IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO. CCD30/2018
11/10/2019

In the matter between

THE STATE

and

JACOB GEDLEYIHLEKISA ZUMA — FIRST ACCUSED
THALES SOUTH AFRICA (PTY) LIMITED — SECOND ACCUSED

and

CASE NO. D12763/2018

In the matter between

THALES SOUTH AFRICA (PTY) LIMITED — APPLICANT

and

THE KWAZULU-NATAL DIRECTOR OF PUBLIC PROSECUTIONS — FIRST RESPONDENT

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS — SECOND RESPONDENT

THE NATIONAL PROSECUTING AUTHORITY THIRD RESPONDENT

Coram: Mnguni, Steyn et Poyo Dlwati JJJ

ORDER

In the result, the following order is made:

1. The NPA's application for condonation of the late delivery of its answering affidavit and extension of such delivery from 1 March 2019 to 11 March 2019 is granted with no order as to costs.

2. The NPA's application to strike out parts of the replying affidavit of Jacob Gedleyihlekisa Zuma dated 1 April 2019 on the grounds that they are scandalous and/or vexatious, and that they constitute impermissible new matter raised in reply is granted in terms of prayers 1 and 2 of the notice of motion thereof with no order as to costs.

3. The application brought by Thales South Africa (Pty) Ltd to strike out certain portions of the answering affidavit of William John Downer dated 11 March 2019, which refer to portions of the affidavits filed by Mr Downer in Mr Zuma's (Criminal Court) permanent stay application is dismissed with costs such costs to include those consequent upon employment of two counsel.

4. The application brought by Jacob Gedleyihlekisa Zuma seeking leave to enter the letter dated 22 March 2018 with accompanying annexures into the record of the proceedings in the application for the permanent stay is dismissed with costs such costs to include those consequent upon employment of two counsel.

5. The application brought by Jacob Gedleyihlekisa Zuma under case number CCD30/2018 is dismissed with costs such costs to include those consequent upon employment of two counsel.

6. The application brought by Thales South Africa (Pty) Ltd under case number D12763/2018 is dismissed with costs such costs to include those consequent upon employment of two counsel.

JUDGMENT

THE COURT

Introduction

[1] In the wake of concession by counsel for Mr Zuma and the National Prosecuting Authority (the NPA) at the hearing in the Supreme Court of Appeal (the SCA) on 14 September 2017 in *Zuma v Democratic Alliance & others*[1] (the DA review application) that the Mpshe decision of 6 April 2009 to discontinue the prosecution of Mr Zuma was flawed, and with the full realisation that the consequence would be that his prosecution would revive, his counsel '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'. In its judgment delivered on 13 October 2017 the SCA, after referring to its earlier judgment in *National Director of Public Prosecutions v Zuma*[2] recounted:

'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 will be the end of the continuing contestations concerning the prosecution of Mr Zuma.'[3]

[2] Unsurprisingly, on 31 January 2018 Mr Zuma delivered his representations to the National Director of Public Prosecutions (the NDPP) asking that his prosecution be stopped. On 16 March 2018 the NDPP declined his representations and decided that Mr Zuma be indicted before this court along with Thales South Africa (Pty) Ltd (Thales)[4] on one count of racketeering, four counts of corruption and one count of money laundering. In addition, the NDPP decided that Mr Zuma must be prosecuted for 12 counts of fraud.

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[1] *Zuma v Democratic Alliance & others* 2018 (1) SA 200 (SCA) para 3.
[2] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA).
[3] *Zuma v Democratic Alliance & others* above.
[4] We shall henceforth refer to all companies in the Thales Group South Africa (Pty) Ltd, formerly Thomson-CSF Group of Companies as Thales.

[3] The origin of these charges is the broad ranging allegations of impropriety relating to the acquisition of strategic armaments for the Department of Defence Force made, inter alia, in September 1999 by Ms Patricia de Lille[5] who was then a member of Parliament. The acquisition of these strategic armaments has gained a measure of notoriety worldwide as the Arms Deal. Flowing from the setting aside of the Mpshe decision, Mr Zuma and Thales appeared in court on 6 April 2018. The case was provisionally adjourned to 8 June 2018. On 8 June 2018, it was further adjourned to 27 July 2018 to allow the NDPP to consider and respond to the representations from Thales which sought to have the charges against it either withdrawn or its prosecution to be discontinued. On 27 July 2018, Mr Zuma and Thales notified the court that they intended applying for permanent stays of their prosecution. Madondo DJP directed the accused to launch their applications by 16 November 2018.

[4] The two applications were launched as individual matters but heard together as the issues arising in each one are substantially the same, save the issue of judicial review raised by Thales. Mr Zuma brought his application in the criminal trial court under case number CCD30/2018. On the other hand, Thales brought its application in the civil division of this court under case number D12763/2018. Mr Zuma and Thales feature, respectively, as accused 1 and 2 in the criminal case pending in this court under case number CCD30/2018. Ms Christine Guerrier (Ms Guerrier)[6] is cited in the criminal case as the representative of Thales in terms of s 332(2) of the Criminal Procedure Act 51 of 1977 (the CPA).[7]

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[5] Ms Patricia de Lille is currently the Minister of Public Works in the country's sixth administration.

[6] Ms Guerrier has been authorised per resolution passed by Thales on 18 April 2018. At the time, she occupied the position of Vice President, Dispute Resolution and Litigation in Thales. See Thales' application, vol 1 at 69, annexure 'G1'.

[7] See ss 332(1) and (10) which are also relevant. Section 332(1) of the CPA provides as follows:
'For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law-

(a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and

(b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body,

in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body.'
Section 332(10) defines a director as:

[5] On 15 November 2018, Mr Zuma launched this application for a permanent stay of his prosecution on the ground that his rights in ss 35(3)*(d)*, 9, 10 and 12 of the Constitution[8] to have his trial begin and concluded without unreasonable delay have been violated. He also predicates his application on wide-ranging grounds of alleged misconduct by successive NDPPs, prosecutors and officials in the NPA. Thales launched its application seeking an order declaring the decision of the former NDPP Shaun Kevin Abrahams (Mr Abrahams) to re-institute the criminal prosecution against it to be inconsistent with the Constitution and invalid on three separate but interrelated grounds. The first is that the decision was ultra vires both on a textual and contextual interpretation of s 22(9) of the National Prosecuting Authority Act 32 of 1998 (the NPA Act). The second is that the decision was in breach of the NPA's prosecution policy. The third is that the decision was irrational. Thales also seeks an order for a permanent stay of prosecution against it on the ground of unreasonable delay.

Background

[6] In as much as the litigation between the NPA and Mr Zuma has a long and troubled history and that the law reports are replete with judgments dealing with the matter, the nature of the relief sought and issues arising in these applications will be better understood against the background that follows. The Arms Deal entailed the procurement of sophisticated military equipment, which included corvettes, submarines, light utility helicopters, maritime helicopters, lead in fighter trainers and advanced light fighter aircrafts.[9]

[7] On 28 September 1999, the then Minister of Defence[10] approved the conduct by the Auditor-General (the A-G) of a special review audit of the Arms Deal process. On 15 September 2000, the A-G finalised and signed the review. In the meantime, the Parliamentary Standing Committee on Public Accounts (SCOPA) commenced an investigation into the Arms Deal. SCOPA produced the 14th report in connection with

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'In this section the word **"director"** in relation to a corporate body means any person who controls or governs that corporate body or who is a member of a body or group of persons which controls or governs that corporate body or, where there is no such body or group, who is a member of that corporate body.'

[8] Constitution of the Republic of South Africa, 1996.

[9] In 2011 a commission of enquiry, chaired by Judge Seriti, a then judge of the Supreme Court of Appeal was appointed to investigate inter alia allegations of fraud and corruption in the Arms Deal.

[10] Mr Mosiuoa Lekota.

the investigation which was adopted by the National Assembly on 2 November 2000. That report recommended, inter alia, that a meeting between the A-G, the Public Protector (the PP), the NPA and the Special Investigative Unit (SIU) be convened to discuss the framework for a further independent and expert forensic investigation on the matter.

[8] On 6 November 2000, Leonard Frank McCarthy (Mr McCarthy) who was the director of the Investigating Directorate: Serious Economic Offences in the NPA, undertook a wide-ranging preparatory investigation into the whole of the Arms Deal in terms of s 28(13) of the NPA Act. Section 28(13) empowered the investigating director to hear evidence in order to enable him to determine if there were reasonable grounds to conduct an investigation into allegations of corruption and fraud in connection with the Arms Deal.

[9] On 13 November 2000, the A-G, the PP, representatives of the NPA and the SIU met and decided to form the Joint Investigation Team (JIT) to conduct a joint investigation. In January 2001, Mr Mbeki, the President of the Republic of South Africa at the time, decided that the SIU should not be involved in the JIT investigation.

[10] On 14 November 2001, the JIT submitted its report, which was subsequently accepted and approved by Parliament. The key finding in the JIT report was that although there might have been irregularities and improprieties in the Arms Deal, no evidence had emerged at that point to suggest that those activities had affected the selection of the successful contractors to render the contracts questionable. The JIT concluded that at that time there were no grounds to suggest that the government's contracting position was flawed but added that the investigations into possible criminal conduct which details were withheld from the public were continuing.

[11] In the course of the preparatory investigation, the records of Thales were examined. This arose because of the existence of conflicts of interest in respect of the position held and role played by Shamin Chippy Shaik, the brother of Schabir Shaik (Mr Shaik), who was the chief of acquisitions in the Department of Defence at the time. Mr Shaik held interests in Thales and African Defence Systems (Pty) Ltd (ADS), which were involved in the bidding for Arms Deal contracts. On 15

September 1999, Nkobi Investments (Pty) Ltd, a company controlled by Mr Shaik had acquired an effective shareholding of 20% in ADS through a 25% shareholding in Thint (Pty) Ltd (then named Thales Group (Pty) Ltd) up to 19 August 2003 which on that date acquired 80% of the shares in ADS from Thales Group (International), a wholly-owned subsidiary of Thales Group (France). A company in Thales was part of the German Frigate Consortium (the consortium) that was awarded the contract for the supply of corvettes to the South African Navy. ADS was the sub-contractor for the consortium for the supply of the corvette combat suite.

[12] Despite Chippy Shaik formally declaring conflicts of interest to the Arms Deal project control board in December 1998 in relation to the companies involving his brother, he did not recuse himself. Instead, he took part in the process that led to the awarding of contracts to those companies. In the Thales audit working papers obtained for purposes of the investigation, the director of Special Operations (the DSO) discovered a reference to a report of bribery involving a senior government official relating to the Arms Deal.

[13] The DSO investigators directed their further investigations to this aspect. They summoned to an examination in terms of s 28(13) of the NPA Act, the members of the auditing firm Arthur Andersen who had conducted the annual audit of the South African companies in Thales. The auditors confirmed under oath that during the audit conducted in the first quarter of 2000 they received a report concerning the involvement in a possible bribe of Alain Thétard (Mr Thétard). Mr Thétard was the executive chairman of the board of directors and chief executive officer of Thales and was also the director of ADS. The auditors also confirmed that the possible bribery involved a senior government official, Mr Zuma. The auditors informed the DSO investigators that Mr Thétard denied that he had ever been approached to pay a bribe. The auditors further said that he had, however, admitted that in the past persons seeking bribes would approach him. Whenever that occurred, he would seek permission to pay the bribe from Thomson-CSF in France. As a matter of course, he would be refused permission whereupon he would report the outcome to the person seeking the bribe.

[14] Armed with that information, the DSO investigators approached and questioned Mr Thétard, first informally and then under oath. Mr Thétard denied that

he had ever been approached to pay a bribe and that he had told the auditors about being approached to pay bribes. The DSO investigators were not convinced with his explanation because the detail of his denials differed when questioned informally and later under oath. Furthermore, it contradicted the evidence obtained by the auditors. The DSO investigators decided to investigate further Thales, Mr Thétard and Mr Zuma.

[15] In mid-2001, the DSO investigators approached Mr Thétard's secretary, Sue Delique (Ms Delique). She testified under oath in terms of s 28(13) of the NPA Act that subsequent to allegations of corruption in the press, there was a flurry of faxes exchanged between Mr Thétard and his superiors in Paris on whether Thales should respond to the allegations. Ms Delique told the DSO investigators that during that period Mr Shaik requested a meeting of the ADS board in Durban. She said that upon Mr Thétard's return from a trip to Durban in March 2000 Mr Thétard had given her a handwritten letter in French to type and then fax in encrypted form (the encrypted fax) to Yan De Jomaron (Mr De Jomaron) of Thales International Africa Ltd in Mauritius and to Jean-Paul Perrier of Thales Group (International) in Paris.

[16] At the time of her first interview Ms Delique could not find the encrypted fax but recalled that its contents were to the effect that Mr Thétard, Mr Shaik and Mr Zuma had met in Durban. In that meeting, Mr Zuma had given a coded indication, in a code established earlier by Mr Thétard, which concluded an agreement to the effect that Mr Zuma would protect Thales against the investigation into the Arms Deal and would support and lobby for Thales in future projects in exchange for a payment to Mr Zuma of R500 000 per annum until ADS started paying dividends. Shortly after the second interview, Ms Delique found the encrypted fax and handed it over to the DSO investigators.[11]

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[11] See *S v Shaik & others* 2007 (1) SA 240 (SCA) para 166. The encrypted fax reads as follows:
'AT
J de J
C R JP Perrier
Encrypted fax
re: J Z/S Shaik
Dear Yan,
Following our interview held on 30/9/00 with S Shaik in Durban and my conversation held on 10/11/1999 with Mr JP Perrier in Paris, I have been able (at last) to meet JZ in Durban on 11th of this month, during a private interview, in the presence of SS.

[17] Ms Delique's evidence prompted the DSO investigators to investigate closely the relationship between Mr Shaik and Mr Zuma. In the course of investigations, the DSO investigators approached Bianca Singh (Ms Singh) who was the personal assistant of Mr Shaik. Ms Singh testified under oath that Mr Shaik and Mr Zuma had a close and long-standing friendship. She also informed the DSO investigators of various payments which Mr Shaik made on behalf of Mr Zuma. Subsequently, the DSO investigators obtained confirmation of these payments from the documents obtained from the auditors of the Nkobi group.

[18] In light of the evidence uncovered in the preparatory investigation, the DSO investigators recommended that the general preparatory investigation be converted into a formal investigation. Mr McCarthy accepted this recommendation on 24 August 2001. The terms of the investigation[12] included suspected fraud or corruption involving, inter alia, the consortium for the supply of the corvettes, and ADS as sub-contractor for the consortium for the supply of the corvette combat suite.

[19] Mr McCarthy drafted the s 28(1)*(a)* declaration in terms of the NPA Act in such a way that it omitted any reference to Mr Zuma in the applications. Instead, the phrase 'a high-ranking official called Mr X' was used. He confined the search and arrest warrants to the premises of Mr Shaik and companies in the Nkobi group and Thales. Although the prosecution team had recommended that Mr Zuma's premises be searched, Mr Ngcuka, who was the NDPP at the time, and Mr McCarthy did not accept that recommendation. Consequently, Mr Zuma's residence and offices were excluded from the premises to be searched.

[20] On 9 October 2001, the premises in South Africa occupied by Mr Shaik and the companies in the Nkobi group, the premises in France and Mauritius occupied by Thales and certain residences of the officers of the company were searched. The documents, computer data and other materials were seized and later analysed. The

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I had asked SS to obtain from JZ a clear confirmation or failing which an encoded declaration (the code had been defined by me), in order to validate the request by SS at the end of September 1999. Which was done by JZ (in an encoded form).
May I remind you that the two main objectives of the ''effort'' requested of Thomson are:
- Protection of Thomson CSF during the current investigations (Sitron)
- Permanent support of JZ for the future projects

Amount: 500k ZAR per annum (until the first payment of dividends by ADS).Yours truly,'

[12] The terms of reference specifically included the solicitation, agreement to pay and undue payments involving entities linked to Thales.

originals of the documents, computer data and other materials seized in South Africa from Thales were, by agreement, kept by the DSO investigators. Immediately after the searches and seizures in Mauritius, William John Downer (Mr Downer)[13] and a DSO investigator Carla Da Silva-Nel (Ms Da Silva-Nel) identified 14 relevant documents from the seized documents, made certified copies thereof and sealed them in envelopes. They came back to South Africa with the identified documents on 11 October 2001. The identified documents included Mr Thétard's diary for the year 2000, which contained an entry relating to a meeting he had with Mr Zuma on 11 March 2000.

[21] On 17 October 2001, Thales International Africa Ltd, Valmet Mauritius Ltd (which by then had changed its name to MTMM) and Mr Thétard launched an application in the Supreme Court of Mauritius (the Mauritian application) seeking, inter alia, orders requiring the director of the Mauritian Economic Crime Office to state whether copies of the materials seized on 9 October 2001 had been made, and, interdicting the director from communicating to the South African authorities any document strictly not related to the warrant and the request on which it was based. It would seem that this application had already been overtaken by the events as Mr Downer and Ms Da Silva-Nel had already made copies of the identified 14 relevant documents and brought them to South Africa. The Mauritian application was finally settled on 27 March 2003 on the basis that the Mauritian authorities would not communicate to anyone the material or documents seized during the searches on 9 October 2001 unless, after notice to the applicants, a court order in Mauritius authorising the communication was first obtained.

[22] The investigation and prosecution teams assert that by 2002 the picture which had emerged from various sources of information and investigation pointed to a financial relationship between Mr Shaik and Mr Zuma which was far more extensive than what the DSO investigators had initially thought based on the terms of the encrypted fax and the documents obtained from the auditors of the Nkobi group companies. Based on the aforesaid the DSO investigators inferred that a wider

[13] Mr Downer has, since January 2001, been involved in the prosecution team leading the NPA investigations, which led to the corruption charges against Mr Shaik and the ten companies in the Nkobi group companies.

financial relationship unrelated to the Arms Deal existed between Mr Shaik and Mr Zuma.

[23] Consequently, on 22 October 2002 Mr McCarthy formally extended the investigation to include the suspected corruption between Mr Shaik and Mr Zuma that was not connected to the Arms Deal. The extended scope of the investigation included the suspected commission of fraud and/or corruption, or the attempted commission of those offences, arising out of payments to or on behalf of or for the benefit of Mr Zuma by Mr Shaik, the Nkobi group companies and/or Thales; and Mr Zuma's protection of, wielding of influence for and/or using public office unduly to benefit Mr Shaik, the Nkobi group companies and/or Thales.

[24] Mr Shaik was subsequently summoned to appear before the DSO investigators for questioning on 26 June 2002. He objected. On 6 September 2002, he launched an application in the Durban High Court against the NPA questioning the validity of s 28(6) of the NPA Act. In his founding affidavit, he made certain allegations to the effect that Mr Zuma might be one of the persons under investigation. The NPA asserts that this was the first time that Mr Zuma's name was publicly mentioned in relation to these investigations. After that revelation, the NPA immediately requested the then Minister of Justice and Constitutional Development, Dr Maduna, to approach Mr Zuma and inform him of what Mr Shaik had done.

[25] On 29 November 2002 while the DSO investigation team was continuing in accordance with its expanded mandate, the Mail and Guardian Newspaper published an article entitled 'Scorpions probe Jacob-Zuma', citing Mr Shaik's application and an affidavit by Mr Downer in an application for mutual legal assistance (MLA). The prosecution team asserts that this was the first media report about the investigation into Mr Zuma, more specifically his alleged attempt to secure a R500 000 bribe from Thales in exchange for his protection during investigations into the Arms Deal and his future support for further projects in the country.

[26] Mr Shaik's application was eventually dismissed on 18 July 2003. His application to the Constitutional Court (the CC) for leave to appeal the decision of the Durban High Court suffered the same fate on 2 December 2003.

[27] On 20 March 2003, the NPA successfully applied in the Pretoria Regional Court in terms of the International Co-operation in Criminal Matters Act 75 of 1996 (the ICCMA) for a letter of request for mutual legal assistance addressed to the Ministry of Justice in France for the French authorities to record, through interrogatories, the statements of certain employees of Thales including Mr Thétard and Mr Perrier. The French authorities did not provide the assistance requested.

[28] On 9 July 2003, the NPA sent to Mr Zuma a list of 35 questions to which answers were required. On 13 August 2003, Mr Zuma sent to the DSO a statement in response to the 35 questions. He denied soliciting or taking any bribe and receiving any payments as opposed to loans from Mr Shaik or the Nkobi group companies over the period 1995 to 2002. He stated that he was a party to a loan agreement with Mr Shaik under which he received loans for personal expenses. He asserted that there was 'no evidence at all that Thales had anything to fear from an investigation into the corvette contract' and 'thus no conceivable motive'[14] for them to have solicited or entertained solicitations for protection against such an investigation.

[29] Mr Zuma also asserted that there was no evidence that he attended a meeting with Mr Shaik and Mr Thétard in Durban on 11 March 2000. He denied that he had attended such a meeting, that he had ever undertaken to protect Thales or to support Thales' projects or that he had any relationship with any of the companies in Thales or with ADS.

[30] The DSO investigation team considered the evidence in their possession against submissions in Mr Zuma's statement of 13 August 2003, and concluded that despite his protestations of innocence, the evidence gathered during the investigations revealed otherwise. In the memorandum dated 21 August 2003 the DSO investigation and prosecution teams recommended that the NPA should indict Mr Zuma along with Mr Shaik, Nkobi group companies and one of the local Thales Group of which Mr Shaik was a director. The memorandum was accompanied by the draft charge sheet. Mr Ngcuka appointed an advisory team of senior NPA officials,[15]

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[14] See annexure 'NPA 23', vol 11 at 327 *et seq*.

[15] The advisory team comprised of Adv Lynette Davids, Adv Lungisa Dyosi, Adv Rudolph Mastenbroek, Adv Saks Mapona, Adv Leonard McCarthy, Dr Silas Ramaile, Adv Sibongile Mzinyathi and Adv Gerrie Nel.

who were not part of the DSO investigation team to consider the investigation team's recommendations.

[31] Ms Davids, a deputy director in the DSO had, at the request of Mr Ngcuka, provided both he and Mr McCarthy during 2001 and 2002 with a memorandum, appraising requests by the DSO prosecution and investigation teams for authority to conduct search and seizure operations and to extend the scope of the investigation. Ms Davids had consistently been sceptical about the prospects of a successful prosecution against Mr Zuma. Ms Ferreira and Mr Downer briefed the advisory team, which also considered Mr Zuma's response to the 35 questions from the NPA.

[32] Mr Ngcuka and most of the members of the advisory team including Mr McCarthy concluded that while there was prima facie evidence of corruption against Mr Zuma, it was doubtful that the NPA would be successful in charging him as opposed to charging Mr Shaik, the Nkobi group companies and Thales. Mr Ngcuka asserts that he decided to test his decision with Mr *Moerane SC* of the Durban Bar. Mr Ngcuka stated that the reason why he chose Mr *Moerane* was that Mr *Moerane* was very skilled in handling matters with wide ramifications. On Friday, 22 August 2003, Mr Ngcuka and the advisory team had a lengthy meeting with Mr *Moerane.* They worked through the memorandum of the prosecution team and the reasons advanced by the advisory team for not prosecuting Mr Zuma as contained in Mr Ngcuka's report to Dr Maduna. Mr *Moerane* agreed with the advisory team's decision that Mr Zuma should not be prosecuted.

[33] By this time Mr Zuma was the Deputy President of the country and the leader of the government business in Parliament. Mr Ngcuka asserts that he decided to announce and explain his decision at a media conference in light of the fact that the outcome of the investigation had become a matter of intense speculation.

[34] Mr Ngcuka and the advisory team prepared a statement to be read at the media conference based on a report to Dr Maduna. On 23 August 2003, Mr Ngcuka informed Dr Maduna of his decision not to indict Mr Zuma. They went together and informed the President, Mr Mbeki, about the Ngcuka decision. In the course of the day, Mr Ngcuka met with Ms Ferreira and Mr Downer and told them of his decision. He also told them that he intended to announce his decision at a press conference.

The two expressed their disagreement and disappointment in his decision and requested Mr Ngcuka to include in his media statement that the prosecution team had recommended that Mr Zuma be prosecuted to which Mr Ngcuka agreed.

[35] Later that day Mr Ngcuka and Dr Maduna held a media conference at which Mr Ngcuka announced his decision to indict Mr Shaik, Nkobi group companies and Thales on various charges including corruption and stated that he would not indict Mr Zuma. Mr Ngcuka said, inter alia, that whilst there was a prima facie case of corruption against Mr Zuma, the NPA had decided not to prosecute him because it was uncertain if its prospects of success were strong enough for a winnable case against him. He also said that the NPA would be referring the issue of the declaration of gifts and donations received by Mr Zuma to Parliament for its consideration.

[36] On 25 August 2003, Mr Shaik appeared in the Durban Magistrate's Court. He was presented with the draft charge sheet containing various charges including a charge of corruption based on the benefits given to Mr Zuma by him and the companies in the Nkobi group from the period 1 October 1995 to 30 September 2002, being the period, which the DSO investigations had covered.

[37] On 30 August 2003, Mr Zuma launched an urgent application in the Pretoria High Court against the NDPP, NPA and DSO in which he sought an order directing the said entities to give him immediate access to the handwritten French version of the encrypted fax. The application was opposed by the respondents. After an exchange of affidavits, nothing further happened.

[38] On 30 October 2003, Mr Zuma launched with the PP a complaint about the manner in which the NPA had conducted the investigation into him. This culminated in a report by the PP dated 28 May 2004, the findings of which included that Mr Ngcuka had unjustifiably infringed Mr Zuma's right to dignity and that he had acted unfairly and improperly in making the media statement on 23 August 2003 to the effect that Mr Zuma would not be prosecuted despite there being a prima facie case against him. However, the PP found that there was no indication that the statement was made in bad faith or with the intent to prejudice Mr Zuma.

[39] In November 2003 Mr Shaik and nine companies in the Nkobi group represented by Mr Shaik were indicted in the Durban High Court on, inter alia, charges of corruption and fraud. Mr Shaik featured as accused 1, the Nkobi group companies represented by Mr Shaik in terms of s 332 of the CPA featured as accused 2 to 10 and Thales, which Mr Shaik also represented as accused 11.[16]

[40] In the latter half of 2003 an intermediary acting for Thales contacted Dr Maduna and indicated that it wanted to meet with him and Mr Ngcuka in order to furnish the NPA with information required in the investigation. This request was made against the backdrop of the application by the South African authorities to the French authorities, then pending in France, to interrogate employees of Thales, including Mr Thétard and Mr Perrier. Messrs Ngcuka and McCarthy travelled to Paris for an off-the-record meeting with Thales executives around July 2003. The second meeting took place around September 2003 but nothing of substance was achieved in either of these meetings.

[41] In the beginning of 2004 Dr Maduna was contacted by Robert Driman (Mr Driman), an attorney of record for Thales.[17] He requested a meeting between the South African authorities and the representatives of Thales. Mr Driman indicated that Thales was ready to co-operate with the NPA. Following the negotiations between the parties, on 19 April 2004, an agreement was reached between the NPA and Thales' representatives that the charges would be withdrawn against Thales should Mr Thétard make an affidavit confirming that he was the author of the encrypted fax.

[42] On 20 April 2004, Mr Thétard provided that affidavit to the NPA. Oddly enough, on 10 May 2004 Mr Thétard provided a further unsolicited affidavit in which he, inter alia, stated that the encrypted fax was a rough draft of a document in which he intended to record his thoughts on a separate issue in a manner, which was not only disjointed but also lacked circumspection. He also stated that he had never faxed the document or directed that it be typed or faxed but had rather crumpled it up and threw it in a waste paper basket from where it was possibly retrieved and handed to the NPA. He refused to be interviewed or to testify in South Africa or any

[16] Mr Shaik was also the director of Thales South Africa.
[17] We have observed that Mr Driman is still the current attorney of record of Thales.

other country outside France but was prepared to be interviewed in France by Messrs Ngcuka and McCarthy on the issues asserted in his affidavit.

[43] According to Mr Downer,[18] the unsolicited delivery of Mr Thétard's second affidavit, and a series of ensuing engagements between the NPA and Thales' legal team between late May and early July 2004, led the NPA to conclude that Thales was negotiating in bad faith and that no good purpose would be served by pursuing any further engagements with them. Despite reaching this conclusion, the NPA resolved to honour its side of the agreement by withdrawing the charges against Thales before it was required to plead when the Shaik trial commenced on 11 October 2004.

[44] Mr Downer's explanation in this regard was that Mr Shaik and his related companies were the main focus of the prosecution at that stage. Mr Thétard had already fled to and remained in France, and there was no possibility of him being extradited to South Africa to stand trial. The NPA was concerned about the trial being delayed by possible arguments by Thales to the effect that the joinder of Thales as an accused was a misjoinder and that Mr Shaik who was also a director of Thales at the time. The agreement and ensuing withdrawal against Thales was not as a result of an assessment of the strength of the State's case against Thales.

[45] On 31 August 2004, Mr Ngcuka resigned as the NDPP and Silas Ramaite (Mr Ramaite) was appointed as the acting NDPP. On 11 October 2004, the trial of Mr Shaik commenced in the Durban High Court before Squires J and two assessors. On 1 February 2005, Mr Pikoli became the NDPP. On 2 June 2005, Mr Shaik was convicted on two counts of corruption and one count of fraud. On 8 June 2005, he was sentenced to a term of 15 years' imprisonment on the two counts of corruption and to a term of three years' imprisonment on the count of fraud. The sentences were ordered to run concurrently. Several of the Nkobi group companies accused were also convicted and sentenced to pay substantial fines or suspended fines.[19]

[46] After the conviction and sentence of Mr Shaik and the Nkobi group companies, Mr Pikoli requested the prosecution team to brief him on the prospects of

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[18] Mr Downer's answering affidavit in the application of accused 1, Mr Zuma in vol 10 at 2683-3074.
[19] *S v Shaik & others* 2007 (1) SACR 142 (D).

a successful prosecution of Mr Zuma. He asserts that he felt that the findings of the court in the Shaik trial concerning Mr Zuma meant that he needed to consider whether or not to prosecute Mr Zuma.[20] On 14 June 2005, Mr Mbeki announced in Parliament that he had decided to dismiss Mr Zuma as Deputy President of the country in the light of the court's finding in the Shaik trial that there was an unsavoury relationship between him and Mr Shaik. On 16 June 2005, the prosecution team addressed a detailed memorandum to Mr Pikoli on the prospects of a successful prosecution of Mr Zuma on charges of corruption related to those on which Mr Shaik and the Nkobi group companies had been convicted, as well as fraud charges arising from his failure to declare the benefits received from Mr Shaik and the Nkobi group companies in terms of the Parliamentary Code of Conduct and the Executive Ethics Code.

[47] On 17 June 2005, the prosecution and investigation teams in the Shaik trial briefed Messrs Pikoli and McCarthy and recommended that Mr Zuma be prosecuted on the same charges. However, they informed them that there was a considerable amount of investigation specific to Mr Zuma that needed to be undertaken. The outstanding investigation included searches of Mr Zuma's premises, the premises of Nkobi group companies and possible other persons or institutions who or which might have funded Mr Zuma. They further recommended that Mr Pikoli delay the announcement of his decision until the completion of the outstanding investigation.

[48] The two teams also considered whether to add Thales as the co-accused of Mr Zuma but decided against that idea for two reasons. The first was the difficulties arising from the April 2004 agreement to withdraw the charges against it. The second was the possibility of a misjoinder if the prosecution of Mr Zuma included the fraud charges in addition to the corruption charges. Mr Pikoli asked the prosecution team to provide further details on the agreement to withdraw the charges against Thales, in particular, on whether Thales had satisfactorily held up its part of the agreement. He also asked the prosecution team to advise him on whether there were reasonable prospects of a successful prosecution against each of Thales Holding companies.

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[20] See Mr Pikoli's affidavit, vol 10 at 4408-4516.

[49] On 20 June 2005 Mr Pikoli announced his decision to indict Mr Zuma after informing the prosecution team, Mr Mbeki, Ms Mabandla, the Minister of Justice and Constitutional Development at the time, and Mr Zuma of his decision. On 29 June 2005, Mr Zuma appeared for the first time in the Durban Magistrate's Court. He was released on bail of R1 000 on certain conditions with his case being adjourned to 11 October 2005 for further investigation. On 4 July 2005, the prosecution team addressed a memorandum to Mr Pikoli in which they recommended that Thales be indicted together with Mr Zuma.

[50] After considering the memorandum, Mr Pikoli concluded that no legitimate obstacle was preventing him from indicting Thales along with Mr Zuma, as there was a reasonable prospect of a successful prosecution against them. He decided that Thales be indicted along with Mr Zuma on the corruption charges. However, as there was still further investigation that needed to be done, he decided to pend his final decision.

[51] On 3 June 2005 the Durban High Court granted a restraint order in terms of s 26 of the Prevention of Organised Crime Act 121 of 1998 (the POCA) by agreement between the NPA and the accused. The Durban High Court also granted leave to appeal to the SCA against the confiscation order. On 29 July 2005, the Durban High Court granted Mr Shaik and several of the Nkobi group companies leave to appeal to the SCA on a limited basis against their convictions on the second (fraud) and third (corruption) counts. The trial court refused them leave to appeal against conviction on the first count (corruption). On petition, the SCA lifted the limitations imposed by the trial court on the appeal against their convictions and directed that argument be heard on their application for leave to appeal against their conviction on that first count together with the appeal against their convictions on the second and third counts. On 6 November 2006, the SCA dismissed[21] the appeals against conviction and sentence as well as the appeal against the confiscation order.[22] The application for leave to appeal to the CC met the same fate.[23]

[21] *S v Shaik & others* 2007 (1) SA 240 (SCA).
[22] *Shaik & others v S* [2007] 2 All SA 150 (SCA).
[23] *S v Shaik & others* 2008 (2) SA 208 (CC).

[52] On 19 July 2005, Mr Shaik's legal team wrote to the prosecution team advising them that on 11 July 2005 Mr Shaik resigned as Mr Zuma's financial advisor and that all the documents pertaining to Mr Zuma, which were held by Mr Shaik or the Nkobi group companies, were handed to Mr Hulley, Mr Zuma's then attorney. On 26 July 2005, the DSO instructed KPMG, which had previously done a forensic investigation for the DSO for purposes of the Shaik trial, to do a new forensic investigation for purposes of the impending trial of Mr Zuma and Thales.

[53] On 8 August 2005, Aubrey Thanda Mngwengwe (Mr Mngwengwe),[24] in consultation with Mr McCarthy, extended the scope of the investigation to include the suspected or attempted commission of fraud by Mr Zuma in relation to his declarations of interests to the registrar of Parliamentary Members Interests, the secretary for the Cabinet and the South African Revenue Service in respect of benefits received from Mr Shaik and/or the companies associated with Mr Shaik and contraventions of the Income Tax Act 58 of 1962 relating to those declarations. On 11 August 2005, the DSO applied and was granted,[25] 21 search warrants for various premises including inter alia Mr Zuma's residences and offices in Johannesburg and KwaZulu-Natal, the offices of Mr Hulley in Durban, the office and residence of Mr Zuma's former attorney Ms Mahomed in Johannesburg, the business premises of Thales Holding and Thales (Pty) Ltd and the residence of Mr Moynot. On 18 August 2005, the DSO applied for a further search warrant for Mr Shaik's residence in Durban.

[54] The majority of the ensuing searches were conducted on 18 August 2005 and computers and a very large quantity of documents and other materials were seized. On 26 August 2005, Ms Mahomed applied in the Johannesburg High Court to have the search warrants pertaining to her office and residence set aside. On 9 September 2005, Hussain J upheld her application and ordered the return of the materials seized during the searches.[26] Hussain J subsequently gave the NDPP leave to appeal to the SCA.

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[24] Aubrey Thanda Mngwengwe was the acting investigating director of the DSO at the time.
[25] In terms of s 29 of the NPA Act.
[26] *Mahomed v National Director of Public Prosecutions & others* 2006 (1) SACR 495 (W).

[55] On 10 October 2005 Mr Zuma and Mr Hulley brought an application in the Durban High Court seeking inter alia an order setting aside of the seven search warrants to Mr Zuma's residences and offices and those relating to Mr Hulley, directing that all of the items seized on 18 August 2005, including any copies made thereof, be returned.

[56] On 11 October 2005, Mr Zuma made his second appearance at the Durban Magistrate's Court. The NPA applied for the matter to be transferred to the high court. At that stage, Mr Zuma had not yet been served with the indictment. Mr Zuma's legal team opposed the application. Eventually the parties agreed that Mr Zuma would be served with a provisional indictment before the next appearance on 12 November 2005. At the same time, the NPA indicated that it would endeavour to provide the final indictment by the end of March 2006.

[57] On 13 October 2005, the prosecution team addressed a further memorandum to Mr Pikoli recommending that certain entities in Thales be indicted alongside Mr Zuma in the high court on 31 July 2006 on two charges of corruption. The prosecution team also recommended that a fresh application for a letter requesting mutual legal assistance from Mauritius aimed at obtaining the originals of documents seized during a search and seizure operation on 9 October 2001 be brought in the Durban High Court. After considering the memorandum, Mr Pikoli decided to indict Thales and Thales Holding as accused 2 and 3. On 14 October 2005 Mr Shaik and two companies in the Nkobi group companies brought an application in the Durban High Court for the setting aside of the search warrants relating to the searches of their premises on 18 August 2005. The NPA opposed the application. The parties exchanged the customary affidavits but nothing happened in the matter.

[58] On 3 November 2005, the NPA sent the provisional indictment to Mr Hulley. It further advised Mr Hulley that it had decided to indict Thales alongside Mr Zuma. On 4 November 2005, the provisional indictment was served on Thales to appear in the Durban High Court on 31 July 2006.

[59] On 7 December 2005, the NPA applied in the Durban High Court, in terms of s 2(1) of the ICCMA, for the issuing of a letter of request to the A-G of Mauritius to release to the South African High Commissioner in Mauritius the originals of the

documents seized from the premises of Thales in Mauritius on 9 October 2001. On 17 January 2003, the Mauritian Independent Commission against Corruption (the ICAC) pointed out that the NPA should send a fresh request specifying to whom the seized documents should be released because the original request was silent on that aspect. On 22 March 2006, Combrink J postponed the ICCMA application to a date to be arranged with the court hearing the criminal trial. Combrink J pointed out that the criminal trial court seized with the matter was the only court with jurisdiction to hear the application. Combrink J also pointed out that the NPA would have to defer its application until the accused had pleaded to the charges.

[60] On 5 January 2006, Thales Holding, Thales, Mr Moynot and his wife, whose premises had been searched on 18 August 2005, applied in the Pretoria High Court for the setting aside of the search warrants relating to their premises. The NDPP conceded that the search conducted at the home of Mr Moynot was technically flawed and the NPA returned all the materials seized in that search. The application continued only in relation to the search warrants of Thales and Thales Holding.

[61] On 15 February 2006, the Durban High Court granted the application made by Messrs Zuma and Hulley on 5 October 2005 for the setting aside of five of the seven search warrants relating to them and ordered the NPA to return all the evidence seized under the five search warrants to them.[27] The NPA sought and was granted leave to appeal that decision to the SCA.

[62] On 24 March 2006, Thales filed a request for further particulars to the provisional indictment. On 7 April 2006, the NPA forwarded a letter to the then legal representatives of Thales advising them that the NPA would instead furnish them with the final indictment once the search warrant cases and the application in terms of the ICCMA for a request for assistance from the Mauritian authorities had been determined. On 12 May 2006, Thales applied in the Durban High Court for an order compelling the NPA to provide substantive answers to their request for further particulars on the provisional indictment. On 15 May 2006, the Durban High Court dismissed the application on the ground that it would be an exercise in futility given the fact that it was the NPA's intention to amend the indictment. On 23 May 2006, the NPA instructed KPMG to prepare and finalise the forensic report using all the

[27] *Zuma & another v National Director of Public Prosecutions & others* 2006 (1) SACR 468 (D).

documents in possession of the NPA including those which the NPA obtained during the searches and seizures on 18 August 2005 on the basis that any disputes about the admissibility of the seized documents referred to in the report would be dealt with at the trial. The instruction excluded those documents in respect of which privilege was claimed or which remained sealed.

[63] On 26 June 2006, the prosecution team addressed letters to the respective legal teams of the accused and the Judge President of this division advising them that the State was not ready to commence with the trial on 31 July 2006. The prosecution team proposed a date in February 2007 for the commencement of the trial. Amongst the reasons given by the prosecution team for the proposed postponement was the production of the final forensic report and the pending Shaik appeal, which the prosecution team believed would help to resolve many legal issues that would be contentious in the prosecution of Mr Zuma and Thales.

[64] The legal teams of the accused were not amenable to consent to the proposed postponement. Consequently, on 19 July 2006 the NPA brought a substantive application seeking an order for the postponement of the trial scheduled for 31 July 2006 to a suitable date in the first half of 2007. On 31 July 2006, shortly before the commencement of the hearing before Msimang J and two assessors, the accused delivered their answering affidavits to the NPA's application for a postponement. The answering affidavits also served as the founding papers in their respective applications for a permanent stay of prosecution. Msimang J adjourned the applications for hearing to 5 September 2006 and fixed a timetable for the delivery of the NPA's answering papers and the accused's replying papers. He also fixed a timetable for the exchange of heads of argument in all the applications.

[65] On 5 September 2006, the NPA handed the legal teams of the accused copies of the KPMG forensic report together with the documents referred to in the forensic report. The new forensic report revealed that the alleged corrupt payments by Mr Shaik or Nkobi group companies to Mr Zuma continued from the period of 1995 to June 2005 and was in the aggregate amount of R4 072 499.85. Msimang J ruled that the court would consider and determine the NPA's application for a postponement first and would not hear argument on the permanent stay applications. The court heard argument and reserved judgment. On 20 September 2006,

Msimang J refused the postponement and called on the prosecution to proceed with the trial. When the prosecution indicated that it was not ready to proceed with the trial, he struck the matter off the roll.

[66] In his judgment, Msimang J was critical of the NPA's decision to embark upon the prosecution precipitously in circumstances in which the NPA ought to have realised that the outstanding investigations would not be concluded within a reasonable time. The effect of Msimang J's order was to terminate the criminal proceedings against Mr Zuma and Thales resulting in their applications for permanent stay of prosecutions becoming moot.

[67] The DSO continued with the investigation of the matter despite the fact that Msimang J had struck it off the roll. The further investigatory work concerned applications which the NPA brought to the Durban and Pretoria High Courts in terms of s 2(2) of the ICCMA for the issuing of letters requesting mutual legal assistance from Mauritius and the United Kingdom. The Mauritian MLA application was aimed at obtaining the originals of the 14 documents in possession of the ICAC seized by the Economic Crime Office of Mauritius in Mauritius during the 9 October 2001 searches. The NPA also wanted to obtain affidavits from the Mauritian authorities who uplifted and preserved the documents.

[68] As regards the Mauritian MLA application, on 2 April 2007, Levinsohn DJP granted the order issuing the letter of request.[28] Mr Zuma and Thales sought and were granted leave to appeal Levinsohn DJP's decision to the SCA. The NPA also applied for an execution of Levinsohn DJP's order despite the pending appeal. On 5 June 2007, Hugo J granted the NPA leave to request the relevant authorities in Mauritius to start the proceedings required to give effect to the letter of request forthwith on condition that if the requested documents were handed over to the South African authorities before the conclusion of the SCA appeal, the documents would be sealed and kept by the South African High Commissioner to Mauritius or the registrar of the Durban High Court. The order also stated that should the appeal succeed, the documents would be handed back to the Mauritian authorities without

[28] *National Director of Public Prosecutions v Zuma & others* (13569/2006) [2007] ZAKZHC 4 (2 April 2007).

the NPA having had access to the documents.[29] On 27 August 2007, before the hearing of the appeal, the NPA conceded in *National Director of Public Prosecutions & another v Mahomed*[30] that the relevant search warrants were overbroad and that the consequent searches of Ms Mahomed's premises were unlawful. However, the NPA argued for the preservation of the seized documents.

[69] Mr Pikoli had in the interim been suspended by Mr Mbeki on an unrelated matter, and Mr Mpshe had been appointed the acting NDPP. On 8 October 2007, the prosecution team submitted a report to Mr Mpshe in order to brief him about the proceedings against Mr Shaik and Nkobi group companies and the investigation into Mr Zuma and Thales. On 1 November 2007, Messrs Mpshe and McCarthy met the prosecution team to assess the team's readiness to proceed with the prosecution of Mr Zuma in the event of a favourable outcome in the SCA. At this meeting, it was agreed that Messrs McCarthy and Mngwengwe would take a decision on Mr Zuma's prosecution should the SCA rule in favour of the NPA on their search warrants appeals.

[70] On 8 November 2007, the parties enjoyed mixed fortune at the SCA. The SCA dismissed Mr Zuma and Thales' appeals in respect of the Mauritian MLA application.[31] A further appeal to the CC suffered the same fate on 31 July 2008, save in respect of the search warrant relating to Mr Hulley's offices which was declared unlawful and severed from the rest of the search warrants. With regards to the United Kingdom MLA application request, which Van der Merwe J had decided in favour of the NPA on 14 September 2007, Mr Zuma and Thales filed an application for leave to appeal but never pursued the matter further.

[71] On the same day, the SCA dismissed the appeal by the NPA in *Mahomed*[32] but varied Hussain J's order by directing that the copies of material seized under the warrants which were set aside be preserved by the registrar of the Johannesburg High Court for the purpose of establishing the identity of the material seized should the identity become an issue in subsequent criminal proceedings. The SCA also

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[29] *National Director of Public Prosecutions v Zuma & others* 2008 (1) SACR 243 (D).
[30] *National Director of Public Prosecutions & another v Mahomed* 2008 (1) SACR 309 (SCA).
[31] *Zuma & others v National Director of Public Prosecutions* [2008] 1 All SA 234 (SCA).
[32] *National Director of Public Prosecutions & another v Mahomed* 2008 (1) SACR 309 (SCA).

dismissed the appeals concerning the searches conducted on 12 August 2005.[33] Subsequent to the SCA judgment in favour of the NPA, the prosecution team commenced the process aimed at finalising a draft indictment based on all available evidence, which draft included racketeering charges.

[72] On 13 November 2007, the prosecution team submitted to Mr Mpshe a formal application in terms of s 2(4) of the POCA for the inclusion of racketeering charges in terms of s 2(1) of the POCA in the indictment. On 20 November 2007, the prosecution team submitted to Mr Mpshe a formal application in terms of s 111 of the CPA for the centralisation of the charges in the indictment into a single hearing in the Durban High Court. On 28 November 2007 Mr Zuma, Mr Hulley and Thales applied to the CC for leave to appeal against the SCA judgments of 8 November 2007 in the search warrants and Mauritian MLA application matters. On 29 November 2007, the prosecution team met with Messrs Mpshe and McCarthy and the other deputy NDPPs in Pretoria in order to brief them about the matter. All those present agreed that the prosecution should be re-instituted, and that the indictment, which included the racketeering charges, be finalised as soon as possible. On 3 December 2007, the prosecution team completed the draft indictment and submitted a report to Ms Mabandla and a draft indictment to Mr Mpshe.

[73] On 4 and 6 December 2007, Mr Mpshe told the prosecution team that he was likely to indict Mr Zuma and Thales in accordance with the draft indictment. He also told the prosecution team that he would announce his decision in 2008 because he did not want the NPA to be seen to be responsible for Mr Zuma failing to be elected as ANC[34] President at its mid-December 2007 elective conference in Polokwane where Mr Zuma and Mbeki were contesting the presidency of the ANC. The prosecution team disagreed with his decision to delay indicting Mr Zuma and Thales and recorded their views in a memorandum sent to him on 6 December 2007.

[74] On 7 December 2007, Mr McCarthy telephoned the prosecution team and placed it on record that he was not consulted about the decision to delay indicting Mr Zuma and Thales. Unbeknown to the prosecution and investigation teams, Messrs

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[33] *National Director of Public Prosecutions & others v Zuma & another* [2008] 1 All SA 197 (SCA) and *Thint (Pty) Ltd v National Director of Public Prosecutions & others* [2008] 1 All SA 229 (SCA).
[34] The African National Congress (ANC) is the majority and ruling political party in South Africa.

Ngcuka and McCarthy were discussing the timing of the service of the indictment on Mr Zuma as well as the filing of the NPA's answer to Mr Zuma's application for leave to appeal to the CC against the SCA's judgments of 8 November 2007, yet Mr Ngcuka was no longer employed by the NPA.

[75] On 18 December 2007, Mr Zuma was elected President of the ANC at the conference in Polokwane. On 21 December 2007, Mr McCarthy telephoned Mr Downer and told him to round up the members of the prosecution team who were all on leave at the time. He told Mr Downer that Mr Mpshe had instructed him to institute the prosecution immediately. On 28 December 2007, the sheriff, accompanied by Mr Du Plooy, the lead investigator in this matter, served the summonses and the indictment on Mr Zuma and Thales. The NPA also sent letters to the legal teams of the accused informing them that the trial was to start in this court on 4 August 2008. The letter asked the legal teams to contact the prosecution team should the date not be suitable to them.

[76] On 15 May 2008, the legal teams of both the accused and the prosecution met with the Judge President of this division about the trial date. At that meeting, Mr Zuma's legal team indicated that Mr Zuma intended to bring two preliminary challenges to the then current prosecution. The first was an application challenging the institution of the prosecution on the ground that the Pikoli and Mpshe decisions to prosecute him were incompatible with s 179(5)*(d)* of the Constitution and s 22*(c)* of the NPA Act in that they were made without him having been invited to make representations.

[77] The second application, which Mr Zuma intended to bring in the event of the first application being unsuccessful, was an application for a permanent stay of prosecution. Thales' legal team indicated that Thales would also bring an application for a permanent stay of prosecution. Pursuant to the discussion, the Judge President allocated 4 and 5 August 2008, as the dates for the hearing of the first application. The criminal trial was adjourned provisionally to 8 December 2008. On 23 June 2008, Mr Zuma launched his first application. As foreshadowed in para 76, the second and alternative ground on which he relied was that he had a legitimate expectation to be invited to make representations before any decision was taken to change the Ngcuka decision.

[78] On 12 September 2008, Nicholson J upheld Mr Zuma's causes of action and declared the 2007 decision to prosecute him invalid.[35] Nicholson J made wide-ranging findings of serious political interference by members of the executive with the prosecution process. The NPA sought and was granted leave to appeal Nicholson J's judgment to the SCA. On 12 January 2009, the SCA upheld the appeal and re-instated the prosecution against Mr Zuma.[36] The SCA found that s 179(5)*(d)* of the Constitution did not apply to the decision to prosecute Mr Zuma. The SCA criticised Nicholson J for making findings of political interference and held that Mr Zuma's allegations on which Nicholson J made those findings were irrelevant, gratuitous and based on suspicion and not on fact and fell to be struck out with a punitive costs order.

[79] Following the SCA's judgment of 12 January 2009, the criminal proceedings against Mr Zuma and Thales were re-enrolled in this court. On 10 February 2009, Mr Zuma's legal team made written representations to the NPA to discontinue his prosecution. By that time, Mr Zuma had been nominated by the ANC to be the President of the country and was expected to be elected as President after the general elections scheduled to take place in May of 2009.

[80] On 20 February 2009, Mr Zuma's legal team made oral representations to the NPA, which consisted of two parts. The first part was a briefing, which elaborated on the written representations on legal issues and the merits. The second part concerned the briefing of the NPA on the allegations of a political conspiracy, which included additional information that was not contained in the written representations submitted by his legal team to the NPA.

[81] At that briefing, Mr Zuma's legal team disclosed that they were in possession of recordings (the spy tapes) of telephone conversations between Mr McCarthy and various politicians. The legal team asserted that the spy tapes proved that Mr McCarthy had manipulated the timing of the decision to indict Mr Zuma and that he had deliberately delayed the decision until after the Polokwane elective conference to undermine Mr Zuma's chances of being elected the President of the ANC. Mr Zuma's legal team asserted further that following Mr Zuma's election as the

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[35] *Zuma v National Director of Public Prosecutions* [2009] 1 All SA 54 (N).
[36] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA).

President of the ANC at the expense of Mr Mbeki, Mr McCarthy had moved with haste to indict Mr Zuma. Mr Zuma's legal team informed the NPA that they intended to apply for a permanent stay of his prosecution should the NPA persist with his prosecution.

[82] Mr Zuma's legal team also warned the NPA that should it become necessary to make such an application the NPA's involvement in a political campaign to discredit Mr Zuma, Mr McCarthy's involvement in delaying the decision to indict him, and the motive behind that decision would be made public. The legal team asserted further that Mr Ngcuka's announcement in 2003 that he had decided not to charge Mr Zuma along with Mr Shaik despite evidence of a prima facie case against him was intended to discredit him. The legal team asserted further that Mr McCarthy had used the resources of the NPA and the DSO to source negative intelligence about Mr Zuma. The legal team pointed specifically to Mr McCarthy's role in the Browse Mole project, which they asserted, was an intelligence gathering project initiated and managed by Mr McCarthy without the knowledge of Mr Pikoli.

[83] At the end of the meeting, Mr Mpshe instructed Messrs Hofmeyr and Mzinyathi to meet with Mr Zuma's legal team to establish whether there was any substance in the allegations. Mr Hofmeyr and Mr Mzinyathi listened to the spy tapes on four occasions between 6 and 16 March 2009. In one of those meetings, Mr Zuma's legal team confirmed that they had no information that implicated the prosecution team or Mr Mpshe in any wrongdoing. On 18 March 2009, Mr Mpshe met with the deputy NDPPs, Mr Mngwengwe and the prosecution team. All present were concerned about the source of the spy tapes. Mr Zuma's legal team had refused to disclose the source of the spy tapes.

[84] Mr Mpshe, in particular, questioned whether the NPA could rely on the spy tapes without first establishing their source as the spy tapes might have been obtained unlawfully. The NPA resolved to ask the South African Police Service (the SAPS) and National Intelligence Agency (the NIA) for assistance. The SAPS did not respond to the NPA's request. The NIA confirmed that it was in possession of intercepted recordings of conversations between Messrs McCarthy and Ngcuka, which it obtained in the course of an investigation into the production and leaking of the Browse Mole report.

[85] On 31 March 2009, Mr Mpshe and the deputy NDPPs listened to the spy tapes. On 1 April 2009, unbeknown to the prosecution team, Mr Mpshe, the deputy NDPPs and Mr Mngwengwe met and decided to accede to Mr Zuma's representations. They also resolved that the decision would be announced publicly and that the prosecution team would not be informed about the decision until shortly before it was made. On 2 April 2009, the prosecution team addressed a further memorandum to Mr Mpshe urging him to reject Mr Zuma's representations.

[86] On 6 April 2009, the prosecution team was called to a meeting with Mr Mpshe in which he informed them of his decision to withdraw the charges against Mr Zuma. The prosecution team was handed copies of a detailed statement, which Mr Mpshe intended making to the media later that day in which he set out the reasons for his decision. The statement included extracts from the spy tapes. At this meeting it was also resolved that charges against Thales should be withdrawn. The prosecution team gave reasons in support of the withdrawal of charges against Thales. In main, it was decided that the whole racketeering case against Thales was not worth pursuing without Mr Zuma. It was resolved further that the press release should include this announcement. As evident from Mr Mpshe's press release, no mention was made of the withdrawal against Thales.

[87] Mr Mpshe announced at the media conference on 6 April 2009 that he had decided to discontinue the prosecution of Mr Zuma. He asserted that he considered the spy tapes to be crucial in that they reflected a manipulation of the prosecution process for ulterior purposes. Mr Mpshe stated that Mr McCarthy had abused the prosecution process in relation to the timing of the service of the indictment on Mr Zuma for ulterior purposes. On 7 April 2009, the matter was re-enrolled and the charges against Mr Zuma and Thales were withdrawn. That same day the Democratic Alliance (the DA)[37] brought an application in the high court in Pretoria (the DA review application), seeking an order reviewing and setting aside the Mpshe decision to discontinue the prosecution of Mr Zuma on the basis that it was unlawful. The NDPP and Mr Zuma opposed the application.

[88] The DA's notice of motion called upon the acting NDPP and the head of the DSO to deliver to the registrar of the high court in terms of Uniform rule 53(1) within

[37] The Democratic Alliance is the official political opposition party in South Africa.

15 days after receipt of the application, the record on which the Mpshe decision to discontinue the prosecution was based, including Mr Zuma's representations. Upon enquiry from the State Attorney representing the NPA, Mr Zuma refused to waive the confidentiality and without prejudice conditions pertaining to the written and oral representations. He also refused to permit the filing of the record subject to suitable written confidentiality undertakings by the DA's legal representatives.

[89] We digress to mention that on 9 May 2009, Mr Zuma became the President of the country. Mr Zuma's refusal triggered the DA to launch an interlocutory application in terms of Uniform rule 6(11) (the DA rule 6(11) application), seeking an order directing the NPA to dispatch the record of proceedings on which the decision to discontinue the prosecution was based excluding Mr Zuma's representations and any documents based thereon. In addition, the DA also sought an order directing that the NPA specify, by written notice, the documents or material excluded from the record.

[90] As was the case with the DA review application, the NPA and Mr Zuma made common cause in opposing the DA's rule 6(11) application. The NPA raised three points in limine. The first was that the DA lacked locus standi to seek the review of the Mpshe decision. The second was that the Mpshe decision did not constitute a reviewable administrative action under the Promotion of Administrative Justice Act 3 of 2000 (the PAJA). The third was that the court should exercise its discretion against the reviewing and setting aside of the Mpshe decision even if it is shown to have been unlawful as contended by the DA.

[91] At the hearing on 9 June 2010, Richard Young and CCII Systems (Pty) Ltd (the intervening parties) sought leave to intervene as parties in the DA's review application. Counsel for Mr Zuma appeared and made submissions in support of the NPA's opposition to both applications. On 22 February 2011, Ranchod J dismissed both applications on the ground that the DA and the intervening parties did not have locus standi to seek judicial review of the Mpshe decision.[38]

[38] *Democratic Alliance v Acting National Director of Public Prosecutions & others* (19577/09) [2011] ZAGPPHC 57 (22 February 2011).

[92] The DA and the intervening parties sought and were granted leave to appeal to the SCA. The appeal was argued at the SCA on 15 February 2013, and both the NPA and Mr Zuma opposed the granting of the interlocutory relief sought. On 20 March 2013, the SCA upheld the appeal by the DA but dismissed the appeals by the intervening parties. The SCA held that the Mpshe decision to discontinue the prosecution of Mr Zuma was subject to judicial review. The SCA further directed the NPA to produce and lodge with the registrar of the North Gauteng High Court, within 14 days, the record of the Mpshe decision, excluding the written representations made on behalf of Mr Zuma 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).[39]

[93] On 12 April 2013, the State Attorney delivered the reduced record which did not include any copies of the spy tapes and transcripts to which Mr Mpshe had referred when he announced his decision on 6 April 2009; or any internal memoranda, reports or minutes of meetings dealing with the contents of the recordings and/or transcripts insofar as these documents did not refer to Mr Zuma's written or oral representations. The State Attorney explained the omission of these documents on the basis that their inclusion in the reduced record may affect Mr Zuma's rights. The State Attorney informed the DA's legal team that Mr Zuma had been informed of their contents with a view to his deciding whether or not to waive the confidentiality of the representations made. The DA was advised that Mr Zuma's stance was not to consent to or waive the confidentiality provisions, which underpinned the representations.

[94] On 18 September 2012, the DA brought the second interlocutory application for an order compelling (DA's application to compel) the acting NDPP to produce and lodge with the registrar of the high court copies of the documents foreshadowed in para 92 above. On 27 September 2012, Mr Zuma's legal team addressed a letter to the State Attorney advising the State Attorney about Mr Zuma's stance on the requested documents. The NPA filed a notice abiding the decision of the court in so far as the making available of the spy tapes and the transcripts to the DA but opposed the granting of an order in so far as it related to the production of the

[39] *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* 2012 (3) SA 486 (SCA).

internal NPA memoranda. Mr Zuma opposed the DA's application to compel. On 16 August 2013, the high court granted the DA's application to compel.[40]

[95] Mr Zuma sought and was granted leave to appeal to the SCA against the order of the high court in the DA's application to compel. The appeal was argued on 15 August 2014. On 28 August 2014, the SCA delivered its judgment dismissing Mr Zuma's appeal, but varying the high court's order to provide that the retired Hurt J would determine the internal documents, which revealed the contents of Mr Zuma's representations. After Hurt J had returned the redacted documents, the NPA provided the remainder of the rule 53 record.

[96] On 6 November 2014, the DA filed its supplementary founding affidavit in the DA's review application. On 31 March and 15 April 2015 the NPA and Mr Zuma, respectively, filed their answering papers in the DA's review application. On 20 May 2015, the DA filed its replying papers in the DA's review application. On 29 April 2016 the full court of the Gauteng Division, Pretoria upheld the DA's review application and granted an order reviewing and setting aside the Mpshe decision.[41] On 24 June 2016, the high court dismissed their applications for leave to appeal.

[97] In the midst of the above, on 18 June 2015 Mr Abrahams was appointed as the NDPP. His appointment was made possible after the then President of the country, Mr Zuma and the Minister of Justice and Correctional Services reached an agreement with the then incumbent Mr Nxasana on 14 May 2015, in terms of which Mr Nxasana was to relinquish his position as the NDPP on 1 June 2015. The decision to appoint Mr Abrahams as NDPP was challenged in the Gauteng Division of the High Court, Pretoria by Corruption Watch (RF) NPC (Corruption Watch), Freedom Under Law NPC (FUL) and the Council for the Advancement of the South African Constitution (CASAC).[42] The applicants sought, inter alia, orders declaring that the termination of the appointment of Mr Nxasana, and consequently Mr Abrahams' appointment as NDPP, were constitutionally invalid.

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[40] *Democratic Alliance v Acting National Director of Public Prosecutions & others* [2013] 4 All SA 610 (GNP).
[41] *Democratic Alliance v Acting National Director of Public Prosecutions & others (Society for the Protection of our Constitution as amicus curiae)* [2016] 3 All SA 78 (GP).
[42] *Corruption Watch (RF) NPC & another v President of the Republic of South Africa & others and a related matter* [2018] 1 All SA 471 (GP).

[98] On 8 December 2017, the high court upheld the orders declaring that the termination of Mr Nxasana and the consequent appointment of Mr Abrahams were constitutionally invalid. The high court suspended these orders for a period of 60 days or until such time as the Deputy President of the country had appointed a new NDPP, whichever was the shorter. The high court also made further orders, including declaring that ss 12(4) and (6) of the NPA Act were unconstitutional and invalid, and an order referring those declarations to the CC for confirmation in terms of s 172(2) of the Constitution. Shortly thereafter, the applicants applied to the CC for the confirmation of the orders of constitutional invalidity. For their part, the NPA and Mr Abrahams appealed to the CC against those orders that did not favour them.

[99] In October 2016, the CC refused to hear the application for leave to appeal on the basis that it was not in the interests of justice to do so at that stage. The NPA and Mr Zuma approached the SCA for leave to appeal. On 11 October 2016 and 30 January 2017, the SCA referred the NPA and Mr Zuma's applications for leave to appeal for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013. On 19 April 2017, the SCA directed that the two applications be consolidated. In the run-up to the hearing in the SCA, counsel for the NPA advised Mr Abrahams that s 179(5)*(d)* of the Constitution on which Mr Mpshe had relied on for his decision to discontinue the prosecution of Mr Zuma, did not authorise his decision.

[100] At the hearing on 14 September 2017, counsel for the NPA and Mr Zuma conceded that the Mpshe decision was liable to be set aside. Counsel for Mr Zuma, however, added that Mr Zuma had every intention in the future to continue to use such processes as were available to him to resist prosecution, including the making of representations in relation to the discontinuation of the prosecution and, if the representations were not successful, an application for a permanent stay of prosecution. On 13 October 2017, the SCA dismissed the appeals.[43] Flowing from the SCA's dismissal of the appeals, notwithstanding the withdrawal of the charges against him on 7 April 2009, the prosecution against Mr Zuma was revived. Accordingly, Mr Abrahams did not have to make a decision on whether Mr Zuma must be recharged or not.

[43] *Zuma v Democratic Alliance & others* 2018 (1) SA 200 (SCA).

[101] It is common cause that the dismissal of the appeals by the SCA on 13 October 2017 did not have any effect in relation to the withdrawal of the prosecution against Thales on 7 April 2009 since the order of the high court which was upheld by the SCA was limited to the Mpshe decision to discontinue the prosecution of Mr Zuma. As such, Mr Abrahams had to decide whether or not Thales should be recharged together with Mr Zuma. In light of concessions by both counsel for the NPA and Mr Zuma, on 14 September 2017 and in anticipation of the SCA's judgment upholding the high court's order, Mr Abrahams wrote to the acting head of the Directorate for Priority Crime Investigation (the DPCI) requesting information about the availability of witnesses, documentary evidence and the docket.

[102] The reason why Mr Abrahams approached the DPCI was because the DSO had been disbanded on 6 July 2009 and its functions and personnel, including Mr Du Plooy, were transferred to the DPCI. He was informed that the witnesses listed in the list of witnesses in terms of s 144(3)*(a)* of the CPA, prior to the matter being withdrawn in April 2009, were available to testify should their attendance be required. He was also informed that the documentary evidence and the docket were still available.

[103] On 11 October 2017, Mr Zuma's legal team wrote to Mr Abrahams requesting that Mr Zuma be afforded an opportunity to make representations which the NPA had to consider before serving an indictment on him or re-enrolling the matter. On 20 October 2017, Mr Abrahams wrote to Mr Zuma's legal team to inform them that Mr Zuma had until 30 November 2017 to make his representations. On the same day, he wrote to the leader of the DA on various issues concerning the prosecution of Mr Zuma. In that letter, he also invited the DA to submit any further comments or representations on the matter by 30 November 2017. On 27 November 2017, Mr Abrahams appointed a team of senior NPA prosecutors to advise him on the impending representations and to conduct the prosecution should the matter proceed. On 7 December 2017, following a request from Mr Zuma's legal team for a further extension until 19 February 2018, Mr Abrahams afforded Mr Zuma an extension to 31 January 2018 to make his representations.

[104] On 31 January 2018, Mr Zuma's legal team delivered his representations asking that the prosecution be stopped. On 8 February 2018 the DPP: KZN, Ms

Noko, forwarded to Mr Abrahams an exchange of emails between her and Thales' legal team in which Thales' legal team advised her that they held instruction from Thales to make representations to the DPP: KZN regarding the matter. Ms Noko informed Thales' legal team that any such representations should be submitted to Mr Abrahams' office because Mr Abrahams would make a decision on the matter.

[105] On 14 February 2018, Mr Abrahams declined Mr Zuma's representations. He wrote to the DA's legal team to inform them that he would reconsider the DA's request for a copy of Mr Zuma's representations should he decide in favour of Mr Zuma's representations that the prosecution should be stopped. On the same day Thales' legal team sent an email to Mr Abrahams' office confirming their instructions to act on behalf of Thales and indicating that Thales wanted to make representations with regard to the potential prosecution of Thales. Thales' legal team also requested that Mr Zuma's written representations be sent to them. Mr Abrahams sent a response to Thales' legal team that same day declining their request to make representations and refusing their request for a copy of Mr Zuma's representations.

[106] On 20 December 2017, attorneys acting for CASAC addressed a letter to the State Attorney representing the NPA and Mr Abrahams in the CC proceedings requesting that the NPA and Mr Abrahams give an undertaking either not to make a decision regarding the prosecution of Mr Zuma until the CC had handed down its decision in the confirmation application or, if they intended taking a decision, that they give CASAC two weeks' advance notice of their intention to do so. Following an exchange of correspondence, the State Attorney sent a letter to CASAC's attorney on 15 January 2018 which included an undertaking by Mr Abrahams to give CASAC two weeks' advance notice of his intention to make a decision.

[107] In a memorandum dated 23 February 2018, the prosecution team recommended to Mr Abrahams that Mr Zuma's representations be rejected and that his prosecution and that of Thales be restarted forthwith. Mr Abrahams was inclined to refuse Mr Zuma's representations. On 26 February 2018, Mr Abrahams instructed the State Attorney to inform CASAC, as per his undertaking, that he would announce a decision on 15 March 2018 on whether the prosecution of Mr Zuma would go ahead or not.

[108] On 6 March 2018, CASAC brought an urgent application in the CC for an order interdicting Mr Abrahams from announcing his decision. The NPA opposed this application. On 14 March 2018, the CC dismissed CASAC's urgent application. On 16 March 2018, Mr Abrahams wrote to Mr Zuma's legal team informing them of his decision to reject Mr Zuma's representations. Later that day, Mr Abrahams announced his decision at a media conference, where he read out a statement announcing his decision. Shortly after the announcement of his decision on 16 March 2018, the indictment was finalised and served on Mr Zuma and Thales and they were summoned to appear in the high court in Durban on 6 April 2018.

[109] On 6 June 2018, Mr Driman submitted written representations supporting a request that the charges against Thales be withdrawn. On 8 June 2018, the accused appeared in the KwaZulu-Natal Local Division of the High Court, Durban for the second time. Their case was provisionally postponed to 27 July 2018 to allow the NPA time to consider and respond to the representations from Thales. At the same time, Mr Zuma's legal team indicated that they required time to prepare this application.

[110] On 27 June 2018, Thales' legal team submitted brief supplementary representations to Mr Abrahams. On 10 July 2018, the prosecution team sent a memorandum to Mr Abrahams regarding the representations from Thales recommending that Thales' representations be rejected and that the prosecution should proceed against Thales. Mr Abrahams accepted the prosecution team's recommendation, as he believed that Thales had a case to answer on the merits. He considered the issues regarding the delay and the unavailability of witnesses that Thales raised in its representations to be issues that would be dealt with by a court in the application for a stay of prosecution.

[111] On 25 July 2018, Mr Abrahams wrote to Thales' legal team informing them of his decision to reject Thales' representations. He advised them that he was of the view that there were reasonable prospects of a successful prosecution against Thales South Africa.

[112] As already stated, in November 2018 Mr Zuma and Thales brought the present applications seeking orders foreshadowed in para 5 above.

[113] The gravamen of Mr Zuma's contention is that he is entitled to a permanent stay of prosecution because his constitutional rights entrenched in ss 35(3)*(d)*, 9, 10 and 12 of the Constitution have been violated. He alleges that from about the commencement of the investigation in early 2000 until the withdrawal of the charges against him on 7 April 2009, the investigation and prosecution teams were part of a strategy by his political opponents aimed at stopping him from being elected as the President of the ANC and ultimately of the country. He contends that the Ngcuka decision and announcement were made in bad faith and for ulterior purposes of harming his political career and strengthening the NPA's chances in a future trial against him.

[114] Mr Zuma's application for a permanent stay of prosecution is founded on the following four pillars:

(a) Unreasonable delay, which includes charge delay and trial delay, occasioned by the conduct and inconsistent decisions of the NPA in the past 16 years;

(b) Indisputable forensic and evidential prejudice resulting from the inordinate delay and the deliberate and indefensible decision of prejudice resulting from the NPA not to charge Mr Zuma together with Mr Shaik, when it was ready to charge them together;

(c) Political and external interference with the prosecution, in violation of the Constitution, the NPA Act and the prosecution policy; and

(d) Pre-trial irregularities (including prosecutorial misconduct) and unlawfulness in the manner in which the NPA pursued the investigation against Mr Zuma.

[115] Thales' application for a permanent stay is also predicated on s 35(3)*(d)* of the Constitution. Thales contends that it has suffered significant and irreparable prejudice to its fair trial rights. Hence, we shall now deal with both Mr Zuma's and Thales' applications for permanent stay of their prosecutions.

Stay of prosecution

[116] Expeditious conclusion of criminal proceedings has always been an essential element of a fair trial.[44] Prior to the commencement of the interim Constitution,[45] the

[44] Steyn 'Undue delay in criminal cases: The Scottish and South African courts' response' (2003) *Acta Juridica* 139-159.
[45] The interim Constitution of the Republic of South Africa, Act 200 of 1993.

power of our courts to disallow or grant adjournments was governed by s 168[46] of the CPA - a provision that is still in force. This section gives courts the power to adjourn proceedings if they deem it necessary or expedient, and by implication, the power to also refuse to adjourn.[47] The principle that an accused person is entitled to a speedy trial was well established in the common law. The focus under the common law was on the reasonableness of the adjournment as determined by the proceedings. In *S v Geritis*[48] Vieyra J said:

'[T]he decision is one within the discretion of the judicial officer presiding at the trial and that it must be a judicial discretion. I venture to suggest that in exercising such discretion two basic principles must be borne in mind. The one is that it is in the interests of society and accordingly of the State that guilty men should be duly convicted and not escape by reason of any oversight or mistake which can be remedied. The other, no less valid, is that an accused person, deemed to be innocent, is entitled, once indicted, to be tried with expedition.'[49]

[117] In *S v Magoda*[50] the court held that the appropriate remedy in matters of undue delay would be to refuse an adjournment and it went as far as to deem the State's case closed in circumstances where the State refused to close its case.

[118] In *Du Preez v Attorney-General of the Eastern Cape*[51] the court held that 20 months was not an unreasonable delay and did not justify the drastic remedy of a stay of the prosecution. The court gave consideration to *Barker v Wingo*[52] where the Supreme Court of the United States approved of a four factor test in deciding upon speedy trial claims namely:

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[46] This section provides as follows:
'A court before which criminal proceedings are pending, may from time to time during such proceedings, if the court deems it necessary or expedient, adjourn the proceedings to any date on the terms which to the court may seem proper and which are not inconsistent with any provision of this Act.'
[47] *S v Scholtz & others* 1996 (2) SACR 623 (C) at 626g-627a.
[48] *S v Geritis* 1966 (1) SA 753 (W).
[49] *S v Geritis* at 754E-G.
[50] *S v Magoda* 1984 (4) SA 462 (C).
[51] *Du Preez v Attorney-General of the Eastern Cape* 1997 (3) BCLR 329 (E).
[52] *Barker v Wingo* (1972) 407 US 514. In the case of *United States v. Marion,* 404 U.S. 307 (1971) at 320 the court stated that irrespective of any prejudice that an accused person may experience by the conduct of his defence, certain interests of the accused are relevant such as those that 'seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends'. Also see *Artico v Italy* (1981) 3 EHRR 1 para 35 where the court stated as a general proposition, in considering Article 6(3)(c), that the existence of a violation of the right is conceivable, even in the absence of prejudice.

(a) The length of the delay before the institution of the prosecution;
(b) The reason for the delay;
(c) The assertion by the accused of his rights; and
(d) The prejudice to the accused.

[119] In *Berg v Prokureur-Generaal*, *Gauteng*[53] it was held that a permanent stay of proceedings could be granted in appropriate cases, but should be reserved only for exceptional cases as it was an extreme remedy.[54]

[120] In *Sanderson v Attorney-General, Eastern Cape*,[55] the CC held that the amount of elapsed time was central to the reasonableness enquiry, and that time had a pervasive significance that impacts upon all of the factors. The length of the delay was not to be considered as a threshold requirement, nor decided in isolation. The amount of time that had elapsed not only conditioned the relevant considerations, such as prejudice, but was itself conditioned by them.[56] It is appropriate to balance the length of the delay with all the other factors, particularly prejudice, rather than to establish this factor as a barrier to relief when the level of the threshold would be arbitrary. The CC further listed three factors that need to be considered when an application for permanent stay has been brought. These are:

(a) The right to a trial within a reasonable time, which is fundamental to the fairness of the trial and the consequent prejudice suffered by an accused if this, does not materialise;
(b) The nature of the case; and
(c) The so-called systemic delay such as effectiveness of police investigation or prosecution of the case and delays caused by congested court rolls.

It was held that the test for establishing whether the time allowed to lapse was reasonable should not be unduly stratified or preordained.[57]

[121] In *Wild & another v Hoffert NO & others*[58] the CC described the relief for a permanent stay of prosecution as a far-reaching remedy. The CC held that it is radical, both philosophically and socio-politically and that 'it prevents the prosecution

[53] *Berg v Prokureur-Generaal, Gauteng* 1995 (2) SACR 623 (T).
[54] See also *Bate v Regional Magistrate, Randburg & another* 1996 (7) BCLR 974 (W).
[55] *Sanderson v Attorney-General, Eastern Cape* 1998 (1) SACR 227 (CC).
[56] *Sanderson v Attorney-General, Eastern Cape* paras 28-29.
[57] *Sanderson v Attorney-General, Eastern Cape* para 30.
[58] *Wild & another v Hoffert NO & others* 1998 (3) SA 695 (CC) para 11.

from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will be seldom warranted in the absence of significant prejudice to the accused'.[59] In *Zanner v Director of Public Prosecutions, Johannesburg*[60] the SCA held that in deciding upon a permanent stay, it was important to have regard to the nature of the offence. It pointed out that the accused's interest should be juxtaposed against the social demands in serious offences and concluded that the accused should stand trial.[61] The court[62] accepted that compelling reasons for granting a permanent stay of prosecution would normally relate to trial prejudice such as the unavailability of witnesses or fading memory, in consequence whereof the accused may be prejudiced in the conduct of his or her trial. The accused had to show definitive and not speculative prejudice, as it is not sufficient to rely on vague allegations of prejudice resulting from the passage of time and the absence of witnesses.

[122] In 2010 the Constitutional Court considered a 37 year delay of instituting prosecution against the accused in *Bothma v Els & others.*[63] The court re-affirmed the factors that should be considered in a decision to stay a criminal prosecution and essentially re-affirmed the approach adopted by the SCA in *Sanderson* above*.* Sachs J held that a balancing test in which the conduct of both the prosecution and the accused had to be weighed and the following considerations examined: the length of the delay; the reason the government assigns to justify the delay; the accused's assertion of a right to a speedy trial; and prejudice to the accused.[64] In some cases, the nature of the offence and the public policy considerations that may be attached to it are taken into account including the interests of victims to such an offence.

[123] Counsel for Thales has also referred us to *Van Heerden & another v National Director of Public Prosecutions & others*[65] in which the SCA granted a permanent stay of prosecution. In *Van Heerden,* the court was misled by the prosecution and

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[59] *Sanderson v Attorney-General, Eastern Cape* above para 38.
[60] *Zanner v Director of Public Prosecutions, Johannesburg* 2006 (2) SACR 45 (SCA).
[61] *Zanner v Director of Public Prosecutions, Johannesburg* para 21.
[62] *Zanner v Director of Public Prosecutions, Johannesburg* para 12.
[63] *Bothma v Els & others* 2010 (2) SA 622 (CC).
[64] *Bothma v Els & others* above para 36.
[65] *Van Heerden & another v National Director of Public Prosecutions & others* [2017] 4 All SA 322 (SCA).

that was conceded to by the State's counsel when the matter was argued in the SCA. *Van Heerden* is therefore distinguishable from the facts in casu. We are however mindful of the guidance given by the SCA at para 70:

'I cannot stress enough that decisions in matters of this kind are fact specific. It follows that this judgment should not be resorted to as a ready guide in determining the reasonableness or otherwise of delays in the finalisation of trials. Whether a breach of a right to an expeditious trial has occurred and relief is justified, is to be determined by a court after having been apprised of all the facts on a case by case basis.' (Our emphasis.)

[124] More recently, the full court in Gauteng Local Division, Johannesburg held in *Rodrigues v National Director of Public Prosecutions & others* and we endorse the court's observation at para 108:[66]

'The refusal of a permanent stay of prosecution is not signalling that we are required to be vengeful to those who are alleged to have committed serious crimes in the past, but rather an affirmation that the principles of accountability and responsibility for breaching the rules of society stand at the doorway of our new constitutional order.' (Our emphasis.)

[125] The decks have now been cleared for a consideration of the contentions advanced by each of the applicants in support of their respective applications for a permanent stay against these factors. We first consider those advanced by Mr Zuma.

The Ngcuka decision

[126] Mr Zuma contends that Mr Ngcuka's statement was the gravest travesty of justice because Mr Ngcuka passed judgment on him in the ever biased court of public opinion. He contends that Mr Ngcuka could have charged him in August 2003 together with the accused in the Shaik trial but Mr Ngcuka decided against that with the result that the Shaik trial ran without him. According to him, Mr Ngcuka did not indict him in the Shaik trial because he wanted to use that trial as a dry run to allow the prosecution to present and elicit damning evidence in public about his relationships and dealings with Mr Shaik, Nkobi group companies and Thales without him having the opportunity to cross-examine the witnesses called to testify in the trial and to give his version. He contends that Mr Ngcuka also wanted to seek in his absence the conviction of Mr Shaik as well as rulings on issues that would pave the

[66] *Rodrigues v National Director of Public Prosecutions & others* 2019 (2) SACR 251 (GJ).

way for his successful prosecution in future. He contends that Mr Ngcuka's failure to indict him intended to and did successfully prejudice him because evidence implicating him was led and accepted in the Shaik trial in his absence.

[127] It is common cause that Mr Ngcuka announced at a conference on 23 August 2003 in the presence of Dr Maduna that he had decided to indict Mr Shaik, Nkobi group companies and Thales, but stated that he would not indict Mr Zuma who was to have been the recipient of the alleged corrupt payments from Mr Shaik and Nkobi group companies. Mr Ngcuka explained that after a careful consideration of the facts and the evidence, they concluded that whilst they had a prima facie case of corruption against Mr Zuma, their prospects of success were not strong enough.

[128] Mr Ngcuka explained that on receipt of the memorandum from the prosecution team which recommended that Messrs Shaik and Zuma be indicted, he assembled an advisory team of eight senior NPA officials to help him consider the recommendations. He together with the advisory team, considered the evidence, the submissions of the prosecution team and Mr Zuma's response to the 35 questions. Most of the members of the advisory team, including himself, concluded that there were reasonable prospects of a successful prosecution of Mr Shaik, Nkobi group companies and Thales.

[129] Mr Ngcuka asserted that the analysis of the evidence by him and the advisory team in relation to the prosecution of Mr Zuma revealed the following:

(a) The evidence discovered and gathered during the investigation consisted largely of letters, faxes and records. There was insufficient witness testimony that could attest to the contents of the documents in question, insofar as they related to Mr Zuma;

(b) Even though Mr Zuma was referred to often in the letters, correspondence and diaries, only in very few instances could criminal knowledge be imputed to him and his direct involvement be proven;

(c) Whilst they had strong evidence about Mr Zuma's presence at various critical meetings,[67] they had insufficient corroboration about his role in those meetings;

[67] 2 July 1998 in London, 18 November 1998 and 11 March 2000 in Durban.

(d) Although Thales paid R250 000 to Nkobi group companies which they suspected to be a follow-up to the bribe solicited, they had some doubt whether Mr Zuma was aware of that payment. They considered that the payment could have represented a concealed bribe, but the evidence which they had fell short of the required standard;

(e) Mr Zuma was given an opportunity to provide them with his version, in the form of a questionnaire, which covered the pertinent areas around which they felt he had a case to meet. His responses were not helpful. Consequently, he could come to court and present a defence, which was reasonably possibly true;

(f) They observed a disturbing trend which showed that Mr Shaik manipulated his relationship with Mr Zuma and exploited the latter's financial vulnerability in order to advance his own business interests; and

(g) They considered the fact that it is the duty of the court to assess the evidence and make a finding and not that of the prosecuting authority but they took into consideration the disruptive effect of such a decision on the government and the broader South African society in the context of not being assured of a successful outcome.

[130] Having analysed the evidence, they asked themselves whether they had a reasonable prospect of a conviction. Hitherto, the test they applied was to assess whether there was sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution otherwise the prosecution, should not be commenced or continued. Having assessed the evidence, they agreed that their case against Mr Zuma was not strong enough to warrant his prosecution. Ultimately, they concluded that, although there was a prima facie case against Mr Zuma, it did not meet the reasonable prospect of conviction test.

[131] Counsel for Mr Zuma submitted that a prosecutor is obliged to prosecute whenever he has a prima facie case. He submitted that the Ngcuka decision in this regard was not consistent with the Constitution, the NPA Act and the prosecution policy directives, code of conduct or any prosecution standard. The difficulty with this proposition is that the legitimacy of the test, which Mr Ngcuka applied, was

confirmed by Harms DP in *National Director of Public Prosecutions v Zuma*[68] when he concluded pertinently that:

'. . .the term "prima facie evidence" has more than one connotation and may mean, as Mr Ngcuka conveyed, that there may be evidence of the commission of a crime which is nonetheless insufficient to satisfy the threshold of a reasonable prospect of success, especially if regard is had to the burden of proof in a criminal case. Although corruption involves two persons, the fact that the one may be guilty does not mean that the other is also guilty because the intention of each party must be decided separately, and evidence that may be admissible against the one may not be admissible against the other.' (Footnotes omitted.)

[132] This reasoning commends itself to us as applying equally in this matter. Counsel for Mr Zuma had another arrow in his quiver. He contended that the decision was not taken to advance a legitimate prosecutorial principle but was part and parcel of a grand political scheme to keep Mr Zuma in the public controversy where he would be regarded as being a corrupt leader without affording him a legitimate constitutional platform to deal with those allegations. In support of this submission, he relied on Mr Ngcuka's declaration that he was a political supporter of Mr Mbeki in the run up to the ANC Polokwane conference and that at the time he was in regular contact with some senior ANC members and supporters. We find this argument fundamentally flawed. The flaw seems to lie in the fact that the uncontested evidence of Mr Ngcuka was that in the indictment of Mr Shaik and his co-accused, which was about to become public, reference was of necessity made to Mr Shaik's relationship with Mr Zuma and the bribe agreement with Mr Thétard. The indictment spelt out what was clearly a prima facie case of corruption against Mr Zuma. Mr Ngcuka felt obliged to explain to the public why he had decided not to prosecute Mr Zuma despite the prima facie case disclosed by the indictment to avoid an inference that Mr Zuma was receiving special treatment. Therefore, his relationship with Mr Mbeki or being his supporter was immaterial as the prima facie evidence of corruption was there regardless.

[133] Mr Zuma contends that he should have been prosecuted with Mr Shaik and that it was unfair to deprive him of the benefits of such a joint prosecution. We observe that a similar complaint was raised by Mr Shaik in his appeal against the

[68] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 43.

conviction to the CC.[69] In rejecting this complaint, the CC held that the fact that there might often be cogent reasons for the holding of joint trials, does not of course mean that a specific trial would be unfair because other possible perpetrators are not charged together with an accused. The CC further held that the proposition cannot be upheld that the failure to charge another party, who may be suspected of being involved in the same offence, in the same trial together with an accused amounts to a breach of any established rule of criminal procedure.[70] As we see it, even if a joint trial would have had some benefit for Mr Zuma of which he was deprived of as a result of his prosecution being separated from Mr Shaik and the Nkobi group, it does not constitute prejudice of any kind, which would impact on the fairness of his trial. Any delay during this period would be justifiable if one has regard to Mr Ngcuka's explanation and the fact that the investigations were ongoing.

The Pikoli decision

[134] As stated above, on 20 June 2005 Mr Pikoli announced his decision to indict Mr Zuma and Thales. The main thrust of Mr Zuma's argument was that there were no special or exceptional circumstances and no new evidence justifying the Pikoli decision to reverse the Ngcuka decision not to prosecute him. Counsel for Mr Zuma contended that the decision not to prosecute Mr Zuma was not because there was no 'evidence' against him at the time but it was a deliberate decision by Mr Ngcuka not to indict him. He submitted that the evidence in question was not independent and could have been used against Mr Zuma in his trial with Mr Shaik.

[135] Counsel for Mr Zuma contended that there was no legal basis for Mr Pikoli to report his decision to Mr Mbeki and Ms Mabandla in the light of the well documented and reasonably held public perception of executive interference in the prosecution of Mr Zuma. According to him, Mr Zuma was then officially an accused person and s 35(3)*(d)* of the Constitution entitled him the right to have his trial begin and conclude without unreasonably delay.

[136] It was further submitted that the NPA was under an obligation from the moment that Mr Pikoli decided to indict Mr Zuma to ensure that his right was protected and/or given effect to. He submitted that by 20 June 2005 the NPA was not

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[69] *S v Shaik & others* 2008 (2) SA 208 (CC) para 47.
[70] *S v Shaik & others* above para 50.

in a position to commence and conclude the trial without unreasonable delay. He submitted that after Mr Pikoli had taken the decision to prosecute Mr Zuma, Mr Pikoli deployed his prosecution team to seek the postponement of the matter instead of prosecuting him in accordance with the terms agreed after the trial was scheduled to commence on 31 July 2006.

[137] He argued that the NPA could not use as an excuse, the litigation by Mr Zuma and Thint on the legality of the search warrants to prevent the NPA from finalising its preparation for the trial in time for the scheduled start on 31 July 2006 because Mr Pikoli did not heed the advice of the prosecution team to delay his announcement. Instead, he stated that he was convinced that the NPA had sufficient evidence to prosecute Mr Zuma. He refused to wait for the results of the further investigation which the prosecution team had requested and held a strong view that it would be unfair to Mr Zuma to prolong the uncertainty in circumstances where he was already satisfied that there was enough evidence to form an opinion about the prospects of a successful prosecution.

[138] Counsel for Mr Zuma argued that the delay which ensued pursuant to the Pikoli decision should be blamed on the NPA because the NPA ought to have taken all the necessary steps to mitigate systemic delays but that its failure to do so resulted in the matter being struck off the roll. He submitted that even at that stage the NPA was not sure, when it would be ready to commence with the trial and despite intimating that it would be ready to commence the trial in October 2006, it only charged Mr Zuma on 28 December 2007, which was two and a half years later.

[139] Mr Pikoli however explains that he took the decision to institute the prosecution against Mr Zuma based on his assessment of admissible evidence and the prospects of a successful prosecution. He states that on 16 June 2005 the prosecution team submitted a memorandum to him recommending Mr Zuma's prosecution. Following the briefing by the prosecution team on 17 June 2005 and discussions with senior advisers at the NPA, as well as his own detailed consideration of the judgment in the Shaik trial and the prosecution team's memorandum of 16 June 2005, he concluded that there was a reasonable prospect of a successful prosecution of Mr Zuma. Consequently, he decided to institute a prosecution against him.

[140] He explains that he considered the possibility of delaying announcing his decision until the DSO had completed the sensitive further investigation, which the prosecution team had indicated was still necessary. Mr Pikoli asserts that he came to the conclusion that it would be untenable because of the following reasons:

(a) The DSO's investigation and the subsequent prosecution and conviction of Mr Shaik and the Nkobi group companies had elicited huge media and public interest;

(b) There was intense speculation about Mr Zuma's political future and the prospects of criminal charges being brought against him, which had been heightened by Mr Mbeki's decision to dismiss him as Deputy President of the country;

(c) He considered his decision to prosecute Mr Zuma to be one of national importance with the potential to affect foreign governments' perception of South Africa and possibly even the economy;

(d) Mr Zuma had been making repeated calls to 'have his day in court';

(e) It would be unfair to Mr Zuma to prolong the uncertainty in circumstances in which he was already satisfied that there was enough evidence to form an opinion about the prospects of a successful prosecution; and

(f) That it would be neither in the interests of justice nor in the public interest to prolong the speculation by delaying the announcement of his decision.

[141] As stated, the August 2005 search warrants executed by the NPA as foreshadowed in para 55 above were challenged by Mr Zuma. The failed challenges to the warrants and their execution delayed the prosecution from August 2005 until the CC handed down its judgment on 31 July 2008. In as much as the parties who challenged the search warrants were within their rights to do so, we hold the view that it was a prudent decision on the part of the NPA to await the outcome of these challenges to seek clarity on whether the NPA could access and use the documents obtained in the ensuing searches without risking or infringing any fair trial rights of Mr Zuma or Thales. It was also important for the NPA to await the outcome of the Shaik appeal, as it would definitely have an impact on Mr Zuma's prosecution. Any delay during this period is regarded as systemic and both parties are equally liable as they both participated in the litigation leading to the delay. As such, it is not open to Mr Zuma to complain about the delay.

The spy tapes

[142] Counsel for Mr Zuma contended that the spy tapes are conclusive that the investigation and prosecution of Mr Zuma were manipulated to suit external political machinations. It was submitted that the conduct in question constitutes a flagrant disregard of the Constitution and the most sacrosanct principle of its very existence. He pointed out that s 32 of the NPA Act requires prosecutors to act impartially and exercise, carry out or perform their functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law. He submitted that Mr McCarthy had exercised his powers not for legitimate reasons but for political ends and other irrelevant considerations and that, his conduct was unlawful and improper, and was not independent but was influenced by persons outside the NPA.

[143] As aptly pointed out by the SCA in *Zuma v Democratic Alliance & others*,[71] the Mpshe decision to discontinue the prosecution of Mr Zuma was driven principally, if not exclusively, by what he considered to be Mr McCarthy's abuse of prosecution process in relation to the timing of the service of the indictment. The recording of telephone calls between Messrs McCarthy and Ngcuka were central to the Mpshe decision to discontinue the prosecution. Mr Mpshe considered the spy tapes to be crucial in that they reflected a manipulation of the process for ulterior purposes. The SCA concluded pertinently that '[t]he reasons for discontinuing the prosecution provided by Mr Mpshe do not bear scrutiny, for the recordings themselves on which Mr Mpshe relied, even if taken at face value, do not impinge on the propriety of the investigation on the case against Mr Zuma or the merits of the prosecution itself'.[72] Crucially, Mr Zuma conceded and the SCA found in the DA review appeal that Mr Mpshe's decision to withdraw the charges was irrational.

[144] We considered that Mr Zuma was also a party to the DA review application and the findings of the SCA on this issue are binding upon him. Assuming that Mr Zuma's accusation was true, that his prosecution is politically motivated, his contention will still be unsustainable because the SCA reiterated in *National Director of Public Prosecutions v Zuma*[73] that a prosecution brought for an improper purpose is only 'wrongful if, in addition, reasonable and probable grounds for prosecuting are

[71] *Zuma v Democratic Alliance & others* 2018 (1) SA 200 (SCA) para 31.
[72] *Zuma v Democratic Alliance & others* 2018 (1) SA 200 (SCA) para 94(iv).
[73] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 37.

absent'. It has not been shown before us that there are no reasonable and probable grounds for prosecuting Mr Zuma. Importantly, the challenges by Mr Zuma are not aimed at the merits of the case against him. The same can be said about Thales.

[145] With regard to Mr McCarthy's alleged motive in relation to the timing of the service of the indictment, the SCA[74] neatly summed up the position on the issue as follows:

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

Timing of the service of the indictment does not impact on the strength of the State's case against Mr Zuma and the prosecution of the case. As the NPA and Mr Zuma formed common cause in opposing the DA review application, the whole period between April 2009 to October 2017 cannot be termed as unreasonable as they were both complicit in their actions.

The Browse Mole investigation

[146] The contention advanced on behalf of Mr Zuma under this heading is that the Browse Mole investigation lends credence to his complaint that his prosecution is politically motivated. It was submitted that the Browse Mole investigation clearly demonstrates that the DSO and/or Mr McCarthy was hell-bent on finding anything against Mr Zuma at all costs in order to secure his conviction. Furthermore, so went the argument, it could not be seriously contended that the investigation into corruption allegations by Mr McCarthy were not conducted by the investigation team when the lead investigator, Mr McCarthy, was solely responsible for that investigation. According to Mr Zuma's counsel, if Mr Pikoli believed that Mr McCarthy had the authority to investigate lawfully the corruption charges against Mr Zuma by obtaining what Mr Pikoli refers to as raw intelligence, he would not have ordered Mr McCarthy to stop the Browse Mole investigation and triggered an investigation into

[74] *Zuma v Democratic Alliance & others* above para 94(v).

the matter. It was submitted that this reaction on the part of Mr Pikoli leads to the inescapable conclusion that the Browse Mole report was not produced for legitimate prosecutorial purposes but as part and parcel of a smear campaign intended to damage Mr Zuma's political standing.

[147] In his affidavit, Mr Pikoli has given a detailed account of the events leading up to the compilation of the Browse Mole report. He explained that following the leaking of the report, he and the DSO co-operated with the ensuing investigation by the director-general of the departments represented on the National Security Council (Cluster). He considered that the involvement of the DSO in the investigation fell within its legal mandate to gather, keep and analyse information relating to criminal activities committed in an organised fashion in terms of s 7(1)*(a)*(ii) of the NPA Act.[75] He pointed out that the contents of the Browse Mole report had nothing to do with and played no part in the investigation and prosecution of Mr Zuma and Thales, and that during his time as the NDPP, it was not handed to the investigators and prosecutors handling the investigation and prosecution of this case. Both Mr Downer and Mr Du Plooy confirmed his version that the Browse Mole report was never given to them before and after his suspension.

[148] In the DA review application,[76] the full court found and the SCA[77] confirmed, that references by Mr Hofmeyr to Mr McCarthy's conduct in relation to the Browse Mole report were considered to be diversionary and irrelevant as they were unconnected to the prosecution or the service of the indictment. The full court also held that there was no rational link between Mr McCarthy's alleged conduct and Mr Mpshe's decision to discontinue the prosecution. We align ourselves with this view. As concisely stated in *National Director of Public Prosecutions v Zuma*[78] above:

'A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent, something not alleged by Mr Zuma and which, in any event, can only be determined once criminal proceedings have been concluded.' (Footnotes omitted.)

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[75] This section was deleted by the National Prosecuting Authority Amendment Act 56 of 2008.
[76] *Democratic Alliance v Acting National Director of Public Prosecutions & others (Society for the Protection of our Constitution as amicus curiae)* [2016] 3 All SA 78 (GP) para 52.
[77] *Zuma v Democratic Alliance & others* 2018 (1) SA 200 (SCA) para 42.
[78] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 37.

Mr Mpshe's 2009 decision

[149] After having instituted a prosecution of Mr Zuma in December 2007, Mr Mpshe publicly announced on 6 April 2009 that he had decided to withdraw the charges against Mr Zuma. He explained that the spy tapes had persuaded him that Mr Zuma's prosecution was irremediably affected by Mr McCarthy's ulterior political motives. Counsel for Mr Zuma contended that the statement by Mr Mpshe was the clearest indication that the NPA itself has acknowledged that its conduct, through Mr McCarthy, constituted an egregious violation of the Constitution, the NPA Act and the prosecution policy. The hurdle besetting Mr Zuma on this submission is that Mr Zuma conceded in the DA review appeal at the SCA, that Mr Mpshe's decision to withdraw the charges against him was irrational and that a rational decision needed to be made. In that judgment at para 80 the court held that even if one accepts that Mr McCarthy had an ulterior purpose in seeking to have the indictment served after the conference, his conduct had no bearing on the integrity of the investigation of the case against Mr Zuma and did not impact on the prosecution itself. In our view, no case has been made before us that Mr Mpshe's decision to initially charge Mr Zuma was in anyway politically motivated. Accordingly, the decision of the SCA in the DA review application paved the way for Mr Zuma to have his day in court something, which he is alleged to have expressed.

[150] The seriousness of the offences that Mr Zuma is facing outweighs any prejudice, which he claims he will suffer if the trial proceeds. Furthermore, the reputational harm, which he claims to have suffered, goes hand in hand with being charged. In any event, this does not seem to have prevented him from ascending to the highest office in the country, being the President of the Republic.

[151] We now turn to the other issues raised by Thales in its application. Thales, being a corporate company is just as much an accused person as accused 1, Mr Zuma. Corporate criminal liability is recognised in our criminal law and plays an integral part in combating bribery and organised crime in South Africa committed by corporate bodies. Counsel for Thales has suggested to us that we ought to draw a distinction between Thales and Mr Zuma in asserting their rights. We will draw that

distinction only in as much as it is supported by the facts relating to each of the accused not based on their legal persona.[79]

[152] The delays and the reasons during the period 24 August 2001 to 16 March 2018 were set out in the historical chronology above. The circumstances relating to Thales' escaping from the initial prosecution and the benefit it had received from Mpshe's decision to withdraw has been dealt with in detail.

[153] Mr Downer's answering affidavit for the State in the application by Mr Zuma relays the chronological order in detail of the events over the period of September 1999 to 30 November 2018.[80]

[154] We are cognisant of the SCA's caution in *McCarthy v Additional Magistrate, Johannesburg*[81] where the SCA relied on the decision of *US v Trammell*:[82]

'Vague and conclusory allegations of prejudice resulting from the passage of time and the absence of witnesses are insufficient to constitute a showing of prejudice. Defendant must show definite and not speculative prejudice, and in what specific manner missing witnesses would have aided the defense. *United State v Jenkins*, 701 F, 2d 850, 855 (10th Cir) 1983.'

[155] Thales has argued that because the NDPP decided to pursue the prosecution against Mr Zuma, it decided to pursue the prosecution against Mr Zuma's erstwhile co-accused too. According to Thales, there has been no special reason that legitimately supports the NDPP's decision to re-instate the prosecution. It complains that it would suffer significant trial prejudice since potential witnesses have, either moved on, will not return to South Africa to testify or have become unavailable to do so due to ill health. In addition, it was submitted that Thales no longer has access to

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[79] In *H.L. Bolton (Engineering) Co. Ltd. V. TJ Graham & Sons Ltd* [1957] 1 QB 159 at 172 the court compared the criminal liability of a company with the human body in the following terms:
'A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by law as such.'
In South Africa, the Constitution recognises the right of a juristic person in terms of the s 8(4) of the Constitution as follows:
'A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of that juristic person.'

[80] See Mr Downer's affidavit, vol 10 at 2683-2917.

[81] *McCarthy v Additional Magistrate, Johannesburg* 2000 (2) SACR 542 (SCA) para 47.

[82] *US v Trammell* 133 F 3d 1343, 1351 (10th Cir 1998).

many documents and others records that might have assisted it in its defence. Thales' application for permanent stay of the prosecution has been opposed by the State in that Thales has not established that its trial would be substantially unfair or that there is any justification that warrants such a radical remedy of a stay of the proceedings.

[156] This court accepts that there was a delay in the prosecution of Thales, but we are not satisfied that the delay would result in trial prejudice. As has been stated earlier in this judgment and as held in *Sanderson*, a stay of prosecution can only be granted in the instance of trial prejudice. In the absence of any extraordinary circumstance favouring an order of a stay, which was not established in Thales' affidavits, we are drive to conclude that Thales' claim for a stay must fail.[83] Whilst Thales claims that it will be prejudiced in its trial as a result of the non-availability of witnesses, we are not satisfied that this will be the case as Ms Guerrier for instance, who has been with Thales since the inception of the investigations is still referred to as the vice president of Thales in this application. The same applies to Mr Driman, who is also still the current attorney of record. Furthermore, whilst a claim has been made that Mr Moynot is alleged to be suffering from Alzheimer's, there was no medical evidence to support this averment. To conclude on this ground, even if there had been a delay in recharging Thales, they cannot be afforded the relief sought.

Thales' challenge to Mr Abrahams' decision

[157] At the heart of Thales' challenges is the decision of Mr Abrahams to re-instate the prosecution against it on 16 March 2018. Thales averred that the decision was inconsistent with the Constitution and invalid. The decision was informed inter alia by the decision of the SCA in October 2017 when the court ruled that Mr Mpshe's decision in 2009 to withdraw the charges against Thales' co-accused, Mr Zuma, was unlawful and had to be set aside.[84] It is common cause that Thales did not participate or play any role in the litigation in 2017. Earlier in this judgment, we referred to the fact that Thales initially misled the NPA about its willingness to co-operate in the prosecution of Mr Shaik who was accused and convicted of bribing Mr Zuma. Based on its initial agreement to co-operate it escaped prosecution and the charges were withdrawn.

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[83] *Wild & another v Hoffert NO & others* 1998 (3) SA 695 (CC) paras 26-27.
[84] *Zuma v Democratic Alliance & others* 2018 (1) SA 200 (SCA).

[158] In order to understand the discretion exercised by the NDPP for withdrawing the charges against Thales, it is necessary to state the facts that formed the basis of the decision which initially was exercised by Mr Ngcuka. It is clear that the NDPP was mindful of criticism that might follow after a decision was made to proceed against the alleged corruptors and not the alleged corruptee (Mr Zuma). Mr Ngcuka stated the following in his affidavit:

'69. Aside from Dr Maduna and me, those present were the Thales delegation comprising Mr Driman, a director of the local Thales companies Pierre Moynot, the attorney of record of the Thales accused in the then-pending proceedings Ajay Sooklal and an in-house lawyer from Thales Group in France Christine Guerrier (Guerrier) (who I see is now the deponent to Thales' application for a permanent stay of prosecution in the present matter).

70. During the meeting the Thales delegation said that they were willing to co-operate and, as Dr Maduna and I accepted their *bona fides*, it was agreed that they would contact my office to discuss my parameters for their co-operation.

71. On 19 April 2004 Mr McCarthy and I met with Adv Naidu (who was now acting for Thales), Mr Driman and Ms Guerrier. The meeting resulted in an agreement, which was recorded in a letter by me to Naidu delivered to him later that day. In the letter I confirmed that if Mr Thétard made an affidavit to the effect that he was the author of the encrypted fax, the NPA would retract two warrants of arrest against Mr Thétard and what (I then thought) were then current subpoenas under section 28 of the NPA Act against him, and withdraw the prosecution against accused 11 in the Shaik trial (i.e, Thint (Pty) Ltd).

72. I should add that the idea was that Mr Thétard's making of the affidavit would be accepted by the NPA as proof of Thales's *bona fides* and would lay the basis for further discussions with Thales and consultations with Mr Thétard aimed at his testifying in the criminal trial if that became necessary, in exchange for which he would be formally indemnified should he give satisfactory evidence and the NPA would withdraw the prosecution against accused Thomson (Pty).

73. On 20 April 2004 Mr Thétard made an affidavit confirming that he was the author of the encrypted fax, which Adv Naidu then forwarded to me.

74. On 4 May 2004 I wrote to Adv Naidu thanking him for the copy of the affidavit from Mr Thétard in which Mr Thétard confirmed that he was the author of the encrypted fax. I said that as a result, the State would withdraw the charge against Thint (Pty) Ltd in the Shaik trial on the date of next appearance and that I had instructed the investigating team to withdraw

the warrants and subpoenas against Mr Thétard. Finally I informed Adv Naidu that provided Mr Thétard submitted to questioning by the prosecuting advocates and was prepared to testify in the criminal trial should it become necessary, the prosecuting advocates would provide him (Adv Naidu) with the relevant documents to assist him in further consultations.

75. The warrants of Mr Thétard's arrest were cancelled on 17 May 2004.

76. On 10 May 2004 however Mr Thétard made a further affidavit, which had not been solicited by the South Africa authorities. The NPA received it on 22 May 2004. In this affidavit Mr Thétard said, amongst other things: that the encrypted fax was *'a rough draft of a document which I intended to record my thoughts on separate issues in a manner which was not only disjointed but also lacked circumspection'*; that he had never faxed the document or directed that it be faxed but rather crumpled it up and thrown it in a waste paper basket from where it was possibly retrieved and handed to the State; that he refused to be interviewed or to testify in SA or any other country outside France; but that he was prepared to be interviewed in France by Mr McCarthy and me on the issues described in the affidavit.

77. The prosecuting team and I regarded the main assertions in this affidavit about the encrypted fax as untruthful and unsolicited and unheralded production as a cynical manoeuvre aimed at disrupting the prosecution in the Shaik trial and discrediting the encrypted fax.

78. …

79. …

80. On 21 June 2004 Mr Diplall wrote to me saying that there was no real reason to wait until 11 December 2004 (the date of the next appearance in the Shaik trial) for the withdrawal of the charge against the accused Thint (Pty) Ltd and proposing that the prosecution do all things necessary to set the matter down in the High Court in the interim for the purposes of withdrawing the charges against Thint (Pty) Ltd and postponing for the trial on 11 October 2004.

81. On 1 July 2004 Mr Diplall wrote to me again, refusing my offer in his letter of 8 June 2004. Mr Diplall gave the following reasons, which I and the others at the NPA involved with this matter regarded as insincere. He said that my offer amounted to a circumvention of the provisions of the ICCMA; the offer my amount to a contravention of *'French law and practice concerning the furnishing of evidence that may be used in a foreign court'*; and my proposed indemnity of Mr Thétard implied that the NPA was still investigating companies in the Thales

group, including Thint (Pty) Ltd, despite the undertaking to withdraw charges against Thint (Pty) Ltd. Mr Diplall said that Mr Thétard was still willing to submit to an interview with Mr McCarthy and me in France, as proposed in his affidavit of 10 May 2004.

82. Upon receipt of this letter I and others at the NPA involved with this matter concluded that Thales was negotiating in bad faith and no good purpose would be served by pushing the negotiations about a possible indemnity any further.

83. Despite reaching this conclusion, we resorted to honour the agreement that I had concluded with Adv Naidu, i.e. to withdraw the charges against Thint (Pty) Ltd when Shaik trial commenced on 11 October 2004. Aside from the fact that I had agreed to do so, there were pragmatic factors which led the NPA sticking to the original agreement despite Thales's conduct in the intervening period. Those included that Shaik and his related companies, practically speaking, were the main focus of the prosecution at that stage; French law did not permit Mr Thétard, as a French citizen who had fled to and remained in France, to be extradited to South Africa to stand trial; and the prosecution team was concerned about the trial being delayed by possible arguments by Thint (Pty) Ltd to the effect that its joinder as an accused was a misjoinder and that Mr Shaik (who was a director of Thint (Pty) Ltd) should not be its nominal representative in terms of s332 of the Criminal Procedure Act.

84. On 5 July 2004 Mr McCarthy wrote to Mr Diplall in response to the letters' letter of 21 against Thint (Pty) Ltd in the Shaik trial would only be withdrawn on the date of the next court appearance (i.e. October 2004) because the prosecution had been unable to arrange the requested earlier appearance.'[85] (Our emphasis.)

What is evident from Mr Ngcuka's affidavit is that the NPA honoured the undertaking it had with Thales' legal team.[86]

[159] The focus of the attack on Mr Abrahams' decision to re-institute the prosecution against Thales is that the NPA has never alleged that the earlier decision to withdraw charges was wrong and unlawful. In our view, Thales fails to understand the rationale for withdrawing the charges in 2004 as well as in 2009.

Thales' review application

[160] Thales has argued that the NDPP does not have a general power to institute a prosecution other than the powers in terms of s 22(9) of the NPA Act. It has been submitted by Thales that the Constitution vests approval power to institute and

[85] See Mr Ngcuka's affidavit, vol 15 at 4541-4546.
[86] See para 41 of this judgment.

conduct prosecutions with the DPP and that the NDPP lacks the power to institute and conduct prosecutions generally. In our view this submission is not only extremely narrow but without merit. The NPA's power to institute criminal prosecutions is derived from s 179(2) of the Constitution. The SCA in *National Director of Public Prosecutions v Zuma*[87] decided that '[t]he power to make prosecutorial decisions and to review them flows from [s 179(2) of the Constitution]'. In addition, s 22(1) of the NPA Act specifically emphasises that the NDPP has to exercise the NPA's prosecutorial powers.

[161] Accordingly, s 179(2) of the Constitution and s 22(1) of the NPA Act empower the NDPP to decide on matters of prosecution, which includes the power to re-institute prosecution.[88] In *National Director of Public Prosecutions v Zuma*,[89] the SCA

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[87] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 64.

[88] It is necessary for purposes of this judgment to quote s 22 in its entirety, it reads:

'22 Powers, duties and functions of National Director

(1) The *National Director*, as the head of the *prosecuting authority*, shall have authority over the exercising of all the powers, and the performance of all the duties and functions conferred or imposed on or assigned to any member of the *prosecuting authority* by the *Constitution*, *this Act* or any other law.

(2) In accordance with section 179 of the *Constitution*, the *National Director* -

(a) must determine prosecution policy and issue policy directives as contemplated in section 21;

(b) may intervene in any prosecution process when policy directives are not complied with; and

(c) may review a decision to prosecute or not to prosecute, after consulting the relevant *Director* and after taking representations, within the period specified by the *National Director*, of the accused person, the complainant and any other person or party whom the *National Director* considers to be relevant.

(3) Where the *National Director* or a *Deputy National Director* authorised thereto in writing by the *National Director* deems it in the interest of the administration of justice that an offence committed as a whole or partially within the area of jurisdiction of one *Director* be investigated and tried within the area of jurisdiction of another *Director*, he or she may, subject to the provisions of section 111 of the Criminal Procedure Act, 1977 (Act 51 of 1977), in writing direct that the investigation and criminal proceedings in respect of such offence be conducted and commenced within the area of jurisdiction of such other *Director*.

(4) In addition to any other powers, duties and functions conferred or imposed on or assigned to the *National Director* by section 179 or any other provision of the *Constitution*, *this Act* or any other law, the *National Director*, as the head of the *prosecuting authority* -

(a) with a view to exercising his or her powers in terms of subsection (2), may-

(i) conduct any investigation he or she may deem necessary in respect of a prosecution or a prosecution process, or directives, directions or guidelines given or issued by a *Director* in terms of *this Act*, or a case or matter relating to such a prosecution or a prosecution process, or directives, directions or guidelines;

(ii) direct the submission of and receive reports or interim reports from a *Director* in respect of a case, a matter, a prosecution or a prosecution process or directions or guidelines given or issued by a *Director* in terms of *this Act*; and

(iii) advise the *Minister* on all matters relating to the administration of criminal justice;

(b) shall maintain close liaison with the *Deputy National Directors*, the *Directors,* the *prosecutors*, the legal professions and legal institutions in order to foster common policies and practices

considered the origin and scope of the NDPP's powers to make prosecutorial decisions and the court held that they are derived from s 179(2) of the Constitution:

'Section 179(2) is the empowering provision. It empowers the NPA to institute criminal proceedings, and to carry out "any necessary functions incidental to instituting criminal proceedings". The power to make prosecutorial decisions and to review them flows from this. If it were necessary specially to empower any member of the NPA to make such decisions

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and to promote co-operation in relation to the handling of complaints in respect of the *prosecuting authority*;

(c) may consider such recommendations, suggestions and requests concerning the *prosecuting authority* as he or she may receive from any source;

(d) shall assist the *Directors* and *prosecutors* in achieving the effective and fair administration of criminal justice;

(e) shall assist the *Deputy National Directors, Directors* and *prosecutors* in representing their professional interests;

(f) shall bring the United Nations Guidelines on the Role of Prosecutors to the attention of the *Directors* and *prosecutors* and promote their respect for and compliance with the above-mentioned principles within the framework of national legislation;

(g) shall prepare a comprehensive report in respect of the operations of the *prosecuting authority*, which shall include reporting on-

(i) the activities of the *National Director, Deputy National Directors*, *Directors* and the *prosecuting authority* as a whole;

(ii) the personnel position of the *prosecuting authority*;

(iii) the financial implications in respect of the administration and operation of the *prosecuting authority*;

(iv) any recommendations or suggestions in respect of the *prosecuting authority*;

(v) information relating to training programmes for *prosecutors*; and

(vi) any other information which the *National Director* deems necessary;

(h) may have the administrative work connected with the exercise of his or her powers, the performance of his or her functions or the carrying out of his or her duties, carried out by persons referred to in section 37 of *this Act*; and

(i) may make recommendations to the *Minister* with regard to the *prosecuting authority* or the administration of justice as a whole.

(5) The *National Director* shall, after consultation with the *Deputy National Directors* and the *Directors*, advise the *Minister* on creating a structure, by regulation, in terms of which any person may report to such structure any complaint or any alleged improper conduct or any conduct which has resulted in any impropriety or prejudice on the part of a member of the *prosecuting authority*, and determining the powers and functions of such structure.

(6) *(a)* The *National Director* shall, in consultation with the *Minister* and after consultation with the *Deputy National Directors* and the *Director*s, frame a code of conduct which shall be complied with by members of the *prosecuting authority*.

(b) The code of conduct may from time to time be amended, and must be published in the *Gazette* for general information.

(7) The *National Director* shall develop, in consultation with the *Minister* or a person authorised thereto by the *Minister*, and the *Directors*, training programmes for *prosecutors*.

(8) The *National Director* or a person designated by him or her in writing may-

(a) if no other member of the *prosecuting authority* is available, authorise in writing any suitable person to act as a prosecutor for the purpose of postponing any criminal case or cases;

(b) authorise any competent person in the employ of the public service or any local authority to conduct prosecutions, subject to the control and directions of the *National Director* or a person designated by him or her, in respect of such statutory offences, including municipal laws, as the *National Director*, in consultation with the *Minister*, may determine.

(9) The *National Director* or any *Deputy National Director* designated by the *National Director* shall have the power to institute and conduct a prosecution in any court in the *Republic* in person.'

[89] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 64.

and to revisit them, one would have expected the Constitution to have said so.' (Footnote omitted.)

[162] Thales interprets s 22(9) of the NPA Act as a provision that restricts the powers exercised by the NDPP.[90] In our view, the section does not require of the NDPP to physically conduct each prosecution in South Africa in person. It means what it says, that the NDPP has the power to exercise prosecutorial functions and to carry out functions related to criminal proceedings.

[163] It is necessary to closely examine and interpret the provisions in the NPA Act that empowers the NDPP to exercise its powers, duties and functions. The SCA confirmed the approach to be followed in interpreting a statute in *KwaZulu-Natal Bookmakers' Society v Phumelela Gaming and Leisure Ltd.*[91] It decided that the interpretation as set out in *Cool Ideas 1186 CC v Hubbard & another*[92] must be followed:

'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity.' (Footnotes omitted.)

[164] The context in which the NPA Act was passed included the consideration of the previous legislation that regulated the prosecution service in South Africa, namely the Attorney-General Act 92 of 1992. In terms of that Act, Attorneys-General enjoyed absolute independence and were accountable to Parliament in a limited sense.[93] The predecessor to the NPA Act was not positively viewed by all in the country. The ANC, the majority party in the Constitutional Assembly, supported a greater constitutional guarantee and the result was the adoption of s 179 of the

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[90] See Thales' replying affidavit inter alia paras 84-87, vol 3 at 715.

[91] *KwaZulu-Natal Bookmakers' Society v Phumelela Gaming and Leisure Ltd* (889/2018) [2019] ZASCA 116 (19 September 2019).

[92] *Cool Ideas 1186 CC v Hubbard & another* 2014 (4) SA 474 (CC) para 28.

[93] See D van Zyl Smit and E Steyn 'Prosecuting Authority in the New South Africa' (January 2000) VIII *CIJL Yearbook* 137 at 142 and M Schönteich 'The National Prosecuting Authority, 1998-2014' (2014) 50 *SA Crime Quarterly* 5-15.

Constitution. The constitutionality of s 179 was challenged on the grounds that it did not comply with the constitutional principle, which required a separation of powers between the legislature, executive and judiciary. The CC did not uphold this objection in *Ex Parte Chairperson of the Constitutional Assembly: in re certification of the Constitution of the Republic of South Africa, 1996.*[94] The CC held that the prosecuting authority was not part of the judiciary and that Constitutional Principle VI was not relevant to the challenge. The court, however, noted at para 146 that s 179(4), which provides that legislation had to ensure that the prosecuting authority exercises its functions without fear, favour or prejudice, was a constitutional guarantee of prosecutorial independence.

[165] What followed subsequently was the enactment of legislation that gave effect to the prosecutorial scheme as sketched by s 179 of the Constitution. The NPA Act was passed in 1998 and came into operation on 16 October 1998. The NPA Act introduced a NDPP who had overall powers to direct prosecutions throughout the country.[95] The NPA Act does not restrict the powers of the NDPP but makes clear that the NDPP is not only authorised to manage and control the NPA, but is also responsible for all criminal prosecutions. Prosecutions are subject to the NDPP's control. The powers of the NDPP as spelt out in the NPA Act follow closely the detailed requirements of s 179 of the Constitution. For example, s 179(5)*(d)* provides inter alia that the NDPP may in certain circumstances intervene in or review the decisions of the DPPs. It defines the NDPP's powers of intervention and does not limit the NDPP's prosecutorial powers.

[166] The legislative history of the various pieces of legislation that governed prosecution in South Africa is not only important in deciding the context of the legislation but necessary to interpret the provisions of the NPA Act. In *Joosub Ltd v Ismail*[96] the court held that the legislative history may be used as an aid in its

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[94] *Ex Parte Chairperson of the Constitutional Assembly: in re certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC).

[95] Harms DP in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 58 stated the following:
'As mentioned before, s 179 created a new prosecutorial structure where, instead of having a number of Attorneys-General, each with their respective areas of jurisdiction, one now has an NDPP who is a presidential (political) appointee at the apex of a single NPA and below him DPPs and prosecutors who are not.'

[96] *Joosub Ltd v Ismail* 1953 (2) SA 461 (A) at 466D-E.

interpretation.[97] The submission by Thales that s 179(2) of the Constitution and s 22(1) of the NPA Act do not grant the NDPP authority over the prosecutorial members under his/her authority, is flawed and not supported by either the contextual or purposive interpretation of the legislation.

[167] We are satisfied that Mr Abrahams had the power in terms of s 179(2) of the Constitution and s 22(1) of the NPA Act to make the decision on re-instituting the prosecution against Thales.

Was the decision of Mr Abrahams in breach of the NPA's prosecution policy?

[168] Another string from Thales' bow in challenging Mr Abrahams' decision as irregular is the non-compliance with the prosecutorial policy, more specifically that Mr Abrahams had breached para 4B of the policy.[98] Paragraph 4B of the policy reads:

'There may, however, be special reasons why a prosecutor will review a particular case and restart the prosecution. These include-

- an indication that the initial decision was clearly wrong and should not be allowed to stand;
- an instance where a case has not been proceeded with in order to allow the police to gather and collate further evidence, in which case the prosecutor should normally have informed the accused person that the prosecution might well start again; and
- a situation where a prosecution has not been proceeded with due to the lack of evidence, but where sufficient incriminating evidence has since come to light.' (Our emphasis.)

[169] Plainly what is required as per the policy is that "special reasons" ought to exist for a review of a decision and the restart of the prosecution. The examples listed in terms of the policy are not an exhaustive list, or limited to only those listed. The policy gives a description of some special reasons. What is required is an examination of the reason for the decision and whether the reason qualifies as a special reason. The word 'special' is defined in the *Shorter Oxford English Dictionary on historical principles*[99] inter alia as 'of such a kind as to exceed or excel in some way that which is usual or common; exceptional in character, quality or degree'. In

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[97] *KwaZulu-Natal Bookmakers' Society v Phumelela Gaming and Leisure Ltd* (889/2018) [2019] ZASCA 116 (19 September 2019) para 12.

[98] https://www.npa.gov.za/content/prosecution-policy-and-policy-directives; see also annexure 'JS11', vol 17 at 5409-5420.

[99] *Shorter Oxford English Dictionary on historical principles* (1978) at 2066.

our view, the decision of whether a reason is special or not will be determined on the facts of each case.

[170] In order to decide on any alleged irregularity committed by Mr Abrahams it is incumbent on this court to consider his conduct in relation to the re-institution of prosecution against Thales. The State in its heads of argument has submitted that the following reasons relied upon by Mr Abrahams qualify as special reasons:

'560.1. Mr Mpshe decided in April 2009 to withdraw the prosecution of Mr Zuma.

560.2. Pursuant to his withdrawal of the prosecution of Mr Zuma, Mr Mpshe also withdrew the prosecution of Thales. He did so only because he believed that he had duly and validly withdrawn the prosecution of Mr Zuma and that it was not appropriate to proceed against Thales without him.

560.3. Shortly after Mr Mpshe's decisions to withdraw the prosecutions, the DA launched its Spy Tapes application to review and set aside Mr Mpshe's decision to withdraw the prosecution of Mr Zuma. Mr Zuma and Thales were accordingly put on notice that the reprieve they received from Mr Mpshe may yet be reversed.

560.4. The SCA finally set aside Mr Mpshe's decision to withdraw the prosecution of Mr Zuma in its Spy Tapes judgment in October 2017. The effect of the judgment was to invalidate Mr Mpshe's decision to withdraw the prosecution of Mr Zuma. His prosecution was thus reinstated.

560.5. This meant that the premise upon which Mr Mpshe had withdrawn the charges against Thales turned out to be false. He had only withdrawn the charges against Thales because he believed that he had validly withdrawn the prosecution of Mr Zuma. But that turned out not to be so. It means that the very basis of his decision to withdraw the charges against Thales turned out to be false.

560.6. Mr Abrahams accordingly decided to restart the prosecution of Thales so as to restore the *status quo ante*.'[100]

[171] The NPA has submitted that the aforesaid circumstances fall within the examples listed in para 4B of the policy, specifically the first one. In addition, it was argued that the reasons listed by Mr Abrahams in any event qualify as 'special reasons'.

[172] Thales disagrees with the submission and contends that the aforegoing reasons are not special. In our view, the reasons are special in comparison to other

[100] The NPA's heads of argument at 233-235.

cases, which should be the yardstick for measuring a decision. The NDPP assessed the facts and since the Mpshe decision was wrong and irrational, he had no choice but to re-institute the prosecution. Thales further argued that the spy tape judgment does not concern Thales since it was not cited as a party thereto and the relief sought by the DA related only to Mr Zuma. Once it was found that the withdrawal of charges against Mr Zuma was unlawful and invalidated retrospectively, it also followed that a decision had to be made about the co-accused, Thales. Thales received beneficial treatment related to Mpshe's irrational and unlawful decision, and the decision of Mpshe in relation to Thales was based on a false premise. In fact, the prosecution policy requires of a prosecutor to prosecute once there is sufficient evidence to provide a reasonable prospect of success, unless public interest demands otherwise.[101]

[173] Thales further submitted that it can never be a special reason for an accused to be prosecuted when its prosecution depends on another accused being prosecuted. Thales' contention is not jurisprudentially sound. It ignores the right of an accused person to be granted a procedurally fair process. Thales as a co-accused, appearing on charges of corruption and racketeering, received the benefit that flowed from the wrongful withdrawal of the charges by Mr Mpshe against Mr Zuma. Thales in its submissions failed to appreciate the nature of the said criminal offences that address the criminal conduct between two or more people. It would have been unjust if not unfair to proceed with the prosecution against Thales whilst the said charges were withdrawn against Mr Zuma, the alleged corruptee. In fact, a decision to proceed with the prosecution against Thales but not Mr Zuma would in all probability have been strongly challenged on the ground of irrationality, had the NDPP not withdrawn the charges previously against Thales.

[174] Thales has submitted that Mr Abrahams' decision to re-institute the prosecution against it, is contained in the letter written by Mr Abrahams on 23 July 2018 and that the reasons as per the letter are the only reasons that the NDPP may rely upon to justify the exercise of his prosecutorial discretion. These reasons they submit are irrational. On the issue of rationality, it is necessary to repeat the decisions of the SCA in clarifying the applicable test regarding legality. In *National Director of Public*

[101] Prosecution policy para 4C.

Prosecutions & others v Freedom Under Law,[102] the court confirmed that decisions not to prosecute are excluded from a review under the PAJA. It should be reviewed on the grounds of legality and rationality.[103]

[175] Any enquiry into the principle of legality must start with the recognition of the Constitution as the supreme law.[104] The history of the principle has been well documented in our jurisprudence. The origin was explained in *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* as follows:[105]

'There is of course no doubt that the common-law principles of *ultra vires* remain under the new constitutional order. However, they are underpinned (and supplemented where necessary) by a constitutional principle of legality. In relation to "administrative action" the principle of legality is enshrined in s 24*(a).* In relation to legislation and to executive acts that do not constitute "administrative action", the principle of legality is necessarily implicit in the Constitution. Therefore, the question whether the various local governments acted *intra vires* in this case remains a constitutional question.' (Our emphasis.)

[176] In *Pharmaceutical Manufacturers Association of SA & another: In re Ex Parte President of the Republic of South Africa & others*,[106] the CC held that:

'Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees

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[102] *National Director of Public Prosecutions & others v Freedom Under Law* 2014 (4) SA 298 (SCA).
[103] Also see *Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order & others* 1994 (1) SA 387 (C) and *Nhlabathi v Adjunk Prokureur-Generaal, Transvaal, en andere* 1978 (3) SA 620 (W) at 630A-D deciding that a decision of a prosecutor to prosecute or not is an administrative action even if the grounds for interference are limited.
[104] See s 1*(c)* of the Constitution that reads:
'**1 Republic of South Africa**
The Republic of South Africa is one, sovereign, democratic state founded on the following values:
. . .
(c) Supremacy of the constitution and the rule of law.'
[105] *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) para 59.
[106] *Pharmaceutical Manufacturers Association of SA & another: In re Ex Parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) para 90.

with it, or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision. This is such a case. Indeed, no rational basis for the decision was suggested. On the contrary, the President himself approached the Court urgently, with the support of the Minister of Health and the professional associations most directly affected by the Act, contending that a fundamental error had been made and that the entire regulatory structure relating to medicines and the control of medicines had as a result been rendered unworkable. In such circumstances, it would be strange indeed if a Court did not have the power to set aside a decision that is so clearly irrational.' (Footnote omitted)

[177] The minimum threshold therefore is the requirement of rationality for the exercise of public power. It is also trite that decisions or conduct that fail to comply with the principle of legality are not constitutional.[107] The CC in *Masetlha v President of the Republic South Africa & another* held that in the case of challenges of legality, the scrutiny of the rationality review would depend on the facts of each case.[108]

[178] In order to demonstrate to this court that the decision of Mr Abrahams was irrational, it would, in our view, be necessary for Thales to show on a balance of probabilities that the decision to prosecute it was wrong and not based on a thorough rational discretion being exercised.[109] The evidence presented to this court was:

(a) Mr Abrahams investigated whether the witnesses are all available;[110]

(b) He listed the following reasons informing his decisions:[111]

'80.1. there were reasonable prospects of a successful prosecution against the Thint companies. In this regard I should mention that in addition to the evaluation of the evidence against the Thint companies in the prosecution team's memorandum of 23 February 2018 (annexure **'SKA 20'** hereto), as appears from paragraph 6.1 of that memorandum the team

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[107] See *Masetlha v President of the Republic South Africa & another* 2008 (1) SA 566 (CC) para 174; *Albutt v Centre for the Study of Violence and Reconciliation, & others* 2010 (3) SA 293 (CC) para 49 deciding that:
'. . .the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the rule of law.' (Footnote omitted.)

[108] *Masetlha v President of the Republic South Africa & another* para 82.

[109] See *Law Society of South Africa & others v President of the Republic of South Africa & others* 2019 (3) SA 30 (CC) para 61. See also *National Energy Regulator of South Africa & another v PG Group (Pty) Limited & others* 2019 ZACC 28 para 48.

[110] See Mr Abrahams' affidavit, vol 16 para 26 that reads:
'26. The response I received from the DPCI was there were well over 100 witnesses whose availability could be determined, the documentary evidence is still available and is in the case and control of the DPCI and the docket constitutes many lever arch files.'

[111] See Mr Abraham's affidavit, vol 16 at p4554-4599.

had provided to me and aligned itself with the evaluation of the evidence against Mr Zuma and the Thint companies in the former prosecution teams memoranda of 16 June 2005 and 4 July 2005, copies of which were annexed and are attached hereto, marked **'SKA 24'** and **'SKA 25'**. Before taking my decision, I carefully considered all of the three memoranda;

80.2. the prosecution of the Thint companies would not have been discontinued but for Mr Mpshe SC's invalid decision to terminate the prosecution against Mr Zuma;

80.3. I wanted to restore the *status quo ante* the withdrawal of charges against Mr Zuma and the Thint companies that had followed and been based on Mr Mpshe SC's invalid decision.' (Our emphasis.)

[179] It is important for purposes of the context in which Mr Abrahams made the decision to quote in full from his letter dated 25 July 2018:

'1. Your representations, submitted via email, dated 6 June 2018, refer.

2. After careful consideration of the matter, I am of the view that there are reasonable prospects of a successful prosecution against your client.

3. Your representations are thus unsuccessful.

4. I have also requested the prosecuting team to provide me with their views on the prospects of preferring charges against your client in terms of section 5(b) of the Prevention and Combating of Corrupt Activities Act, 12 of 2004. In sub-count 2 of count 3.

5. I trust you find same in order.'[112]

[180] In light of the aforegoing conduct demonstrated by Mr Abrahams, it cannot be said that he had not grappled with the decision of re-instituting the prosecution against Thales nor can it be said that he did not have rational reasons for prosecuting Thales with Mr Zuma. Not only did he consider the evidence relating to the charges, but also the public interest in having the matter prosecuted.[113]

[181] In *Bel Porto School Governing Body & others v Premier, Western Cape, & another*[114] the CC held in relation to the fairness of an administrative decision the following:

'[86] The unfairness of a decision in itself has never been a ground for review. Something more is required. The unfairness has to be of such a degree that an inference can be drawn

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[112] Annexure 'SKA29', vol 16 at 4877.

[113] See *Zealand v Minister of Justice and Constitutional Development & another* 2008 (4) SA 458 (CC) para 38 where the court held that the State bears the onus to justify conduct.

[114] *Bel Porto School Governing Body & others v Premier, Western Cape, & another* 2002 (3) SA 265 (CC).

from it that the person who made the decision had erred in a respect that would provide grounds for review. That inference is not easily drawn.

[87] The role of the Courts has always been to ensure that the administrative process is conducted fairly and that decisions are taken in accordance with the law and consistently with the requirements of the controlling legislation. If these requirements are met, and if the decision is one that a reasonable authority could make, Courts would not interfere with the decision.'

[182] In *Law Society of South Africa & others v Minister of Transport & another*,[115] the court ruled that fairness should not be an element of rationality. Moseneke DCJ held:

'[T]he applicants conflate the rationality and proportionality standards of review. I have already remarked that fairness is not a requirement in the rationality enquiry. If the substance of the complaint is about the deprivation of fundaments rights, it would be subject to the proportionality requirements of s 36 and not mere rationality.' (Our emphasis.)

[183] It cannot be said that there is no rational connection between the decision to re-institute and the prosecution that followed against Thales or that Mr Abrahams had erred in his appraisal of the evidence relating to the prosecution or that he was biased in making the decision. It is clear that Mr Abrahams had been considering the prosecution's position in relation to the charges over months as the events unfolded. The decision relating to the two accused cannot simply be dealt with in isolation. Mr Zuma and Thales are co-accused and the evidence to be adduced relates to both.

[184] Mr Abrahams made the decision against Thales, being informed of the following:

'81.1. I knew a lengthy period that had passed since the commission of the offences of which they would be recharged;

81.2. I knew the Thint companies were in no way responsible for the delay since the charges against them were withdrawn in 2009;

81.3. I surmised that if the Thint companies were recharged then, like Mr Zuma had just done, they could and probably would make representations urging the discontinuance of their prosecution; and

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[115] *Law Society of South Africa & others v Minister of Transport & another* 2011 (1) SA 400 (CC) para 39.

81.4. I also thought if the Thint companies' representations were unsuccessful then, as I had little doubt Mr Zuma would do, they could and probably would bring an application in court for a permanent stay of prosecution because of the lengthy period that had passed since the commission of the offences and possibly on other grounds as well as such as the 2004 agreement to withdraw the charges against Thint (Pty) Ltd.'[116]

[185] Thales had indeed post the decision made representations on 6 June 2018 and 27 June 2018 to the prosecution team. Despite the voluminous record that was placed before us to make a decision regarding the legality of the discretion exercised to proceed with criminal charges against Thales, the representations were not placed before us and do not form part of the record. This court was not favoured with the content of the representations, but this is what Mr Abrahams said in relation to the representations:

'I considered the representations and the prosecution team's report and concluded that I agree with its recommendations. I believed that Thales South Africa had a case to answer on merits and the issues regarding delay, the availability of witnesses etc. it had raised in its representations should be aired and tested in open court in the application for a stay of prosecution it would doubtless be bringing.'[117]

[186] In our view, Mr Abrahams' decision is not tainted by an irregularity of any kind that entitles Thales to the relief sought in terms of prayers 1 and 2 of the notice of motion. He clearly observed the prosecution policy and the policy directives when he enquired about the availability of the State witnesses, considered the strength of the State's case and examined the facts on whether the State has a reasonable prospect of success in prosecuting the two accused.[118] We conclude that his decision was substantively and procedurally rational and lawful.

The NPA's application for condonation

[187] The NPA has applied for an order condoning the late delivery of its answering affidavit and extending the date of such delivery from 1 March 2019 to 11 March 2019. In terms of the order of Madondo DJP of 30 November 2018, which was

[116] See Mr Abrahams' affidavit, vol 16, paras 81.1-81.4.
[117] See Mr Abrahams' affidavit, vol 16, para 94.
[118] See paras 5 and 7 of the prosecution policy.

granted by agreement between the parties, the NPA's answering affidavit was due on 1 March 2019 but was only filed and served on 11 March 2019.

[188] The attorney of record for the NPA, Patrick Kevan (Mr Kevan) has deposed to an affidavit in support of this application. He has given three principal reasons for the NPA's lateness in filing and serving its answering affidavit. The first reason was that in the period between 1 December 2018 and 7 January 2019 much of the available time of the prosecution team and of the NPA's legal team was spent searching for and considering the documents claimed by Mr Zuma in his application. According to Mr Kevan this was a lengthy process because it entailed sifting through a large number of possible relevant documents that were in the possession of the NPA and to identify the ones covered by Mr Zuma's application, and then considering each document closely to determine whether there were any grounds on which the NPA should refuse to disclose it or any part(s) of it. The second reason was that Mr Zuma's papers are very voluminous, and it took the NPA longer than it initially anticipated in addressing the contents of Mr Zuma's papers and those of Thales. The NPA prepared a detailed chronology of the relevant events, which span a lengthy period, and which applies equally to the NPA's answers to both applications. The work also included the preparation of two detailed affidavits for the NPA's main deponent, Mr Downer. The final reason was that there were numerous difficulties with annexures and indexes to Mr Zuma's affidavits, which Mr Kevan had to resolve with Mr Zuma's attorney.

[189] The NPA consented to the dates by which Mr Zuma and Thales had to deliver their replying papers and heads of argument, being extended to 12 April 2019 and 30 April 2019 respectively. Although Mr Zuma had initially opposed the application, at the hearing of the matter his counsel informed the court that such opposition was no longer persisted with and left the matter in the hands of the court.

[190] We have considered the application for condonation of the late filing of the NPA's answering affidavit. We hold the view that indeed, because the papers, in particular Mr Zuma's founding affidavit, are voluminous and the matter is complicated, the NPA has given sufficient explanation for the delay. In the interests of justice, the application for condonation and extension of time for the delivery of the NPA's answering affidavit is granted.

The application of the NPA to strike out in Mr Zuma's main application

[191] The NPA brought an application to strike out certain identified portions of Mr Zuma's replying affidavit deposed on 1 April 2019 on the ground that those identified portions are scandalous and/or vexatious, and further, that if they are not struck out, the NPA will be prejudiced. At the hearing of the matter, this application was settled on the basis that the order was granted in terms of prayers 1 and 2 of the notice of motion with no order as to costs.

Thales application to strike out

[192] Thales seeks to strike out certain portions of the answering affidavit of Mr Downer deposed to on 11 March 2019, which refer to portions of the affidavits filed by Mr Downer in Mr Zuma's permanent stay application. By letter dated 29 February 2019 the NPA indicated to Thales that it intended to deliver a single answering affidavit dealing with Thales and Mr Zuma's applications on the basis that:

(a) The applications are to be heard together;
(b) A proper consideration of the allegations made by Thales and Mr Zuma required a detailed chronology, which would be set out in a single main answering affidavit;
(c) Mr Downer would refer where appropriate when responding to the allegations in Thales and Mr Zuma's papers respectively paragraph by paragraph;
(d) The length of the founding and supplementary papers in both applications; and
(e) Numerous difficulties with certain annexures to Mr Zuma's founding affidavit.

[193] By letter dated 1 March 2019, Thales objected to the NPA's intended approach and asserted, inter alia, that its application and that of Mr Zuma's are:

(a) To be heard under different case numbers;
(b) Seek different relief in substance and in form; and
(c) Relate to different parties.

Thales indicated that it would be prejudiced by the decision to deliver a single answering affidavit in both applications.

[194] Nonetheless, on 11 March 2019 the NPA delivered a single answering affidavit, which resulted in this application. The application was opposed by the NPA.

Rule 6(15) of the Uniform rules of court regulates the striking out of the matter from an affidavit. It provides:

'The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudice if the application is not granted.'

[195] From the reading of this rule it is apparent that two requirements must be satisfied before an application to strike out a matter from any affidavit succeeds. The first requirement is that what is sought to be struck out must be scandalous, vexatious or irrelevant. The second is that the court must be satisfied that if such matter was not struck out the party seeking such relief would be prejudiced.

[196] In para 6.1 of his Thales answer, Mr Downer said his affidavit was accompanied by the following further affidavits, which together comprise the State's answering papers in the present application:

'6.1 an affidavit by me comprising the State's main answering affidavit in an application by the first accused in the criminal proceedings, Jacob Gedleyihlekisa Zuma ('Zuma'), for a permanent stay of prosecution – the contents of the sections of my affidavit headed 'Introduction' and 'Chronology of Relevant Events', but not the remainder, are relevant to the present application….'

Mr Downer thus incorporated two chapters of his Zuma answer into his Thales answer. The first was the introduction and the second was the chronology.

[197] It seems to us that it is at the level of the two requirements that Thales' case fails. We found it incomprehensible why the introduction and narration of the chronology of relevant events can be characterised as irrelevant and vexatious. In our view, the substance of narration contained therein is relevant and useful in assessing the conduct of the parties involved in these applications. That aside, we are not persuaded that Thales would suffer any prejudice if the allegations contained in the impugned paragraphs of Mr Downer's affidavit were not struck out. Importantly, the incorporation of portions of the Downer Zuma answer was the most convenient, efficient and expeditious manner of dealing with the two applications because had that not been done, the court hearing these matters from 20 May 2019 onwards would have been unnecessarily burdened with approximately 1286

duplicated pages in the Downer Thales answer. It follows therefore that Thales' striking out application falls to be dismissed.

Application to admit new evidence

[198] At the twilight of the hearing (on 24 May 2019), Mr Zuma brought an application seeking orders in the following terms:

(a) Granting leave that the letter dated 22 March 2018 be admitted into the record of proceedings in the application for the permanent stay; and

(b) Directing that the NPA file with this court an affidavit by an authorised person stating that the NPA is not in possession of documents and/or information relevant to the permanent stay application.

On the face of it, the letter appears to have been written by Mr Abrahams to the acting head: Directorate of Priority Crime Investigation – Lieutenant General Y Matakata relating to investigations into alleged corruption in Durban Central Cas 1941/08/2003. Lugisani Daniel Mantsha (Mr Mantsha) who is the attorney of record for Mr Zuma in these proceedings deposed to the founding affidavit.

[199] Without providing any details how he came to be in possession of this letter, Mr Mantsha deposed that after the existence of this letter was brought to his attention, he addressed a letter dated 22 May 2019 to the State Attorney in which he sought to have a copy of this letter. By letter of the same date, Mr Kevan turned down the request advising him that the NPA had provided all the documents it had found.

[200] Arising from Mr Kevan's response, it appeared to Mr Mantsha that the NPA was not acting in line with its obligation in relation to the prosecutions. Consequently, he addressed another letter to Mr Kevan reminding him that the NPA is duty bound to provide any information in its possession to assist this court. When the exchange of correspondence did not yield the desired results, Mr Zuma brought this application seeking an order as foreshadowed in para 198 above.

[201] As to the relevance of the letter, Mr Mantsha deposed that 'the contents of the letter are self-evidently relevant if one has regard to the NPA's statement under oath and contentions by the NPA's counsel in regard to political interference, manipulation and involvement in Mr Zuma's investigation and prosecution'.

[202] Mr Mantsha explained the relevance of the second part of the order sought, that the NPA as an organ of State has a higher duty to be truthful, transparent and to act in good faith at all times in the manner in which it conducts matters on behalf of the people of South Africa and at the expense of the public purse.

[203] The NPA opposed the application. As to the first part of the order sought, the NPA has advanced three grounds. The first ground is that the letter is a confidential and privileged document relating to an ongoing police investigation. The second ground is that the contents of the letter are irrelevant to Mr Zuma's application for a permanent stay of prosecution as none of the matters referred by the NDPP to the DPCI for investigation concern the prosecution of Mr Zuma. The third ground is that the letter recounts allegations made in an affidavit by Mr Ajay Sooklal dated 16 November 2016 filed in the legal proceedings, which he brought in the Gauteng Division of the High Court, Pretoria against, inter alia, Mr Zuma, both in his then official capacity as the President of the country and in his personal capacity. The NPA contends that Mr Zuma has had ample time to raise in his papers in the present matter any of the allegations made by Mr Sooklal in that affidavit which he considers relevant to his application for a permanent stay of prosecution. The NPA also contends that Mr Zuma has indeed done so in paras 743 and 744 of his founding affidavit.

[204] With regard to the second part of the order sought, the NPA also opposed the granting of this order on three grounds. The first ground is that this amounts to the dramatic amendments of relief sought by Mr Zuma in paras 2 and 3 of his notice of motion, which was confined to those of the documents sought in Mr Zuma's letter of 24 July 2018, which he persisted in seeking in his founding affidavit in the main application. In this regard, the NPA contends that it has provided Mr Zuma with all the documents covered by this application it could find. The second ground is that Mr Zuma gives no reason why, at this very late hour, he seeks dramatically to expand the documents he needs.[119] The third ground is that in any event, the order Mr Zuma is now seeking does not make sense. He wants an affidavit from the NPA to the effect that it is not in possession of documents and/or information relevant to the

[119] See para 2 of the notice of motion in the main application.

application for permanent stay of prosecution. The NPA has in its possession a host of information and documents of that sort.

[205] The court has a discretion to admit the new evidence. However, several considerations have a bearing on the exercise of such discretion, for instance:

(a) The reason why the evidence was not led timeously;
(b) The degree of materiality of evidence;
(c) The possibility that it may have been shaped to relieve the pinch of the shoe;
(d) The balance of prejudice, i.e. the prejudice to the applicant if the application is refused, and the prejudice to the respondent if it is granted;
(e) The stage which the particular litigation has reached;
(f) The healing balm of an appropriate order as to costs;
(g) The general need for finality in judicial proceedings; and
(h) The appropriateness, or otherwise, in all circumstances, if visiting the remissness of the attorney upon the head of his client.[120]

[206] Though said in the context of admitting new evidence on appeal, the words of the CC in *Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others*[121] are apt that courts should exercise their power to admit new evidence sparingly and only under exceptional circumstances. As to the essential requirements, which must be satisfied before such evidence is admitted, the CC said: '[s]uch evidence must be weighty, material and to be believed. In addition, whether there is a reasonable explanation for its late filing is an important factor. The existence of a substantial dispute of fact in relation to it will militate against its being admitted.'[122]

[207] The insuperable difficulty facing Mr Zuma in relation to this letter is that none of the matters referred by the NDPP to the DPCI for investigation concern Mr Zuma's investigation or prosecution. In any event, it seems to us that the introduction of this letter was an attempt by Mr Zuma to hark back to the issue of alleged motive for his prosecution, which has already been answered by the SCA in *National Prosecuting*

[120] See *Oosthuizen v Stanley* 1938 AD 322 at 333; *Mkwanzi v Van der Merwe & another* 1970 (1) SA 609 (A) at 616B-617E.
[121] *Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others* 2005 (2) SA 359 (CC).
[122] *Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others* para 43.

Authority v Zuma.[123] What the answer amounts to is this 'motive behind the prosecution is irrelevant'.

[208] With regard to the second part of the order, it remains to point out that the order sought in the notice of motion was confined to those documents sought in Mr Zuma's letter of 24 July 2018 which he persisted in seeking in his founding affidavit. It is trite that in motion proceedings the applicant is required to make his or her case in the founding affidavit. The basic requirement is also that the relief sought has to be found in evidence supported by the facts set out in the founding affidavit. None of these is found in Mr Zuma's founding affidavit. In our view, the order sought is anchored on unsound foundation.

Order

[209] In the result, the following order is made:

1. The NPA's application for condonation of the late delivery of its answering affidavit and extension of such delivery from 1 March 2019 to 11 March 2019 is granted with no order as to costs.

2. The NPA's application to strike out parts of the replying affidavit of Jacob Gedleyihlekisa Zuma dated 1 April 2019 on the grounds that they are scandalous and/or vexatious, and that they constitute impermissible new matter raised in reply is granted in terms of prayers 1 and 2 of the notice of motion thereof with no order as to costs.

3. The application brought by Thales South Africa (Pty) Ltd to strike out certain portions of the answering affidavit of William John Downer dated 11 March 2019, which refer to portions of the affidavits filed by Mr Downer in Mr Zuma's (Criminal Court) permanent stay application is dismissed with costs to include those consequent upon employment of two counsel.

4. The application brought by Jacob Gedleyihlekisa Zuma seeking leave to enter the letter dated 22 March 2018 with accompanying annexures into the record of proceedings in the application for the permanent stay is dismissed with

[123] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 37.

costs such costs to include those consequent upon employment of two counsel.

5. The application brought by Jacob Gedleyihlekisa Zuma under case number CCD30/2018 is dismissed with costs such costs to include those consequent upon employment of two counsel.

6. The application brought by Thales South Africa (Pty) Ltd under case number D12763/2018 is dismissed with costs such costs to include those consequent upon employment of two counsel.

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Mnguni J

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Steyn J

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Poyo Dlwati J