106(1)*(h)* being interpreted narrowly to mean only formal statutory requirements for appointing a prosecutor, that this court 'should extend its meaning to include the absence of independence and impartiality to conduct a prosecution as falling within the meaning of "title" to prosecute' in terms of s

[61] *Porritt and another v National Director of Public Prosecutions and others* [2014] ZASCA 168, 2015 (1) SACR 533 (SCA), [2015] 1 All SA 169 (SCA) paras 7 – 8.

39(2) and (3) of the Constitution, to allow him to demand an acquittal in terms of s 106(4) in the event of him being successful in removing Mr Downer. In 'the further alternative and as an independent basis' he contends that Mr Downer 'should be removed as a prosecutor in the trial as he lacks the independence and impartiality required by the Constitution and his oath of office taken under s 32(1)(a)[62] and s 32(2)(a)[63] of the National Prosecuting Act 32 of 1998 to serve impartially and exercise, carry out or perform his powers duties and functions in good faith and without fear, favour or prejudice.'

Should 'title to prosecute' be assigned a wider meaning?

[116] I am not persuaded that a wider meaning should be assigned to the word 'title'. As much as there is an obligation on all courts, as contended in argument, in terms of s 39(2) of the Constitution to 'promote the spirit, purport and objects of the Bill of Rights' when interpreting 'legislation' like the CPA, there is no need to adopt a strained wider meaning of the word 'title' to provide a remedy where adequate alternative remedies already exist in our law. It is significant that s 39(3) of the Constitution provides that '[t]he Bill of Rights does not deny the existence of *any rights* or freedoms that are recognised or *conferred by common law*, customary law *or legislation,* to the extent that they are consistent with the Bill.' The argument for an extended meaning of the word 'title' with reference to the constitutional rights and protection which Mr Zuma undoubtedly enjoys, presupposes that he has no satisfactory alternative remedy in our law.

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[62] Section 32(1)*(a)* of the NPA Act provides:
'A member of *the prosecuting authority* shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.' (emphasis in the original)

[63] Section 32(2)*(a)* of the NPA Act provides:
'A *National Director* and any person referred to in section 4 must, before commencing to exercise, carry out or perform his or her powers, duties or functions in terms of this Act, take an oath or make an affirmation, which shall be subscribed by him or her, in the form set out below, namely—
"I

(full name)

do hereby swear/solemnly affirm that I will in my capacity as *National Director*/*Deputy National Director of Public Prosecutions*/*Director*/*Deputy Director of Public Prosecutions*/*prosecutor*, uphold and protect the Constitution and the fundamental rights entrenched therein and enforce the Law of the *Republic* without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the Constitution and the Law. (In the case of an oath: So help me God.)".' (emphasis in the original)

[117] Mr Zuma has satisfactory alternative rights and remedies 'conferred by common law' or 'legislation': he could have brought a separate substantive application, for appropriate declaratory, and pursuant thereto, consequential relief for the recusal/removal of Mr Downer.[64] He chose not to do so. The fact that he had not done so, is of his own making.[65] Alternatively, he could bring an application for a permanent stay of prosecution,[66] which he did, and which was refused by the full court.[67]

[118] The fact that there are alternative satisfactory remedies available militates against extending the meaning of the words 'title to prosecute', in terms of s 39(2) and (3) of the Constitution, to include an absence of independence and impartiality which does not result in an unfair trial.

[119] Ultimately, as has been stated repeatedly above, every trial court must at the end of the trial be satisfied that the accused has received a constitutionally fair trial. If not, then it must acquit the accused. It is unhelpful to speculate at this stage theoretically on a possible infringement of trial rights, which might never arise within the evidential matrix of the trial. As was remarked by Kentridge AJ,[68] albeit in a different context:

'Moreover, once the evidence in the case is heard it may turn out that the . . . issue is not after all decisive.'

By way of example, there would be no need to investigate and rule on the inadmissibility of evidence obtained in a constitutionally unfair manner, if that evidence will never feature or be adduced by the State in support of the prosecution. There is no need to interpret s

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[64] In *Porritt and another v National Director of Public Prosecutions and others* [2014] ZASCA 168, 2015 (1) SACR 533 (SCA), [2015] 1 All SA 169 (SCA) the SCA observed that:
'It was not necessary for the appellants to place reliance on s 106(1)*(h)* for their application for the removal of the prosecutors on the basis that they were biased. The appellants did not have to tender a plea in order to place that objection before the court. Indeed, counsel for the appellants advised from the Bar that the application for the removal of the prosecutors on the ground of an apprehension of bias was separate from the s 106(1)*(h)* plea. But the two issues were argued together by agreement between the two sets of counsel. I conclude that the removal of the prosecutors was not grounded on a lack of title in terms of s 106(1)*(h)* of the CPA.'

[65] Just as with the accused in *Delport and others v S* [2014] ZASCA 197, 2015 (1) SACR 620 (SCA), [2015] 1 All SA 286 (SCA), see specifically para 36.

[66] Pursuant to s 342A of the CPA.

[67] *S v Zuma and another, Thales South Africa (Pty) Limited v KwaZulu-Natal Director of Public Prosecutions and others* [2019] ZAKZDHC 19, 2020 (2) BCLR 153 (KZD).

[68] *S v Mhlungu and others* 1995 ZACC 4; 1995 (3) SA 867 (CC) para 59 at 895D-E.

106(1)*(h)* more broadly than the SCA did in *Porritt* (something which, in terms of the principle of *stare decisis*, is in any event not open to this court).

A 'further alternative basis'

[120] The 'further alternative' basis contended for by Mr Zuma would presumably be a separate substantive application for the recusal or removal of Mr Downer as one of the prosecutors. There is no such application before this court. The special plea in terms of s 106(1)*(h)* of the CPA is the only issue.

[121] A lack of independence or objectivity, or bias, or some other alleged prosecutorial misconduct may be pursued in a separate substantive application, for an order to permanently stay the prosecution, or for the recusal or removal of a prosecutor, or an acquittal where the resultant trial prejudice is such that the accused will or did not enjoy a constitutionally fair trial. But that does not amount to a 'lack of title to prosecute' as contemplated in s 106(1)*(h)* of the CPA. It involves an application, a separate and distinct process to the special plea contemplated in s 106(1)*(h)*, as the separate agreement relied upon by the appellants in *Porritt* in the hearing before the SCA, illustrates. In the present matter there is no agreement that a separate issue as to whether Mr Zuma might suffer trial prejudice or might not receive a fair trial, will be adjudicated additional to the special plea, at the pleading stage. Nor has this court directed that an enquiry into whether Mr Zuma might suffer trial prejudice or not receive a fair trial, be decided at this stage of the proceedings.

[122] The issue before this court for decision, is purely the special plea in terms of s 106(1)*(h)*, nothing else. Preliminary to the indictment being put and the two accused pleading to the various counts in the indictment, Mr Masuku SC at the commencement of the hearing on 17 May 2021 indicated that Mr Zuma intended to raise a plea, as contemplated in s 106(1)*(h)* of the CPA, that Mr Downer, 'has no title to prosecute.' I confirmed with Mr Masuku that what was raised was a plea as contemplated in s 106(1)*(h)*, and not an application for the recusal, or removal, of Mr Downer. Once the written notice of the special plea had been delivered, I similarly clarified with Mr Mpofu,

who had come to lead the defence team of Mr Zuma, when the plea was entered on 26 May 2021, that what was raised was the special plea, not an application for the recusal of Mr Downer. He confirmed that it was the special plea.

[123] This trial has been carefully case managed, as is apparent from the court file, and was certified ready for trial on 23 February 2021. Prior to that date the case management hearings had been adjourned on occasions, inter alia to allow Mr Zuma to bring an application for a permanent stay (which was ultimately refused in 'the permanent stay judgment').[69]

[124] On 8 December 2020 Radebe J granted an order postponing the trial 'provisionally to 23 February 2021, for the resolution of outstanding pre-trial management issues, with a view to the Court at the provisional hearing on 23 February 2021 certifying the matter trial ready in accordance with the Judge President's Pre-Trial Criminal Court Hearings Directive dated 7 November 2018',[70] pending inter-alia the full court judgement in the Thales application for review heard on 26 October 2020, and the State's answer to

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[69] *S v Zuma and another, Thales South Africa (Pty) Limited v KwaZulu-Natal Director of Public Prosecutions and others* [2019] ZAKZDHC 19, 2020 (2) BCLR 153 (KZD).

[70] The Pre-Trial directive of the Judge President requires inter-alia that:

'5(d) Counsel for the prosecution and the defence need, in good time, to consult, request and obtain further particulars to the charges and generally ensure that there are ready and fully instructed at the commencement of the pre-trial hearing where broadly the topics foreshadowed in the (enclosed) draft pro forma pre—trial agenda/minute will be addressed.

6. TRIAL READY CERTIFICATION:

Save in exceptional cases authorised by the Judge President or his delegate, trial readiness certification will be a prerequisite for enrolment for criminal trials in the High Court.'

The pro forma minute alluded to includes the following:

'2. PRELIMINARY ISSUES:

2.1 Does either the State or the defence intend, before the commencement of the trial, raising any issues *in limine*, including matters pertaining to legal representation, further particulars, any referral for observation in terms of sections 77 or 78 of the Criminal Procedure Act 51 of 1977 (CPA), or any other legal questions or procedural issues?

8. ADDITIONAL ISSUES:

8.1 Are there other relevant issues, not dealt with above, which may affect the duration of the trial proceedings which need to be noted, discussed or considered?

Yes/No

8.2 If so, then what is the nature of the contemplated issue (s)?'

10 ORDER MADE:

It is ordered that:

10.1 The matter is certified ready for trial; and

10.1.1 The estimated duration of the trial is ____days.'

Thales's application for further and better particulars dated 23 November 2020. The Judge President's directive referred to is consistent with the 'Directives issued by the Chief Justice of the Republic of South Africa in terms of section 8 of the Superior Courts Act 10 of 2013 read with section 165 (6) of the Constitution'.[71]

[125] On 23 February 2021 an order was granted by Chili J, with the consent of all the parties, in the following terms:

'1. The matter is certified as trial – ready in accordance with the Judge President's Pre-Trial Criminal Court Hearings Directive dated 07 November 2018.

The matter is postponed (in absentia in respect of Mr Zuma and the Thales representative), to 17 May 2021 until 20 June 2021 (being the end of term date) for trial and that the matter will again resume on the first day of the third term in KwaZulu–Natal, and any further dates that the Honourable Judge presiding at the trial and the Honourable Judge President may determine, subject to further clarity on the resumption of international travel under the COVID 19 restrictions, which may affect witnesses and the Thales representative, Mr Durand from abroad.

(This is in terms of the draft order signed by Judge).'

[126] By acknowledging that the matter was ready for trial the parties acknowledged that there were no further applications to be brought before the trial was to commence. Mr Downer has been the lead prosecutor in the trial since 2009, if not before, a fact well known to all. This court would not easily have been disposed, after the matter had been

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[71] These directives inter-alia provide:

4. **PRE-TRIAL CONFERENCES AND CERTIFICATION OF CASES AS TRIAL READY**

The following directives apply to all criminal cases.

4.1 Before enrolling a criminal matter for trial the case must be certified by judicial officer as trial ready.

…

4.5 At the pre-trial conference the issues enumerated below, but not limited thereto, are to be considered and addressed, where relevant:

(a) . . .

(ii) Whether the accused/defence is ready to proceed to trial?

(xvii) The estimated duration of the trial and proposed trial dates.

4.8 Any *in limine* and all preliminary issues, including legal representation, should be resolved before the matter is set down for trial.

4.9 Where a matter has been set down for trial and an issue arises which may prevent the trial proceeding this should be brought to the attention of the presiding officer and other parties as soon as possible.'

certified trial ready, to allow any further adjournment for any further applications, whether for the removal of Mr Downer, or otherwise, to be brought. Obviously, Mr Zuma's right to enter any particular plea, being part of the trial process, remained available to him when he would be required to plead, but then limited to the scope of the plea so entered.

[127] In this context it is important to keep in mind the general caution expressed by Langa CJ in *Thint (Pty) Ltd v National Director of Public Prosecutions and others; Zuma v National Director of Public Prosecutions and other* [72] that:

'. . . this court should discourage preliminary litigation that appears to have no purpose other than to circumvent the application of s 35(5). Allowing such litigation will often place prosecutors between a rock and a hard place. They must, on the one hand, resist preliminary challenges to their investigations and to the institution of proceedings against accused persons; on the other hand, they are simultaneously obliged to ensure the prompt commencement of trials. Generally disallowing such litigation would ensure that the trial court decides the pertinent issues, which it is best placed to do, and would ensure that trials start sooner rather than later. There can be no absolute rule in this regard, however. The courts' doors should never be completely closed to litigants. If, for instance, a warrant is clearly unlawful, the victim should be able to have it set aside promptly. If the trial is only likely to commence far in the future, the victim should be able to engage in preliminary litigation to enforce his or her fundamental rights. But in the ordinary course of events, and where the purpose of the litigation appears merely to be the avoidance of the application of s 35(5) or the delay of criminal proceedings, all courts should not entertain it. The trial court would then step in and consider together the pertinent interests of all concerned. If that approach is generally followed the State would be sufficiently constrained from acting unlawfully by the application of s 35(5) and by the possibility of civil and criminal liability.'

[128] This trial was ready to proceed, as agreed, free of any further interlocutory applications – the only possible exception conceivably being in respect of events not previously reasonably capable of being anticipated, which any substantive application for Mr Downer's removal certainly would not be. A speedy trial and finality in litigation, are

[72] [2008] ZACC 13, 2009 (1) SA 1 (CC), 2008 (12) BCLR 1197 (CC) para 65.

also vital constitutional imperatives. As was said in *Shaik*,[73] quoted above, the rights of the accused are not a one-way street.

[129] There is accordingly no room for any other form of process, as a 'further alternative as an independent basis', as was contended for, being pursued at this stage.

Applying the facts to the above legal interpretation

[130] Mr Downer's uncontested evidence is that he was admitted as an advocate of the Supreme Court of South Africa on 15 April 1980, appointed a Deputy DPP in the NPA with effect from 1 February 1999, elevated to the rank of senior counsel on 21 November 2003 and sworn in as a Senior Deputy Director of Public Prosecutions in the NPA on 6 August 2015. On 28 November 2017 he was designated by the then DPP to exercise, on behalf of the Republic, in all courts within her area of jurisdiction, the powers mentioned in sections 20(1)*(a)*, *(b)* and *(c)* of the NPA Act in respect of the prosecution of the present accused, from that date until the finalisation of the case, and he has again been so designated by the current DPP. Mr Zuma has not challenged this evidence.

[131] Mr Zuma has not established that Mr Downer does not have title to prosecute. The special plea in s 106(1)*(h)* of the CPA accordingly falls to be dismissed.

Section 106(4) of the CPA

[132] In the light of the conclusion that the special plea should be dismissed, it is unnecessary to consider the provisions of s 106(4), whether Mr Zuma would have been entitled to demand an acquittal if the special plea in terms of s 106(1)*(h)* was upheld, whether s 106(4) contains some form of discretion whether to acquit an accused or not,[74] and, whether evidence needs to be received in respect of the determination thereof.

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[73] *S v Shaik* [2007] ZACC 19; 2008 (2) SA 208 (CC) para 43.

[74] In *Delport and others v S* [2014] ZASCA 197, 2015 (1) SACR 620 (SCA), [2015] 1 All SA 286 (SCA) the SCA held in regard to s 106(4) that it did not think that it could be invoked in the circumstances of that case '[f]or if this were the case, it would cause immense prejudice to the prosecution and allow an unscrupulous accused to use it for purposes other than those for which it was intended.' (see para 34) That observation was obiter as the court had not found that the prosecutors lacked title to prosecute but had proceeded on the basis that:

The alternative argument – a 'wider' interpretation of the phrase 'title to prosecute'

[133] The judgment, from here on, deals with the position should I be incorrect in construing the reference to the term 'title to prosecute' to not extend to a wider meaning, to include complaints of alleged bias, lack of independence and objectivity, and/or that the issue before me is confined to the special plea in terms of s 106(1)*(h)*[75] and does not include an application for the recusal (removal) of Mr Downer.[76] Notwithstanding the affidavits being voluminous, I shall endeavour to deal with the arguments advanced by Mr Zuma in this regard, as succinctly as possible, more in point form than elaborate narrative. In doing so I have, as in the first part of this judgment, had regard to all the allegations advanced in the affidavits, even though some might not be referred to specifically in this judgment. I still do not consider complaints against the State/NPA, in accordance with the principle set in *Ndluli* and the wording of s 106(1)*(h)*, unless they implicate Mr Downer.

[134] The discussion below is confined to the twelve grounds listed and discussed by the State in its heads of argument, and the further two grounds identified in the supplementary evidence affidavit, which Mr Mpofu confirmed Mr Zuma relies upon, to the exclusion of any other possible grounds, which were abandoned.

[135] Before considering the particular complaints raised by Mr Zuma, it is necessary first to make the following general observations. They are not made in any particular order:

(a) Many of the allegations advanced in the affidavits are irrelevant to the special plea or an application to remove Mr Downer, or alternatively are based on

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'Properly understood the dispute in this case, however, is not over the prosecutors' standing to prosecute but about whether they were properly appointed and authorised to prosecute. And even if I accept for present purposes that s 106(1)*(h)* may be invoked not only where the standing of a prosecutor is in issue but also where it is asserted that the appointment is irregular, it does not follow that an accused is entitled to demand an acquittal . . .' (at para 32 – footnote omitted).

[75] That is on a separate 'independent basis' as an application for the recusal (removal) of Mr Downer, as was the case in, for example, *Bonugli and another v Deputy National Director of Public Prosecutions and others* 2010 (2) SACR 134 (T).

[76] There is no notice of motion claiming such relief.

suspicion or speculation and not on fact. This has unfortunately had the effect, similar to that described in *NDPP v Zuma,*[77] that '[i]nstead of having a short and simple case, the matter not only ballooned but burst in the faces of many.' Allegations in the affidavits that are irrelevant, speculative and/or not founded on fact, will not be discussed in this judgment. Further, speculative assertions do not amount to allegations of fact, and if contradicted, or even if only denied in answer, with no further factual rebuttal in reply, cannot give rise to a real dispute of fact. A referral to oral evidence is not a remedy to cure the absence of evidence. It seeks to resolve a true dispute between conflicting versions of fact based on admissible evidence. The crucial question is always whether a real dispute of fact has arisen.[78]

(b) A dispute of fact must furthermore relate to a material issue, to be legally relevant. Disputes in respect of collateral or non-material issues are irrelevant.

(c) Many persons, not accused in the trial, mentioned in the affidavits may be prejudiced by allegations that have been made. As remarked in *NDPP v Zuma*[79] they would probably be unable to intervene, even at the appeal stage, as they only have an interest in the reasoning, and not the order. This judgement will accordingly only address allegations made against Mr Downer, who had the opportunity of responding to the allegations in the founding affidavits.

(d) There are various decisions of other courts[80] that have dealt with matters concerning Mr Zuma, although not specifically in the context of a plea in terms of s 106(1)*(h)* of the CPA, or an application for the removal of Mr Downer. The principle of *stare decisis* determines that the reasoning and conclusions of a

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[77] *National Director of Public Prosecutions v Zuma (Mbeki and another intervening)* [2009] ZASCA 1, 2009 (2) SA 277 (SCA), [2009] 2 All SA 243 (SCA) para 81.
[78] Compare *Room Hire Company v Jeppe Street Mansions* 1949 (3) SA 1155 (T) at 1162.
[79] *National Director of Public Prosecutions v Zuma (Mbeki and another intervening)* [2009] ZASCA 1, 2009 (2) SA 277 (SCA), [2009] 2 All SA 243 (SCA) para 84 and 85.
[80] Such as the spy tapes matter and the full court's decision on a permanent stay of prosecution.

court, higher in the hierarchy of courts to this court are binding upon me and must be followed, even if I might consider them to be wrong, unless distinguished.[81]

(e) The question of 'Issue estoppel', which will be discussed separately below, precludes a litigant from contending for a different conclusion to that determined previously between the same parties by another court, even if the relief claimed was dissimilar, in respect of a similar issue to that arising in the present litigation..

(f) Ultimately, the enquiry at the end of every criminal trial must be whether the accused had received a constitutionally fair trial. That imperative remains even if on the evidence adduced in the affidavits to date, it is concluded that it has not been established that Mr Zuma has or will suffer trial related prejudice which might result in him not receiving a constitutionally fair trial. This judgment cannot stand in the way of possible fresh evidence emerging later. The enquiry is one most best answered by the trial court at the end of the trial, when the materiality of all the evidence adduced can be assessed properly. That it is not to say that such an enquiry might never, possibly in exceptional circumstances perhaps, arise, if appropriate, during a trial,[82] but when such a determination, other than at the end of the trial should be made, is solely within the discretion of the trial judge.

Res judicata – issue estoppel and the rule against collateral challenges

[136] It is trite law that a plea of *res judicata* may be raised as a defence to a claim that raises *an issue* disposed of by a previous judgement. A plea of *exceptio res judicata* (plea of matter adjudged) nominally requires simply a demand for 'the same thing on the same ground',[83] which simply raises the question whether the 'same issue' has already been adjudicated upon. The special plea for the removal of Mr Downer as prosecutor has not

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[81] See HR Hahlo and E Kahn *South Africa: The Development of its Law and Constitution* (1960) footnote 23 above.

[82] A special plea that the prosecutor had no title to prosecute was raised midway through the trial in the court *a quo* in *Delport,* but whether that was competent did not arise as an issue for determination before the SCA. In view of the conclusions reached in *Porritt,* trial or similar prejudice would not afford grounds for such a plea, even mid-way during the trial. The enquiry would therefore generally only arise at the end of the trial.

[83] *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 562A.

previously been demanded and was not decided in the judgement of Harms *NDPP v Zuma*,[84] nor in the Spy Tapes case,[85] nor in the permanent stay application before the full court, nor in any other judgment. The State accepts that much. The State's reliance is however not on *res judicata per se* (as such), but on a rule thereof, commonly referred to as 'issue estoppel'.

[137] Harms in *Amler's Precedents of Pleading* in a previous edition[86] in discussing *res judicata*, concisely summarises the position in regard to issue estoppel specifically, as follows:

'A party to previous litigation is not only prevented from disputing the correctness of a judgement in the sense that he may not again rely upon the same cause of action, but he is also prevented from disputing an issue decided by the previous court. The rule is that where the decision set up as *res iudicata* necessarily involved a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms.'[87]

In the current edition of that work, the learned author explains:

'The ambit of the exceptio rei iudicata has been extended by the relaxation in appropriate cases of the common law requirements that (a) the relief claimed and (b) the cause of action be the same. Where the circumstances justify the relaxation of these requirements those that remain are that (a) the parties must be the same and (b) the same issue must arise. The latter involves an inquiry into whether an issue of fact or law was an essential element of the judgment on which reliance is placed. It has become commonplace to speak of 'issue estoppel' when the plea of res iudicata is raised in the absence of a commonality of cause of action and relief claimed.

Aon South Africa (Pty) Ltd v van den Heever NO and others [2017] 3 All SA 365 (SCA)

The defence remains one of res iudicata. Recognition of the defence requires careful scrutiny in each case and depends on the facts of the case with reference to equity and fairness to the parties and to others.'[88]

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[84] *National Director of Public Prosecutions v Zuma (Mbeki and another intervening)* [2009] ZASCA 1, 2009 (2) SA 277 (SCA), [2009] 2 All SA 243 (SCA).

[85] *Zuma v Democratic Alliance and others; Acting National Director of Public Prosecutions and another v Democratic Alliance and another* [2017] ZASCA 146, 2018 (1) SA 200 (SCA), [2017] 4 All SA 726 (SCA).

[86] LTC Harms *Amler's Precedents of Pleading* 5 ed (1999) at 355.

[87] See *Liley and another v Johannesburg Turf Club and another* 1983 (4) SA 548 (W); *Horowitz v Brock and others* 1988 (2) SA 160 (A); *Boland Bank Bpk v Steele* 1994 (1) SA 259 (T) and *Kommissaris van Binnelandse Sake v Absa Bank Bpk* 1995 (1) SA 653 (A), being the authorities cited by Harms.

[88] LTC Harms *Amler's Precedents of Pleading* 9th ed page 316 to 317..

[138] Friedman JP in *Bafokeng Tribe v Impala Platinum Ltd*[89] following *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk,*[90] pointed out that the subject matter in the two relevant actions does not necessarily in all circumstances have to be the same, stating that the requirement that the previous judgement had to be based on the same cause of action and with respect to the same subject matter or thing could, and should, in order to ensure overall fairness, be relaxed having regard to the object of the *exceptio res judicata.* The object of the *exceptio* is to put a limit to needless litigation, and to prevent a recapitulation of the same thing in dispute in diverse actions with the concomitant possible deleterious effect of conflicting and contradicting decisions. He summarized the position as follows:

'The doctrine of issue estoppel has the following requirements: (a) where a court in a final judgement on a cause has determined an issue involved in the cause of action in a certain way; (b) if the same issue is again involved and the right to reclaim depends on that issue, the determination in (a) may be advanced as an estoppel in a later action between the same parties, even if the later action is founded on a dissimilar cause of action.

Issue estoppel is a rule of *res judicata* but is distinguished from the Roman – Dutch law exception in that in issue estoppel the requirement that the same subject – matter or thing must be claimed in the subsequent action, is not required.'[91]

[139] The High Court in *Bafokeng Tribe* made it clear that the principle 'must be carefully delineated and demarcated in order to prevent hardship and actual injustice to parties.'[92] Plainly, issue estoppel should not be applied rigidly or inflexibly but should be developed on a case-by-case basis, having regard to considerations of equity and fairness,[93] to

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[89] *Bafokeng Tribe v Impala Platinum Ltd and others* 1999 (3) SA 517 (BH) at 566F-H.

[90] *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (SCA).

[91] Herbstein & van Winsen *The Civil Practice of the High Courts of South Africa* fifth edition volume 1 page 611 suggest that in *National Sorghum Breweries v International Liquor Distributors* 2001 (2) SA 232 SCA the court seems to have rejected the doctrine of issue estoppel as well as the 'once and for all' rule, but point out that the reasoning of the majority is not clear and has even been described in 2001 *Annual Survey of SA Law* 767 – 768 as 'odd'. Friedman JP disagree that the doctrine of issue estoppel was thus rejected by the SCA stating that if the majority intended to do so, then it would have stated that much expressly.

[92] Page 560 6E – F.

[93] See *Smith v Porritt* 2008 (6) SA 303 (SCA).

prevent hardship and injustice. This accords with the ruling of the Constitutional Court in *Molaudzi*[94] that since *res judicata* is a common law principle:

'. . . it follows that this Court may develop or relax the doctrine if the interests of justice so demand . . . Whether it is in the interest of justice to develop the common law or the procedural rules of the court must be determined on a case-by-case basis . . . Section 173 does not limit this power. It does, however, stipulate that the power must be exercised with due regard to the interests of justice.'

[140] The Constitutional Court in *Molaudzi* further held that a court will, in appropriate cases, be entitled to fashion a remedy to enable it to do justice between the parties. That power is found in s 173 of the Constitution. *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others*[95] held that:

'The power in section 173 vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly and effective manner. Said otherwise, it is the authority to prevent any possible abuse of process and to allow a court to act effectively within its jurisdiction.'

[141] *Molaudzi* applied the *res judicata* principle where both cases were criminal cases. Mr Masuku, who addressed me on this issue on behalf of Mr Zuma, submitted that what *Molaudzi* did not resolve definitively is whether the *res judicata* principles can be applied to a criminal prosecution where the prior case alleged to give rise to the *res judicata,* or issue estoppel, was a 'civil case'. He contended that the application of issue estoppel in criminal matters has been rejected outright, or found only limited application, in various foreign jurisdictions, in favour of an accused and never against the interest of an accused and for the benefit of the State. In separate heads on the issue I was referred to the laws in Canada, Singapore, the United Kingdom, India, Australia, and the United States of America, which provide for that principle, or variations thereof, or deal with it in the context of an abuse of process. It was further submitted before me that the statement that in a

[94] *Molaudzi v S* (CCT 42/15) [2015] ZACC 20; 2015 (8) BCLR 904 (CC); 2015 (2) SACR 341 (CC) (25 June 2015).
[95] [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at para 90.

criminal context, the 'cause of action' is to be regarded as the conviction and sentence as a whole, was dispositive of the argument that a plea of *res judicata* is available to the State in the context before me.

[142] It is not necessary to undertake an analysis of the law in the foreign jurisdictions. These were considered in *Molaudzi,*[96] albeit in a slightly different context in regard to *res judicata* proper. What was said however applies equally to issue estoppel. The Constitutional court concluded in regard to the foreign law which it considered that:

'The general thrust is that *res judicata* is usually recognized in one way or another as necessary for legal certainty and the proper administration of justice. However, many jurisdictions recognise that this cannot be absolute.'[97]

The Constitutional court continued, with reliance on s 173 of the Constitution,[98] that:

'The incremental and conservative ways that exceptions have been developed to the *res judicata* doctrine speaks to the dangers of eroding it. The rule of law and legal certainty will be compromised if the finality of a court order is in doubt and can be revisited in a substantive way. The administration of justice will also be adversely affected if parties are free to continuously approach courts on multiple occasions in the same matter. However, legitimacy and confidence in a legal system demands that an effective remedy be provided in situations where the interests of justice cry out for one'[99] . . . (and that) . . .the circumstances must be wholly exceptional to justify a departure from the *res judicata* doctrine.'[100]

[143] I do not understand issue estoppel not to be available in our Criminal law. The only qualification, following *Molaudzi,* is that it must be applied with caution and not rigidly, in the interests of justice.

[144] Mr Masuku submitted, when it comes to consider what was decided in the relevant previous judgments, that what was decided in a civil review, such as in the judgment of

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[96] Paragraphs 24-30.
[97] Para 30.
[98] Para 34.
[99] Para 37.
[100] Para 38.

the SCA in the Spy tapes matter, or possibly even by the full court in the permanent stay judgment, could not and has not been applied in a criminal trial like the present. He submitted that this was because the burden of proof would be different in a criminal matter, compared to a civil matter. The short reply to that argument is that the court of instance and the SCA in the Spy tapes matter, although sitting as civil courts, and the full court hearing the permanent stay application, even assuming it to have sat as a 'civil court' although that is open to debate, came to the conclusions they did on the basis of common cause facts. In motion proceedings on affidavit, which was the procedure adopted both in the spy tapes review and the permanent stay application, the issues arising were decided on the basis of common cause facts. As was stated by Harms DP in *NDPP v Zuma (Mbeki and another intervening)*[101]*:*

*'*Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. . . In motion proceedings the question of onus does not arise and the approach set out in the preceding paragraph governs irrespective of whether legal or evidential onus lies. . . '

Issue estoppel is not affected by the burden of proof. Either an issue has been decided previously on the basis of certain facts, or it has not. The degree of proof, whether on a preponderance of probability or beyond a reasonable doubt, do not affect the inquiry. Whether issue estoppel can properly be invoked, is however a matter of judgment.

[145] Our law has seemingly also not held that for issue estoppel to operate in a civil matter that the prior determination should have been made by a civil court of law. The prior determination could, for example, have been made by a maintenance court, as in *Sparks*.[102]

[146] Mr Zuma's reliance on *Molaudzi* as being dispositive of the State's submissions, is, with respect, wrong. The contrary is the case. The principle underlying issue estoppel, namely that it seeks to give effect to the finality of judgments, is what is important. Subject

[101] At para 26 to 27.
[102] *Sparks v Sparks* 1998 (4) SA 714 (W) at 723 – 724 per Satchwell J.

to an accused not being prejudiced, there is in my view no reason why the principles relating to issue estoppel cannot be applied to a criminal prosecution where the prior case which determined the issue was a civil case, subject to the application of the principle not resulting in an injustice to the accused.

[147] Regarding the constitution of the full court in the permanent stay application, the position was referred to earlier. The judgment of the full court is *prima facie* (at face value) valid and binding on me. I cannot, sitting as a single judge, or even as a member of any bench in this division, question the validity thereof. It might furthermore be arguable as to whether the full court was sitting as a court before which criminal proceedings was pending,[103] but even if it was not, I can see no reason why issue estoppel, applied cautiously and alive to considerations of fairness, should not apply to the issues before me and previously decided by the full court. If necessary, the common law needs to be developed and extended, having regard to the interests of justice, to preclude an accused to again argue an issue in a criminal trial which had been determined by another court, even if it was a civil court, provided no injustice will occur.

[148] The policy considerations underlying the principle of issue estoppel, namely to bring an end to litigation and to avoid the same issues being litigated with the potential of different judgments being given in respect of the same issue, clearly convey that there is no reason why issue estoppel, cautiously applied, should not apply across civil and criminal matters.

[149] In *Arthur JS Hall v Simons*[104] Lord Hoffmann said:

‘The law discourages re-litigation of the same issues except by means of an appeal. The Latin maxims often quoted are *nemo debet bis vexari pro una et eadem causa* and interest *rei publicae ut finis sit litium.* They are usually mentioned in *tandem* but it is important to notice that the policies they state are not quite the same. The first is concerned with the interest of the

[103] S342A of the CPA.
[104] *Arthur J.S Hall and Co. v. Simons and Barratt v. Ansell and others v. Scholfield Roberts and Hill* [2000] UKHL 38; [2000] 3 All ER 673; [2000] 3 WLR 543.

defendant: a person should not be troubled twice for the same reason. This policy has generated the rules which prevent re-litigation when the parties are the same: *autrefois acquit res judicata* and issue estoppel. The second policy is wider: it is concerned with the interests of the state. There is a general public interest in the same issue not being litigated over again. The second policy can be used to justify the extension of the rules of issue estoppel to cases in which the parties are not the same but the circumstances are such as to bring the case within the spirit of the rules.'

[150] In regard to collateral attacks, it was said by the Supreme Court of Canada in *Garland v Consumers Gas Co*[105] that:

'the fundamental policy behind the rule against collateral attack is to 'maintain the rule of law and to preserve the repute of the administration of justice'. (*R v Litchfielda* [1993] 4 SCR 333 at 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this could undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it.'

[151] In Hunter v Chief Constable of West Midlands [1981] 3 All ER 727 (HL) Lord Diplock held:

'The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack on a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.'

[152] The principle of collateral attack applies equally in respect of issues and questions of fact. In *Commissioner, SARS v Hawker Aviation Services Partnership*[106] it was noted that it is difficult to find, in different cases, instances of collateral attack which parallel one another precisely.[107]

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[105] [2004] 1 SCR 629 (200 SCC 25) para 72 (quoted in Herbstein & van Winsen The Civil Practice of the High Courts of South Africa fifth edition volume 1 page 612).

[106] 2005 (5) 283 (T) at 295.

[107] It cited the speech of Lord Halsbury LC in *Reichel v McGrath* (1889) 14 APP CAS 665 which is also cited in *Hunter v Chief Constable of West Midlands* [1981] 3 All ER 727 (HL) at 734.

[153] The import of the above is that the principle of issue estoppel, as an integral part of *res judicata*, should be extended to circumstances necessary to bring the case within the spirit of the aforesaid rules. If that requires that our common law be developed pursuant to s 39(2) of the Constitution to provide a remedy to prevent the abuse resulting from the same issue being litigated in different forms before different courts, then that development is all the more necessary, in the interests of justice and to give proper effect to the rule of law.

[154] But a development of the common law might not necessarily be required. The principles relating to issue estoppel, as applied in our law, are sufficient to deal with the situations that arise in this judgement. At most, if a development is required, then it might simply be to extend the application thereof between civil and criminal matters, if that is a true point of distinction. In view of the policy considerations underlying the application of issue estoppel, there is no reason in logic and fairness, if applied cautiously, why such an extension would not be appropriate. Obviously, in all instances, fairness must remain an overriding consideration to which any court applying the principle will be sensitive.

[155] Finally, even if issue estoppel does not find proper application between civil and criminal matters, the reasoning of another court on the same issue, although not raised as an *exceptio*, might be compelling as regards the conclusion to be reached in the later judgment in respect of a similar factual position. Indeed, such reasoning will be binding on me where it is the *ratio* of the decision of a higher court.

[156] The principles of *stare decisis* and *res iudicata* (issue estoppel) assume significance in this matter viewed against the background of various court judgments, which have preceded this trial. In 2009 the SCA already referred to the litigation having a ‘long and troubled history and the law reports are replete with judgments dealing with the

matter'.[108] And in 2017, the SCA similarly likened the litigation involving Mr Zuma to TS Elliot's 'the recurrent end of the unending.'[109]

[157] The relief claimed in the special plea might be different to that sought previously in other cases, but in many respects the relief is claimed fundamentally on the same grounds, or at least often on the same facts, which featured as issues in previous judgments. Not only were the issues disposed of, but they were decided in respect of the exact same facts now advanced, by courts whose judgments I am bound to follow. Therefore, even if not truly instances of issue estoppel, if the reasoning which finds application is similar to that previously decided by another court, then that reasoning must in any event be adopted by me.

[158] The only remaining consideration in respect of issues previously decided might be Mr Downer's alleged involvement, or complicity in, or awareness of the existence of the those facts. However, in the light of the conclusions reached in those judgments, namely that the existence of those facts did not establish that Mr Zuma's rights to a constitutionally fair trial had been impaired or had been threatened, it is difficult to fathom how Mr Downer's involvement or knowledge of those factual circumstances, even if such knowledge and involvement could be established, would afford grounds for his removal on the basis that Mr Zuma will allegedly not receive a constitutionally fair trial.

The individual grounds of complaint

[159] The individual grounds relied upon, also alluded to earlier, and repeated here for convenience, are simply alleged manifestations of a general complaint of a lack of independence and objectivity on the part of Mr Downer. They are:

(a) Mr Ngcuka's refusal to authorise searches of Mr Zuma's properties;

(b) Mr Ngcuka's decision not to prosecute Mr Zuma, with Mr Shaik;

(c) Mr Downer's dismissal of the Public Protector's report;

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[108] Per *National Director of Public Prosecutions v Zuma (Mbeki and another intervening)* [2009] ZASCA 1, 2009 (2) SA 277 (SCA), [2009] 2 All SA 243 (SCA) para 2 and the references cited therein.

[109] Per Navsa JA in *Zuma v Democratic Alliance and others; Acting National Director of Public Prosecutions and another v Democratic Alliance and another* [2017] ZASCA 146, 2018 (1) SA 200 (SCA), [2017] 4 All SA 726 (SCA) para 1.

(d) Mr Downer's conduct in the Shaik trial;
(e) Nicholson J's findings of political interference;
(f) Mr Mpshe's April 2009 decision to discontinue Mr Zuma's prosecution, and Mr Hofmeyr's affidavit;
(g) Mr Downer's public reaction to Mr Mpshe's decision;
(h) Mr Downer's affidavit in the Spy Tapes matter;
(i) 'Browse Mole', Mr McCarthy and foreign intelligence services;
(j) Mr Downer's failure to report political interference;
(k) Mr Downer's alleged leaks to the media;
(l) Mr Downer's insistence that Mr Zuma be prosecuted;
(m) The leaking of confidential medical information;
(n) The unlawful attempted physical examination of Mr Zuma.

In general, all these grounds, if established, at best, might potentially affect Mr Zuma's fair trial rights

Mr Ngcuka's refusal to authorise searches of Mr Zuma's properties

[160] Mr Zuma alleges that Mr Downer denounced the refusal by Mr Ngcuka to authorise searches of Mr Zuma's properties as a political favour to Mr Zuma, but that he failed to report this 'unlawful conduct' of Mr Ngcuka, or to lodge a formal complaint about it.

[161] No factual basis is laid for this allegation, and the conclusion sought to be inferred. The person who has personal knowledge of the factual circumstances relating to this complaint, is Mr Downer. He explains that the allegation is incorrect. In late 2001, the prosecution team, of which he was always part, had recommended that Mr Zuma's premises be searched. This recommendation was however not approved by Mr Ngcuka, being the NDPP, and Mr McCarthy, both being his seniors and the officials with whom the decision would lie. Mr Downer explains that he did not denounce the decision not to authorise the searches as being a political favour to Mr Zuma, or as being unlawful. He did believe that Mr Ngcuka's refusal to authorise the prosecution team to search Mr Zuma's premises, was politically motivated and designed to protect Mr Zuma, but Mr

Ngcuka and Mr McCarthy justified their decision not to authorise the searches, as being necessary to avoid the harm that media exposure could cause to the integrity of the investigation, apart from the harm it could cause to the credibility of Mr Zuma, who was then the incumbent Deputy President of the Republic of South Africa. The investigation was at that stage still in a relatively early stage.

[162] The decision whether or not to proceed with a search of Mr Zuma's premises was a value judgement by Mr Downer's superiors, which even if it was perceived as favouring or protecting Mr Zuma, was justifiable for the reasons advanced by them, and hence not necessarily objectively unlawful. Any formal complaint concerning their refusal to authorize the search would have been stillborn, as Mr Ngcuka and Mr McCarthy had a reason for not having done so.

[163] Mr Downer's explanation of the facts has elicited no contradictory reply.

[164] The fact that Mr Downer had not reported their conduct does not deprive him of the title to prosecute, nor would it justify his removal as prosecutor. Mr Zuma has furthermore not demonstrated that he will suffer trial prejudice.

Mr Ngcuka's decision not to prosecute Mr Zuma, with Mr Shaik

[165] Mr Zuma alleges that his constitutional rights to a fair trial were violated by Mr Ngcuka not charging him together with Mr Shaik, and in announcing publicly, on 23 August 2003, that although there was prima facie evidence of wrongdoing, the case against him was unwinnable in court. Further Mr Zuma complains that Mr Downer's insistence that Mr Zuma faces prosecution now, is inconsistent with his advice to Mr Ngcuka in August 2003 that Mr Zuma should be prosecuted together with Mr Shaik, thus showing that Mr Downer is not independent and impartial.

[166] Mr Zuma's complaint that it was unfair to deprive him of the benefits of a joint prosecution with Mr Shaik and his companies, was however rejected by the full court in

the permanent stay application.[110] The full court referred to dicta by Harms DP in *NDPP v Zuma* where the SCA concluded that

'the term "prima facie evidence" has more than one connotation and may mean, as Mr Ngcuka conveyed, that there may be evidence of the commission of a crime which is nonetheless insufficient to satisfy the threshold of a reasonable prospect of success, especially if regard is had to the burden of proof in a criminal case.' (footnote omitted)

The full court also referred to the judgement of the Constitutional Court in *S v Shaik and others*[111] where a similar complaint was raised by Mr Shaik, which the Constitutional Court rejected, stating that the mere fact that there might often be cogent reasons for the holding of joint trials, does not mean that a specific trial would be unfair because other possible perpetrators are not charged together with an accused. The Constitutional Court rejected the proposition that the failure to charge another party, who may be suspected of being involved in the same offence in the same trial together with an accused, would amount to a breach of any established rule of criminal procedure.

[167] The decision not to prosecute Mr Zuma together with Mr Shaik, was the decision of Mr Ngcuka, Mr Downer's senior and the head of the NPA. It was not a decision of Mr Downer. If Mr Zuma felt aggrieved by the public statement released by Mr Ngcuka, then he had remedies against Mr Ngcuka.

[168] The full court concluded in this regard that:

'As we see it, even if a joint trial would have had some benefit for Mr Zuma of which he was deprived of as a result of his prosecution being separated from Mr Shaik and the Nkobi group, it does not constitute prejudice of any kind, which would impact on the fairness of his trial.'

[169] Mr Downer is completely removed from the decision of Mr Ngcuka. There is no decision of Mr Downer that violated Mr Zuma's rights. In fact, the uncontroverted view of Mr Downer and the prosecution team has always been that Mr Zuma should have been

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[110] *S v Zuma and another, Thales South Africa (Pty) Limited v KwaZulu-Natal Director of Public Prosecutions and others* [2019] ZAKZDHC 19, 2020 (2) BCLR 153 (KZD) para 131.

[111] *S v Shaik* [2007] ZACC 19, 2008 (2) SA 208 (CC) para 47. See *S v Zuma and another, Thales South Africa (Pty) Limited v KwaZulu-Natal Director of Public Prosecutions and others* [2019] ZAKZDHC 19, 2020 (2) BCLR 153 (KZD) para 133.

charged together with Mr Shaik. This had been stated in the memorandum to the NDPP dated 21 August 2003. Mr Downer was not insensitive to Mr Zuma's rights to a fair trial. He wanted him and Mr Shaik to be prosecuted together. There is no basis to infer that any conduct on the part of Mr Downer reveals that he was not independent and impartial. He even criticised the decision not to charge Mr Zuma with Mr Shaik, the very fact Mr Zuma contends for.

[170] Obviously, as it turned out, facts emerged from the trial of Mr Shaik, which reinforced the contention, which Mr Downer had held all along, that Mr Zuma should be charged.

[171] There is nothing in the affidavits to gain say the version of Mr Downer set out above. There is no dispute of fact. Mr Downer's title to prosecute has been left untainted by the fact that Mr Zuma was not charged together with Mr Shaik.

Mr Downer's dismissal of the public protector's report

[172] Mr Zuma complains that Mr Downer has had a 'dismissive attitude' towards the findings by the public protector who had found that Mr Ngcuka had violated his (Mr Zuma's) rights in making the media statement on 23 August 2003, because Mr Downer knows that the remedial action recommended by the public protector, was never implemented.

[173] The public protector also said, as appears from the answering affidavit of Mr Downer in the permanent stay application, that although Mr Ngcuka had infringed Mr Zuma's rights to dignity and acted unfairly and improperly in making the media statement on 23 August 2003, 'no indication could be found that the statement was made in bad faith or with the intent to prejudice the Deputy President.'

[174] Shortly after the public protector delivered his report, the NPA and the then Minister of Justice, Dr Penuell Maduna, prepared a response rejecting the criticism of its handling of the investigation and explaining why the statement was made. The remedial action

recommended by the public protector was directed to Parliament. Shortly after the public protector delivered his report, both Dr Maduna, and Mr Ngcuka tried to submit their responses to Parliament, as required, but Parliament would not accept the response.

[175] Mr Downer was not the NDPP. Mr Ngcuka was. It was furthermore Mr Ngcuka's statement which the public protector had found to be offensive. Mr Downer did not share the view expressed by Mr Ngcuka in respect of the prosecution of Mr Zuma that the case was unwinnable. Mr Ngcuka, being Mr Downer's senior, was dealing with the public protector's report and any implications arising therefrom. There was nothing further that Mr Downer could have done.

[176] Accordingly, this ground is without any substance. It does not point to any trial related prejudice. Nor does it show that Mr Downer was not independent and objective. The public protector's report did not involve him, or implicate him, at all. If anyone was dismissive of the public protector's report, then it was possibly Mr Ngcuka, although he too had apparently taken appropriate action on the law as it then stood.[112] There is no evidence that Mr Downer was dismissive of the report.

Mr Downer's conduct in the Shaik trial

[177] Mr Zuma alleges that Mr Downer violated his right to equality and equal protection of the law and his fair trial rights by presenting evidence in the *Shaik* trial, which resulted in adverse findings by the presiding judge, Squires J, against him. Further, that Mr Downer strategy was to prosecute Mr Shaik alone as a trial run to bolster his chances of successfully prosecuting Mr Zuma.

[178] Count one in the *Shaik* trial alleged that Mr Shaik and his Nkobi companies had made regular corrupt payments to Mr Zuma during the period from 1995 to 2002 when

[112] The Constitutional Court in *Economic Freedom Fighters v Speaker of the National Assembly and others; Democratic Alliance v Speaker of the National Assembly and others* [2016] ZACC 11, 2016 (3) SA 580 (CC), 2016 (5) BCLR 618 (CC) authoritatively established that the findings and remedial orders of the public protector are binding unless and until set aside by a court of law.

Mr Zuma was variously a member of the provincial cabinet in KwaZulu-Natal, a member of Parliament, the deputy president of the ruling African National Congress (ANC), and the Deputy President of the Republic of South Africa. Count three alleged that Mr Shaik had been party to a request that Thales should pay an annual R500,000 bribe to Mr Zuma to secure protection from Mr Zuma against the official investigations then current concerning the arms deal, and to secure the support of Mr Zuma for future projects of Thales in South Africa.

[179] The uncontroverted evidence of Mr Downer is that the prosecution team presented evidence in the *Shaik* trial, which it considered necessary and appropriate to secure a conviction of Mr Shaik and his Nkobi companies. The trial court accepted the bulk of the State's evidence, which Mr Downer adduced, and convicted Mr Shaik and his Nkobi companies as charged.[113] It was inevitable that the State's evidence would implicate Mr Zuma, as an unavoidable consequence, if the trial court accepted the evidence against Mr Shaik. As was pointed out by the SCA in *NDPP v Zuma:*[114]

'Although corruption involves two persons, the fact that the one may be guilty does not mean that the other is also guilty because the intention of each party must be decided separately, and evidence that may be admissible against the one may not be admissible against the other. In other words, the fact that Mr Shaik was found guilty does not mean that Mr Zuma is guilty.' (footnote omitted)

[180] That the trial court in the *Shaik* prosecution made findings, which implicated Mr Zuma was inevitable but does not elevate the leading of evidence to secure the conviction of Mr Shaik and his companies to a deliberate strategy to treat Mr Zuma unfairly. It was what was required of the prosecutor. Mr Downer stated that it was always the prosecution team's view that Mr Zuma should have been charged together with Mr Shaik, a fact also recorded in the memorandum by the prosecution team to the NDPP on 21 August 2003, a fact which Mr Zuma himself acknowledged in his plea explanation. This was also

[113] *S v Shaik and others* 2007 (1) SACR 142 (D).
[114] *National Director of Public Prosecutions v Zuma (Mbeki and another intervening)* [2009] ZASCA 1, 2009 (2) SA 277 (SCA), [2009] 2 All SA 243 (SCA) para 43.

acknowledged by Mr Ngcuka when, in announcing his decision on 23 August 2003, he stated that:

'The investigating team recommended that we institute a prosecution against Deputy President Zuma.'

[181] The recommendation of MR Downer and the prosecuting team was however overruled by Mr Ngcuka. But Mr Downer had not acted improperly in any way in the *Shaik* trial. This ground of complaint is without merit.

Mr Justice Nicholson's findings of political interference

[182] Just as in his heads of argument in the application for a permanent stay of prosecution, Mr Zuma relies extensively on findings of political interference, which had been made by Nicholson J in *Zuma v National Director of Public Prosecutions.*[115]

[183] The judgment of Nicholson J must be seen in its correct context. Nicholson J had found that the crux of the dispute before him was whether Mr Zuma was entitled to make representations to the prosecuting authorities before the decision was taken to prosecute him. It was common cause that he had not been afforded that opportunity. Treating the application as in the nature of a civil review, and concluding that the opportunity to make representations formed part of the *audi alteram partem* (hear the other side) principle, Nicholson J granted an order that the decision of Mr Mpshe to prosecute Mr Zuma was accordingly invalid. It was in the context of that judgment that he went on to express the opinion, obiter, that the executive might have interfered in the decision to prosecute.

[184] The decision of Nicholson J was set aside on appeal. The SCA held that findings of political interference are irrelevant to the decision to prosecute, stating that a prosecution is not wrongful merely because it is brought for an improper purpose, but that it will only be wrongful if, in addition, reasonable and probable grounds for prosecution are absent, the motive behind the prosecution being irrelevant.[116] In addition, not only

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[115] *Zuma v National Director of Public Prosecutions* [2008] ZAKZHC 71, [2009] 1 All SA 54 (N).

[116] *National Director of Public Prosecutions v Zuma (Mbeki and another intervening)* [2009] ZASCA 1, 2009 (2) SA 277 (SCA), [2009] 2 All SA 243 (SCA) para 81 read with para 37.

were Nicholson J's findings found to be irrelevant, but it was also held that they were gratuitous, based on suspicion and not on fact, and fell to be struck out.[117] It was even said that there may be reason to hold that many of the allegations made were vexatious and scandalous, but that it was not necessary to decide that for the purposes of that judgment. The above statements were referred to with general approval in the full court judgment.

[185] Those findings of irrelevance apart, Nicholson J's comments regarding political interference in any event did not implicate Mr Downer. In fact, the only reference in the judgement to Mr Downer was that he was part of the team of counsel representing the NDPP at the hearing.

[186] There is no substance to this ground of complaint. The issues have been decided in the earlier judgments.

Mr Mpshe's April 2009 decision to discontinue Mr Zuma's prosecution, and Mr Hofmeyr's affidavit.

[187] Mr Zuma, Thales and Thint were again charged by Mr Mpshe on 28 December 2007.

[188] Mr Zuma's legal team made representations to the senior leadership of the NPA in February 2009 to withdraw the charges against him, based on allegations of political meddling in the timing of the service of the indictment on him in December 2007. The allegations arose from secretly recorded telephone conversations or messages, which became known as the spy tapes, between Mr McCarthy and various others, including Mr Ngcuka, Mr Mzi Khumalo, apparently a close friend of Mr Ngcuka, and Mr Ronnie Kasrils, the Minister of Intelligence at that time. It was alleged that these recordings showed that Mr McCathry manipulated the timing of the decision to charge Mr Zuma until after the Polokwane conference with the purpose of undermining Mr Zuma's chances of being

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[117] *National Director of Public Prosecutions v Zuma (Mbeki and another intervening)* [2009] ZASCA 1, 2009 (2) SA 277 (SCA), [2009] 2 All SA 243 (SCA) paras 81 to 82.

elected as the ANC president at that conference. It was at the mid-December 2007 elective conference in Polokwane that Mr Zuma would challenge Mr Mbeki for the leadership of the ANC.

[189] The spy tapes were produced by Mr Zuma's legal team when it made representations to the NDPP. The origins of these tape recordings have never been fully disclosed, possibly, as the recordings might not have been authorised by a valid court order. If that is so, then the recordings would have been obtained illegally, and probably would be inadmissible in evidence. No explanation has been advanced in the present proceedings to satisfy me of the admissibility of these recordings in evidence. That said, the doubt attached to the admissibility of the recordings has however not prevented them receiving much judicial attention in the past. In what follows, I shall for the purposes of this judgment proceed in a similar manner, as in the SCA spy tapes judgment, although the admissibility of the contents of the recordings has not been established and will have to be established in the future, if relied upon.

[190] When the spy tapes were produced Mr Mpshe instructed senior officials in the NPA, including Mr Hofmeyr to listen to the tapes and to advise him. Mr Downer was not involved in this process. Mr Downer only became aware of the tapes after Mr Zuma's legal representatives had introduced them as part of the representations that were made and when they were disclosed to him. On 6 April 2009 Mr Mpshe accepted Mr Zuma's representations and made public disclosure of the taped conversations when announcing his decision to discontinue Mr Zuma's prosecution. The charges were formally withdrawn on 7 April 2009.

[191] The Democratic Alliance (DA) instituted proceedings to review this decision of Mr Mpshe. Mr Hofmeyr deposed to the main answering affidavit for the NPA. He placed considerable reliance on allegations of political inference as a fact, to defend and justify Mr Mpshe's decision to discontinue the prosecution.

[192] Mr Zuma now alleges that Mr Downer knew about the conversations between Mr McCarthy and Mr Ngcuka in the run-up to the ANC's December 2007 elective conference and that Mr Downer was and is indifferent to them. There is no factual basis alleged for that statement. It is entirely speculative, or at best based on inadmissible hearsay. The only direct evidence on this aspect is that of Mr Downer. He is unequivocal that he did not know of these conversations between Mr McCarthy and Mr Ngcuka and states that he only learned of them after they were raised by Mr Zuma's legal representatives during the oral representations in February 2009. He candidly states that it was wrongful of Mr McCarthy to have discussed these matters, even if the discussions did not amount to political meddling, with Mr Ngcuka, particularly as Mr Ngcuka was at the time no longer with the NPA and was a supporter of Mr Mbeki.

[193] The conversations forming the subject of the spy tapes, if correctly recorded and authentic, may cast doubt on Mr McCarthy's integrity, but in no way reflect adversely on Mr Downer. Indeed, Mr Downer states that he was so shocked by these revelations that he was reduced to tears. Mr Downer all along believed and confirms that Mr Mpshe's decision in late 2007 to reinstitute the prosecution was untainted by the allegations of political conspiracy. The investigation and prosecuting team did not know about these conversations at that time, and presumably neither did Mr Mpshe until the spy tapes were produced to him.

[194] The forum for evaluating these allegations and their relevance to the fairness of the trial, was the court that heard the permanent stay application. The issue was raised, but the full court refused a permanent stay of the prosecution. It pointed out that the SCA had concluded that

'[t]he reasons for discontinuing the prosecution provided by Mr Mpshe do not bear scrutiny, for the recordings themselves on which Mr Mpshe relied, even if taken at face value, do not impinge on the propriety of the investigation of the case against Mr Zuma or the merits of the prosecution itself.'[118]

[118] *S v Zuma and another, Thales South Africa (Pty) Limited v KwaZulu-Natal Director of Public Prosecutions and others* [2019] ZAKZDHC 19, 2020 (2) BCLR 153 (KZD) para 143

The full court further held:[119]

'We considered that Mr Zuma was also a party to the DA review application and the findings of the SCA on this issue are binding upon him. Assuming that Mr Zuma's accusation was true, that his prosecution is politically motivated, his contention will still be unsustainable because the SCA reiterated in *National Director of Public Prosecutions v Zuma* that a prosecution brought for an improper purpose is only "wrongful if, in addition, reasonable and probable grounds for prosecuting are absent'. It has not been shown before us that there are no reasonable and probable grounds for prosecuting Mr Zuma. Importantly, the challenges by Mr Zuma are not aimed at the merits of the case against him."' (footnote omitted)

[195] The issue has accordingly been decided, alternatively, the reasoning above is binding on me. If the recorded conversations did not affect the validity of the prosecution, then it is difficult to see how knowledge thereof on the part of Mr Downer, even if that was established, could affect the title of Mr Downer, or be a ground to remove him as prosecutor.

[196] Mr Mpshe had only informed the prosecution team about the recordings sometime after the representations had been made. Even then, there was no need for Mr Downer to report the existence of these recordings to anyone in authority. The existence of these tapes had been disclosed to Mr Mpshe. Mr Mpshe, as the most senior official in the NPA and as acting National Director of Public Prosecutions, was dealing with the issue and, it would be fair to assume, would deal with any alleged impropriety arising there from. It was not for Mr Downer to take action separate from that which his administrative head may decide on. To suggest that his failure to have done so somehow disqualifies him, has no merit.

[197] The Pretoria High Court reviewed Mr Mpshe's decision to withdraw the charges in the DA's application, and set it aside as unlawful.[120] The Supreme Court of Appeal upheld

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[119] *S v Zuma and another, Thales South Africa (Pty) Limited v KwaZulu-Natal Director of Public Prosecutions and others* [2019] ZAKZDHC 19, 2020 (2) BCLR 153 (KZD) para 144.
[120] *Democratic Alliance v Acting National Director of Public Prosecutions and others* [2016] ZAGPPHC 255, 2016 (2) SACR 1 (GP), 2016 (8) BCLR 1077 (GP).

that decision on appeal[121] in 'the spy tapes judgment'. At the hearing of the appeal before the Supreme Court of Appeal on 14 September 2017, and unfortunately only then, Mr Zuma's counsel and counsel for the NPA conceded,[122] that Mr Mpshe's decision to discontinue the prosecution was unlawful and irrational, and accordingly, that the decision accordingly fell to be set aside. The SCA, in a considered judgment, concluded that the concessions were correctly made and that Mr Mpshe's decision to discontinue the prosecution was indeed irrational, holding inter alia that:[123]

'. . . other than the hearsay evidence of the communications between the members of the NIA and the NPA, we have no admissible substantiation concerning the authenticity or accuracy of the recordings. . . There is no indication of how the recordings came to be in the possession of Mr Zuma's legal team . . . It ought to have been an issue to which the NPA paid greater and focused attention. Instead, the NPA allowed itself to be cowed into submission by the threat of the use of the recordings, the legality of the possession of which is doubtful.'

That is also still the position at present.

[198] And further, the Supreme Court of Appeal stated: [124]

'Questions of admissibility aside, the conversations themselves do not impinge on the integrity of the charges against Mr Zuma nor do they intrude upon the merits of the case. It is true that in the recorded conversations there are exchanges between Mr McCarthy and Mr Ngcuka about when Mr Zuma is to be charged. Collectively, the conversations do not show a grand political design nor is there any indication of clarity of thought on the part of Mr Ngcuka or Mr McCarthy about how either former President Mbeki or Mr Zuma would be decisively advantaged or disadvantaged by the service of the indictment on either side of the Polokwane conference timeline.'

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[121] *Zuma v Democratic Alliance and others; Acting National Director of Public Prosecutions and another v Democratic Alliance and another* [2017] ZASCA 146, 2018 (1) SA 200 (SCA), [2017] 4 All SA 726 (SCA).
[122] *Zuma v Democratic Alliance and others; Acting National Director of Public Prosecutions and another v Democratic Alliance and another* [2017] ZASCA 146, 2018 (1) SA 200 (SCA), [2017] 4 All SA 726 (SCA), paras 59 and 60.
[123] *Zuma v Democratic Alliance and others; Acting National Director of Public Prosecutions and another v Democratic Alliance and another* [2017] ZASCA 146, 2018 (1) SA 200 (SCA), [2017] 4 All SA 726 (SCA), para 63.
[124] *Zuma v Democratic Alliance and others; Acting National Director of Public Prosecutions and another v Democratic Alliance and another* [2017] ZASCA 146, 2018 (1) SA 200 (SCA), [2017] 4 All SA 726 (SCA), para 79.

[199] The Supreme Court of Appeal continued:[125]

'Moreover, even if one accepts that Mr McCarthy had an ulterior purpose in seeking to have the indictment served after the conference, his conduct had no bearing on the integrity of the investigation of the case against Mr Zuma and did not impact on the prosecution itself. It also has to be borne in mind that Mr Mpshe himself and the Minister thought it wise for the sake of the stability of the country, to have the indictment served after the Polokwane conference . . . It appears to me to be inimical to the preservation of the integrity of the NPA that a prosecution is discontinued because of a non-discernible negative effect of the timing of the service of an indictment on the integrity of the investigation of the case and on the prosecution itself. There is thus no rational connection between Mr Mpshe's decision to discontinue the prosecution on that basis and the preservation of the integrity of the NPA. If anything, the opposite is true. In these circumstances discontinuing a prosecution in respect of which the merits are good and in respect of which there is heightened public interest because of the breadth and nature of the charges and the person at the centre of it, holding the highest public office, can hardly redound to the NPA's credit or advance the course of justice or promote the integrity of the NPA.'

[200] The judgment reaffirmed the principle stated earlier above that the motive for the prosecution was irrelevant. It held:[126]

'Moreover, Mr Mpshe ignored the dictum in the Zuma judgment by Harms DP that a bad motive does not destroy a good case. A prosecution brought for an improper purpose, so said this Court in that case, is only wrongful if, in addition, reasonable and probable grounds for prosecuting are absent. In the present case, on the NPA's own version, the case against Mr Zuma is a strong one. Once it is accepted that the motive for a prosecution is irrelevant where the merits of the case against an accused are good, the motive for the timing of an indictment to begin the prosecution must equally be so.'

[201] The full court also observed that even if Mr Zuma's prosecution was politically motivated, it will not assist him for a permanent stay because a prosecution brought for

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[125] *Zuma v Democratic Alliance and others; Acting National Director of Public Prosecutions and another v Democratic Alliance and another* [2017] ZASCA 146, 2018 (1) SA 200 (SCA), [2017] 4 All SA 726 (SCA), paras 80 and 84.

[126] *Zuma v Democratic Alliance and others; Acting National Director of Public Prosecutions and another v Democratic Alliance and another* [2017] ZASCA 146, 2018 (1) SA 200 (SCA), [2017] 4 All SA 726 (SCA), para 88. See also Harms DP in *National Director of Public Prosecutions v Zuma (Mbeki and another intervening)* [2009] ZASCA 1, 2009 (2) SA 277 (SCA), [2009] 2 All SA 243 (SCA) para 37.

an improper purpose is only 'wrongful if, in addition, reasonable and probable grounds for prosecuting are absent.'[127] The full court held that it had not been shown that there were no reasonable and probable grounds for prosecuting Mr Zuma, and that the challenges by Mr Zuma were not aimed at the merits of the case against him. Mr Downer's attitude has simply always been, and still is, that there is a reasonable prospect of a successful prosecution. Whether his assessment is correct is what this trial will determine. But in the interim Mr Downer's title to prosecute is not impugned.

[202] The SCA had furthermore stated,[128]

'[e]ven if one were to accept that Mr McCarthy had his own ulterior purpose for having the indictment served after the Polokwane conference rather than before it, what is indisputable is that it was in any event not practically possible to have the indictment served before the conference. There were nonetheless sound, other reasons, such as the stability of the country, accepted as such by both Mr Mpshe and the Minister of Justice and Constitutional Development, that dictated service of the indictment after the Polokwane conference. In the circumstances Mr McCarthy's alleged motive in relation to the timing of the service of the indictment was ultimately irrelevant.'

Practically the timing had no effect, and, on the facts alleged, have not infringed Mr Zuma's right to a fair trial.

[203] The essence of Mr Zuma's complaint in this regard, as I understand it, is that Mr Downer should have done something about this political interference, and that such failure now disqualifies him from prosecuting in the case. But the rhetorical question that must immediately be posed, is what should Mr Downer have done, and when? That was not addressed in the founding affidavits at all. On the factual matrix before me there is no criticism that can be raised against Mr Downer.

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[127] *S v Zuma and another, Thales South Africa (Pty) Limited v KwaZulu-Natal Director of Public Prosecutions and others* [2019] ZAKZDHC 19, 2020 (2) BCLR 153 (KZD) para 148, quoting from *National Director of Public Prosecutions v Zuma (Mbeki and another intervening)* [2009] ZASCA 1, 2009 (2) SA 277 (SCA), [2009] 2 All SA 243 (SCA) para 37.

[128] *Zuma v Democratic Alliance and others; Acting National Director of Public Prosecutions and another v Democratic Alliance and another* [2017] ZASCA 146, 2018 (1) SA 200 (SCA), [2017] 4 All SA 726 (SCA), para 94(v).

[204] Further, in the permanent stay application Mr Downer who deposed to the answering affidavit of the State, duly authorised thereto, recorded that the State was not relying on the evidence and allegations of political interference in Mr Hofmeyr's affidavit, and which Mr Zuma sought to rely on in those proceedings and still relies in these proceedings. The Supreme Court of Appeal in the spy tapes judgement had rejected Mr Hofmeyr's evidence and allegations, including that the tapes indicated political interference, which would result in Mr Zuma not receiving a fair trial.

[205] Finally, it is not without significance that despite receiving further representations from Mr Zuma after the spy tapes judgment, the subsequent NDPP, Mr Abrahams took the decision that the prosecution against Mr Zuma and Thales should continue.[129]

Mr Downer's public reaction to Mr Mpshe's decision

[206] The allegations in this regard are: that Mr Downer in his affidavit of 2 June 2015 in the spy tapes matter said he cried when Mr Mpshe had announced the decision to terminate Mr Zuma's prosecution and threatened to resign in protest against that decision; and that in 'public engagements' specifically public lectures, Mr Downer had 'freely given strong views' and denounced decisions taken regarding the prosecution, which have 'galvanised political campaigns' for Mr Zuma's prosecution.

[207] Mr Zuma does not state that he was present on the occasion when Mr Mpshe announced his decision, or when Mr Downer allegedly threatened to resign, or that he was present during the lectures. Nor is there any confirmatory affidavit. The allegations therefore are hearsay at best. Mr Downer has however dealt with these events and his account is the only direct version of what transpired.

[208] As regards him having cried, Mr Downer states that the allegation is incorrect. The occasion when he was reduced to tears was at a meeting on 18 March 2009 attended by Mr Mpshe, Deputy National Directors of Public Prosecution, and the investigating director

[129] Thint had been deregistered in the interim. Accordingly, the prosecution against it fell away.

of the DSO, Mr Mngwengwe, when Mr Hofmeyr and the then acting head of the DSO, Mr Mzinyathi made a presentation on the contents of the spy tapes.

[209] Further, as regards his threat to resign, what Mr Downer said in his affidavit of 2 June 2015, dealt with the memorandum from the prosecution team to Mr Mpshe, dated 6 December 2007. The memorandum followed Mr Mpshe having told Mr Downer that he had decided to delay announcing the decision to charge Mr Zuma until the following year because he did not wish the NPA to be seen to be responsible for Mr Zuma failing to be elected as ANC president at Polokwane. In his affidavit Mr Downer said that the prosecution team's view was that any decision to delay the prosecution for reasons unconnected to the prosecution was improper and that the team felt so strongly about this that they initially decided to resign from the prosecution in protest, but reconsidered doing so in the interest of the NPA.

[210] I do not see anything untoward in those reactions and responses that would disqualify Mr Downer from prosecuting or result in him having 'no title to prosecute'.

[211] As regards the second allegation above, Mr Downer has only spoken publicly on one occasion, outside of proceedings in court, when he delivered a lecture at the Middle Temple South African Conference on 24 September 2010, at the invitation of the Middle Temple, for which the then NDPP, Mr Menzi Simelane, had agreed to release him. None of the cases on which he commented, particularly the present criminal prosecution, was 'live' at the time of his lecture. Criticisms which he expressed in that lecture of Mr Mpshe's decision, have in any event been superseded by the findings of the Supreme Court of Appeal in the spy tapes matter. Mr Downer's stance has been vindicated by those findings, whilst those of his superiors, who he contradicted, were rejected and set aside as irrational.[130]

[130] See generally: *National Director of Public Prosecutions v Zuma (Mbeki and another intervening)* [2009] ZASCA 1, 2009 (2) SA 277 (SCA), [2009] 2 All SA 243 (SCA) and *Zuma v Democratic Alliance and others; Acting National Director of Public Prosecutions and another v Democratic Alliance and another* [2017] ZASCA 146, 2018 (1) SA 200 (SCA), [2017] 4 All SA 726 (SCA).

[212] The allegations of alleged misconduct by Mr Downer by giving the public lecture also arose in the permanent stay application. The full court did not deal with those allegations in its judgment, because at the hearing Mr Zuma's counsel expressly abandoned this attack. It was submitted on behalf of Mr Downer that by doing so Mr Zuma, through his counsel, waived his right to rely on this alleged misconduct as a basis for claiming that he will not have a fair trial guaranteed by s 35(3) of the Constitution.[131] I agree with that submission. But regardless of any such waiver, the complaints are in any event, without merit.

Mr Downer's affidavit in the Spy Tapes matter

[213] Mr Zuma complains that Mr Downer filed his affidavit as an essential witness in support of the DA's application in the spy tapes matter, which challenged Mr Mpshe's decision to discontinue the prosecution against him. Mr Zuma views this as Mr Downer siding with his political opponents, the official opposition in the South African legislature. In his founding affidavit, Mr Zuma argued that Mr Downer was 'acutely aware' at the time of the DA's application that the official opposition was 'hostile' towards him and wanted his prosecution 'at all costs', and that Mr Downer had submitted his affidavit to support and side with them. He further alleges that the filing of this affidavit and Mr Downer's opposition to the NPA's basis for defending the discontinuation of his prosecution, placed Mr Downer in the position of a prosecutor who is neither independent nor impartial in relation to his rights to a fair trial.

[214] The decision to discontinue the prosecution against Mr Zuma was taken by the then acting NDPP Mr Mpshe on the advice of Mr Hofmeyr, a senior prosecutor in the NPA. The series of intercepted discussions on the 'spy tapes', were considered by Mr Mpshe to have pointed to a political conspiracy against Mr Zuma which required the discontinuance of his prosecution. Mr Downer was not responsible for that decision.

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[131] See *S v Zuma and another, Thales South Africa (Pty) Limited v KwaZulu-Natal Director of Public Prosecutions and others* [2019] ZAKZDHC 19, 2020 (2) BCLR 153 (KZD).

[215] Mr Downer was not 'an essential witness' in the Spy Tapes case. He did not submit his affidavit in support of the DA. His affidavit was provided at the request of Mr Hofmeyr after he, Mr Downer, had refused to make an affidavit simply confirming the contents of Mr Hofmeyr's affidavit. The initial draft of Mr Downer's affidavit was, in fact, revised by counsel for the NPA, advocate Millard. Mr Downer's affidavit disagreed with the decision of Messrs Mpshe, Hofmeyr and the senior leadership of the NPA, who had sought to defend Mr Mpshe's decision to discontinue the prosecution. Mr Downer's finalised affidavit was filed by the State Attorney, which was representing the NPA, on 11 June 2015. These are matters of public record about which there is no dispute. Mr Downer's independence of mind speaks for itself. And his stance was ultimately vindicated by the judgment in the Spy Tapes matter by the SCA, after both Mr Zuma's counsel and counsel of the NPA conceded that Mr Mpshe's decision, which they initially sought to defend, was 'irrational' and unlawful.

[216] Whatever reputational harm Mr Zuma might have suffered as a result of any purported political manipulation of the timing of the prosecution process, alluded to in the spy tapes, did not prevent him from being elected President in 2009, and to continue in that position for just under nine years. What has not been shown, more importantly for the purposes of this judgment, is that his fair trial rights have been impeded in any way by any conduct of Mr Downer, or that Mr Downer has lost the title to prosecute, or should be removed as prosecutor.

'Browse Mole', Mr McCarthy and foreign intelligence services (CIA)

[217] Mr Zuma states that he has

'now been advised of very damaging information relating to how McCarthy, (Mr Downer's) immediate head, was in regular contact with intelligence operatives of foreign governments in which he freely discussed my prosecution with them'.

This statement refers to Mr McCarthy allegedly having been an intelligence operative handled by a Central Intelligence Agency (CIA) agent, Mr Andre Pienaar, code named Lucianno. The two sources of information relied upon for these allegations are the 'Browse Mole' report and the spy tapes.

[218] Apart from these statements being inadmissible hearsay, they do not implicate Mr Downer. Mr Zuma attempts to deal with that by contending: that Mr Downer 'would have known the role of McCarthy to whom he reported'; that Mr Downer 'was aware that there was regular contact between foreign intelligence agencies and Mr McCarthy, the person to whom he reported'; that Mr Downer 'is acutely aware of Mr McCarthy's intelligence connections'; that Mr Downer knew that Mr McCarthy had received gifts from Mr Pienaar and had discussed the prosecution of Mr Zuma with Mr Pienaar; and that Mr Downer deliberately omitted to report Mr McCarthy's conduct to the relevant authorities. Mr Zuma also says that he fears Mr Downer covered up Mr McCarthy's conduct.

[219] These statements all amount to speculative conclusions without any factual basis being alleged in support thereof. There is no admissible evidence to support even an inference of knowledge on the part of Mr Downer of any involvement Mr McCarthy might have had with foreign intelligence agencies. Being speculative, the allegations and do not call for an answer.

[220] Nevertheless, Mr Downer has responded. He confirms under oath that he has no knowledge whether Mr McCarthy was in contact with intelligence operatives of foreign governments, or not, let alone whether Mr McCarthy discussed Mr Zuma's prosecution with them. Mr Downer denies being involved in the Browse Mole investigation or report. He was unaware of its existence until it was publicised after being leaked. He does not know a Mr Pienaar and has no knowledge of any alleged conversation between this Mr Pienaar and Mr McCarthy. Mr Downer is clear that he did not then have, and does not now have, any management responsibilities within the NPA at head office level. He denies that he was aware of any intelligence connections Mr McCarthy allegedly had, or any gifts Mr McCarthy allegedly received. Mr McCarthy had resigned from the NPA in June 2008 and by the time Mr Zuma's legal representatives disclosed the spy tapes to the NPA in February 2009, Mr McCarthy had emigrated and was working for the World Bank in Washington. Mr Downer only became aware of the conduct of Mr McCarthy after Mr McCarthy had emigrated to work in Washington. It is therefore difficult to understand

how Mr McCarthy's conduct, even assuming the allegations against him to be factually correct, could have any adverse bearing on Mr Downer's suitability as prosecutor in this matter.

[221] Furthermore, Mr Downer confirms that none of the evidence gathered by the investigation and prosecution team - all of which had been discovered to Mr Zuma's legal representatives - derives from the Browse Mole investigation and report. The contents of the Browse More report had nothing to do with and played no part in the investigation and prosecution of Mr Zuma. He denies that 'foreign intelligence' was involved in Mr Zuma's prosecution.

[222] The mere fact that Mr Downer reported to Mr McCarthy as the head of the DSO, the investigation and prosecution being a DSO project, does not mean that Mr Downer knew about Mr McCarthy's involvement in the matter.

[223] Mr Downer's aforesaid denials all stand uncontradicted in reply.

[224] The full court in the permanent stay application observed that the full court in the Spy tapes application had found, as confirmed by the SCA, that references by Mr Hofmeyr to Mr McCarthy's conduct in relation to the Browse Mole report, were 'diversionary and irrelevant as they were unconnected to the prosecution or the service of the indictment.' The full court in the stay application considered and rejected Mr Zuma's allegations concerning the Browse Mole investigation and report.[132] I have no reason to disagree with the view that they were irrelevant and unconnected to the prosecution, and am bound by that decision. This complaint is accordingly likewise without merit.

Mr Downer's failure to report political interference

[132] *S v Zuma and another, Thales South Africa (Pty) Limited v KwaZulu-Natal Director of Public Prosecutions and others* [2019] ZAKZDHC 19, 2020 (2) BCLR 153 (KZD) para 148; see *Democratic Alliance v Acting National Director of Public Prosecutions and others* [2016] ZAGPPHC 255, 2016 (2) SACR 1 (GP), 2016 (8) BCLR 1077 (GP) and *Zuma v Democratic Alliance and others; Acting National Director of Public Prosecutions and another v Democratic Alliance and another* [2017] ZASCA 146, 2018 (1) SA 200 (SCA), [2017] 4 All SA 726 (SCA).

[225] Mr Zuma alleges that Mr Downer 'is and always has been aware' of unlawful political interference in decisions concerning his prosecution, but failed to report them, in breach of the provisions of s 32(1)(b) of the NPA Act.

[226] Section 32(1) of the NPA Act provides:

'(1) *(a)* A member of the *prosecuting authority* shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.

(b) Subject to the Constitution and this Act, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.' (emphasis in original)

[227] Accusing Mr Downer of a failure to report political interference presupposes that Mr Downer knew of the political interference at the time, and that he was required to report it if it was not receiving the attention of his superiors. No factual basis is laid from which knowledge of the alleged political interference on his part can be inferred. It is mere speculation.

[228] The only events which may amount to political interference in decisions regarding Mr Zuma's prosecution, relate to the discussions between Mr McCarthy and Mr Ngcuka, which formed the subject matter of the spy tapes. This has already been dealt with fully earlier in this judgment, and will not be repeated. Mr Downer was not aware of these discussions when they occurred. They were only reported in February 2009 by Mr Zuma's legal representatives to the senior leadership of the NPA. The prosecution team was only advised thereof subsequently. On 6 April 2009 Mr Mpshe made them public when announcing his decision to discontinue Mr Zuma's prosecution. Mr Mpshe, the most senior official in the NPA, and another senior official, Mr Hofmeyr, were dealing with the issue. There is nothing further Mr Downer could or should have done. When Mr Mpshe and Mr Hofmeyr concluded irrationally that the contents of the tapes were grounds to discontinue the prosecution, Mr Downer spoke up, to the extent of filing an affidavit in the

spy tapes matter, filed by the State Attorney representing the NPA, disagreeing with the stance taken by his superiors.

[229] There is no evidence that Mr Downer was in possession of any evidence, to justify laying any charges against his superiors. He says that much in the answering affidavit, and any suggestion to the contrary is based on mere suspicion or speculation. There is also no evidence that he occupied an administrative position where that would have been required of him. During argument, Mr Masuku submitted that Mr Downer should have used 'the internal process' to object to the conduct of his superiors. But that allegation was never made in the affidavits, and it is not known what this internal process would have entailed, or whether it was even available to Mr Downer. Consequently, it was not dealt with in answer, and cannot be relied on.

[230] On the evidence before me Mr Downer played no role in, and had no knowledge of, the alleged political interference. He can accordingly not be an 'essential witness' in the allegations of political interference, and is not on that basis excluded from prosecuting in this trial.

Mr Downer's alleged leaks to the media.

[231] Mr Zuma complains that information regarding his prosecution was leaked by the NPA to the media, specifically, that Mr Downer disclosed information to a journalist, Mr Sam Sole of the *Mail & Guardian*.

[232] Mr Downer does not dispute that there have been leaks from within the NPA, but denies that he was involved in such leaks and denies that these were part of a concerted NPA strategy employed in the prosecution of Mr Zuma. Instead, he said, while Mr Zuma was Deputy President, the NPA went to 'extraordinary measures' to keep the fact of his prosecution confidential.

[233] Insofar as Mr Zuma seeks to impute the leaking of confidential information about the investigation and prosecution to Mr Sole, to Mr Downer specifically, the allegations

are based on speculation, unsupported by admissible evidence from Mr Zuma. The facts are confined to what Mr Downer has admitted.

[234] These allegations of leaks to the media are also not new. They were referred to in the permanent stay application and accordingly became an issue in that application. Mr Downer denies that they were of a pervasive nature and that any members of the prosecution team were responsible for those leaks. At the hearing of the stay application Mr Zuma through his counsel, expressly disavowed, and accordingly waived, reliance on the leaks. That this was so, has not been disputed in reply. Mr Masuku, who co-signed the special plea in this matter, is one of the senior counsel who represented Mr Zuma in the stay of prosecution application. The alleged media leaks to Mr Sole are accordingly, at that level, no longer an issue on which reliance can again be placed.

[235] However, insofar as reliance on the leaks might be found not to have been waived as a ground of complaint in the context of this trial, Mr Downer admits to having had certain discussions with Mr Sam Sole of the *Mail & Guardian*, but denies that these were related to the investigation and prosecution of Mr Zuma, except for two questions which related to the workings of the International Co-operation in Criminal Matters Act 75 of 1996 (referred to as ICCMA) and international requests for mutual legal assistance (referred to as MLA). He denies that these involved any confidential information regarding Mr Zuma's prosecution being disclosed. That version of Mr Downer is not gain-said.

[236] Mr Sole published an article entitled 'Scorpions probe Jacob Zuma*'* in the *Mail & Guardian* of 29 November 2002. Mr Zuma speculates that Mr Sole 'appears to have obtained this information from his association with Mr Downer SC. There is no factual basis for that suspicion. To place that article in perspective, Mr Downer had previously deposed to an affidavit when applying for mutual legal assistance (MLA) in respect of a person who was identified simply as 'Mr X'. 'Mr X' was not identified. Mr Sole, in his article however implicated Mr Zuma. He relied on an affidavit which was deposed to by Mr Shaik on 26 September 2002, being a matter of public record, in proceedings in the Durban High Court, in which Mr Shaik made public that Mr Zuma was being investigated by the

DSO. Mr Downer was not the source for Mr Zuma being named in the media. Indeed, Mr Zuma states that the article cited Mr Shaik's application and the earlier affidavit by Mr Downer in the application for mutual assistance, which only referred to a 'Mr X'.

[237] This is accordingly not a ground to find that Mr Downer does not have title to prosecute, or that he should be removed as prosecutor. He had not disclosed anything confidential regarding Mr Zuma to Mr Sole.

[238] During the argument before me, at the end of his reply, Mr Mpofu referred to the provisions of s 41(6) of the NPA Act. S 41(6) had not been mentioned before, and was as far as I was able to confirm on a re perusal of the supplementary evidence affidavit, also not advanced in that affidavit. Mr Downer did not have the opportunity to respond thereto. The reference to s 41(6) arose specifically when, at the conclusion of his argument in reply, Mr Mpofu handed up a draft order, which apart from seeking an order declaring that Mr Downer lacks title to prosecute Mr Zuma, and asking for leave to lead oral evidence on the issue of an acquittal in terms of s 106(4), sought an order:

'3. Referring the matter of alleged breaches of Section 41(6), read with Section 41(7), of the National Prosecuting Act 32 of 1998 to the National Director of Public Prosecutions and the Legal Practice Council for further investigation and appropriate action.'

[239] Sections 41(6) and (7) provide:

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

(a) any information which came to his or her knowledge in the performance of his or her functions in terms of *this Act* or any other law;

(b) the contents of any book or document or any other item in the possession of the *prosecuting authority*; or

(c) the record of any evidence given at an investigation as contemplated in section 28(1), except—

(i) for the purpose of performing his or her functions in terms of *this Act* or any other law; or

(ii) when required to do so by order of a court of law.

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

[240] As the complaint was only made in argument and then in reply. Mr Downer did not have an opportunity to respond thereto. I accordingly also did not have the benefit of the issue having been dealt with fully in argument. In those circumstances I consider that it will be improper to consider the request for any such a referral further in this judgment. Apart from that procedural difficulty, I have doubt whether the wide terms of s 41(6) are necessarily constitutional and/or would necessarily find application on the facts of this matter. *Prima facie*, it would not, in my view, be unlawful for a prosecutor to deal with enquiries from the press, to ensure that the public is properly informed of the work of the NPA and the progress in investigations, which inevitably might result in the disclosure of information which came to his or her knowledge in the performance of his or her functions in terms of the NPA Act, or any other law. I would have thought that s 41(6) would not, for example, prohibit a member of the NPA, in response to enquiries from a journalist, to confirm or deny that a particular suspect might or might not be formally indicted on particular charges, or that assistance regarding a particular investigation in another jurisdiction, was being pursued. But these are simply ruminations without the benefit of having heard considered argument. If it is believed that the provisions of s 41(6) outlaws such conduct, then a formal charge in that regard can be pursued, where the proper application of s 41(6) can be fully ventilated and its proper interpretation determined.

Mr Downer's insistence that Mr Zuma be prosecuted

[241] Mr Zuma alleges that Mr Downer has pursued his prosecution with 'unrestrained gusto' to ensure that he is convicted 'at all costs', and that Mr Downer's '20 year-long commitment to this case is now an obsession for a legacy and not a pursuit of justice'. This is a conclusion, a matter of opinion, rather than fact.

[242] In answer, Mr Downer referred to documents prepared by him as part of the prosecution team, addressed to the various National Directors of Public Prosecutions,

over many years, which all reveal that far from seeking Mr Zuma's conviction 'at all costs', he and the prosecution team have consistently adopted a careful and measured approach. The documents include: initially a detailed memorandum of 16 June 2005 addressed by Mr Downer and Mr Steynberg to Mr Pikoli on the prospects of successfully prosecuting Mr Zuma. Secondly, a formal application in terms of s 2(4) of POCA dated 30 November 2007, which contained a careful weighing up of the pros and cons of including racketeering charges in terms of s 2(1) of POCA in the indictment. Thirdly, a memorandum addressed by the prosecution team to Mr Mpshe on 3 March 2009 on its evaluation of Mr Zuma's representations that the prosecution should be discontinued. Fourthly, a memorandum addressed by the prosecution team to Mr Mpshe on 14 April 2009 recounting events and decisions involving the prosecution team shortly before the media conference on 6 April 2009 when Mr Mpshe announced his decision to discontinue Mr Zuma's prosecution, and recording the team's reservations about that decision in measured terms.

[243] Mr Downer has explained that his insistence, since 2003, that Mr Zuma be prosecuted, was based on his and the investigation and prosecution team's assessment of the evidence against Mr Zuma. Mr Zuma's fair trial rights have not been infringed. Mr Downer has consistently maintained that the decision by Mr Mpshe to institute criminal proceedings against Mr Zuma, should be implemented. He resisted the subsequent decision of Mr Mpshe and Mr Hofmeyr, to discontinue the prosecution. His stance was vindicated by the SCA.

[244] At a more technical level also, the formal decision of the NPA to prosecute Mr Zuma, is not Mr Downer's decision. The decisions to prosecute Mr Zuma has been wrongly ascribed to Mr Downer, whereas they are decisions taken by the national directors of public prosecution, namely Mr Pikoli in June 2005 and Mr Mpshe in December 2007, albeit in conjunction with input from the investigation and prosecution team and the head of the DSO. On the most recent occasion for reflecting on whether the prosecution against Mr Zuma should continue, the then National Director of Public Prosecutions, Mr Shaun Kevin Abrahams, on 16 March 2018, after the judgement of the SCA in the spy

tapes case, rejected Mr Zuma's further representations and concluded that 'there are reasonable prospects of a successful prosecution of Mr Zuma on the charges listed in the indictment, served on Mr Zuma prior to the termination of the matter by Adv Mpshe SC'.

[245] Mr Zuma has not been prosecuted because Mr Downer is insistent on prosecuting him but because the NDPP, obedient to the judgement of the SCA in the spy tapes case, decided that his prosecution must continue. The full court thereafter also rejected his application for a permanent stay of prosecution.

The leaking of confidential medical information

[246] The medical information referred to is that contained in the letter from Brigadier General (Dr) M.Z. Mdutywa, General Officer Commanding Area Military Health Formation, dated 8 August 2021 and carries an official stamp dated 8 August 2021, addressed to the 'Head of the Centre, Estcourt Correctional Centre, Department of Correctional Services, Estcourt', referred to above. The letter recorded, inter alia, that '[o]n 28 November 2020, the President was put under active care and support after he suffered a traumatic injury', that he 'needed an extensive emergency procedure that has been delayed for 18 months due to compounding legal matters and recent incarceration and cannot be delayed any further as it carries a significant risk to his life' and that the 'minimum proposed period of care is six months.'

[247] On 10 August 2021 an application was launched, carrying the date stamp of the Registrar, to give effect to my directive, quoted in paragraph 33 above, which required that the application for an adjournment of the proceedings was required to be 'supported by an affidavit by a medical practitioner treating Mr Zuma.' In the application Mr Zuma sought an order that, 'The trial and all other related proceedings between the State and Jacob Gedhleyihlekisa Zuma and Thales Africa (Pty) Ltd are adjourned in terms of Section 168 of the Criminal Procedure Act 51 of 1977 to a date agreed upon by the parties or determined by this Honourable Court.' The application was supported by an affidavit by Mr Thusini, duly authorised thereto by Mr Zuma, to which the letter from Brigadier General (Dr) Mdutywa was annexed, and was supported by a confirmatory affidavit of

Brigadier General (Dr) Mdutywa. This confirmatory affidavit was in the usual terms that he had read the affidavit of Mr Thusini and confirmed that the contents thereof were correct in so far as they related to him. Mr Downer also filed an affidavit headed 'The States Affidavit regarding the Postponement of the Proceedings on 10 August 2021', to which the letter from Brigadier General (Dr) Mdutywa was also attached. The medical condition of Mr Zuma accordingly was a material issue on 10 August 2021, and will remain one should Mr Zuma not be able to attend further proceedings due to his physical condition.

[248] An adjournment of the proceedings, which were due to commence on 10 August 2021, had effectively forced on the parties by the contents of Brigadier General (Dr) Mduywa's letter. As indicated earlier in this judgment, on 10 August 2021 I granted an order postponing the matter to 9 and 10 September 2021, directed that the medical report in respect of Mr Zuma be delivered by not later than 20 August 2021, and ordered that the State may appoint a medical practitioner of its choice to examine Mr Zuma, and if necessary to give evidence, as to his fitness to attend court and stand trial.

[249] Paragraph 3 of that order did not expressly refer to the authority for such an order. The statutory provision that applies is s 37(3)*(b)* of the CPA which provides that:

'(3) Any court before which criminal proceedings are pending may –

(a) . . .

(b) order that the steps, including the taking of a blood sample, be taken which such court may deem necessary in order to ascertain the state of health of any accused at such proceedings'

[250] On 7 September 2021 Mr Zuma filed a supplementary evidence affidavit seeking an order that 'at the hearing of this matter on a date to be directed by the Honourable Court, the First Accused intends to apply for an order granting leave to admit into evidence the First Accused's supplementary affidavit filed in terms of section 115 of the Criminal Procedure Act 51 of 1977 ("the CPA") in so far as it relates to the additional plea brought in terms of section 106 (1) (h) read with section 106 (4) of the CPA.'

[251] The affidavit of Mr Thusini, filed in support of the supplementary evidence application, raises that Mr Downer, in the previous application for the postponement of the proceedings on 10 August 2021:

‘ . . strangely filed an unsolicited affidavit even prior to us filing our postponement application in which he disclosed and annexed the confidential medical report in respect of Mr Zuma. While preparing our application (that was the postponement of the proceedings on 10 August 2021), an inquiry was made by a journalist who appeared to have a source in the NPA on matters involving Mr Zuma, who broke the story of the medical report/letter and to our utter surprise and shock, referred to its contents in such a way that it was abundantly clear that the journalist had read or had been advised of the contents thereof. This was despite serious pleas made by Mr Zuma’s legal representatives to the NPA’s legal representatives to treat the report or letter with the strictest confidentiality. The medical report/letter is incidentally similar to the one which was rejected by Judge Pillay . . .’

[252] In answer to the supplementary evidence affidavit of Mr Thusini, Mr Downer explained that on Friday 6 August 2021 the Head of the Estcourt Correctional Centre, Ms Radebe, sent a WhatsApp message to Ms Naicker of the NPA recording that Mr Zuma had been ‘emergency referred to outside hospital due to his medical condition last night.’ Ms Naicker thereupon enquired from Ms Radebe whether she was able to give any indication as to whether Mr Zuma would be brought to court as per the requisition for his attendance on 10 August 2021. Ms Radebe’s response was that she was awaiting documents with that information. On the same day, the Department of Correctional Services issued a media release stating that Mr Zuma had been admitted to a hospital outside the prison for medical observation by the South African Military Health Services. On Saturday, 7 August 2021 Ms Naicker was contacted by a Mr Kenneth Mthombeni, who introduced himself as the Acting Regional Commissioner of Correctional Services. He indicated, regarding the requisition for Mr Zuma, as subsequently confirmed by her in a WhatsApp message, that Mr Zuma would not be brought to court as he was hospitalised in Pretoria.

[253] Mr Downer explains that on Sunday 8 August 2021 at 14h24 Ms Naicker, the Director of Public Prosecutions, KZN (Ms Zungu) and Mr Downer received an email from

Ms Radebe, the officer in charge of the Estcourt Correctional Centre, to which the letter addressed to her earlier that day by Brigadier General (Dr) MZ Mdutywa, being the letter referred to above, was attached. The State was not satisfied with the vague generalities in the letter regarding Mr Zuma's 'condition', the 'extensive emergency procedure' and the 'minimum proposed care of six months.'

[254] Lead counsel for the State, Mr Trengove SC contacted Mr Mpofu regarding the postponement of the proceedings of 10 August 2021. The final terms thereof were finally agreed during subsequent exchanges extending, it seems, to Monday, 9 August 2021, a public holiday. Mr Downer addressed an email to my Registrar advising me that following the hospitalisation of Mr Zuma late the previous week, the State and the legal representatives of Mr Zuma had been separately informed by the Department of Correctional Services and Military Health Services that he remained admitted in an outside health facility. This email also recorded that Mr Downer was 'busy making an affidavit that explains the sequence of events that have led to this approach for a new directive.'

[255] At 11h46 on 9 August 2020 11h46 Mr Downer sent a second email to my Registrar, copied to Mr Thusini, to which he attached an unsigned copy of the affidavit he said he would provide, including the annexures thereto which included the letter.

[256] Mr Downer's answering affidavit, to the supplementary evidence affidavit of Mr Thusini explains that:

'41. Later that afternoon (9 August 2021), around 16h45, a journalist, Ms Karyn Maughan of Newsweek 24, requested from one of the State's counsel, Adv Breitenbach SC, copies of any court papers pertaining to the proceedings the following day. Adv Breitenbach sent a copy of Justice Koen's letter (i.e. annexure AA 20) and the unsigned copy of my affidavit, the annexures thereto and the unsigned copy of Adv Naicker's affidavit.(i.e. annexure AA19). The unsigned affidavits were sent to her on condition that she not publish anything based on them or their annexures before the signed affidavits were filed with this Honourable Court. In response to a request, Adv Breitenbach SC also agreed to forward to her any papers which may be delivered on behalf of the accused.

42. That evening (9 August 2021), at 21h08, Mr Thusini emailed to Justice Koen's Registrar, to me and to the second accused's attorneys, an application by the first accused for the postponement on 10 August 2021 of the trial and all other related proceedings between the State and the accused to a date to be agreed by the parties or determined by Honourable Court. The application was supported by affidavits made by Mr Thusini and Brig Gen Mdutywa. The annexures to Mr Thusini's affidavit included (as annexure FA2) a copy of Brig Gen Mdutywa's letter to Ms Radebe of 8 August 2021, i.e. annexure AA 14 hereto . . .
43. On Monday (Tuesday), 10 August 2021, at about 07h30, Adv Breitenbach SC sent to Ms Maughan the first accused's postponement application (annexure AA 22). In response to a request that we inform her once my and Ms Naicker's signed and commissioned affidavits had been filed, around 08h00 Adv Breitenbach, after checking with me, told her they would be filed shortly.
44. To the best of my knowledge, the first media article based on my affidavit of 9 August 2021 (annexure AA 19) and on the first accused postponement application (annexure AA 22) was the one published by Ms Maughan on News 24 later that morning (10 August 2021). . . As is apparent, it includes excerpts from Brig Gen Mdutywa's letter to Ms Radebe of 8 August 2021 (annexure AA14).'

[257] In reply to Mr Downer's allegations above, Mr Thusini in his replying affidavit stated that:

'In the context of the issues which are pertinent to these proceedings the mere fact that it turns out that it was the one member of the current prosecuting team namely, Adv Breitenbach SC and not directly Adv Downer SC who executed the leak, is neither here nor there. There is no solid line between the misconduct of Adv Downer SC which is the principal focus of the section 106 (1) (h) inquiry and the misconduct of the NPA itself, which is the focus of the section 106 (4).'

[258] The ambit of the complaint raised by Mr Zuma was then widened to also question 'the appointment and involvement of the two counsel who are in private practice namely Adv Trengove SC and Breitenbach SC who represent the State', presumably on a basis similar to the objection taken to the counsel for the State in *Porritt.* This is an issue that had not been raised before, to which there has been no opportunity to respond, and which accordingly will not be considered in this judgment.

[259] The signed application for a postponement, and the affidavits thereto and the signed affidavit of Mr Downer relating to the adjournment, were filed with the court on the morning of 10 August 2021. The chronological sequence of the events culminating in that application has assumed significance.

[260] Mr Thusini's affidavit in the application for postponement was commissioned *ex facie* that document before a practicing attorney in Vryheid on 9 August 2021. The confirmatory affidavit of Brigadier General (Dr) Mdutywa, confirming the contents of the affidavit of Mr Thusini to which Brigadier General (Dr) Mdutywa's letter of 8 August 2021 was annexed, was attested, *ex facie* that affidavit, before a Commissioner of Oaths with the military police, on 8 August 2021. The official stamp of the Military Police, also reflects the date of attestation as '08-08-2021'. Mr Thusini's affidavit did not however exist in commissioned form on 8 August 2021.

[261] There has been no suggestion that Brigadier General (Dr) Mdutywa on 8 August 2021 was confirming the contents of an 'affidavit' other than the, at that stage, still unsigned affidavit of Mr Thusini, which was signed and attested the next day on 9 August 2021. As a Brigadier General in the South African National Defence Force he would, I assume, not sign a confirmatory affidavit confirming the contents of a non-existent affidavit, but would have intended to refer to the 'affidavit' (presumably the unsigned draft) of Mr Thusini, although not truly yet an affidavit, on 8 August 2021. There would be no, or little, purpose in Brigadier General (Dr) Mdutywa confirming the 'affidavit' of Mr Thusini other than for the medical aspects it contains, or would contain, including his letter of 8 August 2021.

[262] Mr Mpofu suggested from the bar that the date of attestation of the affidavit of Brigadier General (Dr) Mdutywa, was simply an 'error.' I am, with respect, unable to, and cannot on what is before me, accept that there was simply an error. The date of the 8th of August 2021 was inserted on Brigadier General (Dr) Mdutywa's affidavit twice: once in manuscript and then also in the form of the official date stamp of the military police. Brigadier General (Dr) Mdutywa would also, no doubt, have verified that his affidavit was

completed correctly before transmitting it to Mr Thusini for filing. The Monday, 9 August 2021, was a public holiday. The affidavits were subsequently filed with the court as the official affidavits in support of the application for a postponement of the hearing on 10 August 2021.

[263] The significance of this sequence lies not so much in Brigadier General (Dr) Mdutywa confirming the 'affidavit' of Mr Thusini when it was still only in draft form, but in him confirming the correctness of his medical report/letter which would form an annexure to the affidavit of Mr Thusini which was yet to be signed, on 8 August 2021, for it to be filed in court. The only inference is that the intention, at that point, was that the letter of 8 August 2021 would form part of the application for a postponement, pursuant to the terms of my directive, which would mean that it would become public when filed.[133] That would be inconsistent with the protestations that the letter was a confidential document, of which the confidentiality, if it in fact was confidential in the first place, was not waived.

[264] The letter had furthermore been disclosed to Mr Downer, Ms Naicker and the DPP of KZN, without any specific restrictions as regards confidentiality, by the Head of the Correctional Centre at Estcourt on 8 August 2021. The letter did not contain anything significantly confidential. On Mr Zuma's version, it was similar to a report previously produced before Judge D Pillay, which had been found to be lacking in particularity, and had culminated in a warrant for Mr Zuma's arrest being authorised by her. The circumstances relating to that event were obviously not dealt with as the allegation was only made in reply. Presumably, if the warrant was authorised unlawfully or improperly by Judge Pillay, being based on confidential information, then proceedings would have been launched to have it set aside. I could find no such application in the court file.

[265] The letter of Brigadier General (Dr) Mdutywa is vague and general in its terms and does not disclose any particularity, which could be said to amount to a violation of Mr Zuma's rights his rights to privacy. Specifically, it does not mention the medical condition

[133] Per Ponnan JA in *City of Cape Town v South African National Roads Authority Limited and others* [2015] ZASCA 58; 2015 (3) SA 386 (SCA); [2015] 2 All SA 517 (SCA).

Mr Zuma suffers from. Mr Mpofu however submitted that it was unacceptable, in the spirit of uBuntu, for Mr Zuma's relatives to hear from press reports, and not from Mr Zuma personally, that he was suffering from a life threatening illness. The letter presumably would not record a diagnosis which the doctors had not shared with Mr Zuma previously, and which he could have shared with his family even before the letter was issued to the Department of Correctional Services. The doctors would not convey information regarding Mr Zuma's medical condition to the Department of Correctional Services without his authority, and, at least them having advised him of the details of his state of health, which were then recorded in the letter.

[266] Finally, the right to privacy, like most fundamental rights, except the right to life, is not an absolute right and is subject to limitations, having regard to what is reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom.[134] Competing rights and interests must also be considered. In the present enquiry, it is not only Mr Zuma's right to privacy that is at stake. As has been remarked earlier in this judgment, the constitutional court has held that fairness is not a one-way street. There are also the rights of members of the public, the proper administration of justice and the interests of justice generally, which must be considered in a prosecution where the medical condition of the accused is made an issue. These are all considerations, which a court will still have to consider once fully ventilated and after all medical reports relating to Mr Zuma's treatment, medical parole, and the like, have been produced, should the medical condition of Mr Zuma be or remain a material issue for determination in further legal proceedings. I am not persuaded that the disclosure of the contents of the letter constituted an actionable violation of Mr Zuma's rights.

[267] In the alternative, if it did, then Mr Zuma would have remedies he might pursue. In the context of the prosecution and Mr Downer's title to prosecute, it might, at best, amount to an irregularity. It bears repeating, as held in *Shaik and Others v NDPP,*[135] that while

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[134] Section 36 of the Constitution. See generally in regard to the right to privacy, *Bernstein and others v Bester NNO and others* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC).
[135] 2008 (1) SACR 1 (CC) para 44.

some irregularities may result in a failure of justice and an unfair trial, not every irregularity has that effect. The question is therefore, even assuming that it amounted to an irregularity, whether it was of the kind to render the trial unfair. I am not persuaded, on the evidence that has been placed before me, that it has affected the merits of the prosecution, and that Mr Downer has therefore been deprived of the title to prosecute and/or that he should be removed as a prosecutor. The merits of the prosecution stand apart from the events concerning Mr Zuma's medical condition.

[268] The request for a referral pursuant to s 41(6) of the NPA Act has been dealt with earlier.[136] That brings me to the final ground relied upon.

The unlawful attempted physical examination of Mr Zuma.

[269] The allegations by Mr Zuma in this regard proceed from an interpretation of the order granted by me on 10 August 2021. It relies particularly on some of the exchanges between counsel and myself in court before the order was granted and alleges that Mr Zuma was visited in breach thereof.

[270] The order envisaged that the medical report would be produced on 20 August 2021. Following the grant of that order Mr Thusini wrote to Mr Downer stating that should that be impossible, communication to the NPA would be made; that following consultations on 19 August 2021 and

'unforeseen major developments pertaining to Mr Zuma's health, as well as a recent procedure performed on him publicly announced by the Department of Correctional Services, it might not be possible to deliver the report within the scheduled period, and that if necessary, these delays will be explained in greater detail to the court during oral evidence.'

The letter concluded that the 'current indication' is that the report will be ready on or before 27 August 2021.

[271] Mr Downer responded on behalf of the State stating that the State did not accept the failure to comply with paragraph 2 of the court order, nor the reasons provided

[136] Para 238 to 240 above.

therefor, that the State would continue to do all it can to ensure that the matter was ripe for hearing on 9 and 10 September 2021, and that the State reserved all its rights.

[272] Mr Downer enclosed a letter addressed to the Acting Regional Commissioner: Department of Correctional Services dated 21 August 2021, which official had requested a written application from the State providing particulars of the name and experience of the doctor who the State required to examine Mr Zuma to determine his fitness to attend court and to stand trial, to grant access to Mr Zuma for an examination. Mr Downer also enquired when such examination might be convenient, and requested access to Mr Zuma's medical records, and other related issues. The letter was copied to Mr Thusini, and the Office of the General Officer Commanding Military Health Formation, Department of Defence.

[273] Mr Thusini replied that:

'it was agreed in court that it would be the medical report which would trigger either agreement or disagreement on the part of the NPA. Only thereafter, depending on which option the NPA chose, would the contingent "right" to appoint its own doctor' (arise)'

He accordingly complained that Mr Downer's conduct flies in the face of this sequence and was to:

'prematurely insist on a physical examination of the former President, by an unknown stranger and without his consent or even the consent of the state assigned treating doctors and while they are busy compiling the report, as ordered by the court. Such conduct is plainly unlawful, unjustified and irrational in the circumstances.'

[274] Mr Downer's letter in response, dated 24 August 2021, disputed the above interpretation of the order, pointed out that the order was not qualified in the manner suggested, that the purpose of the medical examination was for the State to obtain the opinion of a medical practitioner appointed by it as to whether Mr Zuma was fit to attend court to stand trial, but ended by saying, 'the State will not proceed with the examination of your client against the will of your client or his doctors . . .'

[275] In the founding supplementary evidence affidavit, Mr Thusini referred to Mr Downer's response as 'his misleading and self-serving interpretation of the order'. It continued that:

'Instead of offering an apology for misreading and misinterpreting the order of Koen J he sent a private doctor accompanied by his police investigator, a Colonel Du Plooy, to physically arrive at a private hospital to conduct an illegal medical examination of Mr Zuma. He did so without any legal basis. He did so to purely humiliate Mr Zuma who, had he not voiced his objection, might have been subjected to an unauthorized and unlawful medical examination. Notably, no notification to or arrangement with Mr Zuma's legal team was done by Mr Downer.

In breach of the order of the court, Mr Downer plainly violated Mr Zuma's rights. The more detailed envisaged medical report had not yet been issued by the treating medical team. The employment of a private doctor on behalf of the NPA to examine the medical records of Mr Zuma was in itself therefore an anomaly because it created the impression that Mr Zuma's doctors and/or Mr Zuma had conspired to manufacture medical conclusions that must only be believed if the NPA's own private doctors prematurely examined him without seeking his consent. Sending to Mr Zuma's hospital a Professor Sarkin to conduct a physical examination without any basis, which would possibly have included taking his blood samples and other vital statistics, was the most irresponsible violation of Mr Zuma's rights. It is a complete disregard of Mr Zuma's constitutional rights and demonstrates a loss by the NPA prosecutors of their constitutional conscience.'

[276] The contentions that Mr Downer had misconstrued the court order, and that 'the report would trigger the examination', were persisted with in oral argument before me by Mr Mpofu. He described it as resulting in a situation where, before the report became available, 'the vultures of the NPA were already circling'.

[277] In answer to the allegations by Mr Thusini in the founding supplementary evidence affidavit, Mr Downer disputed Mr Thusini's interpretation of the court order and continued:

'I deny sending a private doctor and Col Du Plooy to the hospital where the first accused was a patient for the doctor to conduct an examination of him. As Col Du Plooy will confirm, he has never gone to the hospital in question for that purpose or any other related to the present matter. As Prof Sarkin will confirm, he has never gone to the hospital in question for that purpose. I note that Mr Thusini does not say that he was present during this alleged incident, nor is there any

affidavit by the first accused or anyone else who confirms his (Mr Thusini's) affidavit. I accordingly submit the contents of these paragraphs is inadmissible hearsay.'

The contents of the answering affidavit of Mr Downer are confirmed in separate confirmatory affidavits by Colonel Johan Du Plooy and Professor Ian Andrew Sarkin.

[278] The allegations that the medical doctor appointed by the State and Colonel du Plooy went to the private hospital to examine Mr Zuma were not confirmed by any confirmatory affidavit from Mr Zuma. They are hearsay and inadmissible. The State's version is furthermore corroborated by the contemporaneous correspondence exchanged at that time, the authenticity of which has not been challenged. Mr Downer's letter had recorded that notwithstanding the terms of the court order granted on 10 August 2021, Mr Zuma would not be examined by the State against his will.

[279] In his replying affidavit Mr Thusini did not dispute the denials by Mr Downer, confirmed by Colonel du Plooy and Professor Sarkin under oath, that the latter two men had physically arrived at the private hospital where Mr Zuma had been admitted to conduct a medical examination. I would have expected that if their denial was disputed that, at least, an affidavit would be filed by Mr Zuma, or someone who would confirm such attendance. There was none. In argument, Mr Mpofu conceded that no examination of Mr Zuma had taken place and that the defence accepted the NPA's denial that Prof Sarkin and Col du Plooy had arrived at the hospital where Mr Zuma was treated. Mr Zuma was not examined by medical specialists appointed by the State at all, consistent with the letter from Mr Downer. What one is left with are hearsay allegations that are untrue, but were used to launch an unjustified attack on Mr Downer.

[280] The only contention thus remaining was that a request had been made by Mr Downer, representing the State, for a convenient time to be indicated when the State's medical expert(s) could examine Mr Zuma, at a time when the report of the doctors representing Mr Zuma had not yet been produced. Even if the interpretation of my order contended for by Mr Zuma was correct, such a premature request would not be grounds

for the removal of Mr Downer. When the request was refused, the examination was not proceeded with. It is a non-issue.

[281] When it comes to the interpretation of a court order, it is trite law that a court order must be interpreted on the ordinary meaning of the words used, and in the context they were expressed.[137] My order provided that the report had to be provided by 20 August 2021. It is correct that the defence had indicated that it could not bind itself to that date, but I would have thought that Brigadier General (Dr) Mdutywa would have had sufficient time to provide a more detailed report timeously explaining the vague statements contained in his report of 8 August 2021. The vagueness of the latter is common cause. As Mr Mpofu rightly remarked at the time the adjournment was sought on 10 August 2021, not only was the State 'in the dark', but so also the defence, and I might add, this court, as to what Mr Zuma's medical condition was. Brigadier General (Dr) Mdutywa, or any other defence force doctors, did not have to undertake time consuming and detailed further examinations. He simply had to explain his reasons for expressing the terse and vague conclusions in his letter of 8 August 2021 in more detail. Granted that Mr Zuma required some surgical procedure in the interim, but that could simply have been referred to with a brief explanation of any *sequelae* (consequences). It seems however that the time was spent to prepare a report, which to this day, I have not seen.

[282] How matters might pan out practically in the future, when the letter of Brigadier General (Dr) Mdutywa featured in support of the application for the postponement on 10 August 2021, was canvassed during the exchange with counsel before the order of the 10 August 2021 was granted by consent. Various permutations were considered. Plainly, as a first observation, it was anticipated that the more detailed report would be available on or before 20 August 2021, and not a week later. Time was of the essence for the State to decide whether to accept the conclusions reached in such report, or not. If the report concluded that Mr Zuma could attend court and stand trial, then a further separate independent examination by the State's specialists might not have been required. But because the doctors, notwithstanding it previously having been checked with them by Mr

[137] *Eke v Parsons* [2015] ZACC 30, 2016 (3) SA 37 (CC), 2015 (11) BCLR 1319 (CC) para 29.

Mpofu that the report would be ready by 20 August 2021 or shortly thereafter, would only have their report available a week later (although no explanation on oath has ever been offered why it could not have been ready before), the State would be left with very little, and possibly insufficient time, to conduct its own examination and inquiries. It might want to determine for itself whether it should agree with the report, even if favourable to it.

[283] In any event further, Mr Zuma was required in terms of s 37 of the CPA to submit to such an examination, and the order of this court that he should do so, was not qualified as regards when he would be required to submit thereto. Specifically, the order was not qualified that he would only have to do so after a report was filed and/or if it was favourable to him.

[284] The trial is now to proceed on its merits. I shall give Mr Zuma the benefit of any doubt that he subjectively might have believed, or possibly was advised, that he was not required to submit to a medical examination before the medical report was made available. I want to clarify however that there are no conditions attached to the order that he submit to medical examination by a doctor or doctors of the State's choice, to determine whether he is fit to attend court and stand trial. Should Mr Zuma's medical condition arise as a relevant issue in this trial in the future, whether in support of an application for an adjournment or in deciding whether he is fit to attend court and stand trial, then he is required to submit to such medical examination by doctors of the State's choice and to produce all relevant records and reports pertaining to his medical condition within a reasonable time. That was what the order intended to achieve.

[285] The complaint raised under this last heading is not a ground for depriving Mr Downer of his title to prosecute or to remove him as prosecutor. It is perhaps best dismissed as having been based on a possible misunderstanding.

Conclusion

[286] The allegations of bias against Mr Downer were based largely on the fact that he has allegedly not been independent and objective. On a proper interpretation of s

106(1)(*h*) of the CPA, that does not deprive Mr Downer of the title to prosecute. In the alternative, and adopting a wider interpretation of the words 'title to prosecute', I am still not persuaded that Mr Downer lacks the title to prosecute or should be removed as prosecutor. On the evidence before me it has not been shown that Mr Zuma's rights to a constitutionally fair trial have been impaired, or that there is a real possibility that his rights will be impaired.

Order

[287] The following order is granted:

1. The special plea is dismissed.
2. The matter is directed to proceed to trial in respect of the not guilty pleas of Mr Zuma and Thales.
3. Paragraph 3 of the court order of 10 August 2021, as now clarified in paragraph 284 above, stands.

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KOEN J

26 October 2021

APPEARANCES

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