IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: Yes.
(2) OF INTEREST TO OTHER JUDGES: Yes.
(3) REVISED.

13-12-2018 .....
DATE

.....
SIGNATURE

Case no: 21405/18

In the matter between:

DEMOCRATIC ALLIANCE — Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA — First Respondent
DIRECTOR-GENERAL IN THE OFFICE OF THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA — Second Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES — Third Respondent
STATE ATTORNEY — Fourth Respondent
JACOB GEDLEYIHLEKISA ZUMA — Fifth Respondent

Case no: 29984/18

And in the matter between:

ECONOMIC FREEDOM FIGHTERS

and

STATE ATTORNEY — First Respondent
JACOB GEDLEYIHLEKISA ZUMA — Second Respondent
HULLEY AND ASSOCIATES INCORPORATED — Third Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES — Fourth Respondent
DIRECTOR-GENERAL: DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT — Fifth Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA — Sixth Respondent
CHIEF OPERATIONS OFFICER: PRESIDENCY — Seventh Respondent

Case Summary: **Administrative law – Applications for judicial review under the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and under the principle of legality - Decisions by the Presidency and by the State Attorney to procure private legal representation for Mr Zuma and for the state to pay for his private legal costs in defending the corruption, fraud and other criminal charges against him and in the ancillary or related civil legal proceedings – Statutory authority invoked for the impugned decisions are s 3(1) or s 3(3) of the State Attorney Act 56 of 1957 and reg 12.2 of the Treasury Regulations made in terms of the Public Finance Management Act 1 of 1999.**

Impugned decisions were not authorised by the statutory provisions invoked - they amount to a breach of the principle of legality, are unconstitutional, and fall to be set aside – they also fall to be reviewed and set aside in terms of PAJA - they were not authorised and are *ultra vires*, and materially influenced by an error of law.

JUDGMENT

MEYER J (LEDWABA DJP and KUBUSHI J concurring)

INTRODUCTION

[1] These are two applications – one brought by the Democratic Alliance (case no. 21405/18) and the other by the Economic Freedom Fighters (case no. 29984/18) – for the review and setting aside of the decisions taken by the Presidency and the State Attorney to procure private legal representation for former President Jacob Gedleyihlekisa Zuma and for the state to pay the legal costs incurred by him in his personal capacity in the criminal prosecution instituted against him on 20 June 2005, 28 December 2007 and 16 March 2018, and in ancillary or related civil proceedings (the impugned decisions). The criminal charges against Mr Zuma include a charge of racketeering, corruption, money laundering and 12 charges of fraud. The 'Stalingrad defence' strategy, which Mr Zuma adopted, has cost the state, and hence the taxpayer, thus far a total amount of between R16 788 781.14 and R32 million. The Presidency's stance is that it will continue

to provide state funding for Mr Zuma's criminal trial 'on the basis that the decision is presumed to be valid and binding until it is set aside by the court'.

[2] The term 'Stalingrad defence', Wallis JA explained in *Moyo v Minister of Justice and Constitutional Development and others* (387/2017); *Sonti v Minister of Justice and Correctional Services and others* (386/2017); [2018] ZASCA 100 (20 June 2018) para 169, '. . . has become a term of art in the armoury of criminal defence lawyers. By allowing criminal trials to be postponed pending approaches to the civil courts, justice is delayed and the speedy trials for which the Constitution provides do not take place. I need hardly add this is of particular benefit to those who are well-resourced and able to secure the services of the best lawyers.'

[3] Other than for declaratory relief that the state is not liable for the legal costs incurred by Mr Zuma in his personal capacity in the criminal prosecution instituted against him, in any civil litigation related or incidental thereto and for any other associated legal costs, the DA seeks the impugned decisions to be judicially reviewed under the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or under the principle of legality, and the EFF seeks the judicial review of the impugned decisions under the principle of legality. Both the DA and the EFF contend that a 'just and equitable' remedy includes the rendering of an account by the State Attorney in order to ascertain the exact amounts that were expended on Mr Zuma's private legal costs and to take all necessary steps, including the institution of civil proceedings, to recover the amounts paid by the state for Mr Zuma's legal costs. The applications of the DA and of the EFF were heard together as they arise out of the same facts and both concern the legality of the decisions to appoint private legal representation for Mr Zuma and to pay the legal costs incurred by him in his criminal prosecution and the related civil litigation. The legislative authority invoked for the impugned decisions are s 3(1) or s 3(3) of the State Attorney Act 56 of 1957 and reg 12.2 of the Treasury Regulations made in terms of the Public Finance Management Act 1 of 1999 (the PFMA).

[4] The DA and the EFF are respectively the second and third largest political parties represented in the National Assembly of Parliament. The President of the Republic of South Africa, the Director-General or Chief Operations Officer in the Office of the

President, who is its accounting officer for the purposes of Chapter 5 of the PFMA (the DG in the Presidency), the Minister of Justice and Correctional Services, the State Attorney and Mr Zuma are respondents in both applications. The Director-General of the Department of Justice and Correctional Services and Hulley and Associates Inc (Hulley) are also cited as respondents in the EFF application. Hulley is an incorporated firm of attorneys, its sole director being Mr Michael Hulley, who represented Mr Zuma in most of the litigation in question.

[5] Mr Zuma served in the national leadership of South Africa's ruling political party, the African National Congress, as its Provincial Chairperson in KwaZulu-Natal and its National Chairperson from December 1994 until December 1997, its Deputy President from December 1997 until December 2007, and its President until December 2017. Mr Zuma was employed as the Member of the Executive Council (MEC) for Economic Affairs and Tourism in KwaZulu-Natal from October 1995 until June 1999, then as the Deputy President of the Republic of South Africa until 14 June 2005, and as President of the Republic of South Africa from 9 May 2009 until 14 February 2018, when he resigned.

BACKGROUND FACTS

[6] The factual background that follows is uncontroversial. What is referred to as 'an encrypted note' was found during the investigation by the National Director of Public Prosecutions (NDPP) that allegedly implicated Mr Zuma in corrupt activities relating to the government's 1999 strategic arms acquisition programme that became known as the arms deal, while he held the office of MEC: Economic Affairs and Tourism in KwaZulu-Natal. As a result, the NDPP forwarded questions to Mr Zuma for his response. Mr Zuma thereupon instructed a private attorney, who engaged the services of junior and senior counsel, to advise and assist him in responding and to launch an urgent application in the High Court for access to the 'encrypted note'. On 23 August 2003, the then NDPP, Mr Bulelani Ngcuka, announced his decision that Mr Schabir Shaik would be indicted on charges of corruption in respect of various undue benefits he had afforded or arranged for Mr Zuma since late 1995, but that Mr Zuma would not be indicted simultaneously. Mr Ngcuka announced this decision at a press conference in the presence of the then Minister, Dr Penuel Maduna. In the press release, he inter alia said:

'After careful consideration in which we looked at the evidence and the facts dispassionately, we have concluded that, whilst there is a *prima facie* case of corruption against the Deputy President, our prospects of success are not strong enough. That means that we are not sure if we have a winnable case.'

[7] The National Prosecuting Authority (NPA) charged Mr Shaik and several companies he controlled with one count of corruption for making 238 payments for Mr Zuma's benefit between October 1995 and September 2002, totaling R1, 340, 078, with the aim of inducing Mr Zuma to use his political influence to benefit Mr Shaik's business interests or of rewarding him for having done so; one count of fraud for misrepresenting companies' accounting records to disguise such benefits afforded to Mr Zuma; and another count of corruption, for attempting to procure a R500 000 annual bribe for Mr Zuma from a French-owned arms manufacturer, Thompson-SCF (Pty) Ltd (later renamed Thint (Pty) Ltd (Thint), with the aim of inducing Mr Zuma to use his influence to protect its interests in any public investigation into the government's 1999 arms acquisition programme.

[8] Having pleaded not guilty, Mr Shaik stood trial in the Durban and Coast Local Division of the High Court (Squires J) from 11 October 2004 to 4 May 2005. On 31 May 2005, Mr Shaik was found guilty on all three counts, and, on 8 June 2005, sentenced to an effective term of imprisonment for 15 years. Whilst serving his sentence, Mr Shaik's appeals to the Supreme Court of Appeal and to the Constitutional Court were dismissed on 6 November 2006 and on 2 October 2007 respectively. A private attorney, Ms Julie Mohamed, and senior and junior counsel, were appointed to represent Mr Zuma's interests on a watching brief in the Shaik trial, at a total cost to the state of R 1 020 930.40.

[9] On 14 June 2005, a week after Mr Shaik had been sentenced, the then President Thabo Mbeki dismissed Mr Zuma as the Deputy President of the Republic of South Africa. In his statement at the joint sitting of Parliament, President Mbeki said:

'I've since carefully studied the judgment. I did this fully to inform myself about Justice Squires' findings, given the fact that the issue of the relationship between the Deputy President, the Honourable Jacob Zuma, and the accused had been canvassed during the trial.

As Honourable Members would know, the judgment contains detailed matters of fact and inference against which penalties have been meted out. At the same time, proceedings pertaining to a possible appeal to higher courts are still pending. However, the judgment contains some categorical outcomes.

These are that the court has made findings against the accused and at the same time pronounced on how these matters relate to our Deputy President the Hon. Jacob Zuma raising questions of conduct that would be inconsistent with expectations that attend those who hold public office.

In this regard, I would like to emphasize two basic pillars of our jurisprudence, namely, equality before the law and the right to be presumed innocent until proven otherwise.'

On the same day, Mr Zuma announced that he accepted and respected President Mbeki's 'pronouncement' and that, although he would remain on as Deputy President of the ANC, he would voluntarily resign his 'seat in Parliament, not as an admission of guilt of any kind, but in order to make it easier for the ANC and government to function in Parliament'.

[10] On 20 June 2005, the then NDPP, Mr Vusi Pikoli, announced that Mr Zuma would be indicted on two counts of corruption, which counts mirrored those of which Mr Shaik had been convicted. Mr Zuma's criminal trial was scheduled to commence in the High Court, Durban on 31 July 2006. During August 2005, several search warrants were issued in the High Court, Pretoria (Ngoepe JP) and executed at various premises in the country, including Thint's office in Pretoria, Mr Zuma's apartment in Killarney, Johannesburg and his residence at the Nkandla Traditional Village in KwaZulu-Natal and the Hulley office in Durban. On 6 October 2005, Mr Zuma and Hulley applied to the High Court, Durban for an order invalidating the search warrants, and they briefed three counsel (led by Adv Kemp SC) to argue the matter over two days. Such an order was granted by Hurt J on 15 February 2006, but overturned by the Supreme Court of Appeal on 8 November 2007. Mr Zuma and Hulley were ordered to pay the NPA's costs, including those of two counsel, in both the application to set aside the search warrants and the appeal. Mr Zuma and Hulley appealed to the Constitutional Court, briefing three counsel (again led by Adv Kemp SC) to argue the matter over three days. The appeal to the Constitutional Court was dismissed in almost all respects, on 31 July 2008. No order as to costs in the Constitutional Court was made.

[11] The NDPP brought an application to the High Court, Durban for the issuing of a letter of request to the Mauritian authorities in terms of s 2(2) of the International Co-Operation in Criminal Matters Act 75 of 1996, for the delivery of original documents seized during a search and seizure of the Thompson/Thales offices in Mauritius during 2001. Mr Zuma instructed Hulley to oppose the application and three counsel (led by Adv Kemp SC) were briefed in the matter. On 7 April 2007, Levinsohn DJP rejected Mr Zuma's grounds of opposition and issued the request. Mr Zuma then launched an urgent application for an order precluding the NDPP from furnishing the Mauritian authorities with the request issued by Levinsohn DJP, pending Mr Zuma's appeal to the Supreme Court of Appeal. The High Court, Durban (Hugo J) heard the urgent application. It is reported that Hugo J queried Mr Zuma's counsel over the efforts to stop the retrieval of documents from Mauritius that might relate to arms deal corruption, in response to which Adv Kemp SC said the following:

'We think it is important. This is not like a fight between two champ fighters. This is more like Stalingrad. It's burning house to burning house.'

Mr Zuma appealed to the Supreme Court of Appeal against the order of Levinsohn DJP. The appeal was dismissed with costs, including those of two counsel, on 7 November 2007. His further appeal to the Constitutional Court was also dismissed with costs, including those of two counsel, on 31 July 2008.

[12] The related civil litigation apparently caused the NPA not to be ready to commence with Mr Zuma's criminal trial on the scheduled date, 31 July 2006. It applied for a postponement of the criminal trial for a period of six months (later revised to 3 months). Mr Zuma opposed the application and launched a counter-application for a permanent stay of the prosecution against him. On 20 September 2006, Msimang J concluded that, as the search warrants litigation was still pending in the appeal courts, the NPA could not be certain that it would be able to use the contested evidence within the further period sought (by October 2006), and, therefore, refused the postponement, and struck the matter from the roll. Msimang J deemed it unnecessary to deal with Mr Zuma's counter-application.

[13] On 27 December 2007, the acting NDPP, Adv Mokotedi Mpshe, announced that Mr Zuma would be indicted again on two counts of corruption, and also on twelve counts of fraud, one count of racketeering and one of money laundering, all related to his alleged dealings with Mr Shaik and Thint. Mr Zuma's criminal trial was then scheduled to commence in August 2008. During June 2008, Mr Zuma launched an application in the High Court, Pietermaritzburg for the review and setting aside of the NDPP's decision to indict him, arguing that it was procedurally unfair to make such a decision without first having invited him to make representations under s 179(5)(d)(i) of the Constitution, which section in its relevant part provides that the NDPP '. . . may review a decision to prosecute . . . after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from . . . [t]he accused person'. The application was argued in the High Court, Pietermaritzburg (Nicholson J) on 4 and 5 August 2008. Three counsel (led by Adv Kemp SC) were briefed by Hulley to argue the matter on Mr Zuma's behalf. On 12 September 2008, Nicholson J found in favour of Mr Zuma, but suspended the effect of his order by granting the NDPP leave to appeal, on 22 October 2008. On 12 January 2009, the Supreme Court of Appeal upheld the NDPP's appeal with costs, including those of two counsel, and replaced the order of the court below, inter alia, by dismissing Mr Zuma's application for an order reviewing and setting aside the NDPP's decision to indict him and ordering him to pay the NDPP's costs of suit, including those consequent upon the employment of three counsel.

[14] After the Supreme Court of Appeal's judgment, Mr Zuma, represented by Hulley and Adv Kemp SC made representations to the acting NDPP, Adv Mpshe, in writing on 10 February 2009, and orally on 20 February 2009. In the oral representations they reportedly indicated that they were in possession of tape recordings made by government intelligence agents (called the 'spy tapes') of telephone conversations involving prosecutors and political actors showing that there had been a political conspiracy to prosecute Mr Zuma, and, if the prosecution against Mr Zuma was not discontinued, they would apply to court for a permanent stay of the prosecution. On 9 March 2009, Hulley made further oral representations, which included playing certain parts of the spy tapes. Relying on these representations, the acting NDPP on 1 April 2009, reviewed the decision

to prosecute Mr Zuma and decided to discontinue the prosecution for 'policy' reasons. This decision was announced to the public on 6 April 2009.

[15] On 7 April 2009, the DA instituted an application in the High Court, Pretoria for an order reviewing and setting aside the acting NDPP's decision to discontinue the prosecution of Mr Zuma (the DA's review application). The DA's review application was opposed by the State Attorney on behalf of the NDPP, and by Mr Zuma, who had been cited as respondent in his personal capacity. It took almost seven years from initiating the DA's review application before it was finally heard by the Full Court of this division. The delay was caused by two interlocutory applications. The first one concerned a challenge by the NDPP and by Mr Zuma to the *locus standi* of the DA to bring the application, the reviewability of the acting NDPP's decision to discontinue the prosecution and the duty of the NDPP to furnish the court and the DA with the record of its decision under r 53 of the Uniform Rules of Court. In addition to the two counsel (one senior and one junior) briefed by the State Attorney for the NDPP, Hulley briefed three counsel (led by Adv Kemp SC) to represent Mr Zuma. On 22 February 2011, Ranchod J concluded that the DA had not provided a sustainable basis for its contention that it had standing to bring the review application and he also refused the relief to compel the production of the record of the decision to discontinue the prosecution.

[16] The DA (and other parties that sought to intervene) were ordered to pay the costs of the application, including those of two counsel. The DA (and two others) appealed the judgment and order to the Supreme Court of Appeal. On 20 March 2012, the Supreme Court of Appeal upheld the DA's appeal in respect of all three issues, and the acting NDPP and Mr Zuma were ordered to pay the DA's costs, jointly and severally, including those of two counsel. The Supreme Court of Appeal substituted the order of the High Court as follows:

'1. The issues raised for separate adjudication by the respondents are determined as follows:

1.1 The respondents' objection to the standing of the first applicant in the review application is dismissed with costs including the costs attendant on the employment of two counsel.

1.2 The first respondent's decision of 6 April 2009 to discontinue the prosecution of the third respondent is held to be subject to review.

1.3 In the rule 6 (11) application the first respondent is directed to produce and lodge with the registrar of this court the record of the decision. Such record shall exclude the written representations made on behalf of the third respondent and any consequent memorandum or report prepared in response thereto or oral representations if the production thereof would breach any confidentiality attaching to the representations (the reduced record). The reduced record shall consist of the documents and materials relevant to the review, including the documents before the first respondent when making the decision and any documents informing such decision.

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

[17] When the matter returned to the High Court, Pretoria, Mr Zuma and the NDPP resisted the inclusion in the r 53 record of those parts of the spy tapes on which the decision of the acting NDPP to discontinue the prosecution was based. The DA then applied for an order compelling the production of those parts of the spy tapes. Again, in addition to the two counsel (one senior and one junior) briefed by the State Attorney to represent the NPA, Hulley, and two counsel, Adv Kemp SC and a junior, resisted the application on behalf of Mr Zuma. On 16 August 2013, the High Court (Mathopo J) granted the relief sought by the DA, with costs. Mr Zuma appealed to the Supreme Court of Appeal against that judgment and order, but the appeal was dismissed with costs, including those of two counsel, on 28 August 2014. Navsa ADP, who wrote the unanimous judgment of the Supreme Court of Appeal, noted the following by way of introduction:

'In the main, the lack of merit of the present appeal was conceded by counsel on behalf of Mr Zuma, particularly in relation to the release of audio recordings and transcripts thereof in the possession of the third respondent, the Acting National Director of Public Prosecutions (the ANDPP).'

[18] The DA's review application was finally heard over three days (1 – 3 March 2016) before the Full Court of this division. Again, in addition to three counsel (two senior and one junior) briefed by the State Attorney for the NPA, Hulley, Adv Kemp SC and three other counsel (one senior and two junior) represented Mr Zuma in opposing the DA's review application. On 29 April 2016, the Full Court unanimously held that the decision

of the acting NDPP, Mr Mpshe, taken on 1 April 2009 to discontinue the prosecution of Mr Zuma was irrational and the decision was reviewed and set aside. Mr Zuma and the NDPP were ordered to pay the DA's costs, including those of three counsel.

[19] Mr Zuma applied to the Supreme Court of Appeal for leave to appeal against the judgment and order of the Full Court. The acting NDPP and the head of the Directorate of Special Operations also applied for leave to appeal to the Supreme Court of Appeal. The two applications were referred for oral argument in terms of s17(2)(d) of the Superior Courts Act 10 of 2013. In referring the matter for oral argument, the Supreme Court of Appeal directed the parties to be ready, if called upon to do so, to argue the merits of the appeal. On 13 October 2017, the Supreme Court of Appeal made the following order in the two applications for leave to appeal that were consolidated:

'1. The applications for leave to appeal are granted.

2. The appeals are dismissed with costs, including the costs of three counsel and the costs related to the applications for leave to appeal. The National Prosecuting Authority and Mr JG Zuma are to pay such costs jointly and severally, the one paying the other to be absolved.'

[20] The unanimous judgment of the Supreme Court of Appeal, written by Navsa ADP, started off thus:

'TS Eliot spoke of the recurrent end of the unending'. 'The relevance of these words will soon become apparent.'

Navsa JA then referred to what Harms JA said in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 2:

'The litigation between the NDPP and Mr Zuma has a long and troubled history and the law reports are replete with judgments dealing with the matter. It is accordingly unnecessary to say much by way of introduction and a brief summary will suffice.'

He then continues to say:

'[3] The current applications are part of the continuing litigation saga that has endured over many years and involved numerous court cases. It is doubtful that a decision in this case would be the end of the continuing contestations concerning the prosecution of Mr Zuma. Minutes into the argument before us counsel for both Mr Zuma and the NPA conceded that the decision to discontinue the prosecution was flawed. Counsel on behalf of Mr Zuma, having made the

concession, with the full realization that the consequence would be that the prosecution of his client would revive, gave notice that Mr Zuma had every intention in the future to continue to use such processes as are available to him to resist prosecution.

[4] The South African public might well be forgiven for thinking that the description at the beginning of this judgment was coined to deal with the prosecution or latterly, more accurately, the non-prosecution of Mr Zuma. I shall, in due course, deal with the nature and import of the concessions made by both the NPA and counsel on behalf of Mr Zuma.

. . .

[62] Counsel on behalf of Mr Zuma was intent on recording that he reserved all of his rights in relation to a revived prosecution. It was submitted that Mr Zuma would be within his rights to make representations to be properly assessed in relation to the discontinuation of the prosecution and that Mr Zuma would have regard to all the options at his disposal to resist being prosecuted. These are issues we are not required to address.'

[21] In January 2018, Mr Zuma instructed Hulley to approach the NDPP again to make representations under s 179(5)(d) of the Constitution. On 16 March 2018, the then NDPP, Adv Shaun Abrahams, announced his decision to reinstate the 16 criminal charges (racketeering, corruption, money laundering and fraud) that had been brought against Mr Zuma in 2009 and that his representations had been unsuccessful. On 17 March 2018, Mr Michael Hulley released a press statement indicating that 'the likely course of action would be to take the decision of the NDPP on review'. On 6 April 2018, Mr Zuma appeared in the High Court, Durban following the reinstatement of the criminal case against him. The case was postponed. Mr Zuma indicated his intention to institute an application to review and set aside the decision of the NDPP to reinstate the charges against him, and for a stay of the prosecution.

[22] The state has thus funded Mr Zuma's Stalingrad defence strategy from before he had been indicted for the first time on 20 June 2005 - in order to respond to the NDPP's questions, to obtain access to the 'encrypted note' and to represent his interests at the Shaik trial - until the decision of the Supreme Court of Appeal on 13 October 2017, upholding the setting aside of the acting NDPP's decision to discontinue the prosecution of Mr Zuma, and the Presidency intends to continue to provide state funding for Mr

Zuma's criminal trial 'on the basis that the decision is presumed to be valid and binding until it is set aside by the court'.

[23] The law reports are indeed replete with judgments dealing with Mr Zuma's criminal prosecution and the related civil proceedings, and in particular his challenges to:

(a) the lawfulness of the search warrants issued against him (*Zuma and another v National Director of Public Prosecutions and others* 2006 (1) SACR 468 (D); [2006] 2 All SA 91 (D); *Thint (Pty) Ltd v National Director of Public Prosecutions* [2008] 1 All SA 229 (SCA); *National Director of Public Prosecutions v Zuma and another* [2008] 1 All SA 197 (SCA) and *Thint (Pty) Ltd v National Director of Public Prosecutions and others*; *Zuma and another v National Director of Public Prosecutions and others* 2009 (1) SA 1 (CC));

(b) the letter of request issued to access information held by the Mauritian authorities (*National Director of Public Prosecutions v Zuma and others* ((13569/2006) 2 April 2007 (DC&LD) unreported; *Zuma and Others v National Director of Public Prosecutions* [2008] 1 All SA 234 (SCA) and *Thint Holdings (Southern Africa) (Pty) Ltd and another v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 141 CC));

(c) his indictment in terms of s 179 of the Constitution (*Zuma v National Director of Public Prosecutions* [2009] 1 ALLSA 54 (N); 2009 (1) BCLR 62 (N); and *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA));

(d) the DA's *locus standi* in the DA's review application, the reviewability of the decision of the acting NDPP to discontinue his prosecution and to the furnishing of the record to the DA (*Democratic Alliance and others v Acting National Director of Public Prosecutions and others* 2012 (3) SA 486 (SCA); [2012] 2 All SA 345 (SCA); [2012] 2 All SA 345 (SCA); 2012 (6) BCLR 613 (SCA));

(e) the disclosure of the transcripts of the conversations recorded in the spy tapes (*Democratic Alliance v Acting National Director of Public Prosecutions and others* 2016 (2) SACR 1 (GP); [2016] 3 All SA 78 (GP); 2016 (8) BCLR 1077 (GP); *Zuma v Democratic Alliance and others* [2014] 4 All SA 35 (SCA));

(f) and his opposition to the DA's review application (*Zuma v Democratic Alliance and others; Acting National Director of Public Prosecutions and another v Democratic Alliance and another* 2018 (1) SA 200 (SCA); [2017] 4 All SA 726 (SCA); 2018 (1) SACR

123 (SCA); *Democratic Alliance v Acting National Director of Public Prosecutions and others* 2016 (2) SACR 1 (GP)).

THE IMPUGNED DECISIONS

[24] Generally, legal costs incurred by the state are paid by the department with authority over the person requesting legal assistance. The State Attorney may only obligate the funds of a department with the prior written approval of the accounting officer of that department. Legal costs are normally defrayed from funds allocated for that purpose from the departmental budget. Here, the payment of Mr Zuma's private legal costs required the approval of the DG in the Presidency and it was paid to the Department of Justice and Correctional Services – the Office of the State Attorney in particular - from the budget of Legal and Executive Services in the Presidency.

[25] The Presidency filed the review record on 18 April 2018 and a supplementary one on 19 June 2018. It also, as I have mentioned, filed explanatory affidavits in both the DA and EFF applications. In its explanatory affidavit in the DA application the following is stated with regard to the review record:

'8. In essence the DA seeks to set aside the decision by the accounting officer in the Presidency and/or the State Attorney to provide state funding to the former President, Mr JG Zuma, for his legal defence in the criminal prosecution brought against him in relation to certain conduct pertaining to the negotiation of the contract for the procurement of strategic defense equipment, otherwise known as the 'arms deal case'.

9. In order to compile the review record and prepare this affidavit the Presidency has searched for records of the decision, including the advice upon which the decision was made. It is necessary to stress that this has not been without challenge since the events date back 14 years. Furthermore, the State Attorney who was responsible for handling the request for funding from Mr Zuma is now deceased.

10. The Presidency was intent on meeting the deadline for the filing of the review record and the same was filed on 18 April 2018. However, we did not stop searching for further documents that would be relevant to the review application. A small number of further documents were located and these were filed as a supplementary record on 19 June 2018.

11. As part of the continued search for documents the State Attorney wrote to the legal representative of Mr Zuma (Hulley) on 18 May 2018 requesting their "assistance in filling some of the gaps in the record that the DA has highlighted". This letter is annexed as A1.
12. The State Attorney did not receive a response to this letter. A follow-up letter was sent on 29 May 2018, annexed as A2. The State Attorney did not receive a response to this letter either.
13. The State Attorney also consulted a number of individuals previously in the employ of the Department of Justice and Correctional Services and the Presidency as well as current employees in order to obtain as much information as possible.
14. As a result, we have provided the documents that we were able to find. Some of these are unsigned or in draft form but we were unable to locate the final version of those documents.'

[26] The record reveals that Mr Zuma (through his privately instructed attorneys) has made six requests for state funding of his personal legal representation in his criminal prosecution and the related civil litigation, which dates back to March 2004. At various junctures decisions were taken by the DG in the Presidency and the State Attorney for the state to pay for Mr Zuma's private legal representation.

(a) Response to NDPP's questions and application for access to the encrypted note

[27] There is no evidence in the record of any final decision having been taken to approve the state's payment of the legal costs incurred by Mr Zuma in responding to the NDPP's questions or those incurred by him in his application to gain access to the 'encrypted note'. The record contains only a motivation by the DG in the Presidency to the State Attorney, dated 9 March 2004, requesting retrospective approval for the payment of Mr Zuma's private legal costs that had already been incurred. A subsequent memorandum prepared by the Chief State Law Advisor to the DG in the Presidency, dated 20 April 2004, advising him that the state should consider paying the legal costs that had been incurred by Mr Zuma, but subject to repayment of those costs in the event of him being charged with a criminal offence and convicted, and presentation of an account of the legal services rendered to him at the conclusion of all proceedings.

(b) The watching brief in the Shaik trial

[28] The record reveals that the DG in the Presidency approved the briefing by the State Attorney of two counsel to attend the Shaik trial on a watching brief. However, no approval was given by the DG in the Presidency for the payment of the costs of Mr Zuma's private attorney. Indeed, the DG in the Presidency expressly advised the State Attorney that the Presidency would not pay for the costs of Mr Zuma's private attorney. Yet the record reveals that Mr Zuma's private attorney, Ms Mohamed, was indeed paid the sum of R108 724.56 by the state for work she had done for Mr Zuma in connection with the Shaik trial.

(c) Mr Zuma's defence in his criminal trial and related litigation

(i) The first request for defence funding (Ms Oosthuizen)

[29] Mr Zuma's then private attorney, Ms Oosthuizen of Grutter & Lombard Attorneys, first requested the state to fund Mr Zuma's defence in his criminal prosecution on 23 September 2005. On 14 December 2005, the Chief Operating Officer and Accounting Officer in the Presidency, Mr Fowler, approved Mr Zuma's request for state funding. Mr Fowler took this decision in terms s 3(1) of the State Attorneys Act. Mr Fowler required Mr Zuma to conclude a repayment agreement (a draft of which he attached to his instructions to the State Attorney) and he further authorised the State Attorney to instruct one senior and one junior counsel at the most cost-effective rates. It appears that Mr Zuma did not conclude the repayment agreement; the Presidency states that '[w]e were unable to locate that agreement, in draft or final form' and Mr Zuma's current attorney, Mr Lugisani Mantsha, who deposed to his answering affidavits, states that he submits 'that Mr Fowler's approval was not subject to an undertaking'. Mr Zuma did not suggest that he indeed furnished the required undertaking.

(ii) The second request for defence funding (Mr Hulley)

[30] In July and August 2006, Mr Hulley requested that the state pay for all of Mr Zuma's legal costs in his criminal trial, including two senior counsel, two junior counsel, an accountant or forensic auditor, witnesses' expenses and Mr Hulley's firm's fees. On 14 September 2006, Mr Zuma signed an 'application and undertaking' in terms of which he applied '...for legal assistance at the State's expense in a criminal case in which I am

accused of two counts of corruption.' The written undertaking that was given by Mr Zuma reads thus:

'I hereby undertake on demand to refund to the State Attorney all costs incurred by the State Attorney in connection with my defence should the court find that I acted in my personal capacity and own interests in the commission of the alleged offences. The demand to refund all costs incurred will still be in the discretion of the State Attorney.'

[31] The State Attorney paid Hulley's invoices for the legal costs incurred in Mr Zuma's criminal defence from July 2006 to at least October 2006. However, there is no record of any decision having been taken by the DG in the Presidency approving Mr Zuma's application dated 14 September 2006 for the appointment of attorneys and counsel at state expense, and approving the payments made to Hulley in 2006. In this regard the Presidency states:

'We were not able to locate a written decision by Mr Fowler, or anyone else, approving the appointment of a private attorney [for Mr Zuma].'

[32] On 20 September 2006, the High Court refused the NPA's application for postponement of Mr Zuma's criminal trial and struck the matter off the roll. The prosecution of Mr Zuma was only reinstated by the acting NDPP, Mr Mpshe, on 27 December 2007.

(iii) The third request for defence funding (Mr Hulley)

[33] The reinstatement of the charges against Mr Zuma on 27 December 2007 appears to have prompted Mr Hulley to approach the State Attorney again in January 2008 for funding of Mr Zuma's legal costs in his criminal prosecution. Mr Hulley again requested the state to cover the costs of Mr Zuma's defence, including those of Adv KJ Kemp SC, two junior counsel, a second senior counsel on an *ad hoc* basis and the firm Hulley. The DG in the Presidency approved this request for funding, subject to a certain fee structure and an undertaking that Mr Zuma would repay the state should he be convicted. Mr Zuma signed a written 'application and undertaking' on 26 September 2008, in terms of which he applied 'for legal assistance at State expense in the criminal case in which I am accused' and his undertaking reads thus:

'I hereby undertake on demand to refund to the State Attorney all costs incurred by the State Attorney in connection with my defence.'

(d) The DA's review application

[34] In November 2009, Mr Hulley requested the State Attorney to fund Mr Zuma's opposition to the DA's review application. The DG in the Presidency approved this request on 11 February 2010. The Presidency and the State Attorney acted under the belief that the DA's review application 'falls within the ambit of the State's undertaking to pay for Mr Zuma's legal fees' since 'the application is directly connected to the criminal proceedings which were withdrawn by the acting NDPP'. The Presidency also confirms in its explanatory affidavit in the DA application that this request for funding was dealt with 'as an extension of its decision to provide funding to Mr Zuma for his defence to the criminal charges' and that accordingly, no further request for an undertaking of repayment was sought.

(e) Other interlocutory applications related to the criminal trial

[35] On 6 March 2007, Mr Zuma's private attorneys requested the State to fund Mr Zuma's opposition to the NPA's application for a letter of request for documents from the Mauritian authority. That application was approved by the DG in the Presidency, but subject to the requirement that:

'Mr JG Zuma entered into an agreement that he would refund the Presidency all the monies paid on his behalf in the event that he is not successful in his opposition of the State Application.'

Furthermore, as 'a condition for the approval', Mr Zuma's lawyers were required to provide 'the actual/estimate of the total costs of the legal fees for this matter'. The Presidency states that 'there is no further signed undertaking in relation to this funding that we were able to find.' Mr Mantsha, on behalf of Mr Zuma, simply states that: 'I am unable to assist the Applicant'. Mr Zuma, as I have mentioned before, was unsuccessful in the application. Nevertheless, he was never called upon nor did he repay the legal costs incurred in opposing the application and the appeals that followed.

[36] There is no record of any decisions having been taken to authorise the state's payment of Mr Zuma's legal costs in his application to set aside the search warrants

issued against him, including the appeals that followed from 2005 to 2006, and Mr Zuma's application for the review of his indictment in December 2007, including the appeals that followed in 2008-2009. The state paid the legal costs incurred by Mr Zuma in these interlocutory applications and appeals.

STATUTORY AUTHORITY INVOKED FOR THE IMPUGNED DECISIONS

[37] The question of the state funding of Mr Zuma's private legal costs in the criminal case against him was occasionally raised in Parliament since 2008. For example, on 12 September 2008, a DA member of Parliament asked the Minister in the Presidency this question:

'What is the total amount that has been made for the refunding the legal costs incurred by the Government on behalf of a certain person Mr Jacob Zuma in the event of a guilty verdict; if not, why not; if so, what are the relevant details;

Whether any security or surety is held in lieu of the legal costs incurred; if not; why not; if so, what are the relevant details?'

In response, the Minister in the Presidency said:

'(1) The practice is that any person who receives funding or legal representation at the state's expense makes an undertaking to refund the state in the event he/she is found guilty of the charges against him/her.

After the verdict, the state attorney in recovering the costs, will compute a bill of costs after taxation, present the bill to the said person ("accused") to refund the amount that has been taxed.

At this stage we cannot say how much Mr Zuma will be expected to pay in the event of a guilty verdict, because his case has not been finalised.

(2) There is no security held in lieu of legal costs to be incurred, however, if Mr Zuma was a public servant, his pension benefits would be withheld until the case is finalised.

Should Mr Zuma be liable to refund the State, in the case the normal legal processes will be followed.'

[38] The DA's unchallenged evidence, however, is that it had been seeking clarity from the Presidency on the amounts paid by the state towards Mr Zuma's personal legal costs and the basis for any such payments since the Supreme Court of Appeal had upheld the decision of the Full Court of this division setting aside the decision of the acting NDPP to

discontinue the prosecution of Mr Zuma in October 2017, but that its requests were 'stubbornly ignored and resisted' by the then President, Mr Zuma.

[39] Mr Cyril Ramaphosa was the Deputy President of South Africa from 2014 until 2018. He was elected as the President of the ANC on 18 December 2017. The National Assembly elected him as the President of South Africa on 15 February 2018. Acting on the instructions of the newly incumbent President Ramaphosa, the State Attorney, on 13 March 2018, disclosed that since 1 May 2009 the Presidency had spent an amount of R15 300 250 'on legal costs pertaining to the National Prosecuting Authority's decision to decline to prosecute former President Zuma on charges of fraud, corruption and racketeering'. The State Attorney qualified this statement the next day, stating '. . . that the amount must be broken down into two separate time periods - before and after the decision to withdraw the charges that was eventually the subject of a review application'. The amount incurred in the initial period was R7 505 949.45 and the legal costs incurred 'from the application to review the decision to withdraw the charges up to the end of the decision of the Supreme Court of Appeal, was R7 794 301.28'.

[40] Mr Julius Malema, the President of the EFF and its leader in the National Assembly, submitted the following written question for President Ramaphosa to answer in the National Assembly on 14 March 2018, the first occasion on which he would answer Parliamentary questions as the President of South Africa:

'(a) What is the total amount that the Presidency spent on the legal costs of former President Mr JG Zuma, since his election as President in 2009;

(b) On what legal provision(s) or policy did the State rely when using State resources to fund the former President's personal legal costs?'

Addressing the National Assembly on 14 March 2018, President Ramaphosa replied thus:

'According to information from the Department of Justice and Correctional Services, Government has contributed R15.3 million to the personal legal costs of former President Jacob Zuma since 2006.

Of this amount approximately R7,5 million was spent in the period between 2006 and the withdrawal of the charges against the former President in 2009. An amount of R7.8 million has been spent since 2009.

This stems from a request by the former President in 2006 for legal representation at state expense in respect of the criminal proceedings. The request was approved by the Presidency based on advice by the State Attorney's office and the Department of Justice and Constitutional Development (as it was then).
The former President signed an undertaking to refund the state if he was found to have acted in his personal capacity and own interests in the commission of the offences with which he was charged.
This administration is guided by the fundamental principle that public money should not be used to cover the legal expenses of individuals on strictly personal matters or who are found have to committed criminal offences.'

[41] President Ramaphosa undertook to answer part (b) of Mr Malema's Parliamentary question in writing as soon as possible. On 22 March 2018, President Ramaphosa provided the following written answer to that part of the question:
'I am informed that the State Attorney, at the time of considering the request made by President Zuma for legal representation at State expense, considered section 3(3) of the State Attorney Act, 1957 (as amended) to give her discretion where the State was not party to a matter but interested or concerned in it, or it was in the public interest to provide such representation to a government official.
The acts on the basis of which it is alleged that the former President committed criminal offences took place during his tenure as a government official both at provincial and later at national level.
In addition, the Department of Justice considered section 12.2.2 of the then applicable Treasury Regulations, issued in terms of the Public Finance Management Act, 1999, read with section 3(1) of the State Attorney Act, as providing for an obligation to refund the state if any loss was found to be incurred when an official was acting outside the course and scope of his employment.
For this reason, the State Attorney decided that it was appropriate to grant the request of the former President, subject to the condition that he make an undertaking (which he did) to refund monies thus spent should it be found that he acted in his personal capacity and own interest in the commission of the alleged offences.

[42] On 14 March 2018, the DA addressed a letter to President Ramaphosa, seeking answers to specific questions pertaining to the state's payment of Mr Zuma's private legal costs. On 22 March 2018, the State Attorney responded to the DA's letter of 14 March,

after consulting with the Department of Justice and the Presidency. Therein, the State Attorney, inter alia states:

'2.1 The decision to provide to Mr Zuma legal representation at state expense was taken in accordance with section 3(1) of the State Attorneys Act 56 of 1957.

2.2 This decision was taken by the Presidency in 2006. After receiving the request for legal representation the Presidency sought advice from the Minister of Justice and the State Attorney.

2.3 The decision was based on advice from the Chief State Law Advisor (Mr Daniels), the Director–General in the Department of Justice (Adv Simelane), the Minister of Justice (Minister Mabandla) and the State Attorney (Ms Mosidi).

2.4 All the officials referred to in para 4 above recommended the provision of legal representation at state expense under section 3 of the State Attorney Act.

2.5 The Presidency at the time was further advised that there may be circumstances in which a private attorney may be engaged in order to provide legal representation to a government official or department. The Presidency was also advised that the circumstances of this particular request warranted the appointment of a private attorney on the basis that there may exist a conflict of interest were the state attorney to be engaged in providing legal representation or a perception of a conflict of interest.

2.6 The decision was subject to the undertaking by former President Zuma to refund the legal costs incurred by the State in the event that his defence is unsuccessful. We have been unable to locate a written agreement between the Presidency and Mr Zuma in this respect.

2.7 However, we have been provided with an undertaking dated 22 August 2006 signed by Mr Zuma and attach it hereto as Annexure A. A second undertaking was made on 26 September 2008, which is attached hereto as Annexure B.

2.8 The Presidency, at the time, was advised that the basis for the application of section 3 of the State Attorney Act was that the charges concerned government; that they relate to Mr Zuma's activities while he held political office as an MEC in KZN and later was required to answer questions as Deputy President; and that the matter is of public import.

2.9 . . . Due to the fact that the Presidents who came after the undertaking was signed are the successor in title in the President's office, they assume the obligation created in the undertaking. The office of the Presidency is therefore bound by that decision and must continue paying for Mr Zuma's legal fees on the basis that it undertook to do so until such time as the decision is reviewed and set aside by a court.'

[43] In the explanatory affidavit filed on behalf of the Presidency in the DA application, Mr Lubisi, inter alia states:

'30. In its supplementary affidavit dated 7 May 2018 the Applicant [the DA] invites the Presidency to provide details of the payments that have been made by the State to Mr Zuma's legal representatives. It took time to piece together this information as several state attorneys were involved over the years. I provide here all the information regarding the legal fees that I have been able to locate. This is reflected in the spread sheet and annexed as A5. The total payment by the Pretoria State Attorney is R15 235 250.73. The Johannesburg State Attorney has paid R532 600.00 for case number 83058/16. Total payment for the matters reflected in the spreadsheet, therefore, is R15 767 850.73. In addition to these payments, and as evidenced by pages 27 and 28 of the supplementary record filed by the Presidency, a payment of R1 020 930.41 was made by the State for legal fees incurred by Mr Zuma in the *S v Shaik* trial. As a result, according to the information provided to the Presidency by the Department of Justice, the total cost to the State of Mr Zuma's legal fees is R16 788 781.14.

. . .

32. I have made every effort to obtain the necessary information in order to assist the Court. I am advised by the relevant State Attorneys that, in some cases, files had been destroyed due to their age.

33. It is correct that the Presidency has not yet requested a refund of any of the funding provided to Mr Zuma. We await the outcome of this application before we do so.'

On the EFF's calculation, the amount spent on Mr Zuma's state-carried legal costs is closer to R32 million.

DELAY

[44] The DA and the EFF instituted their present review applications on 23 March 2018 and on 2 May 2018 respectively. The DA seeks the review and setting aside of the impugned decisions under PAJA or under the principle of legality. The EFF only initiated a legality review. It is only Mr Zuma who is opposing the applications.

[45] Mr Zuma argues that the DA, on its own version, became aware of the decisions that the state would fund the legal costs he incurred in his personal capacity in the criminal prosecution against him on 12 September 2008, when the Minister in the Presidency responded to the DA's parliamentary question to which I have referred in paragraph 37

supra. He further argues that the EFF application 'has not been brought within a reasonable time' since the 'decision to fund Mr Zuma was taken as far back as 2006', that Mr Malema should have known about the decision to fund Mr Zuma's private legal costs from at least 2008, and that, although the EFF was founded in July 2013, it 'could have questioned the decision as far back as July 2013 or soon thereafter'. Mr Zuma accordingly takes issue with the delay of the DA and of the EFF in initiating their review applications. He argues that the delay in each instance is unreasonable and ought to non-suit the DA and the EFF.

[46] In *Khumalo and another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC), Skweyiya J said this:

'[44] . . . Nevertheless, it is a long–standing rule that a legality review must be initiated without undue delay and that courts have the power (as part of their inherent jurisdiction to regulate their own proceedings) to refuse a review application in the face of an undue delay in initiating proceedings or to overlook the delay. This discretion is not open-ended and must be informed by the values of the Constitution. However, because there are no express legislated time periods in which the MEC was required to bring her application, there is no requirement that a formal application for condonation needs to have been brought.

. . .

[49] In *Gqwetha* [*Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA)] the majority of the Supreme Court of Appeal held that an assessment of a plea of undue delay involves examining: (1) whether the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in the light of 'all the relevant circumstances'); and if so, (2) whether the court's discretion should be exercised to overlook the delay and nevertheless entertain the application.'

(Footnotes omitted.)

[47] In *Khumalo* the Constitutional Court further held that '[in] terms of the first leg of the enquiry, any explanation offered for the delay is considered' (para 50), and as to the second leg of the enquiry, Skweyiya J said this:

'[52] But should we nevertheless overlook the unreasonable delay? On this leg of the test, the majority in *Gqwetha* held the delay cannot be evaluated in a vacuum but must be assessed with

reference to its potential to prejudice the affected parties and having regard to the possible consequences of setting aside the impugned decision. . . .

[53] Under the Constitution, however, the requirement to consider the consequences of declaring the decision unlawful is mediated by a court's remedial powers to grant a 'just and equitable' order in terms of s 172(1)(b) of the Constitution. A court has greater powers under the Constitution to regulate any possible unjust consequences by granting an appropriate order. While a court must declare conduct that it finds to be unconstitutional invalid, it need not set the conduct aside.

. . .

[56] Considering the courts' power to grant a just and equitable remedy, the impact of a finding of invalidity may be ameliorated by fashioning a remedy that is fair to Mr Khumalo. . . . Therefore, on this leg of the test, the consequences and potential prejudice do not in this case, and ought not in general, favour the court non-suiting an applicant in the face of the delay. The application of this aspect of the test set in *Gqwetha* must be contextualized in the courts' discretion to grant a just and equitable remedy.

[57] An additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision. In my view this requires analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge.'

(Footnotes omitted)

[48] I turn to consider whether the delay in each instance was unreasonable. I accept that the DA knew of *a* decision for the state to pay Mr Zuma's personal legal costs incurred by him in defending the criminal prosecution against him since around the time when the DA member questioned the Minister in the Presidency on the matter in Parliament on 12 September 2008, and that the EFF might reasonably be expected to have become aware of such a decision since the latter part of 2013. But, the DA and the EFF knew – and still know – very little about the decisions taken in respect of the funding of Mr Zuma's private legal costs. The decisions taken, and the reasons therefore, were never disclosed. The Presidency and the State Attorney appeared to have taken several decisions to fund Mr Zuma's legal costs beyond those incurred in his criminal defence, including before he was charged and in the various related civil applications and the DA's review application. The exact amount paid by the state for Mr Zuma's private legal costs in the criminal case and in the related litigation is still uncertain and it appears that it could be anywhere between

R16, 788, 781.14 and R32 million. The DA and the EFF cannot reasonably be expected to have become aware of the state funding of Mr Zuma's private legal costs incurred prior to his indictment on 20 June 2005 nor of the related civil proceedings and appeals, which were never disclosed to the DA or to the EFF until President Ramaphosa had taken office as the President of South Africa on 15 February 2018. Furthermore, the prosecution of Mr Zuma was discontinued on 6 April 2009 and only reinstated on 16 March 2018.

[49] Since at least October 2017 - when the Supreme Court of Appeal had upheld the decision of the Full Court of this division setting aside the decision of the acting NDPP to discontinue the prosecution of Mr Zuma - the DA has sought clarity on amounts that had been paid by the state towards Mr Zuma's private legal costs and the basis for any such payments, but the DA's requests for such information were indisputably ignored by the Zuma administration. Undisputed is also the EFF's averment that in light of the 'astonishing announcement' by Hulley, on 17 March 2018, that the likely cause of action would be to take the decision of the NDPP - that Mr Zuma's representations had been unsuccessful and that the criminal matter would proceed to trial - on review, 'many members of the public, including members and constituents of the EFF began to question how Mr Zuma (who has been unemployed since 14 February 2018) would be able to afford yet another course of litigation in which he would risk being not only defeated but also directed to pay the NDPP's costs'.

[50] The DA and the EFF only came to learn of the nature and extent (at least in part) of the impugned decisions in March 2018, when the new Ramaphosa administration disclosed the Presidency's liability. The Presidency first disclosed the reasons and legal basis for the state's payment of Mr Zuma's private legal costs, including the written undertaking for the repayment, on 22 March 2018. As soon as the DA learned of the extent and basis for the state's payment of Mr Zuma's private legal costs, it initiated its review application on 23 March 2018. The EFF initiated its legality review application within one month of it becoming aware of what it considers to be the exorbitant amount of public money being spent on Mr Zuma's legal costs, the legal basis upon which the money was paid and the revelation that despite Mr Zuma's undertaking to repay the money 'on demand', the State Attorney had taken no readily realisable security for such

repayment. Having due regard to all the relevant circumstances I am of the view that the delays in initiating the DA and EFF review applications were not undue or unreasonable.

[51] I am further of the view, on the totality of circumstances, that even if the delays should be considered undue or unreasonable, they should in the interests of justice nevertheless be overlooked. The matter is of obvious public importance – not only because of the sums of public money involved, but because it raises important issues pertaining to the functions of the State Attorney and the use of public resources to fund public officials' private civil and criminal litigation. Mr Zuma continues to rely on the 2008 agreement by the state to fund his defence in his criminal trial and to litigate on a luxurious scale and the Presidency has confirmed its intention to continue to honour 'the undertaking' unless the 2008 decision to pay is set aside by the court. There is a considerable and continuous financial burden to be borne by the public and the state. As was held in *South African National Roads Agency Ltd v Cape Town City* 2017 (1) SA 468 (SCA) para 108, the public interest is a compelling factor. Here, the principle of legality and the constitutional principles of transparent and accountable governance also obtrude.

[52] The papers before us do not reveal any real prejudice to Mr Zuma. On the contrary, on 26 September 2008, Mr Zuma in writing undertook to repay the State Attorney in full 'on demand', and he does not claim to have been unable to make the necessary arrangements for this eventuality or to be financially unable to pay back the full amount within a reasonable period of time. Furthermore, the merits of each review application are so strong as to compel us to overlook any insufficiency in the explanations proffered for the delays in initiating the review applications. I am of the view, therefore, that the delays by the DA and the EFF should not prevent this court from looking into the challenges to the lawfulness of the exercise of public power and that the DA and the EFF should not be non-suited in the face of the delays.

CONDONATION (DA)

[53] The DA denies that it initiated its review application outside the 180-day period prescribed in terms of s 7(1) of PAJA. It contends that the answer given by the Minister in the Presidency to its parliamentary question on 12 September 2008, was oblique and

lacking in any meaningful particularity. It initiated its review application on 23 March 2018, as soon as it learned of the extent and basis for the state's payment of Mr Zuma's legal costs. The DA thus argues that it complied with s 7(1) of PAJA; it instituted its application for judicial review without unreasonable delay and not later than 180 days after it might reasonably be expected to have become aware of the decisions. But it seeks, *ex abundante cautela*, an extension of the 180–day period for instituting its review application under s 9(2) of PAJA. I accept that the DA's review application was initiated out of time and that it rightly applied for an extension under s 9. The issue of unreasonableness is pre-determined by the Legislature; a delay exceeding 180 days is unreasonable *per se*. A court is then only empowered to entertain a review application under PAJA if the interests of justice dictate an extension in terms of s 9.

[54] In *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] 4 All SA 639 (SCA) para 26, Brandt JA said the following:

'At common law, application of the undue delay rule required a two-stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned (see eg *Associated Institutions Pension Fund and others v Van Zyl and others* 2005 (2) SA 302 (SCA) at paragraph 47 [also reported at [2004] 4 All SA 133 (SCA) – Ed]). Up to a point, I think, s 7(1) of PAJA requires the same two-stage approach. The difference lies, as I see it, in the Legislature's determination of a delay exceeding 180 days as *per se* unreasonable. Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180-day period the issue of unreasonableness is pre-determined by the Legislature: it is unreasonable *per se*. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been "validated" by the delay (see eg *Associated Institutions Pension Fund (supra)* at para 46). That of course does not mean that, after the 180-day period, an enquiry into the reasonableness of the applicant's conduct becomes entirely irrelevant. Whether or not the delay was unreasonable, and if so, the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not (see eg *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA) at paragraph 54).'

[55] In *South African National Roads Agency Ltd v Cape Town City* 2017 (1) SA 468 (SCA), the Supreme Court of Appeal considered the question how the judicial discretion on whether to condone a delay and extend the 180–day period in terms of s 9 of PAJA should be exercised. In this regard Navsa JA said the following (para 80):

'In *Tasima (Pty) Ltd v Department of Transport* [2016] 1 All SA 465 (SCA) ([2015] ZASCA 200) paras 29–30 this court observed that in considering whether to extend the 180-day period in terms of s 9, a court would be guided by what the interests of justice dictate. In order to determine that question, regard should be had to all the facts and circumstances. This equates with how the judicial discretion on whether to condone a delay was exercised before the advent of PAJA. There is no maximum period provided for in PAJA and the cases in which the 180-day period was extended are diverse in relation to the period of delay. Simply put, whether one is considering condoning a delay either under the provisions of PAJA or beyond it, the same determining criterion applies, namely the interests of justice. Viewed thus, a definitive classification of the nature of the impugned decision is not strictly necessary, particularly if regard is had to the challenge essentially being one of legality.'

(Footnotes omitted.)

[56] Having regard to all the facts and circumstances of this particular case, I am of the view that the interests of justice dictate that the DA's delay in instituting its review application in terms of PAJA should be condoned and the 180-day period extended in terms of s 9. This conclusion is reached for the same reasons that led me to conclude that the delays in initiating the DA and EFF review applications were not undue or unreasonable, but even if they were, should nevertheless be overlooked in the interests of justice.

INTERPRETATION OF THE INVOKED STATUTORY PROVISIONS

[57] The legislative provisions invoked by the Presidency and the State Attorney that empowered the DG in the Presidency and the State Attorney to approve Mr Zuma's requests for legal assistance at state expense in the criminal case against him and in the related civil litigation, and for making the payments to Mr Zuma's private attorneys, is s 3(1) or 3(3) of the State Attorney Act, as well as reg 12.2 of the Treasury Regulation.

[58] Section 3 of the State Attorney Act reads thus:

'(1) The functions of the office of the State Attorney and of its branches shall be performed in any court or in any part of the Republic of such work on behalf of the Government of the Republic as is by law, practice or custom performed by attorneys, notaries and conveyancers or by parliamentary agents: Provided that the functions in regard to his duties as parliamentary agent shall be subject to the Standing Rules of the respective Houses of Parliament.

(2) There may also be performed at the State Attorney's office or at any of its branches like functions for or on behalf of the administration of any province, and the South African Railways and Harbours Administration, subject to such terms and conditions as may be arranged between the Minister of Justice and the Administration concerned.

(3) Unless the Minister of Justice otherwise directs, there may also be performed at the State Attorney's office or at any of its branches like functions in or in connection with any matter in which the Government or such an administration as aforesaid, though not a party, is interested in or concerned in, or in connection with any matter where, in the opinion of the State Attorney or of any person acting under his authority, it is in the public interest that such functions be performed at the said office or at one of its branches.'

[59] And reg 12.2.1 of the Treasury Regulations, which is headed 'Claims against the state through acts of omissions', reads as follows:

'An institution must accept liability for any loss or damage suffered by another person, which arose from an act of omission of an official as a claim against the state and does not recover compensation from an official, provided the official shall forfeit this cover if he or she, with regard to the act or omission, is liable in law and –

(a) intentionally exceeded his or her powers;

(b) made use of alcohol or drugs;

(c) did not act in the course or scope of his or her employment;

(d) acted recklessly or intentionally;

(e) without prior consultation with the State Attorney, made an admission that was detrimental to the state; or

(f) failed to comply with or ignored standing instructions, of which he or she was aware of or could reasonably have been aware of, which led to the loss, damage or reason for the claim, excluding damage arising from the use of the State vehicles; and

(g) in the case of a loss, damage or claim arising from the use of a state vehicle, the official –

(i) used the vehicle without authorisation;

(ii) did not possess a valid driver's licence or other appropriate licence;

(iii) did not use the vehicle in the interest of the state;

(iv) allowed unauthorised persons to handle the vehicle or;

(v) deviated materially from the official journey or route without prior authorisation;'

[60] The DA and the EFF argue that neither s 3 of the State Attorney Act nor reg 12.2.1 of the Treasury Regulations authorises the state to procure private legal representation for government officials in their private capacities or to fund such private legal costs. Section 3, they argue, permits only the office of the State Attorney to itself provide legal representation to government officials in certain circumstances. In any event, they argue, those circumstances were clearly not met in Mr Zuma's case. Mr Zuma, on the other hand, argues that s 3(3) vests the State Attorney with a discretion to act for a government official in a matter, whether the government is a party or not, where it has an interest in the matter or where it is otherwise concerned in the matter. Government's interest or the public interest, Mr Zuma argues, is automatically implicated when a government official is charged with any criminal offence.

[61] Section 3 of the State Attorney Act and reg 12.2.1 of the Treasury Regulations must be interpreted in accordance with the established principles of interpretation. (See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *Bothma-Batho Transport (Edms) (Bpk) v S Bothma and Seun Transport (Edms) (Bpk)* 2014 (2) SA 494 (SCA) para 12.) A contextual interpretation of the statutory provisions invoked by the Presidency and the State Attorney as authority for the impugned decisions is required. Such interpretation must promote the spirit, purports and objects of the Bill of the Rights (s 39(2) of the Constitution).

[62] The meaning to be attributed to the asserted statutory provisions as contended for by Mr Zuma is, in my view, not warranted and has no basis in its language or in context. On its clear wording s 3(1) authorizes the State Attorney to act on behalf of government and perform the work ordinarily performed by attorneys and other legal representatives in court or any part of the Republic. The purpose of s 3(1) is to give the State Attorney the legal mandate to act as government's legal representative in court or anywhere in the Republic. Section 3(2) extends the mandate given to the State Attorney to include

representing the administration of any province and the South African Railways and Harbours administration. Section 3(3) further extends the mandate by permitting the State Attorney to perform the same functions (a) in or in connection with any matter in which government, *though not a party*, is interested or concerned in or (b) in connection with any matter where it is in the public interest that such functions be performed at the office of the State Attorney or at one of its branches. Section 3 is not a provision which provides authority for the appointment of private legal representatives for government officials to represent them in their private capacities in criminal proceedings against them and in related civil litigation nor does it confer the authority for state funding of such private external legal representation. It simply and clearly is not a provision that authorises the funding of the private legal costs of government officials.

[63] Regulation 12.2 of the Treasury Regulations does not govern the provision of legal representation for government officials nor the payment by the state of the private legal costs incurred by government officials. It enjoins the state to assume liability for 'any loss or damage' caused by the acts or omissions of government officials, *inter alia*, in the course and scope of their employment, without intention or recklessness, and without the influence of drugs or alcohol. The provision effectively indemnifies officials from third party damages claims, where they *inter alia* have acted without any intention to cause harm or willful recklessness or disregard of instructions.

[64] Furthermore, I agree with the contentions of the DA and of the EFF that the requirements of s 3 of the State Attorney Act have in any event not been met in Mr Zuma's case. First, the work was not performed on behalf of the government or the administration of any province or the South African Railways and Harbours administration, but on behalf of Mr Zuma in his personal capacity. Second, the work was not performed at the State Attorney's office or at any of its branches. Third, the government is a party to the criminal proceedings against Mr Zuma and was a party in all the other related civil proceedings. Fourth, it cannot be said to be in the government's interest or in the public interest to have appointed private attorneys for Mr Zuma and for the state to fund his private legal costs in defending the 18 criminal charges, including racketeering, corruption, money laundering, fraud and tax evasion, and in the related civil proceedings. The first situation

in which s 3(3) authorises the State Attorney to act - where 'the government ... though not a party, is interested or concerned' in a matter - finds no application to the criminal case against Mr Zuma nor to the related civil litigation. The government in the form of the NDPP or the NPA was a party in each matter and still is a party in the criminal prosecution, and was represented by the State Attorney in all of the related civil litigation. The second situation authorised by s (3)(3) - that 'it is in the public interest' for the State Attorney to act in the matter – according to the Presidency and the State Attorney, has been interpreted in practice as authority for the State Attorney to act for government officials facing criminal prosecution (or civil claims) in respect of conduct committed in the course and scope of their official functions.

[65] The general principle of vicarious liability holds an employer liable for the wrongs committed by an employee during the course of employment. Where an act is done by an employee solely for his own interests and purposes, although occasioned by his employment, a subjective and an objective test are applied for determining vicarious liability. This approach for determining vicarious liability was thus formulated by O-Regan J in *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para 32:

'The approach makes it clear that there are two questions to be asked. The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee's state of mind and is a purely factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interests and the purposes and the business of the employer. This question does not raise purely factual questions, but mixed questions of fact and law. The questions of law it raises relate to what is 'sufficiently close' to give rise to vicarious liability. It is in answering this question that a court should consider the need to give effect to the spirit purport and objects of the Bill of Rights.'

(Footnote omitted)

[66] Vicarious liability is not an issue here, and the question whether acts were committed in the course and scope of an employee's employment for vicarious liability to arise must not be conflated with the question whether criminal acts allegedly committed

by a public official were committed in the course and scope of his or her public office for the State Attorney, in government's interest or in the public interest, to act on behalf of the public official in his or her criminal prosecution on charges of corruption and fraud. Different considerations apply in each of the two situations. Nevertheless, when the objective test for determining vicarious liability is applied to the question whether it is in the government's interest or in the public interest that the State Attorney performs the functions as contemplated in s 3(3) of the State Attorney Act on the basis that the acts allegedly committed by Mr Zuma had been committed in the course and scope of his official functions, the inevitable conclusion, for the reasons that follow, is that there is not a 'sufficiently close link' between the acts allegedly committed by Mr Zuma and the purposes and business of the state.

[67] As was held by Mlambo JP, who wrote the unanimous judgment of the Full Court of this division in *President of the Republic of South Africa v Office of the Public Protector and another (Economic Freedom Fighters and others as Intervening Parties)* [2018] 1 All SA 576 (GP) para 54, it is the nature of the conduct investigated that determines whether the conduct of a Member of the Executive qualifies as personal or as official. In other words, it is the nature of the acts allegedly committed by the public office bearer that determines whether there is a 'sufficiently close link' between the alleged acts and the execution of the public office bearer's official duties. There Mlambo JP said the following:

'. . . It is the nature of the conduct investigated that determines if the issue is personal or official. . . . Members of the Executive have private dealings in their personal capacities and these are quite distinct from their conduct whilst pursuing the interests, objectives and responsibilities of the departments they lead. Put differently, if that conduct falls outside the confines of the Constitution, more particularly Chapter 5 thereof, we fail to see how such conduct can be regarded as the conduct of the Head of State acting in his official capacity.'

[68] The need to give effect to the spirit, purport and objects to the Bill of Rights fortifies my conclusion. In *Glenister v President of the Republic of South Africa and others* 2011 (3) SA 347 CC para 57 the Constitutional Court recognized that-

'. . . [c]orruption has become a scourge in our country and it poses a real danger to our developing democracy. It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights.'

Furthermore, in *Economic Freedom Fighters v Speaker, National Assembly and others* 2016 (3) SA 580 (CC) para 1, the Constitutional Court emphasized that the foundational values of the Constitution demand public accountability of public office bearers who abuse their office. In this regard Mogoeng CJ said that-

'. . . we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason public–office bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.'

(Footnote omitted.) Allegations or charges of corruption and fraud against a public office bearer, in the words of former President Thabo Mbeki, raise 'questions of conduct that would be inconsistent with expectations that attend to those who hold public office'. And, as was said by President Ramaphosa, it is a 'fundamental principle that public money should not be used to cover the legal expenses of individuals on strictly personal matters'.

[69] It is in the public interest that charges relating to the abuse of public office – corruption and fraud – are prosecuted to ensure public accountability, the promotion of good governance, the protection of the rule of law and the protection and advancement of the rights enshrined in the Bill of Rights. If the state is burdened with the high legal costs of those public office bearers who are charged with such crimes, the taxpayer bears that burden and poor communities continue to be denied access to essential services, as the state's resources are being diverted in funding the defences of public office bearers charged with such crimes, in this instance financially assisting Mr Zuma to have litigated on a most luxurious scale. This conclusion does not mean, as the EFF in my view correctly argues, that because Mr Zuma's private legal costs in question could not legally have been funded by the Presidency, he cannot be assisted by the state. Mr Zuma, like every other accused person, has the constitutional right to a fair trial, which includes the right to have a legal practitioner assigned to him by the state at state expense 'if substantial injustice would otherwise result' (s 35(3)(g) of the Constitution). Mr Zuma, like all other accused persons in South Africa, is thus entitled to be represented by a legal practitioner using his own resources, or those offered by the Legal Aid Board 'if substantial

injustice would otherwise result'. (See *Acting Premier, Western Cape, v Regional Magistrate, Bellville, and others* 2006 (2) SA 67 (CPD) para 8.)

[70] The resistance of our courts to acknowledge that acts of corruption and fraud allegedly committed by a government official are sufficiently closely linked to the powers and duties of such official's public office and thus allegedly committed by the official when acting within the course and scope of his or her employment, is further demonstrated by judgments, such as the unreported judgment of the Western Cape division of the High Court, *Government v Minister of Police (Govender and others v National Minister of Police and another* (21976/2015) 18 February 2016, para 56), and *Acting Premier, Western Cape v Regional Magistrate, Bellville, and others* 2006 (2) SA 79 (CPD).

[71] *Govender* concerned Standing Order 109(1)(a) published under the South African Police Service Act, 1995, which in relevant part provides as follows:

'If a member of the Force is to be tried in a criminal court, his defence, should he so elect, will be conducted by the State Attorney; provided he has indicated in the application prescribed . . . or the evidence reflects that he did not forfeit the privilege of State defence in that he, where applicable . . . acted in the execution of his duties or bona fide believed that he did.'

The applicants, who were members of the South African Police Service, were charged *inter alia* with charges of money laundering, corruption and fraud. Veldhuizen J held:

'[9] It is clear to me that the fact that the applicants are members of the SAPS placed them in a position to commit the offences and crimes as alleged. The conduct on which the prosecution rely, can, however, by no stretch of the imagination be described as acts that were performed within the course and scope of their duties as employees of the SAPS. It has nothing to do with the duties and functions which they are by statute required to perform.'

[72] In *Acting Premier, Western Cape* it was held that government officials charged with offences of corruption and fraud are not charged with offences allegedly committed *on behalf of* the provincial government, but they are charged in their personal capacities. There, the second and third respondents had applied to the State Attorney to represent them at their criminal trial on charges of corruption and fraud on the basis that, when the offences were allegedly committed, the second respondent had been the Member of the Executive Council responsible for Environmental Affairs and Development Planning in the Western Cape and the third respondent had been the Premier of the Western Cape. Their

application had been refused. They subsequently made an application to the Minister of Justice and Constitutional Development for her department to provide legal representation for them at their criminal trial. The application was also refused. They also approached the Provincial Government of the Western Cape to have their legal representation funded by the provincial government, but their request was refused. The reason for the refusal, as stated in the judgment (at 84B), was that the Provincial Government of the Western Cape-

'. . . had a long-standing protocol in terms whereof it did not and does not provide funds for the legal assistance to employees of it who are charged with dishonesty. Instead, it supports the prosecution in such cases.'

[73] When the criminal trial was part-heard, the presiding magistrate conducted an enquiry in terms of s 342A of the Criminal Procedure Act 51 of 1977, pursuant to which he ordered the Provincial Government of the Western Cape to pay the costs of the second and third respondents in the further conduct of the trial, provided that the costs would be recoverable by the provincial government in the event of their being convicted. The Acting Premier, Western Cape then brought an application to the High Court for the review and setting aside of the order of the presiding magistrate. In reviewing and setting aside the order, Cleaver J held that the Provincial Government of the Western Cape had no legal obligation to pay the second and third respondents' costs in the trial. He also held that the order was irrational or unreasonable, *inter alia* for the following reason (para 11):

[11] . . . Finally, there is the apparent basis upon which the first respondent concluded that the applicant ought to fund the defences of the second and third respondents. He relied on the fact that the two respondents were innocent until proven guilty and on evidence on record to the effect that both of them acted within the scope and course of their duties as elected officials of the Provincial Government of the Western Cape. That the two respondents are innocent until proven guilty is so, but in my view that presumption does not justify the ruling that the first respondent was to provide legal assistance for them. As to the official capacities which the two respondents occupied, it would seem that the first respondent was of the view that the applicant ought to fund the defences of the two respondents because the applicant would in some way be vicariously responsible for the actions of the two respondents. Vicarious liability generally applies when an employer is sought to be held liable for the delict committed by an employee acting in the course and scope of his employment. The two respondents are not being charged with offences under

the Corruption Act and fraud committed *on behalf of* the applicant, they are being charged in their personal capacities and vicarious liability is not an issue.'

[74] Similarly, the charges of corruption, fraud, racketeering, money laundering and tax evasion against Mr Zuma have nothing to do with any of the official functions he was required to perform as MEC or Deputy President of the Republic of South Africa. The specific conduct on which the prosecution rely - that Mr Zuma allegedly received 783 payments or gratifications outside his official remuneration – is not conduct that could in any way be connected to his official functions. The alleged payments or gratifications were solely for Mr Zuma's benefit.

[75] I conclude, therefore, on a proper interpretation of s 3 of the State Attorney Act and of reg 12.2.1 of the Treasury Regulations, that these provisions did not authorise the impugned decisions by the Presidency and by the State Attorney to procure private legal representatives for Mr Zuma and for the state to pay for his private legal costs in defending the corruption and other criminal charges against him and in the ancillary or related civil legal proceedings. The impugned decisions were not authorized by the statutory provisions invoked by the Presidency and by the State Attorney and consequently amount to a breach of the principle of legality. (See *Liebenberg NO and others v Bergrivier Municipality* 2013 (5) SA 246 (CC) paras 93-96). They are unconstitutional and fall to be set aside. They also fall to be reviewed and set aside in terms of PAJA; they were not authorised and are *ultra vires*, and were materially influenced by an error of law – the view that the decisions were authorised by s 3(1) or s 3(3) of the State Attorney Act and reg 2.2.1 of the Treasury Regulations (s 6 2(a)(i) and s 6(2)(d) of PAJA). This conclusion is dispositive of both the DA and the EFF review applications and renders it unnecessary to consider the other grounds raised by them why the decisions ought to be set aside.

APPROPRIATE REMEDY

[76] I now turn to consider the appropriate remedy, one that is 'just and equitable' in the particular circumstances of this case. Section 172(1)(a) of the Constitution makes it mandatory for a court to declare conduct that is inconsistent with the Constitution, invalid. Section 172(1)(b) gives a court the further power to make any order that is 'just and

equitable'. Section 8 of PAJA empowers a court, in proceedings for judicial review under PAJA, to 'grant any order that is just and equitable'.

[77] The DA and the EFF argue that a just and equitable remedy requires a repayment order. Mr Zuma, on the other hand, argues that even if this court were to hold the agreements to pay his legal fees invalid-

'...that would not automatically give rise to the obligation for him to pay. The nullification of the agreement would not give rise to a payment obligation. That claim should be enforced by the State separately. The Applicant seeks to invite the Court to make an incompetent order.'

[78] A just and equitable remedy is one that corrects and reverses unlawful conduct. In *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 CC para 29, Moseneke DCJ described the purpose and breadth of the courts' remedial power under s 8 of PAJA as follows:

'It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance the efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.'

(Footnote omitted.)

[79] In *Allpay Consolidated investment holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency and others* 2014 (4) SA 179 (CC) paras 30 and 32, the Constitutional Court quoted *Steenkamp* with approval and elaborated on the 'corrective principle', thus:

'[30] Logic, general legal principle, the Constitution and the binding authority of this court all point to a default position that requires the consequences of invalidity to be corrected or reversed

where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality.

. . .

[32] This corrective principle operates at different levels. First, it must be applied to correct the wrongs that led to the declaration of invalidity in the particular case. This must be done by having due regard to the constitutional principles governing public procurement, as well as the more specific purposes of the Agency Act. Second, in the context of public-procurement matters generally, priority should be given to the public good. This means that the public interest must be assessed not only in relation to the immediate consequences of invalidity – in this case the setting-aside of the contract between SASSA and Cash Paymaster - but also in relation to the effect of the order on future procurement and social-security matters.'

(Footnote omitted.) The Constitutional Court further held that a party has 'no right to benefit from an unlawful contract' (para 67).

[80] Recently, in *Corruption Watch NPC and others v President of the Republic of South Africa and others* 2018 (2) SACR 442 (CC), Madlanga J said the following:

'[68] There is no preordained consequence that must flow from our declarations of constitutional invalidity. In terms of s 172(1)(b) of the Constitution we may make *any* order that is just and equitable. The operative word 'any' is as wide as it sounds. Wide though this jurisdiction may be, it is not unbridled. It is bounded by the very two factors stipulated in the section – justice and equity. This court has laid down certain principles in charting the path on the exercise of discretion to determine a just and equitable remedy.

[69] What must be paramount in the relief that a court grants is the vindication of the rule of law. The effect of that is the reversal of the consequences of the constitutionally invalid conduct. Ordinarily therefore, Mr Nxasana would have to resume office, as he did not vacate it validly. This is analogous to the situation of an employee whose dismissal was invalid. . . . '

(Footnote omitted.)

[81] I am of the view that a just and equitable remedy in all the circumstances of this case is one that requires the State Attorney to render an account of all the private legal costs that were incurred by Mr Zuma in defending the criminal charges against him and in all the related or ancillary litigation, and to take the necessary steps to recover the amounts paid by the state for his private legal costs. First, such an order is essential for the vindication of the rule of law, the correction of Mr Zuma's use of public resources to

enable him to defend himself against the criminal charges brought against him and to litigate in the various related civil proceedings on a most luxurious scale, and to enforce the constitutional principle of public accountability – especially by those entrusted with the highest office in the Republic of South Africa. Simply declaring the agreements and the decisions to appoint private legal representatives and to pay Mr Zuma's private legal costs unlawful, without ordering repayment, would not achieve the remedial objects inherent in the relief which a court should grant in the vindication of the rule of law.

[82] Second, in its founding papers, the EFF argues that it would be just and equitable to order that-

'. . . each amount paid to Hulley Inc, must be repaid to the public purse, without delay, and with interest at the prescribed rate. Mr Zuma and Hulley Inc should be jointly and severally liable for this repayment.'

Furthermore, the EFF contends that-

'[a] repayment deadline of six months is not unreasonable, considering that Mr Zuma has undertaken, in both of his requests for funding, to repay the State Attorney "on demand". Mr Zuma has thus presumably made provision for this eventuality. Also, as Mr Zuma no longer holds any public or political office, nothing precludes him from having a family member or other benefactor assist with the repayments.'

Mr Zuma, although uniquely positioned to present factual material to contradict the EFF's proposed remedy, failed to do so, nor did he explain why he should be entitled to retain the benefit of the unlawful payments made by the state for his private legal costs. In his answering papers, Mr Zuma offered no factual material about his personal circumstances or any other circumstance to counter the EFF's contention about his ability to repay the money in full and in good time.

COSTS

[83] There is in my view no reason why the general principle that costs follow the event should not be applied in this instance. The costs order sought by the DA includes the costs of three counsel and the one sought by the EFF, the costs of two counsel. The circumstances, in my view, warrant the employment of two or three counsel. The DA further seeks that its costs to be paid by Mr Zuma and by the President, the DG in the Presidency, the Minister of Justice and Correctional Services and the State Attorney,

jointly and severally. But such an order would be unwarranted in the circumstances. The Presidency, the Minister of Justice and Correctional Services and the State Attorney notified the DA that they would abide the decision of this court early on in the proceedings. The Presidency filed a brief explanatory affidavit in each application to assist this court in determining the issues raised.

REFUSAL OF HULLEY'S REQUEST FOR A POSTPONEMENT

[84] What remains is to express our displeasure with the conduct of Hulley, which firm of attorneys is cited as the third respondent in the EFF application. Although it had given notice of its intention to oppose the application on 25 May 2018, it never filed an answering affidavit. Furthermore, although it had been notified of the case management meeting that was held before the Deputy Judge President AP Ledwaba on 14 August 2018, it elected not to attend. Counsel nevertheless appeared for Hulley and at the commencement of the hearing before us and from the bar, orally requested a postponement of the hearing of the matter in order for it to file an answering affidavit.

[85] Practitioners ought to know that a postponement is not merely for the asking. In *Persadth and another v General Motors South Africa (Pty) Ltd* 2006 (1) SA 455 (SE) para 13, Plasket J gave the following concise summary of the principles applicable to postponements of applications:

'The following principles apply when a party seeks a postponement. First, as that party seeks an indulgence he or she must show good cause for the interference with his or her opponent's procedural right to proceed and with the general interest of justice in having the matter finalised; secondly, the court is entrusted with a discretion as to whether to grant or refuse the indulgence; thirdly, a court should be slow to refuse a postponement where the reasons for the applicant's inability to proceed has been fully explained, where it is not a delaying tactic and where justice demands that a party should have further time for presenting his or her case; fourthly, the prejudice that the parties may or may not suffer must be considered; and, fifthly, the usual rule is that the party who is responsible for the postponement must pay the wasted costs.'

(Footnotes omitted.)

[86] Hulley became aware of the set-down of the matter on 6 – 7 November 2018, at least during the week preceding the hearing of the matter. Its counsel could not proffer any explanation why a proper interlocutory application for a postponement was not filed,

thereby enabling the other parties to respond in an orderly fashion and enabling this court then to exercise its discretion as to whether to grant or refuse the indulgence on all the facts placed before it. The reasons for the failure of Hulley to have filed an answering affidavit and its inability to proceed have not been explained; we were not satisfied that it was not a delaying tactic; no facts were placed before us to conclude that justice demands that it should have further time for presenting its case; nor was the question of prejudice addressed. We, therefore, refused the oral request for a postponement.

ORDER

[87] The DA and the EFF are *ad idem* that a single order should be made in respect of both review applications. They also agreed on the wording of such order and their proposed draft order was handed to us at the conclusion of the hearing. I propose to make their suggested draft order an order of this court.

[88] In the result the following order is made:

(a) It is declared that the State is not liable for the legal costs incurred by Mr Jacob Gedleyihlekisa Zuma (Mr Zuma) in his personal capacity in criminal prosecutions instituted against him, in any civil litigation related or incidental thereto and for any other associated legal costs.

(b) The decisions taken by the Presidency and the State Attorney that the State would cover the legal costs that Mr Zuma incurred in his personal capacity in the criminal prosecution instituted against him on or about 20 June 2005, 28 December 2007 and 16 March 2018 are declared invalid and are reviewed and set aside.

(c) The decisions taken by the Presidency and the State Attorney that the State would cover the legal costs that Mr Zuma incurred in his personal capacity in interlocutory and ancillary applications related to his criminal prosecution are reviewed and set aside.

(d) The State Attorney is directed forthwith to:

    (i) compile a full and complete accounting of all the legal costs that were incurred by Mr Zuma in his personal capacity in the criminal prosecution instituted against him and all related or ancillary litigation, including all the applications referred to in this matter, and which were paid for by the State; and

(ii) to take all necessary steps, including the institution of civil proceedings, to recover the amounts paid by the State for Mr Zuma's legal costs referred to in paragraph (d)(i).

(e) The State Attorney is directed within three months of the date of this order, to file a report, under oath and supported by the full and complete accounting referred to in paragraph (d)(i), detailing the steps that have been taken and that will be taken to recover the amounts paid by the State for Mr Zuma's legal costs.

(f) In case 21405/18 (the Democratic Alliance's review application), the costs are to be paid by the fifth respondent (Mr Zuma), including the costs of three counsel.

(g) In case 29984/18 (the Economic Freedom Fighters' review application), the costs are to be paid by the second respondent, (Mr Zuma), including the costs of two counsel.

P.A. MEYER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree.

A.P. LEDWABA
DEPUTY JUDGE PRESIDENT OF
THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree.

E.M. KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Consolidated hearing	
Date of hearing:	6-7 November 2018
Date of judgment:	13 December 2018
DA review application	
Counsel for the applicant:	Adv Sean Rosenberg SC (assisted by Adv Janice Bleazard and Adv Lerato Zikalala
Instructed by:	Minde, Shapiro and Smih, Belville, Cape Town C/o Klagsbrun Edelstein Bosman de Vries Inc. Nieuw Muckleneuk, Pretoria
Counsel for 1st–4th respondents:	Adv Hamilton Maenetje SC (assisted by Adv Adila Hassim and Adv Nyoko Muvangua)
Instructed by:	State Attorney, Pretoria
Counsel for 5th respondent:	Adv Thabani Masuku SC (assisted by Adv Mpilo Sikhakhane)
Instructed by:	Lugisani Mantsha Inc., Graighall, Johannesburg C/o Lucky Thekiso Attorneys, Pretoria
EFF review application	
Counsel for applicant:	Adv Tembeka Ngcukaitobi (assisted by Adv Ben Winks)
Instructed by:	Mabuza Attorneys, Johannesburg C/o Nkome Inc., Hatfield, Pretoria
Counsel for 1st and 4th-7th respondents:	Adv Hamilton Maenetje SC (assisted by Adv Adila Hassim and Nyoko Muvangua)
Instructed by:	State Attorney, Pretoria
Counsel for 2nd respondent:	Adv Thabani Masuku SC (assisted by Adv Mpilo Sikhakhane)
Instructed by:	Lugisani Mantsha Inc., Graighall, Johannesburg C/o Lucky Thekiso Attorneys, Pretoria
Third Respondent's Attorneys:	Hulley & Associates Inc., Sandton Johannesburg c/o Mavhungu Masibigiri Attorneys, Arcadia, Pretoria