THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1028/2019

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA **APPELLANT**

and

DEMOCRATIC ALLIANCE **RESPONDENT**

And in the matter between:

JACOB GEDLEYIHLEKISA ZUMA **APPELLANT**

and

ECONOMIC FREEDOM FIGHTERS **RESPONDENT**

Neutral citation: *Jacob Gedleyihlekisa Zuma v Democratic Alliance and Economic Freedom Fighters* (Case no 1028/2019) [2021] ZASCA 39 (13 April 2021)

Coram: PONNAN, DAMBUZA, MAKGOKA and SCHIPPERS JJA and GORVEN AJA

Heard: 16 March 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10:00 am on 13 April 2021.

Summary: Review application – delay – State Attorney Act 56 of 1957 – neither s 3(1), nor s 3(3), authorises the State to cover private legal costs – whether just and equitable to order repayment of public monies paid without any legal basis. Costs – unwarranted allegations that scandalise the court – punitive costs as a mark of displeasure and to vindicate the integrity of the court.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Meyer J, (Ledwaba DJP and Kubushi J concurring), sitting as court of first instance): judgment reported *sub nom Democratic Alliance v President of the Republic of South Africa and Others; Economic Freedom Fighters v State Attorney and Others* [2019] 1 All SA 681 (GP).

The appeal is dismissed with costs, including those of two counsel, to be paid on the attorney and client scale.

JUDGMENT

Ponnan JA (Dambuza, Makgoka and Schippers JJA and Gorven AJA concurring)

[1] This is an application for leave to appeal and, if granted, the determination of the appeal itself. It concerns decisions purportedly made in terms of s 3 of the State Attorney Act 56 of 1957 (the Act)[1] to pay State funds to a private firm of attorneys

[1] Section 3 of the State Attorney Act 56 of 1957 has been amended by the State Attorney Amendment Act 13 of 2014. The section as amended now reads:
'(1) The functions of the offices of State Attorney shall be the performance in any court or in any part of the Republic of such work on behalf of the Government of the Republic as is by law, practice or custom performed by attorneys, notaries and conveyancers'.
(2) There may also be performed at the offices of State Attorney like functions for or on behalf of the administration of any province, subject to such terms and conditions as may be arranged between the Minister of Justice and Constitutional Development and the administration concerned.
(3) Unless the Minister of Justice and Constitutional Development otherwise directs, there may also be performed at the offices of State Attorney like functions in or in connection with any matter in which the Government or such an

for legal costs incurred by the applicant, Mr Jacob Gedleyihlekisa Zuma, in respect of court proceedings relating - or incidental - to his prosecution for corruption and related offences. The respondents, invoking the constitutional principle of legality, sought orders: (a) reviewing and setting aside the decisions and each of the related payments; and, (b) directing Mr Zuma to pay back the money.

[2] The two judges who considered the application referred it for oral argument in terms of the provisions of s 17(2)*(d)* of the Superior Courts Act 10 of 2013. Different considerations come into play when considering an application for leave to appeal as compared to adjudicating the appeal itself. As to the former, it is for an applicant to convince the court that he or she has a reasonable prospect of success on appeal. Success in an application for leave to appeal does not necessarily lead to success in the appeal. Because the success of the application for leave to appeal depends, *inter alia*, on the prospects of eventual success of the appeal itself, the argument on the application, to a large extent, had to address the merits of the appeal.[2]

[3] Inasmuch as the appeal raises a point of statutory interpretation, the application had to succeed. On that score, the high court has spoken and, absent an appeal, the judgment will continue to apply. Future litigants are entitled to the benefit of this Court's view on the question. In the circumstances, we considered it

administration as aforesaid, though not a party, is interested or concerned in, or in connection with any matter where, in the opinion of a State Attorney or of any person acting under his or her authority, it is in the public interest that such functions be performed at the said offices.'
The applications, the subject of this appeal, predate the amendment, which came into operation with effect from 7 February 2020. In any event, for the present, nothing turns on the amendment.

[2] *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd* [2019] ZASCA 161; 2020 (2) SA 61 (SCA) para 1.

appropriate to grant leave to Mr Zuma to proceed with the appeal. That opened the door to a full consideration of the substantive merits of the appeal itself.

[4] In December 1994, Mr Zuma was elected the National Chairperson of the African National Congress (the ANC) and chairperson of the ANC in KwaZulu-Natal. After the 1994 elections, he was appointed to serve in the first democratic government of the Republic of South Africa. Initially, he served at a provincial level as the Member of the Executive Committee (MEC) for Economic Affairs and Tourism in the KwaZulu-Natal Province. Following the 1999 general elections, Mr Zuma was appointed the Deputy President of the country. He ascended to the Presidency on 9 May 2009 - a position that he occupied until his resignation on 14 February 2018.

[5] On 23 August 2003, the National Director of Public Prosecutions (the NDPP) (at that time Mr Bulelani Ngcuka) announced that a certain Mr Shabir Shaik would be indicted on charges of corruption. It was alleged that between October 1995 and September 2002, Mr Shaik personally, and some of the corporate entities that he controlled, had made numerous payments totalling a substantial amount of money to or on behalf of Mr Zuma. Somewhat surprisingly, Mr Zuma was not indicted together with Mr Shaik (and his corporate entities). In 2005, Mr Shaik was convicted on two counts of corruption and one of fraud and sentenced to an effective term of imprisonment for a period of 15 years. Mr Shaik's appeals to this Court[3] and the Constitutional Court[4] were subsequently dismissed.

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[3] *S v Shaik and Others* [2006] ZASCA 105; [2007] 2 All SA 9 (SCA); 2007 (1) SA 240 (SCA).
[4] *S v Shaik and Others* [2007] ZACC 19; 2008 (2) SA 208 (CC); 2007 (12) BCLR 1360 (CC); 2008 (1) SACR 1 (CC).

[6] A week after Mr Shaik was sentenced, President Thabo Mbeki released Mr Zuma from his responsibilities as the Deputy President of the country. On 20 June 2005, the then NDPP (at the time Mr Vusi Pikoli) indicted Mr Zuma on two counts of corruption (the 2005 indictment), which mirrored those on which Mr Shaik had been convicted. His trial was due to begin on 31 July 2006, but on that date the National Prosecuting Authority (NPA) applied for a postponement.

[7] On 22 August 2006, Hulley Inc, a firm of attorneys in private practice, submitted a request on behalf of Mr Zuma to the State Attorney (the 2006 request) 'for legal assistance at the State's expense in a criminal case in which [he was] accused of two counts of corruption' and to appoint Hulley Inc and four specified counsel (two senior and two junior) 'to conduct the case on [his] behalf'. The request included an undertaking 'on demand to refund the State Attorney all costs incurred by the State Attorney in connection with Mr Zuma's defence should the court find that [he] acted in [his] personal capacity and own interests in the commission of alleged offences'. On 20 September 2006 (less than a month after the 2006 request was submitted), the criminal trial was struck from the roll. It was never re-enrolled.

[8] On 27 December 2007, Advocate Mokotedi Mpshe, the then acting NDPP, announced that Mr Zuma would be indicted on two counts of corruption, twelve of fraud and one each of racketeering, money laundering and tax evasion (the 2007 indictment). His trial was due to commence in August 2008, but in June 2008 he applied for an order reviewing and setting aside the decision to indict him. That application was heard on 4 and 5 August 2008 and decided in Mr Zuma's favour (per Nicholson J) on 12 September 2008. Nicholson J thereafter granted leave to the NDPP to appeal to this Court.

[9] On 26 September 2008, Hulley Inc submitted yet a further request on behalf of Mr Zuma to the State Attorney (the 2008 request) 'for legal assistance at State expense in [a] criminal case in which [he was] accused of' and to appoint Hulley Inc, and four counsel (two senior and two junior) 'to conduct the case on [his] behalf'. The request included an undertaking 'on demand to refund to the State Attorney all costs incurred by the State Attorney in connection with [his] defence'.

[10] On 12 January 2009, this Court overturned the order of Nicholson J, and replaced it with an order, *inter alia*, dismissing Mr Zuma's review application with costs. Following upon the decision of this Court, Mr Zuma made legal representations to the NDPP. On 1 April 2009, after receiving representations on behalf of Mr Zuma, Mr Mpshe decided to discontinue Mr Zuma's prosecution (the discontinuation decision).

[11] On 7 April 2009, the Democratic Alliance (the DA), the official opposition in the National Parliament, brought proceedings to review and set aside the discontinuation decision. The DA's application was opposed by the State Attorney on behalf of the NDPP and by Hulley Inc on behalf of Mr Zuma. It took almost seven years from the launch of the DA's review application for it to be heard by the high court, owing in large measure to a range of procedural challenges by Mr Zuma and the NDPP, they having made common cause throughout the proceedings. In the meanwhile, on 9 May 2009, Mr Zuma was inaugurated as President of the Republic of South Africa. On 29 April 2016, the high court set aside the discontinuation decision. On 13 October 2017 this Court dismissed an appeal by Mr Zuma and the

NDPP against the order of the high court.[5] The effect was that the 2007 indictment was revived. On 16 March 2018, the NDPP announced that the charges against Mr Zuma would be reinstated.

[12] Since this Court's decision in October 2017, the DA had endeavoured to obtain clarity from the Presidency as to the extent of the payments made by the State toward Mr Zuma's legal costs, as also, the basis for those payments. The requests were initially ignored by the Presidency. In March 2018, the third largest political party in the National Assembly, the Economic Freedom Fighters (the EFF), asked the newly elected President, Mr Cyril Ramaphosa, (who had since replaced Mr Zuma) how much the State had spent on Mr Zuma's legal costs and on what legal basis. The President replied that since 2006 the State had spent R15.3 million on Mr Zuma's legal costs, pursuant to a decision taken by the State Attorney in the exercise of her discretion under s 3(3) of the Act.

[13] When the EFF demanded further information in late March 2018, the State Attorney provided copies of Mr Zuma's 2006 and 2008 requests, and stated that the decision to approve the requests had been 'taken in terms of section 3(1) of [the Act] by the Presidency'. The State Attorney subsequently clarified:

'We are advised that the amount must be broken down into two separate time periods – before and after the decision to withdraw the charges that was eventually the subject of a review application. The amount incurred in the initial period is R7 505 949, 45 . . . The process from the application to review the decision to withdraw the charges up to the end of the decision of the Supreme Court of Appeal, the legal costs incurred is the amount of R7 794 301, 28 . . . The total for both the periods referred to herein is an amount of R15 300 250, 73 . . .'

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[5] *Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another* above fn 2.

[14] On 13 March 2018, it was reported in the media that the Presidential spokesperson, Ms Khusela Diko, had confirmed that all expenditure that the State had incurred in respect Mr Zuma's legal costs was 'in line with the provisions of the State Attorney Act'. The DA then raised the following with President Ramaphosa:

'4.1 Your spokesperson, Khusela Diko, confirmed to the media on 13 March 2018 that all expenditure incurred by former President Zuma was incurred in line with the provisions of the State Attorney Act.

4.1.1 On what provisions of the State Attorney Act 56 of 1957 does the Presidency rely to claim compliance with the State Attorney Act;

4.1.2 What steps were taken to ensure that the Presidency, in allowing this expenditure, was in lawful compliance with all relevant legislation;

4.1.3 The attorney of record of former President Zuma was not the State Attorney but Michael Hulley of Hulley and Associates, a private law firm. On what basis is it alleged that this practice is subject to the provisions of the State Attorney Act.

4.2 Former President Zuma was, at all relevant times, cited in his capacity as an ordinary citizen and not in his official capacity. The costs orders granted by the Courts in the matters *Zuma v Democratic Alliance and Others: Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another* (771 /2016, 1170/2016) (2017) ZASCA 146; [2017] 4 All SA 726 (SCA); 2018 (1) SA 200 (SCA); 2018 (1) SACR 123 (SCA) (13 October 2017) and *Democratic Alliance v Acting National Director of Public Prosecutions and Others (*19577 /2009) [2018] ZAGPPHC 255; 2018 (2) SACR 1 (GP); [2016] 3 All SA 78 (GP); 2016 (8) BCLR 1077 (GP) (29 April 2018) were also against former President Zuma in his personal capacity. Kindly explain on what basis he would have been entitled to expect his legal fees to be paid by the State and/or Presidency and/or Treasury. Also, regard must be had to the concessions made by former President Zuma and the National Prosecuting Authority's legal counsel, in the Supreme Court of Appeal, that there was no merit in the opposition to our client's Application.

4.3 Media reports furthermore reveal that your acting spokesperson, Tyrone Seale, conveyed to the Financial Mail that the State would continue to fund former President Zuma's legal fees based on an undertaking that was concluded by former Presidents Zuma and Mbeki in 2006.

Mention is also made of an undertaking that former President Zuma has undertaken to refund the state should he be found guilty.

4.3.1 Kindly confirm whether this is the position of the Presidency? If so, kindly explain the legal basis on which such position is held.

4.3.2 Was the Agreement concluded between former Presidents Mbeki and Zuma in writing? If so, we are entitled and require a copy thereof.

4.3.3 If not concluded in writing, what was the exact terms of the agreement? Full details are requested.

4.3.4 Was the so-called undertaking to repay the legal fees, if convicted, in writing? If so, we require copies thereof. If not, we require full details of the undertaking.

4.4 Kindly indicate whether there is a current obligation that former President Zuma's legal fees shall continue to be paid by the Presidency / State / Treasury.

4.5 Insofar as there exists a current obligation on the State to continue to fund the legal costs of former President Zuma in the above matter or in any other matter, kindly indicate what oversight is exercised by your office and/or the Government and/or Treasury over such expenditure.'

[15] On 22 March 2018, the State Attorney, after consulting with the Department of Justice and the President, responded as follows to the DA's letter:

'The decision to provide to Mr Zuma legal representation at state expense was taken in accordance with section 3(1) of the State Attorneys Act 56 of 1957. This decision was taken by the Presidency in 2006. After receiving the request for legal representation the Presidency sought advice from the Minister of Justice and the State Attorney. The decision was based on advice from the Chief State Law Advisor (M Daniels), the Director-General in the Department of Justice (Adv Simelane), the Minister of Justice (Minister Mabandla) and the State Attorney (Ms Mosidi) (paras 2.1 -2.4 of the letter);

The Presidency was also advised that the circumstances of this particular request warranted the appointment of a private attorney on the basis that there may exist a conflict of interest where the state attorney to be engaged in providing legal representation or a perception of a conflict of interest (para 2.5);

The decision was subject to the undertaking by former President Zuma to refund the legal costs incurred by the State in the event that his defence is unsuccessful. We have been unable to locate a written agreement between the Presidency and Mr Zuma in this respect. However, we have been provided with an undertaking dated 22 August 2006 signed by Mr Zuma and… a second undertaking was made on 26 September 2008 (paras 2.6 and 2.7);
The Presidency, at the time was advised that the basis for the application of section 3 of the State Attorney Act was that the charges concerned government; that they relate to Mr Zuma's activities while he held political office as an MEC in KZN and later was required to answer questions as Deputy President; and that the matter is of public import (para 2.8);
Due to the fact that the Presidents who came after the undertaking was signed are the successor in title in the President's office, they assume the obligation created in the undertaking. The office of the Presidency is therefore bound by that decision and must continue paying for Mr Zuma's legal fees on the basis that it undertook to do so until such time as the decision is reviewed and set aside by the court (para 2.9).
The PFMA and the Treasury Regulations require the accounting officer in the Presidency (as a Department) to ensure that there is sufficient funding for expenditure that it undertakes to cover. This necessarily means that there must be a budget provided for Mr Zuma's legal fees. In order to continue fulfilling its obligations under the PFMA and the Treasury Regulations, the accounting officer in the Presidency will request Mr Zuma's legal representatives to provide estimates of how much they will require in order to render their services to Mr Zuma in the criminal trial. In turn, the office of the Presidency will seek to ensure that such estimated costs are reasonable and budgeted for (para 2.10).'

[16] On 23 March 2018, the DA applied to the Gauteng Division of the High Court, Pretoria (the DA application)[6] for an order in the following terms:

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

[6] The DA application was launched under high court case number 21405/2018.

2 The decision(s) taken by the President of the Republic of South Africa, the Director-General of the Presidency, the State Attorney and/or any other public official that the State would cover the legal costs that Mr Zuma incurred in his personal capacity in the criminal prosecution instituted against him on or about 20 June 2005 and 28 December 2007 is declared invalid and is reviewed and set aside.

3 The decision(s) taken by the President of the Republic of South Africa, the Director-General of the Presidency, the State Attorney and/or any other public official that the State would cover the legal costs that Mr Zuma incurred in his personal capacity in interlocutory and ancillary applications related to his criminal prosecution is reviewed and set aside.

4 Mr Zuma is directed to repay to the National Treasury any and all such amounts that the State has paid towards Mr Zuma's personal legal costs as a result of the decision(s) referred to in paragraphs 2 and 3 above or otherwise, within three months of the date of this order or such other reasonable period as the Court may determine.

5 To the extent that it may be necessary, extending in terms of section 9(2) of PAJA the 180-day time period for the institution of judicial review proceedings so as to terminate one day after the institution of this application.'

[17] Shortly thereafter, the EFF also launched an application out of the same court (the EFF application).[7] It sought an order in the following terms:

'1. The decision or decisions made by or on behalf of the first respondent ("State Attorney") to appoint and pay the third respondent ("Hulley Inc") to provide and procure legal and related services for the second respondent ("Mr Zuma") ("the impugned decisions") are reviewed, declared unconstitutional or otherwise unlawful, and set aside;

2. All of the payments made by or on behalf of the State Attorney to Hulley Inc or any other person in purported pursuance of the impugned decisions ("the impugned payments") are reviewed, declared unconstitutional or otherwise unlawful, and set aside;

[7] The EFF application was launched under high court case number 29984/2018.

3. Within 6 (six) months, Mr Zuma and Hulley Inc, liable jointly and severally, shall repay the amounts of the impugned payments, plus interest at the prescribed rate, calculated from the date of each payment;

4. The costs of this application shall be paid jointly and severally by any parties opposing it;

5. The applicant is granted any further and/or alternative relief that the Court deems fit.'

[18] Aside from Mr Zuma, none of the other respondents, who had been cited in each application, opposed the relief sought.[8] Both applications succeeded. The high court (per Meyer J (Ledwaba DJP and Kubushi J concurring))[9] issued the following order:

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

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

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

(d) The State Attorney is directed forthwith to:

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[8] The DA application cited the President of the Republic of South Africa, the Director General in the Office of the President, the Minister of Justice and Correctional Services, the State Attorney and Mr Zuma, as the first to fifth respondents respectively. The EFF application cited the State Attorney, Mr Zuma, Hulley and Associates Incorporated, the Minister of Justice and Correctional Services, the Director General: Department of Justice and Constitutional Development, the President of the Republic of South Africa and the Chief Operations Officer: Presidency of the Republic of South Africa as the first to seventh respondents respectively.

[9] The judgment has been reported *sub nom Democratic Alliance v President of the Republic of South Africa and Others; Economic Freedom Fighters v State Attorney and Others* [2018] ZAGPPHC 836; [2019] 1 All SA 681 (GP).

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

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

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

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

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

[19] On appeal, which is opposed by the DA and EFF, it is contended on behalf of Mr Zuma that the high court was wrong to hold that:

(a) the DA and EFF had brought their applications within a reasonable time;

(b) section 3 of the Act did not authorise the State Attorney to fund private legal costs at all, including for Mr Zuma; and

(c) it is just and equitable to require Mr Zuma to pay back the money.

As to (a):

[20] This envisages a two-stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned. It is difficult in this case to attempt any precise identification of the date when the clock started ticking. This is because for as long as Mr Zuma occupied the highest office in the land: (a) he was both the ultimate decision-maker and

beneficiary; and (b) much of what occurred relating to the funding of his legal costs was shrouded in secrecy.

[21] In argument before us, much store was sought to be placed on the observation by the high court that:

'I accept that the DA knew of *a* decision for the state to pay Mr Zuma's personal legal costs incurred by him in defending the criminal prosecution against him since around the time when the DA member questioned the Minister in the Presidency on the matter in Parliament on 12 September 2008, and that the EFF might reasonably be expected to have become aware of such a decision since the latter part of 2013.'[10]

[22] There appears, however, to have been no factual foundation whatsoever for the rather speculative hypothesis that 'the EFF might reasonably be expected to have become aware of such a decision since the latter part of 2013'. In the answering affidavit filed on behalf of Mr Zuma in the EFF application, it was stated:

'12. The applicant was formed on or about July 2013 by Mr. Julius Malema, the deponent to the founding affidavit, who has been its leader titled "Commander-in Chief". Mr. Malema formed the party after having been expelled by the African National Congress following an internal disciplinary hearing.

13. It is common knowledge, Mr. Malema has been a long-standing member of the ANC and served as the President of the ANC Youth League from 2008 to April 2012 when he was expelled from the party. Mr. Malema was also a staunch supporter of Mr. Zuma -and in close proximity to the ANC national leadership including Mr. Zuma.

14. It can be reasonably informed that as far back as 2008 (if not 2006) Mr. Malema was or could be expected to have known about the existence of a decision or decisions to provide Mr. Zuma with state assistance to fund his (Mr. Zuma's) criminal case. It would be disingenuous and misleading the Court for Mr. Malema to contend otherwise.'

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[10] Para 48.

[23] That was the high-water mark of Mr Zuma's case on the question of delay by the EFF. But, that is to conflate the position of Mr Malema, with that of the EFF and to impute such knowledge as he may have had (the actual extent of which is still far from clear) to his party. It follows that a proper basis had not been laid on behalf of Mr Zuma for the conclusion urged upon the court. In that, it is important to emphasise that the suggestion appears to have been that the EFF might (not must) reasonably have become aware of the decision since the latter part of 2013.

[24] The EFF explained the timing of its application, which was instituted within one month of it becoming aware of: (a) the exorbitant amount of public money being spent on Mr Zuma's legal costs; (b) the purported legal basis upon which this money was paid; and (c) the alarming revelation that, despite Mr Zuma's undertaking to repay the money 'on demand', the State Attorney had taken no readily realisable security for such repayment.

[25] In seeking to determine when the clock started ticking, some attempt was made to suggest that a distinction ought to be drawn between the DA, on the one hand, and the EFF, on the other. In focusing on the former, it was argued that as long ago as 1 August 2008, the DA had learnt, in answer to a question in Parliament, that: '[t]he legal representation in the corruption matter is provided as the State has a direct interest in the matter as it is alleged that the charges relate to the Strategic arms procurement process entered into by the State'.

[26] However, in the context of a case such as this, any attempt to distinguish between the DA and EFF may well be artificial and illusory. For, as it was put in

Opposition to Urban Tolling Alliance v The South African National Roads Agency Limited:

'In its terms s 7(1) [of Promotion of Administrative Justice Act 3 of 2000] envisages asking when "the person concerned" was informed, or became aware, or might reasonably be expected to have become aware, of the administrative action. This admits of an answer where the act affects and is challenged by an individual, but does not readily admit of an answer where it affects the public at large. In that situation it would be anomalous – if not absurd – if an administrative act were to be reviewable at the instance of one member of the public, and not at the instance of another, depending upon the peculiar knowledge of each. It seems to me that in those circumstances a court must take a broad view of when the public at large might reasonably be expected to have had knowledge of the action, not dictated by the knowledge, or lack of it, of the particular member or members of the public who have chosen to challenge the act.'[11]

[27] In any event, although the DA had first raised questions in Parliament in 2008, at no stage until March 2018 had there been any intimation as to the legal basis for the decision. Until 2018, the response, such as it was, in each instance was vague and studiously coy. The high court was thus correct in holding: '[b]ut, the DA and the EFF knew – and still know – very little about the decisions taken in respect of the funding of Mr Zuma's private legal costs'.[12]

[28] Nor, until the review application was launched and the rule 53 record filed, was anyone to know of the scale and extent of the funding. It now emerges that the State Attorney paid all of Mr Zuma's legal costs; that is, Hulley Inc's fees and disbursements (including counsel's fees), as well as the costs of his opponents when so ordered, in at least the following matters: (a) unsuccessfully seeking to set aside

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[11] *Opposition to Urban Tolling Alliance v The South African National Roads Agency Limited* [2013] ZASCA 148; [2013] 4 All SA 639 (SCA) para 27.
[12] Ibid.

certain search and seizure warrants issued in October 2005 (R9 676 176); (b) unsuccessfully seeking to set aside a request for co-operation from Mauritian authorities made in April 2007 (R4 791 437); (c) unsuccessfully seeking to set aside the 2007 indictment (R2 649 512); (d) unsuccessfully opposing the DA's review of the 2009 decision to discontinue the prosecution (approximately R7,8 million).

[29] Neither the 2006, nor 2008, request had made reference to the costs incurred before 22 August 2006 or any ancillary litigation other than the criminal trial itself. And yet, in all of the aforementioned matters costs to the tune of some R 25 million were borne by the State. This, despite neither a request, nor authorisation for the payment of those funds. On any reckoning those payments lacked any proper legal basis. What is more, it has since emerged that the funding included costs that were incurred in 2005, not on any litigation that directly involved Mr Zuma, but in respect of a watching brief in the Shaik trial. The funding tap had thus been opened much earlier than the DA or EFF could reasonably have suspected.

[30] Moreover, the funding is ongoing. In an affidavit filed on behalf of the Presidency it was stated:

> 'The Presidency continues to provide state funding for former President Zuma for his criminal trial. It does so on the basis that the decision is presumed to be valid and binding until it is set aside by a court. The continued funding is therefore subject to the finding of this Court as to the lawfulness of the decision to provide funding in the first place.'

As the alleged wrong is still continuing and will continue into the future it is difficult to speak of 'delay'; this is because the relief claimed is directed not only at the setting aside of a single past act, but also the ongoing conduct that continues to have a deleterious impact on the public purse.

[31] To have granted Mr Zuma a blank cheque to pay private lawyers is egregious. A web of maladministration appears to have made that possible. Many of the payments have no asserted legal basis whatsoever and aside from Mr Zuma, there has been no attempt by any of the other respondents who were cited in the review applications, to defend them. That such a state of affairs obtained only became evident after the rule 53 record saw the light of day. Mr Zuma has been significantly enriched by those payments. It would be naïve for a court to simply ignore all of this. The effect on state resources can also not be overlooked. Substantial unplanned expenditure has occurred and will continue to occur. The thrust of the argument advanced on behalf of Mr Zuma, on this score, appears to be that even if unlawful, the payments should continue because the DA and EFF waited too long to take the matter on review. Such a contention is breathtakingly audacious and must be rejected. In all the circumstances, it was proper for the high court to have entered into the substantive merits of the review application.

As to (b):

[32] Mr Zuma argues that the State Attorney was authorised by either s 3(1), or s 3(3), of the Act to appoint and pay private attorneys to represent him. However, neither section authorises the State to cover private legal costs. They provide only for the provision of services by the State Attorney. Section 3(1) of the Act reads:

'The functions of the office of the State Attorney and of its branches shall be the performance in any court or in any part of the Republic of such work on behalf of the Government of the Republic as is by law, practise or custom performed by attorneys…'.

[33] That section authorises the State Attorney to act on behalf of the Government and to perform the work ordinarily performed by attorneys and other legal

representatives. The purpose of the section is to give the State Attorney a legal mandate to act as the Government's legal representative. Hulley Inc was to perform and procure services not 'on behalf of the Government of the Republic', but on behalf of Mr Zuma in his personal capacity. In all of the litigation, Mr Zuma was cited in his personal capacity; the orders sought would have been enforced against him personally, not against any government office or department. The fact that Mr Zuma held high office in the executive does not mean that in representing him the State Attorney was acting 'on behalf of the Government'.

[34] In relying on s 3(1), the Presidency and the State Attorney appear to conflate when a government official acts in an official (or representative) capacity with that of an official acting in his or her personal capacity. There has been no suggestion that Mr Zuma was advancing any governmental interest or purpose. The prosecution was instituted against him in his personal capacity. The thrust of the allegations against him is that he used his official position and influence in Government to advance his private interest. His interest in the Shaik trial was that of a potential accused in his personal capacity. So too, was Mr Zuma's interest in the DA's application to review the discontinuation decision.

[35] The decisions to appoint and pay Mr Hulley could thus not have been made in terms of s 3(1) of the Act, which does not authorise the State Attorney to perform work on behalf of anybody other than the Government itself. The decisions were thus ultra vires s 3(1) and consequently unlawful, unconstitutional and invalid.

[36] That leaves, s 3(3) of the Act, which provides:

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

[37] Section 3(3) permits the State Attorney to perform the same functions: (i) in or in connection with any matter in which the Government though not a party ‘is interested or concerned in’ or (ii) in connection with any matter where, in the opinion of the State Attorney or of any person acting under his authority, it is ‘in the public interest’ that such functions be performed. To fall within the scope and ambit of s 3(3), it must be evident that the performance of functions by the State Attorney, in matters where the Government is not a party, is justified by the Government’s interest or concern in the matter or that it is in the public interest that the State Attorney assume the functions.

[38] The test for a Government or public interest under s 3(3) cannot be reduced to whether the person requesting legal assistance currently holds, or held, high office in the Government. Indeed, at the time of some of the payments Mr Zuma was not even in the Government. The fact that ‘there was a possibility of the Deputy President being implicated’ or that ‘the allegations were related to Mr Zuma holding office either as an MEC in the Province of KwaZulu-Natal or Deputy President’, could never be determinative of whether there is a legitimate Government or public interest in extending the State Attorney’s services to him.

[39] Mr Zuma argues that the State has an interest in 'protecting a government official'. But this is not necessarily so. The Government and the public have an interest in protecting the rule of law and ensuring accountability and good governance; all of which is achieved by prosecuting offences of corruption and other abuses of public office and by ensuring that criminal trials proceed without delay. Whether the Government or the public has an interest, for the purposes of providing legal assistance by the State Attorney's office, must entail at least an assessment of the nature of the proceedings; the issues arising for determination; and, whether there is a legitimate reason for Government to support a position taken in the matter by a party other than Government.

[40] I daresay, the Government and the public can hardly have a legitimate interest in supporting a defence against criminal charges by an incumbent or former public office bearer and especially not in respect of charges of dishonesty and corruption. Allowing officials to resist being held accountable, by drawing on state resources to obstruct or delay a prosecution, subverts the Government's (and the public's) interest. In that regard, much has been sought to be made of the presumption of innocence. However, Mr Zuma's complaint in that regard misses the point. This is not a case about whether Mr Zuma is guilty or not, rather it is about whether the Act authorised the decisions sought to be impugned.

[41] The reliance by Presidency and State Attorney on an alleged conflict of interest to justify the appointment of private legal practitioners at State expense to act for Mr Zuma does not assist. The concern over a potential conflict of interest only arose because of an acceptance in the first place that the State Attorney was

entitled to act for Mr Zuma under ss 3(1) or 3(3) of the Act. Since that assumption is incorrect, the question of a conflict of interest did not properly arise.

[42] In any event, it is difficult to see how a conflict of interest could possibly have arisen. The contestation in the contemplated criminal proceedings was between the NDPP, on the one hand, whose independence is constitutionally protected, and Mr Zuma, on the other, a private citizen, albeit one holding high public office. If anything, the existence of an actual or potential conflict of interest fortifies the view that the State Attorney could not act for Mr Zuma. The State Attorney is obliged to act only if it is in the Government's interest or the public interest to do so. That there may have been a divergence between those interests and Mr Zuma's interests must mean that the State Attorney was precluded from acting for Mr Zuma. Moreover, the potentiality of a conflict of interest cannot alter the mandate or extend the powers of the State Attorney.

[43] It follows that neither s 3(1), nor s 3(3), of the Act entitles the State to pay for Mr Zuma's private legal costs in his criminal prosecution and related matters, as the Presidency and State Attorney had believed. On its express terms, ss 3(1) and 3(3) only permits the State Attorney to perform functions; it does not authorise the State Attorney to outsource its functions to a private attorney, at State expense. Yet this is what occurred in Mr Zuma's case.

As to (c):

[44] In its founding papers, the EFF contended that it would be just and equitable to order that 'each amount paid to Hulley Inc, must be repaid to the public purse, without delay, and with interest at the prescribed rate.' Considering that Mr Zuma

had undertaken, in both of his requests for funding, to repay the State Attorney 'on demand', presumably, so the contention went, he had made provision for this eventuality. Mr Zuma was uniquely positioned to present evidential material to contradict this. He did not do so. In his answering papers, Mr Zuma offered no factual material to counter these contentions. Accordingly, there was nothing before the high court to suggest that the order sought was not just and equitable in the circumstances. Arguably, consequent upon a finding that the payments should never have been made, it may perhaps be the only just and equitable remedy.

[45] A just and equitable remedy in this case, so found the high court, requires a full and complete accounting by the State Attorney, under oath and an order directing Mr Zuma to repay to the State the legal costs incurred on his behalf. A repayment order may well be essential to remedy the abuse of public resources; vindicate the rule of law; and, reaffirm the constitutional principles of accountability and transparency, especially by a former incumbent of the highest office in the land. Simply setting aside the decision to pay, without ordering an accounting and repayment, would achieve none of those crucial remedial objectives. This, in any event, is less onerous than if Mr Zuma were asked to repay the amounts on demand as he had undertaken to do.

[46] In any event, given the nature of the discretion exercised by the high court, no warrant exists for interference.[13]

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[13] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) paras 89 and 90.

Costs:

[47] In his application for leave to appeal, Mr Zuma alleged that the court: (a) 'essentially [gave] more weight to the political interests of the political parties involved than advancing [his] constitutional rights'; (b) would have made different findings if it had been acting 'fairly and without bias'; (c) in having accepted the submission that he should approach the Legal Aid Board if he could not afford private representation, demonstrated 'further evidence of bias'; (d) was 'hell-bent on finding against [him] on any point possible'; and, (e) 'has become accustomed to its trend of punishing me with costs all the time'.

[48] However, nowhere was any factual foundation laid for any of those allegations. Despite having been challenged by the EFF in its answering affidavit to withdraw these unwarranted and scandalous allegations levelled, not just against the court below, but the judiciary at large, Mr Zuma did not do so. What is more, even after further opportunity for reflection, the stance was persisted with in the appeal. From the bar in this Court, there was an attempt to either downplay or justify the allegations as 'robust criticism'.

[49] The contention, absent any factual foundation, that all three judges who heard the matter had left their judicial station, scandalises the court. If true, that all three either independently of each other, or worse still acting in concert, would have renounced their judicial impartiality is a most serious allegation. Imputing bias to a judicial officer should not lightly be made. Nor, should the imputation of a political motive. This is not to suggest that courts are immune from criticism, even robust criticism for that matter. But, the criticism encountered here falls outside acceptable bounds.

[50] The fairness of court proceedings would clearly be under threat if a court does not apply the law and assess the facts of the case impartially. As it was described in *S v Le Grange and Others*:

‘It must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial. The integrity of the justice system is anchored in the impartiality of the judiciary. As a matter of policy it is important that the public should have confidence in the courts. Upon this social order and security depend. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. Impartiality can be described – perhaps somewhat inexactly – as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. Bias in the sense of judicial bias has been said to mean ‘a departure from the standard of even-handed justice which the law requires from those who occupy judicial office’. In common usage bias describes ‘a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.’[14]

[51] There is nothing on the record to sustain the inference that the presiding judges in this matter (or at a more generalised level in other matters involving Mr Zuma) were biased or that they were not open-minded, impartial or fair. The allegations were made with a reckless disregard for the truth and persisted in during argument. They ought not to have been made at all. But, having been made, they ought, in response to the invitation from the EFF, to have been retracted. To have persisted in the unjustified criticism of not just the high court, but more generally the judiciary,

[14] *S v Le Grange and Others* (040/2008) [2008] ZASCA 102; 2009 (1) SACR 125 (SCA) 2009 (2) SA 434 (SCA); [2010] 1 All SA 238 (SCA); 2010 (6) BCLR 547 (SCA) para 21.

is plainly deserving of censure. Little wonder then that the EFF submits that Mr Zuma should be penalised with a punitive costs order as a mark of this Court's displeasure and to vindicate the integrity of the high court and the judiciary. A submission, for the reasons given, with which I am in agreement.

[52] In the result, the appeal must fail and it is accordingly dismissed with costs, including those of two counsel, to be paid on the attorney and client scale.

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V M Ponnan
Judge of Appeal

APPEARANCES

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