IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 836/2013

Reportable

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA	**Appellant**
and	
DEMOCRATIC ALLIANCE	**First Respondent**
THE HEAD OF THE DIRECTORATE OF SPECIAL OPERATIONS	**Second Respondent**
THE ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**Third Respondent**

Neutral Citation: *Zuma v DA* (836/2013) [2014] ZASCA 101 (28 August 2014).

Coram: Mpati P, Navsa ADP, Brand, Ponnan & Tshiqi JJA

Heard: 15 August 2014

Delivered: 28 August 2014

Summary: **Interpretation and enforcement of order of this court in *Democratic Alliance v Acting National Director of Public Prosecutions* (2012) 3 SA 486 (SCA) – ANDPP ordered to produce record of decision to discontinue prosecution against appellant save for confidential written representations and anything that might reveal such representations – no blanket prohibition – no specific claim of confidentiality by appellant despite opportunities to assert such claims – audio recordings conceded to be compellable – sufficient safeguards in relation to production of internal documentation within the office of the NDPP that make up part of the record of decision – conduct of officials of the NDPP criticised.**

ORDER

On appeal from: The North Gauteng High Court, Pretoria (Mathopo J sitting as court of first instance).

The following order is made:

1. The appeal is dismissed with costs including the costs attendant upon the employment of two counsel.

2. The order of the high court is amended only to the degree reflected in what is set out hereafter:

'1. The First Respondent is directed to comply with the order of the Supreme Court of Appeal in case no. 288/11 dated 20 March 2012 (the SCA order), within five days of the date of this order.

2. The record to be produced and lodged by the First Respondent with the Registrar of this Court, in terms of the SCA order, shall include a copy of the electronic recordings and a transcript thereof referred to by the First Respondent in the announcement of the First Respondent's decision of 6 April 2009 as well as any internal memoranda, reports or minutes of meetings dealing with the contents of the recordings and/or transcript itself, insofar as these documents do not serve to breach the confidentiality of the Third Respondent's written or oral representations.

3. With regard to memoranda, minutes and notes of meetings, referred to by the Frist Respondent in paragraph 26 of her answering affidavit (the internal documentation):

3.1 Within five days of the date of this order, the First Respondent shall cause to be delivered to the Honourable Mr Justice NV Hurt (Justice Hurt) copies of the internal documentation;

3.2 On the copy of each document forming part of the internal documentation, Justice Hurt shall mark or record that part of the document which he considers to reveal the contents of Third Respondent's written or oral representations (the representations) to First Respondent;

3.3 The exercise referred to in paragraph 3.2 above shall be performed in accordance with any directives which the Honourable Justice Hurt may prescribe in order to fulfil his mandate;

3.4 The ruling of Justice Hurt shall be final and binding on the parties; and

3.5 Should Justice Hurt, for whatever reason, be unable to commence or complete the exercise referred to in this paragraph, the Applicant and the Third Respondent shall attempt to reach agreement on another independent and impartial person to replace him and, if no agreement can be reached within five days of Justice Hurt becoming unavailable, then the chairperson of the General Council of the Bar of South Africa shall be requested to appoint such person.

4. The First Respondent and the Third Respondent shall pay the Applicant's costs (including the costs of two counsel) jointly and severally, the one paying the other to be absolved.'

JUDGMENT

Navsa ADP (Mpati P, Brand, Ponnan & Tshiqi JJA concurring):

[1] This appeal is part of a protracted litigation battle involving the appellant, Mr Jacob Zuma, who is presently the President of the Republic of South Africa, the office of the National Director of Public Prosecutions (the NDPP) and the first respondent, the Democratic Alliance (the DA), a registered political party and the official opposition in

our national parliament.[1] In the main, the lack of merit of the present appeal was conceded by counsel on behalf of Mr Zuma, particularly in relation to the release of audio recordings[2] and transcripts thereof in the possession of the third respondent, the Acting National Director of Public Prosecutions (the ANDPP). However, it is necessary, especially in the light of the litigation referred to above, that the history of this case culminating in the present appeal, and the issues that arose therein, be carefully set out and that the concessions made in court be accurately recorded. It is also necessary to provide as succinctly as possible the bases for the orders that appear at the end of this judgment. The object of this exercise, perhaps optimistically, is to obviate further protraction and to expedite the litigation.

[2] The present litigation follows upon the decision of this court in *Democratic Alliance v Acting National Director of Public Prosecutions* 2012 (3) SA 486 (SCA), and concerns the interpretation and enforcement of the order made in that case. I shall, for the sake of convenience, refer to that case as the first appeal.

[3] As noted in para 2 of the first appeal, the DA had applied in the North Gauteng High Court for an order reviewing, correcting and setting aside the decision of the office of the NDPP to discontinue the prosecution of Mr Zuma, and for a declaration that the decision was inconsistent with the Constitution. Thereafter, the DA required the office of the NDPP and the Head of the Directorate of Special Operations to deliver to the registrar of the high court, in terms of rule 53(1) of the Uniform Rules of Court, the record on which the impugned decision was based, which included representations made by Mr Zuma as to why the prosecution should be discontinued.

[1] See *NDPP v Zuma* 2009 (2) SA 277 (SCA) fn 2 and the cases there cited.
[2] Referred to during the litigation and in different parts of the record as electronic recordings.

[4] In para 3 of the judgment of the first appeal, this court dealt with the attitude of the prosecuting authority in relation to the record. It noted that the prosecuting authority refused to deliver the record on the basis that it contained the said representations, which it contended had been made on a confidential and without prejudice basis, pointing out that Mr Zuma had declined to waive the conditions under which he had submitted his representations. Furthermore, the office of the NDPP informed the DA that it intended to contest the DA's locus standi in the review application and that it would assert that a decision by the National Prosecuting Authority (NPA) to discontinue a prosecution was not reviewable. The DA was informed that these issues would be raised in limine.

[5] The DA responded by launching interlocutory applications in which it sought orders directing the ANDPP to dispatch the record of proceedings on which the decision to discontinue the prosecution was based, excluding the representations by Mr Zuma and directing that the prosecution authorities specify, by written notice, the documents or material excluded from the record.

[6] In resisting the interlocutory applications the ANDPP and Mr Zuma contested the DA's locus standi in the review application. The high court accepted the submission on behalf of the ANDPP that the DA did not have a direct and substantial interest in the decision to discontinue the prosecution. It held, ultimately, that the DA had not provided a sustainable basis for its contention that it had standing to bring the review application. Consequently, the high court dismissed the application to compel production of the reduced record of the decision to discontinue the prosecution. In the first appeal, this court, in overturning the decision of the high court, concluded as follows in relation to the question of the locus standi of the DA in respect of the review application:

'Presently, it follows that the DA has standing to act in its own interests, as well as in the public interest, and is entitled to pursue that application to its conclusion.'

[7] In the first appeal this court, in dealing with the reviewability of a decision to discontinue the prosecution, restated what is now accepted as a legal truism, namely, that the exercise of all public power must comply with the Constitution.[3] The court went on to note the concession by the ANDPP and Mr Zuma that the decision to discontinue the prosecution was subject to a rule of law review, but contended that the review was a narrow one and could be brought only on limited grounds. This court declined an invitation to delineate the parameters of such a review of a decision of the NDPP.

[8] In dealing with the production of the record and the contention that the representations by Mr Zuma were confidential and not subject to disclosure this court, at para 33, said the following:

'There was debate before us about what the value would be to the reviewing court of a reduced record, namely a record without Mr Zuma's representations. Concern was also expressed on behalf of Mr Zuma that there might be material in the record of decision, which might adversely affect his rights and to which he might rightly object. That concern was met by an undertaking on behalf of the first respondent that, in the event of this court altering the decision of the court below so as to order the production of the record of the decision sought to be reviewed, the NDPP's office would inform Mr Zuma of its contents. Questions involving the extent of the record of the decision and its value to the court hearing the review application are speculative and premature. In the event of an order compelling production of the record, the office of the NDPP will be obliged to make available whatever was before Mr Mpshe when he made the decision to discontinue the prosecution. It will then fall to the reviewing court to assess its value in answering the questions posed in the review application. If the reduced record provides an incomplete picture it might well have the effect of the NDPP being at risk of not being able to justify the decision. This might be the result of Mr Zuma's decision not to waive the confidentiality of the representations made by him. On the other hand, a reduced record might redound to the benefit of the NDPP and Mr Zuma.'

[3] See para 27 and the authorities cited thereafter.

[9] Significantly, at para 37 of the judgment in the first appeal, this court noted that:

'Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed. The DA, in its application to compel discovery, has merely asked for an order directing the office of the NDPP to despatch within such time as the court may prescribe the record of proceedings relating to the decision to discontinue the prosecution, excluding the written representations made on behalf of Mr Zuma to the office of the NDPP.'

[10] Having held in favour of the DA on both scores, this court went on to make the order that is at the heart of the present appeal, the relevant part of which reads:

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

. . .

4. The . . . order set out in para [3.1.3] above is to be complied with within 14 days of date of this judgment.' (My emphasis.)

[11] Events subsequent to the order led to the litigation culminating in the present appeal. On 12 April 2012, two days after the expiry of the 14 days afforded to the ANDPP to comply with this court's order, the State Attorney, in a letter, conveyed to the DA's attorneys that:

(i) They were in the process of preparing copies of the reduced record as indicated in the order in the first appeal;

(ii) A list of documents was supplied which, it was alleged, constituted the reduced record; and

(iii) The list was said to not be in breach of the confidentiality obligation.

[12] The last two paragraphs of the letter bear repeating:

'4 Other material considered by the Acting NDPP at the time is subject to the confidentiality obligation and therefore cannot be disclosed – unless it may transpire that Mr Zuma's team may at a later stage be willing to consent to a relaxation of the confidentiality in respect of particular documents or particular contents, in which event we will advise you accordingly.

5 There are in addition certain tape recordings which are in the process of being transcribed, but that process has not been completed as yet and will take some additional time. On completion thereof, we are obliged to give an opportunity to Mr Zuma's legal team to consider whether there is any objection to disclosure of such transcripts. On completion of that process, if there is no objection to disclosure, they will be made available as a supplement to the record.'

[13] On 9 May 2012 the State Attorney wrote to the DA's attorneys, stating that Mr Zuma's legal representatives required a period of two to three weeks to consider the transcripts referred to in the preceding paragraph, but that they are not consenting to the release, pending further consultation with their client.

[14] I interpose to state that the list of documents referred to in para 11 were supplied to the DA's attorneys during May 2012 and that they comprised representations that the ANDPP received from the DA and others, attempting to persuade him not to discontinue the prosecution. At the end of June 2012 the DA, apparently frustrated at no further

documentation having been produced, wrote to the State Attorney recording the history of the matter and stating the following:

'5. A copy of the transcript of the recordings ("*the transcript*") has not been furnished. The transcript itself and any consequent memorandum or report prepared in response thereto, are not covered by the limitation to the production of the record as per the order of the SCA for the following reasons:

5.1 Firstly, the recordings and/or the transcript could not possibly have been given in confidence to the First Respondent because he quoted extensively from these recordings when announcing his decision to discontinue the prosecution of the Third Respondent on 6 April 2009.

5.2 Secondly, the limitation in the SCA order only relates to "*the written representations made on behalf of the Third Respondent and any consequent memorandum or report prepared in response thereto or oral representations if the production thereof would breach any confidentiality attaching to the representations (the reduced record)*". The recordings and/or the transcript are neither written, nor oral representations nor memorandum or report prepared in response thereto.

5.3 Thirdly, the limitation in the SCA order does not cover memoranda or reports prepared in response to oral representations but merely in response to the written representations.

5.4 Fourthly, to the extent that internal NPA memoranda, reports or minutes of meetings deal with the contents of the recordings and/or the transcript itself, as opposed to Third Respondent's written or oral representations in respect thereof, they are not covered by the limitation in the SCA's order and should be produced. In other words, the internal debate regarding the effect of what is revealed in the recordings on the decision on whether or not to discontinue the prosecution, is not covered by the limitation to the extent that such debate does not refer to the representations themselves.

6. It is inconceivable there are no internal NPA memoranda, reports or minutes of meetings dealing with the contents of the recordings and/or the transcript itself. We accordingly call on you to produce these documents, as well as the recordings and the transcripts themselves forthwith, failing which our client will take all the necessary steps to compel compliance with the order of the SCA. Naturally, costs will be sought against your clients as well.'

[15] The exhortation in the last paragraph of the letter, set out at the end of the preceding paragraph, yielded no results. It is common cause that during telephone discussions in July 2012 between a specific State Attorney and the DA's legal representative, the former had indicated that the blame for the delay was attributable to Mr Zuma's attorney. The NDPP itself adopted a supine attitude.

[16] This led to the DA approaching the North Gauteng High Court for an order, inter alia, directing that the record be produced and lodged by the Third Respondent with the Registrar of that Court, in terms of the SCA order, which shall include a copy of the electronic recording and a transcript thereof as referred to by the Third Respondent in the announcement of his decision on 6 April 2009, as well as any internal memoranda, reports or minutes of meetings dealing with the contents of the recordings and/or the transcript itself, insofar as these documents do not directly refer to the Appellant's written or oral representations. In addition, the DA sought an order that the ANDPP be held in contempt of the SCA order.

[17] The basis of the application, as foreshadowed in the letter from the DA's attorneys as set out above, was that in terms of the order in the first appeal, a copy of the transcript of the recordings ought to have been furnished and that the recordings could not possibly have been provided to the ANDPP confidentially, as that office quoted publicly and extensively from the recordings when announcing the decision to discontinue the prosecution of Mr Zuma. Furthermore, it was contended that the SCA order envisaged an embargo only on written representations made on behalf of Mr Zuma and any subsequent memorandum or report in relation thereto, if the production thereof would breach any confidentiality attaching to the representations. The recordings and/or transcripts, it was submitted, were neither written nor oral representations nor a memorandum or report related to the representations. In addition, it was asserted that memoranda or reports relating to internal debate within the office of

the NDPP concerning the recordings were not covered by any limitation envisaged in the order in the first appeal. The DA was adamant that internal memoranda, reports or minutes of meetings addressing the transcripts must exist and are susceptible to disclosure. In the founding affidavit on behalf of the DA the following appears:

'The notion of an accused making representations to the First Respondent "*in confidence*", which representations then lead to the discontinuation of a prosecution, is already absurd. For the time being, the Applicant has elected to live with that absurdity. But the Applicant cannot accept and will not allow the NDPP to conceal the foundation of the decision, i.e. the recordings and the internal debate regarding them.'

[18] It is important to note that the ANDPP's answering affidavit does not adopt a position in relation to the confidentiality of the tapes or transcripts. It resorts to a metaphorical shrugging of the shoulders, and places the reason for its non-compliance with the order of this court in the first appeal at the door of Mr Zuma's legal representatives, submitting that the present dispute was due to them not being timeously forthcoming with a final position on the disclosure of the tapes or the transcripts. The NDPP's office assumes the position that the lack of consent to the release of the tapes or transcripts was sufficient to forestall compliance with the order in the first appeal.

[19] The ANDPP admits that internal records, including memoranda and minutes of meetings and notes, exist and that they relate to internal discussions and consultations leading up to the decision to discontinue the prosecution. The following part of the answering affidavit is a stark revelation of the ANDPP's attitude, dealt with in greater detail later in this judgment:

'However, those memoranda, reports, minutes and notes all arose from and deal specifically with what was conveyed both in writing and orally in the representations submitted on behalf of the third respondent and on the basis of confidentiality. Those issues are inextricably linked

with the recordings or transcripts. Thus all these fall within the ambit of the SCA order and are covered by the limitation for the production of the record.'

[20] It is necessary to record that Mr Zuma did not file an answering affidavit in response to the application to compel production of the reduced record.

[21] Before the high court the office of the NDPP, in line with the attitude that appears from what is set out above, informed Mathopo J, who heard the matter, that it would abide the court's decision in relation to the production of the transcripts and that the matter should be argued between the DA and Mr Zuma. The following is recorded in para 13 of the high court's judgment:

'During argument counsel for the first respondent unequivocally made the concession that the first respondent has "no view" regarding the transcripts or recordings.'

[22] In the high court, even though Mr Zuma had not filed an answering affidavit, counsel on his behalf submitted that confidentiality, as envisaged in this court's order in the first appeal, extended to everything comprising representations made on Mr Zuma's behalf. It was contended that since the office of the NDPP did not itself take steps to obtain the recordings but accessed them through the efforts of Mr Zuma, separating them from the representations would be illogical and irrational.

[23] In deciding the matter, Mathopo J reasoned as follows:

'[21] The applicant has alleged in its papers that the transcripts are not protected by confidentiality. The third respondent confronted with such serious allegation elected not to submit any evidence to gainsay the averments. It is settled law that a bare or unsubstantiated denial will only pass muster where there is no option available to a respondent due, for example, to a lack of knowledge or because nothing more can be expected from the

respondent. A bare denial in circumstances where a disputing party must, necessarily be conversant with the facts averred and is in a position to furnish an answer or countervailing evidence as to its truth or correctness, does not create a real or genuine dispute of fact. A proper answer to the material averments under reply requires at the minimum, a separate and unequivocal traversal of each and every allegation which the party seeks to contend.

[22] It should have been obvious to the third respondent that, in the absence of any countervailing evidence particularly since the parties accorded different interpretations to the SCA order, more was required to clarify his position instead of seeking refuge on a point of law. The objective facts submitted by the applicant cried out for an answer, yet the third respondent elected not to respond. This approach is not without consequences. The third respondent imperilled his position in the circumstances by failing to put up any cogent explanation as to why he is entitled to the confidentiality.'

[24] The following is the order made by the court below:

'1. The First Respondent is directed to comply with the order of the Supreme Court of Appeal in case no. 288/11 dated 20 March 2012 ("the SCA order"), within five days of the date of this order.

2. The record to be produced and lodged by the First Respondent with the Registrar of this Court, in terms of the SCA order, shall include a copy of the electronic recordings and a transcript thereof referred to by the First Respondent in the announcement of the First Respondent's decision on 6 April 2009 as well as any internal memoranda, reports or minutes of meetings dealing with the contents of the recordings and/or transcript itself, insofar as these documents do not serve to breach the confidentiality of the Third Respondent's written or oral representations.

3. With regard to the memoranda, minutes and notes of meetings, referred to by the First Respondent in paragraph 26 of her answering affidavit ("the internal documentation"):

3.1 within five days of the date of this order, the First Respondent shall cause to be delivered to the Applicant's Cape Town attorney Minde Schapiro & Smith (Mr M Smith) and to the Third Respondent's attorney of record copies thereof;

3.2 on the copy of each document referred to in 3.1 above, the First Respondent shall mark or record that part of the document which she considers to be confidential;

3.3 save for the purpose of consulting with counsel, the Applicant's attorney shall not disclose to any other party, including the Applicant, any part of the document in respect of which the First Respondent claims confidentiality;

3.4 should the Applicant dispute any claim to confidentiality and should the parties be unable to resolve such dispute, the Applicant shall on notice to the Respondents and any person having an interest therein, have the right to apply to a Judge of the North Gauteng High Court in chambers for a ruling on the issue;

3.5 should the circumstances require, any of the parties shall have the right to apply to a Judge of the North Gauteng High Court in chambers for an amendment to paragraphs 3.2, 3.3 and 3.4 of this order.

4. The First Respondent and the Third Respondent shall pay the Applicant's costs (including the costs of two counsel) jointly and severally, the one paying the other to be absolved.'

[25] The present appeal by Mr Zuma, directed against that order, is before us with the leave of the court below.

[26] Telescoped, the procedural and evidential problems faced by Mr Zuma are that the ANDPP filed an answering affidavit in which, essentially, she took no stance on the confidentiality of the materials sought by the DA, other than the written representations in her possession, and further that confidentiality is not specifically claimed by anyone in respect of any particular document or other materials in the possession of the office of the NDPP. In relation to the internal memoranda, that part of the answering affidavit referred to in para 19 above lacks specificity and the generalisation resorted to by the ANDPP, which will be dealt with in greater detail in due course, is, to say the least, disingenuous. Worryingly, much of what the ANDPP stated in her answering affidavit appears not to be first-hand knowledge and seems to be based on what she was told by Mr Mpshe, who was the Acting Director of Public Prosecutions at the time of the

decision not to prosecute Mr Zuma. Mr Mpshe did not depose to a confirmatory affidavit. It will be recalled that the ANDPP decided to abide the decision of the high court and did not make an appearance in this court. Thus, the party that filed an inconsequential affidavit took no part in the argument in either court and the party that did not file an affidavit was the only contestant in both. Even the letter written by Mr Zuma's attorney, subsequent to the high court application being launched by the DA, is worthless. It is necessary to quote it in full:

'We refer to the Application to Compel as well as the request received from the Democratic Alliance regarding the production of the record and respond thereto as follows:

1. The Order of the court (**"the Order"** of the SCA) relates to the production of the reduced documentary record qualified as it was by the exclusions set out therein. In the interest of precision we set out the wording hereafter.
2. Consequently, any record which breaches such confidentiality in the absence of a waiver or consent would not be in accordance with the Order.
3. Our instructions are neither to consent nor waive the confidentiality provisions which underscore the representations made. The motivation for such confidentiality was well founded and has not dissipated with the passage of time. This principle of confidentiality is, self-evidently, recognised as valid by all the parties.
4. The Record of the Decision would obviously be only that information and documents relevant thereto. These cannot extend beyond what was brought to the attention of the acting NDPP.
5. His decision would obviously include past subjective knowledge of the Zuma prosecution and investigation (including the Court papers of the past litigation), as well as (oral) reports to him regarding the merits of the charges and of the matter raised in the representations.
6. It is clear that the Order envisages that only the documentary portions (that is what portions exist in written, including electronic, format) of the above Record be produced.
7. It is from such documentary Record that the representations (written and oral) and whatever documentary materials were generated or established as a result of the contents thereof, are to be excluded. That stripped down version is what equates to the Reduced Record.
8. We quote the paragraph from the Order:

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

(our underlining).

9. We respectfully point out that the Reduced Record is simply there to assist in the supplementation of the founding papers should the Democratic Alliance so consider fit. This does not preclude the Respondents from explaining the decision in answer, the Reduced Record is clearly not a reflection of (all) material on which the decision was based.

May we request that we have sight of any further documents which constitute the reduced record before their production to the Applicants. That was clearly the tenor of the arrangement between the parties.'

[27] As can be seen from what is set out above the litigation that led up to the order of this court in the first appeal was conducted on the basis of what appears to be a reluctant acceptance by the DA of the confidential nature of representations to a prosecuting authority in relation to a pending prosecution. Thankfully, this is not an issue that is required to be addressed in this appeal. There will in future, no doubt, be litigation about whether such representations can be considered to be confidential, particularly in an era of prosecutorial accountability. If that question is answered in the affirmative the parameters of confidentiality might have to be explored and may include a consideration that, in all probability, representations that lead to decisions not to persist in a prosecution must of necessity be exculpatory and therefore non-prejudicial. This aspect, however, need detain us no further.

[28] At the commencement of proceedings before us, counsel on behalf of Mr Zuma was constrained to accept that what is set out in the preceding paragraphs is an abject lesson on how not to conduct opposing litigation. Oftentimes, misguided unsuccessful litigants criticise the courts in which they appeared, rather than being introspective about the litigation choices made by them or by their advisers. In the present case, counsel for Mr Zuma, acting in the best traditions of the legal profession, recognised that the fault lay with the manner in which the litigation was conducted.

[29] Initially, counsel on behalf of Mr Zuma repeated the argument made in the high court, set out in para 22 above, namely that the audio recordings were an integral part of the representations made by Mr Zuma and therefore fell within the confidentiality 'prohibition'. When asked to identify within the record the factual foundation for this proposition, he experienced great difficulty. First, he could find no substantiation in the affidavit filed on behalf of the ANDPP. Second, he sought, rather desperately, to rely on statements in the DA's replying affidavit, which as he ultimately conceded contained no admissible evidence in his favour. If anything, the DA's replying affidavit expressly resists the notion that the recordings formed part of the confidential written representations. When faced with this intractable problem, counsel for Mr Zuma ultimately conceded, without qualification, that this meant he had no case against the release by the ANDPP of the audio recordings, and a transcript thereof.

[30] It is important to note the following in relation to the audio recordings. First, if regard is had to the highlighted part of para 3.1.3 of the order in the first appeal, set out in para 10 above, the audio recordings do not constitute written representations. It appears, as best as can be gleaned from the first appeal and the record in the present matter, that Mr Zuma gave the office of the NDPP 'access' to the audio recordings. In the two paragraphs quoted from the letter written by the State Attorney after the first appeal, referred to in para 11 above, it is clear that the ANDPP herself saw them as distinct from the written representations. Second, the audio recordings came into

existence long before Mr Zuma made his representations. Third, it was accepted by counsel for Mr Zuma that the gist of those recordings, namely that they contained a discussion involving the office of the NDPP indicating that the decision to prosecute Mr Zuma was politically inspired and constituted an abuse of power, was made public in 2009 by Mr Mpshe. That appears to put paid to any suggestion that they were subject to confidentiality. Fourth, it was accepted on behalf of Mr Zuma, as reflected in the public statement made by Mr Mpshe, which was an annexure to the DA's replying affidavits, that the office of the NDPP sought and obtained verification of the authenticity of the audio recordings from the National Intelligence Agency (NIA) and a copy thereof existed in the hands of the NIA, which made it available to the office of the NDPP. The NIA declassified the information and if any privilege at all attached to the audio recordings, it may be that it could only be claimed by the NIA.

[31] Importantly, the audio recordings cannot by any stretch of the imagination, or by a process of deduction, be said to reveal Mr Zuma's confidential representations, the prevention of which was the object of the order of this court in the first appeal. Put simply, a reading of para 3.1.3 of the order in the first appeal, for all the reasons set out in this and the two preceding paragraphs, dictates that the audio recordings be produced as conceded on behalf of Mr Zuma.

[32] That brings us to the second part of the order of the court below (para 3 of that order) which relates to documentation admittedly in the hands of the office of the NDPP and which are referred to in para 26 of the answering affidavit in the present case:

'Further the NPA confirms that the contents of the conversations that had been intercepted and were transcribed were indeed dealt with in the memoranda, minutes and notes of meetings etc, by officials of the NPA in the process of internal discussion and consultation leading up to the decision by Adv Mpshe.'

[33] The stance adopted by the office of the NDPP is set out in para 27 of the answering affidavit and appears in para 19 above. For the sake of convenience it is repeated:

'However, those memoranda, reports, minutes and notes all arose from and deal specifically with what was conveyed both in writing and orally in the representations submitted on behalf of the third respondent and on the basis of confidentiality. Those issues are inextricably linked with the recordings or transcripts. Thus all these fall within the ambit of the SCA order and are covered by the limitation for the production of the record.'

[34] The court below, in dealing with the documentation referred to, stated the following (at para 38):

'It would seem to me that the position adopted by the third respondent is that the SCA order envisaged a blanket prohibition of the disclosure of the memoranda, minutes or notes, reports etc, despite the fact that no legal claim of confidentiality has been asserted by the third respondent.'

[35] At para 40 of the judgment of the high court, in line with what is stated at para 37 of the judgment of the first appeal (set out in para 9 above), the following is stated:

'The first respondent, as an organ of state, has a duty to prosecute without fear, favour or prejudice by upholding the rule of law and the principle of legality. It is also a constitutional body with a public interest duty. It behoves its officials to operate with transparency and accountability. The first respondent has a duty to explain to the citizenry why and how Mpshe arrived at the decision to quash the criminal charges against the third respondent. In pursuance of its constitutional obligations it is incumbent upon the first respondent to pass the rationality test and inform the public why it quashed the charges. In my view, the converse would make the public lose confidence in the office of the NDPP. The documents, sought by the applicant, will assist in enquiring into the rationality of the decision taken by Mpshe. It cannot simply be said that all the documents submitted, whether oral or written, are covered by privilege. That would amount to stretching the duty of privilege beyond the realms of common sense and logic.'

[36] The high court rightly concluded that the order of this court in the first appeal did not envisage a blanket prohibition of disclosure and that it excluded only matters that Mr Zuma could rightly consider confidential. The high court reasoned that absent specificity in relation to claims of privilege, there is an obligation to disclose. In order to protect legitimate claims of confidentiality by framing an appropriate order, the high court relied on the decision of this court in *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 (1) SA 438 (SCA). At para 14 of that case, this court was concerned with achieving a balance between the rights of access to documentation and confidentiality. Mathopo J accordingly made the order as quoted in para 24 above.

[37] Before us, counsel on behalf of Mr Zuma, without any vigour, submitted that the order by Mathopo J was inadequate to protect Mr Zuma's confidentiality rights. His primary objection appeared to be to the release of the documentation to the DA's attorney, as envisaged in the order of Mathopo J. As best as could be discerned, the submission appeared to be that there would be enormous pressure and stresses brought to bear on the DA's attorney which might lead to a disclosure in the public domain. It was put to counsel that an officer of the court has ethical and legal obligations, the breach of which would be upon pain of professional and criminal sanction, and that that in itself was sufficient protection. His response was that it was preferable that the parties agree upon a senior counsel to whom the documents would be released and that he was agreeable to that person's decision regarding confidentiality being final and binding. Consequently, the parties undertook to reach agreement in this regard and to report to this court within a week. Beyond this and the other submission referred to in this paragraph, there was no effective, or indeed any other, argument in relation to the second part of the order made by Mathopo J.

[38] I can detect no flaw in the reasoning of the court below leading to the second part of the order. The office of the NDPP must engender public confidence. In *Democratic*

Alliance v President of the RSA 2012 (1) SA 417 (SCA) this court quoted, amongst others, the Privy Council which, in *Sharma v Brown-Antoine and Others* [2007] 1 WLR 780 (PC), said, with reference to prosecutorial independence, that the maintenance of public confidence in the administration of justice required that it be, and is seen to be, even-handed. The Supreme Court of the United States of America, in *Imbler v Pachtman, District Attorney* 424 US 409 (1976), spoke of the fearless and impartial policy which should characterise the prosecutorial service and 'the independence of judgment required by his public trust'. The Constitutional Court in the Certification judgment[4] dealt with the independence of a prosecuting authority as follows (para 146):

'[Section] 179(4) provides that the national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. There is accordingly a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts. In the circumstances, the objection to [s] 179 must be rejected.'

[39] It is to achieve and promote the objectives in the preceding paragraphs that the order of this court in the first appeal and the second part of the order of the court below are directed.

[40] As undertaken, the parties reported to this court within a week concerning their discussions and attempts to reach agreement about a suitable senior counsel or retired judge to be the final arbiter of confidentiality. They reached agreement concerning an order to replace the second part of the order made by the court below. During argument before us, we were assured that the parties were agreed that there should now be finality and it was in that spirit that the agreement was reached. The order in substitution of the second part of the order of the court below as it appears hereafter in the main follows the agreement reached by the parties.

[4] *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) (1996 (10) BCLR 1253 (CC)).

[41] One remaining aspect requires to be addressed, albeit briefly. As recently as April this year, this court in *National Director of Public Prosecutions v Freedom Under Law* 2014 (4) SA 298 (SCA) criticised the office of the NDPP for being less than candid and forthcoming.[5] In the present case, the then ANDPP, Ms Jiba, provided an 'opposing' affidavit in generalised, hearsay and almost meaningless terms. Affidavits from people who had first-hand knowledge of the relevant facts were conspicuously absent. Furthermore, it is to be decried that an important constitutional institution such as the office of the NDPP is loath to take an independent view about confidentiality, or otherwise, of documents and other materials within its possession, particularly in the face of an order of this court. Its lack of interest in being of assistance to either the high court or this court is baffling. It is equally lamentable that the office of the NDPP took no steps before the commencement of litigation in the present case to place the legal representatives of Mr Zuma on terms in a manner that would have ensured either a definitive response by the latter or a decision by the NPA on the release of the documents and material sought by the DA. This conduct is not worthy of the office of the NDPP. Such conduct undermines the esteem in which the office of the NDPP ought to be held by the citizenry of this country.

[42] The following order is made:

1. The appeal is dismissed with costs including the costs attendant upon the employment of two counsel.

2. The order of the high court is amended only to the degree reflected in what is set out hereafter:

'1. The First Respondent is directed to comply with the order of the Supreme Court of Appeal in case no. 288/11 dated 20 March 2012 (the SCA order), within five days of the date of this order.

[5] See paras 37 to 41.

2. The record to be produced and lodged by the First Respondent with the Registrar of this Court, in terms of the SCA order, shall include a copy of the electronic recordings and a transcript thereof referred to by the First Respondent in the announcement of the First Respondent's decision of 6 April 2009 as well as any internal memoranda, reports or minutes of meetings dealing with the contents of the recordings and/or transcript itself, insofar as these documents do not serve to breach the confidentiality of the Third Respondent's written or oral representations.

3. With regard to memoranda, minutes and notes of meetings, referred to by the Frist Respondent in paragraph 26 of her answering affidavit (the internal documentation):

3.1 Within five days of the date of this order, the First Respondent shall cause to be delivered to the Honourable Mr Justice NV Hurt (Justice Hurt) copies of the internal documentation;

3.2 On the copy of each document forming part of the internal documentation, Justice Hurt shall mark or record that part of the document which he considers to reveal the contents of Third Respondent's written or oral representations (the representations) to First Respondent;

3.3 The exercise referred to in paragraph 3.2 above shall be performed in accordance with any directives which the Honourable Justice Hurt may prescribe in order to fulfil his mandate;

3.4 The ruling of Justice Hurt shall be final and binding on the parties; and

3.5 Should Justice Hurt, for whatever reason, be unable to commence or complete the exercise referred to in this paragraph, the Applicant and the Third Respondent shall attempt to reach agreement on another independent and impartial person to replace him and, if no agreement can be reached within five days of Justice Hurt becoming unavailable, then the chairperson of the General Council of the Bar of South Africa shall be requested to appoint such person.

4. The First Respondent and the Third Respondent shall pay the Applicant's costs (including the costs of two counsel) jointly and severally, the one paying the other to be absolved.'

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MS NAVSA

ACTING DEPUTY PRESIDENT

APPEARANCES:

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