THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 771/2016

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA	**APPLICANT/APPELLANT**

and

DEMOCRATIC ALLIANCE	**FIRST RESPONDENT**
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**SECOND RESPONDENT**
THE HEAD OF THE DIRECTORATE OF SPECIAL OPERATIONS	**THIRD RESPONDENT**

And in the matter between:

Case No: 1170/2016

ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**FIRST APPLICANT/APPELLANT**
THE HEAD OF THE DIRECTORATE OF SPECIAL OPERATIONS	**SECOND APPLICANT/APPELLANT**

and

DEMOCRATIC ALLIANCE	**FIRST RESPONDENT**
JACOB GEDLEYIHLEKISA ZUMA	**SECOND RESPONDENT**

Neutral Citation: *Zuma v DA* (771/2016); *ANDPP V DA* (1170/2016) [2017] ZASCA 146 (13 October 2017).

Coram: Navsa ADP, Cachalia, Bosielo, Leach and Tshiqi JJA

Heard: 14 September 2017

Delivered: 13 October 2017

Summary: Decision by Acting National Director of Public Prosecutions to discontinue prosecution – whether decision wanting for invocation and reliance on inapposite provision of the Constitution– whether decision rational – manner in which NPA conducted litigation deserving of judicial censure.

ORDER

On appeal from: The Gauteng Division of the High Court, Pretoria (Ledwaba DJP with Pretorius and Mothle JJ sitting as court of first instance), reported sub nom *Democratic Alliance v Acting National Director of Public Prosecutions & others* 2016 (2) SACR 1 (GP).

The following order is made:

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

JUDGMENT

Navsa ADP (Cachalia, Bosielo, Leach and Tshiqi JJA concurring):

Introduction

[1] T S Eliot spoke of 'the recurrent end of the unending'.[1] The relevance of these words will soon become apparent. Before us there are two applications for leave to appeal, referred by this Court for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013. In referring the matter for oral argument, this Court directed the parties to be ready, if called upon to do so, to argue the merits of the appeal. The two applications were consolidated as they arise out of the same facts. We heard the applications and directed that the merits be argued as well. The first application is by Mr Jacob G Zuma, presently the President of the Republic of South Africa. The other application is by the Acting National Director of Public Prosecutions (the ANDPP)[2] and the Head of the Directorate of Special Operations (DSO)[3]. The applications are directed against a judgment of the Gauteng Division of the High Court, Pretoria, in terms of which the decision on 1 April 2009 by the then ANDPP, Mr Mokotedi Mpshe, to discontinue the prosecution of Mr Zuma on serious criminal charges, including charges of racketeering, corruption, money laundering and fraud, was held to be irrational and was reviewed and set aside. The order was at the instance of the Democratic Alliance (the DA), the official opposition in the National Parliament.

[2] Eight years ago, in 2009, this Court in *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) (hereinafter referred to as *Zuma*), stated the following in para 2:

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[1] From his poem, Little Gidding, which forms part of *Four Quartets*, a series of poems that discuss time, perspective, humanity and salvation. Part of the poem from which it is taken reads as follows:
'In the uncertain hour before the morning
Near the ending of interminable night
At the recurrent end of the unending. . .'

[2] The office of the National Director of Public Prosecutions (the NDPP) was established in terms of s 179(1)*(a)* of the Constitution read with s 5 of the National Prosecuting Authority Act 32 of 1998 (NPA Act).

[3] The Head of the Directorate of Special Operations was established in terms of s 7 of the NPA Act.

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

Save for what is set out below, the litigation history up to that point is recounted in that case.[4] I do not intend to repeat it. Much more litigation followed, culminating in the matter presently before us. Unlike instances in the past, in the present case, the National Prosecuting Authority (the NPA) and Mr Zuma made common cause.

[3] The current applications are part of the continuing litigation saga that has endured over many years and involved numerous court cases. It is doubtful that a decision in this case will be the end of the continuing contestations concerning the prosecution of Mr Zuma. Minutes into the argument before us counsel for both Mr Zuma and the NPA conceded that the decision to discontinue the prosecution was flawed. Counsel on behalf of Mr Zuma, having made the concession, with the full realisation that the consequence would be that the prosecution of his client would revive, gave notice that Mr Zuma had every intention in the future to continue to use such processes as are available to him to resist prosecution.

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

[5] At this stage it is necessary to set out in some detail the background to the litigation in the court below. The reason for this is to assess whether the concessions referred to in para 3 above, which will be dealt with in detail later, were rightly made and whether there are other equal or perhaps more compelling considerations over and above those conceded by Mr Zuma and the NPA, which render the decision to discontinue the prosecution liable to be set aside. Furthermore, the history is important in that there are certain aspects in respect of which judicial comment is required. I now turn to deal with the history of the matter.

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[4] In paras 3-7.

The background

[6] Initially, corruption charges were brought by the NPA against Mr Zuma during 2005, before he was elected to the high office he currently holds, and well after the conviction of his former business associate, Mr Shabir Shaik, on fraud and corruption charges.[5] Investigations related to the criminal charges against Mr Zuma commenced in 2001. During 2006 the case against him was struck from the roll by Msimang J in the Durban and Coast Local Division of the High Court, after an application by the State for a postponement to complete its investigation and finalise an indictment was refused.[6] This had the result that the prosecution was terminated.[7] Not only had Mr Zuma opposed the application by the State for a postponement, but in addition his legal representatives filed an application for a permanent stay of the prosecution. When the matter was struck from the roll that too came to an end.

[7] On 28 December 2007, a new indictment containing charges of corruption and money laundering was served on Mr Zuma. This Court, in *Zuma*, held that the then ANDPP, Mr Mokotedi Mpshe, had taken the decision to prosecute.[8] The significance of that finding in relation to the heads of argument initially filed by both the applicants in this matter, the later supplementary heads filed on behalf of the NPA, and ultimately on the outcome of this case, will be dealt with during the course of this judgment.

[8] Subsequent to the indictment being served, further legal battles were waged by Mr Zuma against the NPA concerning search warrants and other issues related to

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[5] The core of the State's case had been that Mr Shaik and corporate entities under his control had made numerous separate payments of money directly to, or for the benefit of, the then Deputy President of South Africa, Mr Jacob Zuma, as bribes for the latter to advance Mr Shaiks' business interests. President Zuma has complained on an on-going basis that he was prejudiced by not being charged together with Mr Shaik whilst having to endure the slur of his alleged criminal conduct. See also para 12 infra. For the details concerning Mr Shaik's convictions, see the judgment of this Court in *S v Shaik & others* [2006] ZASCA 105; 2007 (1) SA 240 (SCA) and the subsequent judgment of the Constitutional Court in *S v Shaik & others* [2007] ZACC 19; 2008 (2) SA 208 (CC) refusing an application for leave to appeal against the convictions and sentences.

[6] As reflected in para 5 of *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA).

[7] See *Thint Holdings (Southern Africa) (Pty) Ltd & another v National Director of Public Prosecutions; Zuma v National Director of Public Prosecution*s [2008] ZACC 14; 2009 (1) SA 141 (CC) in paras 40-42 and also para 75 of the *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) judgment.

[8] Para 6 of the *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA).

his prosecution. For present purposes it is unnecessary to have regard to the other contestations.

[9] On 10 February 2009, more than a year after the new indictment was served, Mr Zuma's legal representatives, in an attempt to persuade the NPA to discontinue the prosecution, made written representations, purportedly for consideration by Mr Mpshe, in terms of the provisions of s 179(5)*(d)* of the Constitution[9] which provides:

'The National Director of Public Prosecutions -

. . .

(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:

(i) The accused person.

(ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant.'

[10] I pause to record that these representations were not made under oath. They were also not disclosed to the public, the court below or this Court, on the basis of confidentiality claimed by Mr Zuma and on the basis that they had been made on a 'without prejudice' basis. In resisting the DA's application in the court below to have the decision to discontinue the prosecution set aside, the principal deponent on behalf of the NPA, Mr William Hofmeyr, a Deputy National Director of Public Prosecutions and the head of the Asset Forfeiture Unit in the NPA, explained that the written representations on behalf of Mr Zuma covered the following topics:

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[9] Section 22(2)*(c)* of the NPA Act echoes the provisions of s 179(5)*(d)* of the Constitution. It reads as follows:

'In accordance with section 179 of the *Constitution*, the *National Director* –

. . .

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

This power of review vested in the National Director of Public Prosecutions has to be seen against the general power vested in the Prosecuting Authority in terms of s 179(2) of the Constitution, to institute criminal proceedings on behalf of the State and to carry out any necessary functions incidental thereto. One also has to have regard to the powers of Directors of Public Prosecutions set out in s 24(1) of the NPA Act which include the power to initiate and conduct criminal proceedings and functions incidental thereto. In addition, in terms of s 22(1) of the NPA Act, the NDPP, as the head of the prosecuting authority, has authority over the exercise of all the powers, and the performance of all the duties and functions conferred or imposed on or assigned to any member of the prosecuting authority by the Constitution, this Act or any other law.

(a) The merits of the prosecution;
(b) His intention to challenge the inclusion of racketeering charges in the indictment and whether this would inevitably lead to delays in the prosecution;
(c) Mr Zuma's contention that delays in finalising the prosecution and the trial would undermine his right to a fair trial;
(d) The financial costs of the prosecution;
(e) Policy and legal implications associated with prosecuting a sitting President.[10]
(f) The risks of political, economic and social instability, should the NPA proceed with its prosecution of Mr Zuma;
(g) The impact of the trial on the administration of justice. They argued that even if the NPA secured a conviction, the majority of South Africans would still believe that Mr Zuma had been treated unfairly;
(h) The existence of a political conspiracy, of which the NPA was part, to discredit Mr Zuma.

[11] On 20 February 2009, 10 days after they made written representations Mr Zuma's legal representatives, attorney Michael Hulley and his counsel Mr Kemp J Kemp SC, made oral representations to the NPA. The NPA team receiving the representations comprised Mr Mpshe and his deputies, including Mr Sibongile Mzinyathi, a Deputy Director of Public Prosecutions and head of the National Prosecutions Service in the National Director of Public Prosecution's office and Mr Thanda Mngwengwe, an investigating Director with the DSO at the time that charges were re-instituted and prosecutor under whose hand the indictment was filed and Acting Head: DSO at the time the charges were withdrawn.

[12] Mr Hofmeyr described how the oral representations consisted of two parts. The following are the relevant parts of his affidavit:
'241 On 20 February 2009, Michael Hulley and Kemp J Kemp SC (Zuma's legal representatives) made oral representations to the NPA. The NPA delegation comprised of Mpshe and his deputies, including Mzinyathi. Mngwengwe was also present and participated in the representations process.

[10] Although Mr Zuma was not the President of the country at the time, he was nominated by the ANC and expected to be elected as President after the general elections, scheduled to take place in May of that year (2009).

242 The oral representations consisted of two parts: the first part was a briefing which elaborated on the written representations on legal issues and the merits. The second part was a briefing on the allegations of a political conspiracy which included additional information that was not contained in the written representations that had been submitted.
243 Hulley disclosed that he was in possession of recordings of [telephone] conversations between McCarthy and various politicians, including Ngcuka, Mzi Khumalo (a close friend of Ngcuka) and Ronnie Kasrils (Minister of Intelligence at the time).
244 He maintained that the recordings proved that McCarthy manipulated the timing of the decision to charge Zuma and that he had deliberately delayed the decision until after Polokwane with one purpose in mind: to undermine Zuma's chances of being elected as ANC President at Polokwane. Following Zuma's election and Mbeki's defeat, McCarthy had moved with haste to charge Zuma.
245 Hulley and Kemp informed the NPA that they intended to apply for a permanent stay in the prosecution of Zuma if the NPA persisted with its prosecution. They warned that if they did, the NPA's involvement in a political campaign to discredit Zuma, as well as McCarthy's involvement in delaying the decision to prosecute, and the motive behind it, would become public.'

[13] Mr Hulley apparently also complained about the decision taken in 2003 by Mr Bulelani Ngcuka, the then National Director of Public Prosecutions (the NDPP), not to charge then Deputy President Zuma along with Mr Shabir Shaik whilst announcing publicly that there was a prima facie case against the former. Mr Zuma's legal representatives were adamant that individuals in the NPA, past and present, conspired to discredit him. They referred to the fact that Mr McCarthy, the head of the DSO at the time had used the resources of the NPA to source negative intelligence concerning Mr Zuma. To this end he had initiated the Browse Mole report which was supposedly based on intelligence gathered by private intelligence operatives.

[14] On 9 March 2009 Mr Hofmeyr and Mr Mzinyathi, instructed by Mr Mpshe, met with Mr Hulley and listened to the recordings of the telephone conversations referred to in para 12, in Mr Hofmeyr's office and made notes of what they had heard. Mr Hofmeyr specifically enquired of Mr Hulley whether any member of the prosecution team, excepting Mr McCarthy, was implicated in any campaign against or wrong-doing in relation to the prosecution of Mr Zuma. The answer was in the negative. At

this stage it is necessary to record that the prosecutors involved in the day-to-day running of the prosecution were Mr William Downer SC; Mr Anton Steynberg, a Deputy Director of Public Prosecutions from KwaZulu-Natal; Mr George Baloyi, a Deputy Director of Public Prosecutions from Gauteng; and Mr Johan Du Plooy, a Senior Special Investigator with the DSO. Mr Downer was involved in the prosecution of Mr Shaik and it follows that he was the lead prosecutor in relation to the prosecution of Mr Zuma. The prosecutors referred to above were given the code-name 'Project Bumiputera Team'. I shall hereafter refer to them collectively as the prosecution team.

[15] Mr Hulley asked Mr Hofmeyr when it could be expected of Mr Mpshe to respond to the representations made on behalf of Mr Zuma. He warned that if the prosecution continued he would advise Mr Zuma to bring an application for a permanent stay of proceedings. It will be recalled that such an application had been brought earlier but was not finally persisted in for the reason set out in para 6 above.

[16] Having received the representations and being concerned about the effect of the recordings referred to above, Mr Mpshe was anxious about how best to respond. The prosecution team compiled a memorandum in which they identified what they considered to be the shortcomings of the representations. First, they pointed to the fact that they had not been made under oath. They considered the representations to be self-serving and cautioned that they had to be viewed with circumspection. Second, and importantly, they asserted that the representations had not addressed the merits of the case against Mr Zuma. Third, they indicated that whilst Mr Zuma's legal representatives pointed to a political conspiracy on the part of Mr Ngcuka and Mr McCarthy, they did not implicate the prosecution team.

[17] The prosecution team consistently maintained the position set out in the preceding paragraph. Simply put, their view was that the evidence on which the charges were based was untainted and the prosecution should continue as the case against Mr Zuma was strong. This view was supported by eminent outside senior counsel who advised that insofar as fair trial issues might arise, in relation to allegations of prosecutorial impropriety, those should be dealt with by the trial court.

[18] When these issues were being debated within the NPA, Mr Mpshe was rightly concerned about whether the telephone conversations in issue had been lawfully intercepted and the recordings properly obtained. The following part of Mr Hofmeyr's affidavit, confirmed by Mr Mpshe in his affidavit, is relevant:

'The NIA had informed us that they were in possession of intercepted recordings of conversations between McCarthy and Ngcuka, obtained during the course of an investigation into the production and leaking of the Browse Mole report. We were shown a copy of a certificate, signed by a judge, authorising the interception of McCarthy's mobile phone.'

It is important to note that the certificate by the judge indicating the scope of the authorisation did not form part of the record and counsel for the NPA was unable to enlighten us in regard thereto. Furthermore, how Mr Zuma's legal representatives came to be in possession of what appears to be classified information obtained by the NIA was not explained. At a meeting between NPA management and the prosecution team held on 30 March 2009 the following appears:

'NIA is extremely cross about the info in Hulley's possession

Appears SAPS & NIA were listening to the tapes'

Suffice to say, it is troubling and warrants investigation by the relevant authorities.

[19] During the on-going discussions between Mr Mpshe, his deputies and the prosecution team concerning the oral representations made on behalf of Mr Zuma, it appears from the NPA's own notes that they were all agreed that the case against him was a strong one on the merits. At one stage during an NPA internal meeting, when the recordings and the allegations concerning manipulation and a conspiracy were being discussed, the following was stated:

'Case against Mr Zuma is watertight.'

They were also all agreed that the prosecution was untainted. Subsequent to the disclosure of the recordings the NPA's interactions with Mr McCarthy and Mr Ngcuka in relation to the allegations against them of a political conspiracy to thwart Mr Zuma from becoming the President of the country yielded nothing of any substance. Mr Ngcuka denied the allegations and Mr McCarthy informed them that he would not respond until he was supplied with details concerning the recordings.

[20] The material parts of notes taken at an internal meeting of the NPA on 1 April 2009, at which it was decided to discontinue the prosecution, read as follows:

'*Mpshe says after listening to the tapes he can't separate [McCarthy's] involvement, he got angry. He can't go on with this case. He has decided to drop the charges. We just need to prepare the motivation and how do we substantiate this decision. He says we have sufficient (information) to explain our decision.

- He has no doubt that the President may have been a player behind the curtains.
- He then goes on to the inferences that he draws about the involvement of Mbeki e.g the fact that you are on your own i.e you have no president to protect you.

*Silas is prepared to abide by your decision. If you are satisfied and can justify I cannot say I disagree with your decision. I will just need a lot of work to prepare on the motivation.

*[Mr Hofmeyr] says this is the most difficult decision. This is for legal reasons and for the organisation. This is the correct decision. This would lead the NPA to attack. This is not because we are weak. We need to think careful[ly] of what to say and how to package. We need to strategize on how to approach the team and need to have a proper discussion with them.

*I say I respect the decision and that the fact that I might have come to a different conclusion, we should be very careful on how to manage this, avoid a cover-up. I would not be part of the cover-up.

*Silas says there should be a valid and sound legal basis which he is not sure we have. This needs a lot of a research. There is also a possibility of a *nolle prosequi*. If you agree, you have to release the material, if not explain why not.

*Thanda [Mngwengwe] says he also supports it but it should be based on sound legal basis and we should be careful not to appear to be doing what McCarthy did [to] Zuma.

*In support of Silas' point about the nexus, what we did by going to NIA was actually to legitimise an illegitimate process by Hulley.

*I propose that we only use the Hulley tapes and not use the NIA tapes. Mpshe sort of agrees with me.

*[Mr Hofmeyr] disagrees with me and says there is no train smash by using the NIA tapes but only refer to them.

Agreed that the press release is on Monday at 11h00.'

It was agreed between the persons who attended that meeting that the prosecution team would not be informed until shortly before the public announcement was to be made.

[21] Unaware of what had transpired on 1 April 2009, the very next day the prosecution team addressed a further memorandum to Mr Mpshe, urging him to reject the representations made on behalf of Mr Zuma. The following paragraphs of that memorandum, bear repeating:

'6. We refer to our memorandum of 20 March [2009], in which we recorded counsel's advice. Counsel advised the NPA that if the decision to prosecute Mr Zuma in December 2007 was taken properly according to the merits of the evidence, then it would withstand Mr Zuma's conspiracy claims, whatever their merits. Counsel persist with their advice.

7. Given the importance for the present decision of the 2007 decision to prosecute, the Bumiputera team re-examined our notes, diaries and memoranda concerning the events of November and December 2007.

8. Having done so, we are satisfied that the position is quite clear. All the members of the Bumiputera team and all the NPA top management to whom our recommendations were presented, were unanimous that Mr Zuma should be charged. The consensus was also that racketeering charges in terms of POCA should be included. The consensus included the Acting NDPP. Indeed, on 14 December 2007, [Mr] Mpshe signed the POCA authorization for the racketeering charges.

9. The recommendations, discussions, motivations and decisions were founded on the merits of the evidence.

10. Despite this consensus concerning the correctness of the decision in principle, the Acting NDPP had not actually made the final decision to prosecute, and when, before he went on leave after 14 December [2007].

11. The delay can be attributed to a difference of approach between the Bumiputera team and the Acting NDPP regarding **when** the decision would be taken. The team recommended that the decision to prosecute should be taken and implemented immediately in early December or as soon as possible after that, as all obstacles to the prosecution had by then been removed and we were ready to prosecute. We codified our recommendations in our memorandum to the Acting NDPP dated 6 December 2007. Part of our motivation was (and remains) that political considerations, which might include the then impending Polokwane conference, should be left out of account.

12. [Mr] Mpshe decided nevertheless to delay his decision until after Polokwane. He told Adv Downer that he did not wish the NPA to be seen to be interfering in the Polokwane proceedings. Adv Downer noted that the Acting NDPP told him expressly that this decision was his ([Mr] Mpshe's) and his alone.

13. Adv McCarthy issued the instruction to Adv Downer after Polokwane on 21 December to proceed with issuing and serving the indictment and summonsing the accused. We do not

know what interaction between Advocates Mpshe and McCarthy preceded this instruction.' (Emphasis in the original.)

[22] Significantly, for reasons that will become clear later, Mr Hofmeyr, and not Mr Mpshe, responded to the memorandum by way of an e-mail that same day and suggested that the prosecution team's memorandum be amended to emphasise Mr McCarthy's central role in the decision to formally institute proceedings against Mr Zuma. The relevant part of the email reads as follows:

'At our meeting on 29 Nov it was decided that the Head of the DSO should take the decision. His subsequent discussion with [McCarthy] and you was that charges should be after 1 Jan. He says [McCarthy] phoned him about the 21st or 24th to say he wants to proceed now. He then informed him that he does not agree, that it should wait until after 1 Jan as previously agreed. But he said that since it was the Head of the DSO that must take the decision, it was up to [McCarthy] to make the decision.'

In a further e-mail Mr Hofmeyr said, amongst others:

'Clearly [McCarthy] made the decision to institute [the prosecution proceedings] between xmas and new year – without the support of the NDPP, but pretended that he had the support. As far as one can see, Tanda [Mngwengwe] was not involved in that decision – he was simply asked to sign.'

[23] The prosecution team maintained its stance and refused to make the changes suggested by Mr Hofmeyr. This is reflected in Mr Steynberg's response on behalf of the prosecution team to Mr Hofmeyr on 3 April 2009. Mr Steynberg responded as follows:

'[U]ltimately [Mpshe's] decision, in accordance with his in-principle decision of 29 November, whoever finally put their name to it. [Mpshe] has consistently taken responsibility for the decision since it was implemented. The only issue between him and [McCarthy], it now seems, was the timing of the decision . . . . The fact that [McCarthy] might have decided, for his own Machiavellian reasons, to implement the decision on 28 Dec instead of the following week/month does not in and of itself make it [McCarthy's] decision and not that of the ANDPP.'

It is necessary to note that material parts of the record that we may now have regard to, in relation to the decision to terminate the prosecution, flowed from the decisions of this Court in *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* [2012] ZASCA 15; 2012 (3) SA 486 (SCA) and *Zuma v*

Democratic Alliance & others [2014] ZASCA 101; [2014] 4 All SA 35 (SCA), in terms of which the disclosure of a reduced record of what was before Mr Mpshe when he made the decision was ordered.

[24] On 6 April 2009 Mr Mpshe announced publicly that he had made the decision to discontinue the prosecution of Mr Zuma and issued a detailed media statement providing the reasons for the decision. It is against those reasons, and those reasons alone, that the legality of Mr Mpshe's decision to terminate the prosecution is to be determined.[11] The statement recorded that representations had been received from Mr Zuma's legal representatives, both written and oral. The following part of the statement is important:

'The representations submitted by the legal representatives pertained to the following issues:

- The substantive merits
- The fair trial defences
- The practical implications and considerations of continued prosecution.
- The policy aspects militating against prosecution.

I need to state upfront that we could not find anything with regard to the first three grounds that militate against a continuation of the prosecution, and I therefore I do not intend to deal in depth with those three grounds.

I will focus on the fourth ground which I consider to be the most pertinent for purposes of my decision. I will now deal with the policy aspects militating against the prosecution.'

[25] The statement went on to record, under the heading 'possible abuse of process', that in the course of representations made on behalf of Mr Zuma, very serious allegations were made about manipulation of the NPA which were substantiated by the recordings of the telephone conversations. The statement noted that the NIA 'confirmed that it had legally obtained the recordings in the course of its investigation into the circumstances surrounding the production and leaking of the Browse Mole report'. Mr Mpshe's statement continued and dealt with what he said were 'legal considerations'. It focused on the independence of the office of the NDPP as constitutionally prescribed and had regard to 'two categories of abuse of process', namely:

[11] See *National Lotteries Board & others v South African Education and Environment Project* [2011] ZASCA 154; 2012 (4) SA 504 (SCA) at para 27.

‘a) a manipulation or misuse of the criminal justice process so as to deprive the accused of a protection provided by law or to take an unfair advantage over the accused;
b) where, on a balance of probability the accused has been, or will be prejudiced in the preparation or conduct of his defence or trial by either a delay or haste on the part of the prosecution which is unjustifiable. (*R v Derby Crown Court, ex Parte Brooks* [1985] 80 Cr. App. R 164, per Ormrod LJ).’

[26] Mr Mpshe framed the issue that he was confronted with as follows:
‘The issue can be formulated as follows:
The question is whether a legal or judicial process which is aimed at dispensing justice with impartiality and fairness to both parties and to the community which it serves should permit its processes to be abused and employed in a manner which gives rise to unfairness and/or injustice. (See *Jago v District Court of New South Wales*, [1989] 168 CLR 23 at 30, per Mason CJ).’

[27] In his statement Mr Mpshe stated that the framework within which ‘abuse of process’ had to be considered was as set out in the English case of *R v Latif* [1996] 1 WLR 104. Mr Mpshe’s statement proceeded along the following lines:
‘There will always be a tension between two extreme positions in that, if a trial is discontinued, the public perception would be that the criminal justice system condones improper conduct and malpractice by law enforcement agencies – and if a trial is discontinued the criminal justice system will incur the reproach that it is failing to protect the public from serious crime.’

[28] The statement continued with a reference to the following passages lifted from *Latif*:
‘“No single formulation will readily cover all cases, but there must be something so gravely wrong as to make it unconscionable that a trial should go forward . . .” (*R v Martin*, [1998] 1 All ER 193, at 216, per Lord Clyde).
“Something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all respects a regular proceeding.” (*R v Hui-Chi-Ming* [1992] 1 AC 34, at 57B, per Lord Hope)
“An abuse may occur through the actings of the prosecution, as by misusing or manipulating the process of the court. But it may also occur independently of any acts or omissions of the prosecution in the conduct of the trial itself.” (*Martin* (supra), at 215, per Lord Clyde).’

[29] The statement also cited what was said by Harms DP in *Zuma*, in paras 37-38:

'The court dealt at length with the non-contentious principle that the NPA must not be led by political considerations and that ministerial responsibility over the NPA does not imply a right to interfere with a decision to prosecute . . . . This, however, does need some contextualisation. A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent, something not alleged by Mr Zuma and which in any event can only be determined once criminal proceedings have been concluded. The motive behind the prosecution is irrelevant because, as Schreiner JA said in connection with arrests, the best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal. The same applies to prosecutions.

This does not, however, mean that the prosecution may use its powers for "ulterior purpose": To do so would breach the principle of legality. The facts in *Highstead Entertainment (Pty) Ltd t/a "The Club" v Minister of Law and Order* [1994 (1) SA 387 (C)] illustrate and explain the point. The police had confiscated machines belonging to Highstead for the purpose of charging it with gambling offences. They were intent on confiscating further machines. The object was not to use them as exhibits – they had enough exhibits already – but to put Highstead out of business. In other words, the confiscation had nothing to do with the intended prosecution and the power to confiscate was accordingly used for a purpose not authorised by the statute. This is what "ulterior purpose" in this context means. That is not the case before us. In the absence of evidence that the prosecution of Mr Zuma was not intended to obtain a conviction the reliance on this line of authority is misplaced as was the focus on motive.'

[30] The recordings of telephone calls between Mr McCarthy and Mr Ngcuka were central to Mr Mpshe's decision to discontinue the prosecution. According to the statement, they were considered to be crucial in that they reflected a 'manipulation of the prosecution process for ulterior purposes'. In the statement there were also references to discussions between Mr Ngcuka and Mr McCarthy, involving the timing of the filing of papers in the Constitutional Court in opposing the appeal against the decision of this Court in *Zuma.* This, it was suggested, related to achieving political ends and was indicative of a further abuse of the prosecution process. The statement also referred to an interception of Short Message Service (SMS)

exchanges between a private intelligence operative and Mr McCarthy, allegedly about achieving political ends in relation to the case against Mr Zuma.

[31] It is apparent from Mr Mpshe's statement, under the heading 'conclusion', that his decision to discontinue the prosecution was driven principally, if not exclusively, by what he considered to be Mr McCarthy's abuse of the prosecution process in relation to the timing of the service of the indictment. It is necessary to consider carefully the following parts of Mr Mpshe's statement:

'[A]n intolerable abuse has occurred which compels a discontinuation of the prosecution.

What actually triggers the abuse of process is a major determining factor, because it is that trigger which determines the purpose of the abuse and reveals whether the conduct in question is directed at a legitimate or illegitimate purpose.

In the present matter, the conduct consists *in the timing of the charging of the accused*. In general there would be nothing wrong in timing the charging of an accused person, provided that there is a legitimate prosecutorial purpose for it and the accused is aware, should be aware or has been made aware of such purpose. For example, the timing may be related to the availability of witnesses, or the introduction or leading of specific evidence to fit in with the chain of evidence.

It follows therefore that, *any timing of the charging of an accused person which is not aimed at serving a legitimate purpose is improper, irregular and an abuse of process*. A prosecutor who uses a legal process against an accused person to accomplish a purpose for which it is not designed abuses the criminal justice system and subjects the accused person to that abuse of process.

Abuse of process through conduct which perverts the judicial or legal process in order to accomplish an improper purpose offends against one's sense of justice.

The above implies the following:

Mr McCarthy used the legal process for a purpose outside and extraneous to the prosecution itself. Even if the prosecution itself as conducted by the prosecution team is not tainted, the fact that Mr McCarthy, who was head of the DSO, and was in charge of the matter at all times and managed it almost on a daily basis, manipulated the legal process for purposes outside and extraneous to the prosecution itself. It is not so much the *prosecution* itself that is tainted, but the legal process itself.

Mr McCarthy used the legal process for a purpose other than which the process was designed to serve, i.e. for collateral and illicit purposes. *It does not matter that the team acted properly, honestly, fairly and justly throughout. Mr McCarthy's conduct amounts to a serious abuse of process and offends one's sense of justice*.

What Mr McCarthy did was not simply being over-diligent in his pursuit of a case, it was pure abuse of process.

If Mr McCarthy's conduct offends one's sense of justice, it would be unfair as well as unjust to continue with the prosecution.

In the light of the above, I have come to the difficult conclusion that it is neither possible nor desirable for the NPA to continue with the prosecution of Mr Zuma.

It is a difficult decision because the NPA has expended considerable resources on this matter, and it has been conducted by a committed and dedicated team of prosecutors and investigators who have handled a difficult case with utmost professionalism and who have not been implicated in any misconduct.

Let me also state for the record that the prosecution team itself had recommended that the prosecution should continue even if the allegations are true, and that it should be left to a court of law to decide whether to stop the prosecution.

However, I believe that the NPA has a special duty, as one of the guardians of the Constitution and the Bill of Rights, to ensure that its conduct is at all times beyond reproach.

As an officer of the court I feel personally wronged and betrayed that on a number of occasions I have given evidence under oath that there has not been any meddling or manipulation of the process in this matter.

It is with a great regret that I have to say today that in relation to this case I can not see my way clear to go to court in future and give the nation this assurance.' (My emphasis.)

[32] On 14 April 2009 the prosecution team addressed a memorandum to Mr Mpshe and the management within his office, including Mr Hofmeyr. The purpose, inter alia, was to record their 'reservations regarding the decision [terminating the prosecution] and the process'. The 'reservations' in truth were a criticism of the decision to terminate the prosecution and reflected the disappointment of the prosecution team. The relevant parts read as follows:

'The Team wishes to place on record certain further concerns regarding the process and the merits of the decision:

5.1 The legal aspects of the motivation were not given to us for comment beforehand. In the few minutes before the press conference it was impossible to digest and comment on the legal justification given for the decision. Nor was there the opportunity utilised to run this reasoning past two counsel who were available and eminently qualified to advise on these issues.

5.2 In our view, the legal motivation provided for the decision is questionable and may be vulnerable on review. We do not now deem it necessary to undertake an exhaustive critique of the reasoning, since the die is now cast. However, we point out the following:

5.2.1 The reasoning relies heavily on the "abuse of process" doctrine in UK and Canadian law. There is no reference to any South African cases which endorse the application of this doctrine in South African law. We are concerned that this doctrine may have been inappropriately applied without due consideration of its applicability in our law.

5.2.2 In relying uncritically on this doctrine, we are concerned that a precedent may have been set which will come back to haunt the NPA in the future.

5.2.3 We are still of the view that the ultimate test should be **whether the abuse in question would prevent the accused from having a fair trial,** a question which was not even addressed.

5.2.4 The normal remedy for procedural unfairness, in circumstances where a trial has not even commenced, would be to **remedy the procedure**. We are of the view that the decision and the reasons given failed to draw the proper distinction between the procedure and the merits of the decision.

5.3 The two crucial questions that senior counsel both advised needed to be answered, were not. Namely, whether McCarthy's manipulation improperly influenced the ANDPP's decision and, if so, whether with *ex post facto* knowledge of all the circumstances he is still of the view that the decision to prosecute was correct. This failure appears to us to be fatal to the correctness of the decision.

5.4 The Team still does not have a settled, first-hand version, firstly, of the interaction between the ANDPP and McCarthy in the crucial periods leading up to the ANDPP's instruction on 6 December 2007 to [Mr Downer] that the ANDPP has decided to delay his decision/announcement until after Polokwane so as not to prejudice/ or to be perceived to be prejudicing JZ's election at Polokwane. Secondly, leading up to McCarthy's instruction to [Mr Downer] on 21 December 2007 to proceed with summons immediately, and how the ANDPP's confirmation under oath that it was his decision, in consultation with the ID and the Head: DSO, and the Team, to prosecute on 27 December 2007, fits with these events.'**(**Emphasis in original.)

[33] Mr Hofmeyr was the most vociferous of those within the NPA management in advancing the argument that the prosecution should be discontinued and, as referred to above, was the principal deponent in opposing the DA's application. The case sought to be made out by him was that it was Mr McCarthy that had influenced Mr Mpshe in respect of the timing of the service of the indictment. The timing of the

service of the indictment was in relation to the African National Congress' (ANC) national elective conference to be held from 16-20 December 2007 at Polokwane. Mr Zuma was a candidate to be elected President of the ANC, with the ultimate purpose of being elected the President of South Africa. According to Mr Hofmeyr the telephone conversations referred to above prove that Mr McCarthy and his co-conspirators in favour of former President Mbeki and against Mr Zuma were concerned that serving the indictment before the Polokwane conference would enhance Mr Zuma's chances of being elected. It was suggested further that the telephone conversations show that after Mr Mbeki's devastating defeat at the Polokwane conference, Mr McCarthy and his co-conspirators considered that serving the indictment after the conference would now be the only way of saving the country and ousting Mr Zuma. It is in this regard that Mr McCarthy is said to have influenced the timing of the service of the indictment. It was this conduct that Mr Hofmeyr and Mr Mpshe contended was so egregious that it amounted to abuse of process and justified the discontinuation of the prosecution. Mr McCarthy's co-conspirators were said by Mr Hofmeyr, to include Mr Ngcuka and Mr Ronnie Kasrils, the former Minister of Intelligence Services. It was submitted that they acted in collusion with former President Mbeki. Whether Mr Hofmeyr's explanations and conclusions are borne out by the objective evidence and whether they could rightly have been an appropriate basis for Mr Mpshe's decision to discontinue the prosecution, are issues for adjudication in the appeals, in the event of the applications for leave to appeal being successful.

[34] In relation to Mr McCarthy's alleged role in the timing of the service of the indictment, it is necessary to record what Mr Hofmeyr himself stated in the NPA's answering affidavit, namely, that the indictment itself was only finalised on 27 December 2007. According to Mr Hofmeyr, McCarthy had originally wanted the indictment to be served on 24 December 2007, but this had proved impossible to do because a mistake in the indictment needed to be corrected. Mr Hofmeyr stated that an additional problem was that the sheriff who was to serve the indictment required additional copies and the prosecution team could not get everything done on time. In responding to an assertion in the DA's supplementary founding affidavit, Mr Hofmeyr said the following:

'551 The NPA respondents admit that the prosecution could only be formally instituted once the indictment had been signed and served on Zuma.
552 The date of signature of the indictment and the date on which it was served should not be confused with the date on which the decision to prosecute was made. The decision to prosecute Zuma was taken on 29 November 2007. The authorisation to include POCA charges in the indictment was signed on 14 December 2007. Mngwengwe signed the indictment on 27 December 2007.
553 The NPA respondents deny that Zuma's involvement as a contender for the President of the ANC was a relevant consideration or that it impacted on the finalisation of the charge at all.'

This contradicts his earlier assertion that the timing of the service of the indictment was manipulated by Mr McCarthy. It is clear that the circumstances set out above are what dictated the timing of the service of the indictment.

[35] For reasons that will become clear later in this judgment, it is worth noting that counsel on behalf of the NPA wanted it placed on record that no member of its present legal team had any hand in the drafting and finalisation of the affidavits filed on behalf of the NPA.

The court below

[36] Ledwaba DJP, in his judgment in the court below, (comprising three members – the other two being Pretorius and Mothle JJ) had regard to the DA's rationality challenge and the response to it by the ANDPP and the head of the DSO. He took into account Mr Mpshe's statement to the media, in which he conceded that the substantive merits of the case against Mr Zuma were strong and that fair trial rights were not affected. The court below had regard to Mr Mpshe's assertion that the decision to discontinue the prosecution was a response to the alleged abuse of process by Mr McCarthy, when he manipulated the timing of the service of the indictment on Mr Zuma. Ledwaba DJP observed that the words used by Mr Mpshe in his media statement bore a striking resemblance to those adopted by Seagroatt J of the High Court of Hong Kong in the matter of *HKSAR v Lee Ming Tee & another*.[12] Similarly, the DA in an annexure to its heads of argument pointed to several instances in which passages in Mr Mpshe's media statement were almost identical to

[12] *HKSAR v Lee Ming Tee & another* [2001] HKCFA 32; (2001) 4 HKCFAR 133; FACC 8/2000 (22 March 2001).

passages from that judgment. The quoted parts from Mr Mpshe's media statement in paras 25 and 26 above are two such examples. Mr Mpshe's media statement did not mention nor does it appear that he took into consideration that the high court decision in *HKSAR* was overturned on appeal. The appeal court in that case said the following:

'Although the question is debatable, the better view is that an abuse of process does not exist independently of, and antecedently to, the exercise of judicial discretion. The judicial decision that there is an abuse of process which requires the grant of a stay is itself the result of the exercise of a judicial discretion. It is for the judge to weigh countervailing considerations of policy and justice and then, in the exercise of the discretion, decide whether there is an abuse of process which requires a stay.'[13]

[37] The court below noted that *Latif* and the appeal court in *HKSAR* had held that a determination of whether an abuse of process justified a stay of prosecution was an exercise for a court of law and could not occur by way of an extra-judicial pronouncement. In the view of the court below Mr Mpshe 'surprisingly' failed to mention that fact in his media statement.

[38] The court below found that Mr Mpshe had disregarded the prosecution team's recommendation that even if the allegations regarding Mr McCarthy were true, the decision to halt the prosecution had to be made by the trial court. The court below agreed with the view of the prosecution team and held that it was for a court of law to deal with allegations of abuse of process.

[39] Ledwaba DJP also had regard to the dictum of this Court in *Zuma* to the effect that a prosecution is not wrongful merely because it is brought for an improper purpose and that it would only be wrongful if, in addition, reasonable and probable grounds of prosecuting are absent. Ledwaba DJP stated that Mr Zuma did not allege that there were no reasonable or probable grounds for prosecution.

[40] The court below considered Mr Hofmeyr's admission that Mr Mpshe had told Mr Downer that the decision about the timing of the service of the indictment had

[13] *HKSAR v LEE Ming Tee and Anor* [2003] HKCFA 34; (2003) 6 HKCFAR 336 in para 184; FACC 1/2003 (22 August 2003).

been his (Mr Mpshe's) alone. It weighed this against what Mr Mpshe stated later in his supplementary affidavit, namely, that he had been untruthful in communicating this to Mr Downer. It will be recalled that Mr Hofmeyr was the principal deponent on behalf of the NPA rather than Mr Mpshe, the decision-maker at the centre of the present dispute. Mr Mpshe initially provided a very brief confirmatory affidavit and later, only after the DA's replying affidavit had been filed, did Mr Mpshe provide a further supplementary affidavit. The court below had regard to the following parts of that supplementary affidavit:

'16. McCarthy told me that it would be harmful to the NPA, particularly the DSO which was under severe attack at the time, if Zuma was prosecuted before the Polokwane conference. He believed that if Zuma were to be charged before the Polokwane conference, it would destabilise the DSO, the NPA and the country.

24. I met with the Minister during the evening of 5 December 2007. I raised with her the issue that the announcement would possibly be delayed. It was clear to me that she agreed that the prosecution should be delayed. She was concerned that the NPA would be perceived as targeting Zuma ahead of the Polokwane conference.

25. The following day (6 December 2007) I telephoned Downer to inform him of the decision to delay the Zuma prosecution. I told Downer that I had taken the decision to postpone the prosecution independently. I told him that it was my decision and my decision alone. I did so because Downer was aware that I had met the Minister the previous day. I did not want him to think that the Minister had interfered or that the Minister had unduly influenced me.

26. I did not tell Downer that it was McCarthy who had persuaded me that it was necessary and that delaying the prosecution was the better option for the NPA. I knew that the decision to delay the prosecution was likely to be unpopular. I knew that Downer would be unhappy with that decision.

27. As head of the NPA, I felt that I had to support the decision. McCarthy had already made the decision. I did not want to blame it on others when I knew it was likely to be unpopular. As expected, Downer was angry about the decision to postpone the prosecution.'

[41] Ledwaba DJP took a dim view of the contradictory versions supplied by the NPA as to who had taken the decision about the timing of the service of the indictment. In paras 76 and 77 of its judgment, the court below dealt with what it considered to be a lack of an explanation by the NPA of how Mr McCarthy's alleged influence to have the service of the indictment delayed would have disadvantaged Mr Zuma:

'76. Apart from the contradictory versions as to who took the decision to delay the service of the indictment and for what reason, there has been no attempt in the papers to explain how Mr McCarthy's alleged influence and lobbying to have the service of the indictment delayed, would have disadvantaged Mr Zuma. It seems to this Court that it would be logical to assert the view that the service of the indictment *before* the Polokwane conference, would have thwarted the ambitions of Mr Zuma to assume the leadership of the ANC.

77. However, it is not indicated in the papers before us how the service of the indictment *after* the Polokwane Conference, as allegedly advocated by Mr McCarthy, would have been a tool to influence the outcome of elections which, as logic dictates, would by then have occurred. Indeed it so happened that the indictment was served on Mr Zuma after he had been elected President of the ANC.' (Emphasis in original.)

It will be recalled that there was a suggestion by Mr Hofmeyr based on the recorded conversations that service on Mr Zuma after the Polokwane conference was considered by Mr McCarthy and his co-conspirators as the only way of dislodging him. There were arguments for and against service of the indictment before or after the Polokwane conference timeline, none of which were decisive in relation to the outcome that Mr McCarthy might have intended to achieve.

[42] Other references by Mr Hofmeyr to Mr McCarthy's conduct in relation to the Browse Mole report, were considered by the court below to be unconnected to the prosecution or the service of the indictment. The court below saw these references as diversionary and irrelevant. In any event, so the court observed, the reason supplied by Mr Mpshe for the discontinuation of the prosecution was the timing of the service of the indictment and not anything else. It held that there was thus no rational link between Mr McCarthy's alleged conduct and Mr Mpshe's decision to discontinue the prosecution.

[43] Ledwaba DJP found it disconcerting that Mr Downer and the other members of the prosecution team were kept in the dark when the decision to discontinue the prosecution was ultimately taken. The court could not comprehend the need for secrecy. In the view of Ledwaba DJP, Mr Mpshe's acknowledged feelings of anger and betrayal caused him to act impulsively and irrationally. For all these reasons the court below reviewed and set aside the decision to discontinue the prosecution. The following part of para 92 of the judgment of the court below was initially considered

by counsel on behalf of both the NPA and Mr Zuma to be an unwarranted incursion by the court into territory that rightly belonged to the NPA:

'It is thus our view that the envisaged prosecution against Mr Zuma was not tainted by the allegations against Mr McCarthy. Mr Zuma should face the charges as outlined in the indictment.'

The position adopted by Mr Zuma and the NPA before the latter filed supplementary heads and before the hearing of the appeal

[44] The heads of argument filed in this Court on behalf of Mr Zuma, in line with what was stated emphatically and repeatedly by Mr Hofmeyr, was that Mr McCarthy's manipulation in relation to the timing of the service of the indictment was of such a nature that it amounted to an egregious prosecutorial abuse of process. It was submitted that the timing of the service of the indictment had been driven by Mr McCarthy's aim to hamper Mr Zuma's presidential prospects, both at ANC and State level. It defended Mr Mpshe's decision to terminate the prosecution in the following terms:

'The defence of the Decision relies on the proposition that prosecutorial abuse can serve as the premises of a permanent stay. This submission is made with reference to the rationality debate.'

Essentially, the contention on behalf of Mr Zuma was that although the prosecutorial discretion to prosecute or desist was not the mirror image of the jurisprudence on a permanent stay, the relationship between the two was one relied on in relation to the rationality of Mr Mpshe's decision. The following appears in the heads on behalf of Mr Zuma:

'Whilst the DA contended that the Zuma case conflated the review with a permanent stay proceeding, the relevance of such jurisprudence is the following:

a. If a NDPP's exercise of discretion invokes circumstances which approximate those which have moved Courts in comparative systems to grant permanent stays, any imputation of irrationality suffers greatly.

b. It is indeed so that the bar for permanent stays by the Courts is set at different heights. At present the bar in English jurisprudence is set high.'

[45] In the present case, so it was contended, in the light of the nature of the prosecutorial abuse complained of, namely, the wielding of prosecutorial powers for

improper political purposes, Mr Mpshe had acted rationally in deciding to discontinue the prosecution. The following appears in the heads of argument:

'Where the abuse is designed to impact on who holds the highest office in the land and affect the political system of choice, and is executed by very powerful functionaries perceived to interact closely with the office of the President, a blunt cessation of prosecution will more likely restore faith in than bring into [disrepute], the Prosecution Authority.'

[46] Finally, it was submitted that the NDPP has an unfettered and wide discretion whether to prosecute in any given instance. With reference to *Kaunda & others v President of the Republic of South Africa & others* 2005 (4) SA 235 (CC), it was contended that a decision not to prosecute can be reviewed only on the very narrow ground that it offends the principle of legality, which would include irrational decision-making. Counsel on behalf of Mr Zuma relied on the 'paramountcy of prosecutorial independence' and argued that a bona fide and honest decision by a prosecution authority has 'very considerable immunity for review'.

[47] The court below was criticised by the NPA for its finding that Mr Mpshe acted hastily in making his decision. Furthermore, it was submitted that the court below had erred in holding that Mr Mpshe ought to have left it to the court to adjudicate the complaint of abuse of process. In respect of Mr Mpshe's reliance on the *HKSAR* and *Latif* cases, the following is stated on behalf of the NPA:

'It is submitted that the Court *a quo* erred in making the facts of the HKSAR and Latif cases analogous to the present case, and in finding that Mpshe acted "disingenuously". Both of the aforementioned foreign judgments concerned an application by the accused in each case for a stay of prosecution. The applications for a stay occurred during the trial of the respective accused.' (Emphasis in original.)

[48] The case for the NPA was that what is set out above is a far cry from the position where the prosecution itself believes that there has been an abuse of process. In such an event, so it was submitted, it would be acting in bad faith for a prosecutor to continue to prepare on the merits of a case, without informing the accused of the abuse which it believes justified the termination of the prosecution. The NPA relied on the decision in *Regina (Corner House Research & others) v Director of the Serious Fraud Office (JUSTICE intervening)* [2008] 3 WLR 568 which,

in its view, recognised the existence of a broad discretion in prosecuting authorities. That, so it was argued, reflected a long-standing practice based on the recognition that while there is a strong public interest in the enforcement of the criminal law where the evidence to secure a conviction exists or may be found, there are exceptional cases in which countervailing public interests require restraint.

[49] The NPA contended that the media statement by Mr Mpshe and the answering affidavit of Mr Hofmeyr provided the factual justification for the discontinuation of the prosecution. It was submitted on behalf of the NPA that neither the court below nor this Court could, in motion proceedings, find that Mr Mpshe's discretion was exercised for a collateral purpose or for improper or irrelevant reasons.

[50] The NPA, in its heads of argument, submitted that the statement by the court below that Mr Zuma should now face the charges outlined in the indictment was impermissible and infringed upon the doctrine of the separation of powers.

[51] It was submitted that abuse of process issues go beyond fair trial issues and that the abuse in this case 'is among the most egregious imaginable'. The heads of argument went on to state:

'What could be more institutionally damaging than an attempt – by manipulating the timing of service of the indictment – to swing an election in favour of a political aspirant seeking high office. This seems by far the most momentous form of prosecutorial abuse.'

It was submitted that the court below erred in finding that there was no rational connection between the need to protect the integrity of the NPA and the decision to discontinue the prosecution against Mr Zuma.

[52] On behalf of the NPA, it was contended that the court below should have found that Mr McCarthy's conduct overall, was such that it clearly evidences the manipulation of the prosecutorial process for political ends, compelling Mr Mpshe to discontinue the prosecution.

[53] Finally, it was contended that there had indeed been an attempt in the papers to explain how Mr McCarthy's conduct in delaying the service of the indictment would

disadvantage Mr Zuma. For this proposition they relied on the following statement by Mr Hofmeyr:

'Before the Polokwane conference, Ngcuka and others opposed to Zuma, debated amongst themselves whether or not Mbeki's chances of retaining the ANC Presidency would be strengthened by delaying the prosecution. Correctly or incorrectly, they believed that Mbeki's chances of defeating Zuma would be strengthened if the prosecution were to be delayed. McCarthy did as he was asked to do although it was clear that at times, he did not agree with Ngcuka's instructions. Ultimately, McCarthy ensured that the prosecution was delayed. He did so for one reason only, to bolster Mbeki's chances of successfully defeating Zuma.'

It was submitted that it is clear that McCarthy and Ngcuka believed that the service of the indictment shortly before the Polokwane conference would provoke a backlash from those who would consider it part of a plot to besmirch Mr Zuma. That would, so they believed, move delegates to rally around Mr Zuma. That they may have miscalculated does not detract from the fact that Mr McCarthy persuaded Mr Mpshe to delay the service of the indictment which he believed would disadvantage the then President Mbeki if the NPA did not hold back.

Additional heads of argument on behalf of the NPA

[54] Just a little over a week before the present applications for leave to appeal were to be heard, the NPA filed 'additional heads of argument'. It is necessary to set out paras 1-7 of their heads in their entirety:

'1. These additional heads of argument are submitted to clarify submissions made in the main heads of argument concerning the applicability of section 179(5)(d) of the Constitution.

2. The applicants accept that Mokotedi Mpshe ("Mpshe"), as the Acting NDPP, could not rely upon s 179(5)(d) in deciding to discontinue the prosecution of Mr Zuma. In this regard:

2.1 This Court found in National Director of Public Prosecutions v Zuma [2009 (2) SA 277 (SCA) 285] that it was [Mr] Mpshe who decided on 27 December 2007 to indict Mr Zuma.

2.2 This Court also held in the same case that s 179(5)(d) does not allow a review by the NDPP of his own earlier decisions but is limited to a review of a decision made by a DPP or some other prosecutor for whom a DPP is responsible.

2.3 In the result, the decision by Mpshe in 2009 to review his earlier decision taken in 2007 to indict Mr Zuma, could not be carried out in terms of s 179(5)(d).

3. However, s 179(2) of the Constitution provides the following:

"179(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings."

4. In the NDPP v Zuma case, Harms DP said:

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

5. These incidental *functions* would include the power of prosecutors to reconsider a decision to prosecute or not to prosecute.

6. Thus where the decision to prosecute is taken by the NDPP, as permitted in terms of s 22(9) of the NPA Act, the NDPP may reconsider his or her own decision in terms of s 179(2).

7. It is submitted that although Mpshe believed that he was acting in terms of s 179(5)(d), which he was empowered to do, his decision is not invalidated thereby, because he was in any event vested with the power to reconsider in terms of s 179(2).'

[55] For the proposition set out in para 7 of the additional heads, counsel on behalf of Mr Zuma relied *on Latib v Administrator, Transvaal* 1969 (3) SA 186 (T) and *Howick District Landowners Association v Umgeni Municipality* 2007 (1) SA 206 (SCA). In *Howick* the validity of a council resolution introducing a rates assessment referred to the incorrect provision of a statute under which it purported to act. It was held that the resolution was not null and void since the authority that the council wanted to invoke was plain. In *Latib* the administrator of the then Province of the Transvaal, in issuing an Administrator's Notice declaring a certain route to be a public main road and throughway, inadvertently failed to mention a particular subsection of a section of a Roads Ordinance under which he had made the declaration. The court in that case held that since he had indeed acted under the appropriate empowering legislation, the notice was not invalidated because of the administrator's oversight. In *Latib*, Galgut J said the following:[14]

'It seems clear, therefore, that, where there is no direction in the statute requiring that the section in terms of which proclamation is made should be mentioned, then, even though it is desirable, nevertheless there is no need to mention the section, and, further, that, provided that the enabling statute grants the power to make the proclamation, the fact that it is said to be made under the wrong section will not invalidate the notice.'

[14] At 190H-191A.

[56] In its additional heads, counsel on behalf of the NPA sought to distinguish the decision of the Constitutional Court in *Minister of Education v Harris* [2001] ZACC 25; 2001 (4) SA 1297 (CC). In that case the Minister had invoked s 3(4)*(i)* of the National Education Policy Act 27 of 1996 to determine the age requirements for the admission of learners to an independent school. It was a power he did not have and the court held that to be so. It was submitted on behalf of the NPA that since Mr Mpshe in any event had the power in terms of s 179(2) of the Constitution to carry out any necessary functions incidental to instituting criminal proceedings, it was open to Mr Mpshe to reconsider his own decision in light thereof.

The applications for leave to appeal

[57] The two applications for leave to appeal, as stated at the beginning of this judgment, were referred for oral argument in terms of the provisions of s 17(2)*(d)* of the Superior Courts Act. Section 17(1)*(a)* provides*:*

'(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a)(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.'

The present case raises issues of public importance. As previously mentioned, it is part of a longstanding litigation saga that involves the President of the Republic of South Africa. It concerns the office of the NDPP and its powers and obligations. Furthermore, the conduct of prosecutors within the NPA falls to be considered. For these reasons, apart from the question of prospects of success, leave should be granted in terms of the provision of s 17(1)*(a)*(ii). In this regard see *Minister of Justice & others v Southern African Litigation Centre & others* [2016] ZASCA 17; 2016 (3) SA 317 (SCA)[15] It is now necessary to turn our attention to the merits of the decision to discontinue the prosecution.

A sudden and dramatic change of stance

[58] At the commencement of proceedings before us, the following was put to counsel on behalf of Mr Zuma: In *Harris* the Constitutional Court had regard to *Latib*

[15] See paras 22-23. See also Van Loggerenberg *Erasmus Superior Court Practice* vol. 1 (service issue 4) at A2-56.

and the dictum set out in para 55 above, but went on to distinguish the facts of that case from the case it was considering. The Constitutional Court was dealing with a decision-maker who had consciously made an election to rely on a statutory provision found wanting.[16] *Harris* was not dealing with an inadvertent or incorrect reference to a statutory power and where the person exercising the statutory power had indeed acted consciously under the proper empowering statute. It was dealing with the obverse, as are we. Furthermore, in *Liebenberg NO v Bergrivier Municipality & others* [2013] ZACC 16; 2013 (5) SA 246 (CC), the Constitutional Court was equally emphatic concerning the invocation and reliance on a statutory power that was inapposite. Jafta J, in a minority judgment, in differing with the majority on the construction of a particular word in a statutory provision, set out the law in this regard. In para 93 the following appears:

'In our law, administrative functions performed in terms of incorrect provisions are invalid, even if the functionary is empowered to perform the function concerned by another provision. In accordance with this principle, where a functionary deliberately chooses a provision in terms of which it performs an administrative function but it turns out that the chosen provision does not provide authority, the function cannot be saved from invalidity by the existence of authority in a different provision.'

[59] Faced with this seemingly insuperable difficulty in relation to Mr Mpshe's incorrect invocation of s 179(5)*(d)* of the Constitution in reviewing the decision to discontinue the prosecution, counsel on behalf of the NPA conceded that Mr Mpshe's decision to discontinue the prosecution was liable to be set aside

[60] Counsel on behalf of Mr Zuma, in turn, summarily also conceded that the decision to discontinue the prosecution was liable to be set aside and did not attempt to argue against the applicability of the Constitutional Court decisions referred to in paras 56 and 58 above. Mr Kemp, on behalf of Mr Zuma, accepted that the decision by Mr Mpshe was irrational and that a rational decision needed to be made.

[61] Initially, counsel on behalf of the NPA argued that the statement by the court below, that Mr Zuma should now face the charges set out in the indictment offended against the doctrine of the separation of powers. When it was put to him, that in the

[16] In this regard, see para 17 and 18 of *Harris*.

event of a finding that the decision to discontinue the prosecution was liable to be set aside, the ineluctable consequence was that the decision to prosecute made by Mr Mpshe on 29 November 2007 was revived, he was constrained to concede that this was so.

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

Conclusions

[63] The problems for the NPA and for Mr Zuma go way beyond those relating to the concessions made on the basis referred to above. It is unsettling that different law enforcement agencies of government appear to be spying upon each other. Insofar as the tape recordings of the telephone conversations are concerned, other than the hearsay evidence of the communications between the members of the NIA and the NPA, we have no admissible substantiation concerning the authenticity or accuracy of the recordings. The alleged judge's certificate, which would have indicated the breadth of the authorisation to record telephone conversations, was not made available to the court below or to us. In terms of s 16 of the Regulation of Interception of Communications and Provisions of Communication-Related Information Act 70 of 2002, an application for an interception direction has to be made to a judge.[17] The applicant has to comply with the requirements of that section. Section 16 has very specific requirements, quite clearly intended to ensure that there is no infringement of rights other than in the manner statutorily provided for. Section 43 of that Act enables a disclosure of the contents of intercepted communications to another law enforcement officer, only to the extent that such disclosure is necessary for the proper performance of the official duties of the authorised person, or the law enforcement officer receiving the disclosure. Section 42 prohibits the disclosure of

[17] Interception direction is defined in s 1 as 'a direction issued under section 16(4) or 18(3)(a) and which authorises the interception, at any place in the Republic, of any communication in the course of its occurrence or transmission, and includes an oral interception direction issued under s 23(7)'.

information, save in circumstances set out thereunder. There is no indication of how the recordings came to be in the possession of Mr Zuma's legal team. There are heavy penalties prescribed in relation to contraventions of the Act including those related to the prohibition against disclosure.[18] The question of the admissibility of the recordings as evidence and the issues referred to above was never seriously addressed by the NPA. It ought to have been an issue to which the NPA paid greater and focused attention. Instead, the NPA allowed itself to be cowed into submission by the threat of the use of the recordings, the legality of the possession of which is doubtful

[64] Furthermore, this Court raised with counsel on behalf of the NPA our concerns about the nature and substance of Mr Hofmeyr's affidavit. We also enquired of counsel why Mr Mpshe, the decision maker in the present case, was not the principal deponent and why he only made a 'supplementary confirmatory affidavit' after the DA had provided its replying affidavit. Counsel on behalf of the NPA accepted that what was suggested to him was preferable and more appropriate.

[65] Early on in his affidavit, Mr Hofmeyr stated that he was tasked by Mr Mpshe to investigate Mr Zuma's claims of a political conspiracy which included 'but were not limited' to allegations that Mr McCarthy manipulated the timing of the service of the prosecution. A careful consideration of Mr Hofmeyr's affidavit reveals that much of it is based on conjecture and supposition. What follows are a few examples of how careful one has to be in assessing his assertions. In para 23 of his answering affidavit on behalf of the NPA the following is stated:

'Until he listened to the recordings himself, Mpshe had been unaware of how deep McCarthy's association [with] Ngcuka still was. Most senior managers in the NPA, including Mpshe, knew that McCarthy and Ngcuka were still friendly. We were unaware of the extent to which Ngcuka, using McCarthy as his proxy, was involved in directing the Zuma prosecution, and possibly other investigations and prosecutions. It was Ngcuka, working with others, and not McCarthy, who ultimately decided when Zuma should be charged.'

[66] In the very next paragraph he stated the following:

[18] See s 51.

'*My investigations revealed* that McCarthy met regularly with Ronnie Kasrils . . ., former Minister of Intelligence at critical points before and after the Polokwane conference. They spoke in guarded terms and were careful not to reveal too much information over the telephone. It appears further (from the text of their conversations) that Kasrils acted as a conduit for McCarthy to communicate with Mbeki without arousing any suspicion.' (My emphasis.)

[67] In para 26 of Hofmeyr's affidavit the following appears:

'Both Kasrils and Pienaar were close to Mbeki. *As far as I am concerned*, McCarthy's interaction with them at critical points during the Zuma investigation, coupled with the tone and content of their discussions . . ., demonstrated how closely McCarthy identified with Mbeki's political aspirations. It shows that he was willing to discuss sensitive NPA investigations with them and take direction from them on what to do. As far as I was concerned, Kasrils was a confidant with whom McCarthy could discuss strategy about the Zuma prosecution. *I believe* he also served as an intermediary between McCarthy and Mbeki.' (My emphasis.)

[68] At the end of para 30 of Mr Hofmeyr's affidavit he stated the following:

'He did so for one reason only, to bolster Mbeki's chances of successfully defeating Zuma.'

[69] In para 41 the following appears:

'*It was rumoured* that Mbeki consulted Ngcuka on Pikoli's suspension. Ngcuka was present at a meeting between Mbeki and the Minister, on 11 March 2007 at which Pikoli briefed Mbeki on the Selebi prosecution. We were very surprised to learn that he had been present.' (My emphasis.)

[70] In para 43, Mr Hofmeyr stated:

'*My own investigations* into Zuma's allegations *showed conclusively* that Ngcuka and McCarthy had made politically motivated decisions about prosecutions in at least two other high profile cases. Both decisions were intended to assist Mbeki. The NPA's policy does not permit me to disclose the identities of the two individuals because of the harm that it may cause them.' (My emphasis.)

[71] Mr Hofmeyr went on to state, in para 45:

'Mpshe was deeply concerned about evidence of political interference and manipulation of NPA cases. *Although my investigations had begun to expose* the extent of this political

interference, especially in relation to McCarthy's involvement in the Browse Mole report and the Selebi investigation, at the time of the press conference, my investigations remained incomplete.' (My emphasis.)

[72] With reference to Mr Mpshe's press statement he said the following:

'Mpshe's press statement points out that it had not been possible to deal fully with all of these aspects and come to firm conclusions. He was satisfied that there was sufficient evidence for him to conclude that Zuma's prosecution had been compromised and that McCarthy had behaved improperly. What he did not know was the extent to which McCarthy had compromised other cases he was responsible for.'

[73] As can be seen, Mr Hofmeyr did not provide facts from which he or this Court could draw such damning conclusions against any of the individuals mentioned. He speaks of his investigations, the ambit and nature of which are not disclosed. He refers to rumours and tells us what he believes. He makes statements such as 'as far as I am concerned'. This is a wholly unsatisfactory approach. He refers to unconnected political activity which in my view was resorted to in order to create atmosphere against Mr McCarthy and those he considered to be co-conspirators.

[74] The position Mr Hofmeyr adopted in para 58 of his affidavit was the one propounded to the world by Mr Mpshe, when he announced the decision to discontinue the prosecution:

'As emphasised by Mpshe during the press conference held on 6 April 2009, McCarthy used the legal process and his statutory powers as head of the DSO for ulterior and illicit purposes. It does not matter that other members of the prosecution team acted properly, honestly, fairly and justly throughout the process. McCarthy's conduct amounted to a serious abuse of his power for an ulterior purpose. For Mpshe, his behaviour was an affront to his sense of justice.'

[75] Mr Hofmeyr was intent on imputing the decision to prosecute Mr Zuma to Mr McCarthy. He sought to dispel as untrue the statement made on behalf of the NPA in an affidavit in other litigation, that Mr Mpshe had made the decision to prosecute. This was done notwithstanding that this Court in *Zuma* had decided on the evidence placed before it that Mr Mpshe had taken the decision to prosecute Mr Zuma. In his affidavit in the present case, Mr Hofmeyr claimed that Mr McCarthy had taken the

decision to prosecute, almost immediately before turning to assert Mr Mpshe's powers, purportedly in terms of s 179(5)*(d)* of the Constitution, to review a decision of a Director of Public Prosecution (DPP). The DPP he was referring to was Mr McCarthy. One is left with the impression that Mr Hofmeyr took up this position because he was intent on legitimising Mr Mpshe's decision to discontinue the prosecution. It appears contrived.

[76] In resisting the DA's application and supporting the decision to discontinue the prosecution on the basis of Mr McCarthy's manipulation of the timing of the service of the indictment, Mr Hofmeyr attempted to place the focus on Mr McCarthy being responsible for the decision to delay the service of the indictment, until after the Polokwane conference. However, as already alluded to, he contradictorily stated the following in his affidavit:

'On 6 December 2007 Mpshe called Downer for the second time. He told Downer that although he was satisfied with the draft indictment, *he had decided* to delay the prosecution until the following year because he did not want to be seen to be interfering with "the Polokwane process", particularly in light of President Mbeki's call for calm and stability prior to Polokwane.

Mpshe told Downer that he had also discussed the matter with the Minister and that his conversation with her had given him further "insight" into why it was *necessary to delay the prosecution*. Downer was understandably angry. He told him that by now the NPA should have learned not to take instructions from the Minister. Downer insisted that the prosecution team would not support any decision to delay the prosecution. He emphasised the importance of making an announcement by no later than 7 December 2007, the date on which the NPA's papers were due to be filed in the Constitutional Court.' (My emphasis.)

Later in his affidavit, Mr Hofmeyr stated that when he learnt that the prosecution had been delayed, he was angry and could not understand how such a decision had been made. He says the following:

'The decision was clearly intended to favour one faction in the ANC above another.'

Mr Hofmeyr stated that he had asked Mr Mpshe how the decision to postpone the prosecution had come about. The latter, according to Mr Hofmeyr, confirmed that it was Mr McCarthy who had persuaded him that it was necessary to postpone the prosecution. Mr Hofmeyr went on to say:

'Mpshe felt that it was McCarthy's decision. He was prepared to support whatever decision McCarthy made.'

[77] In the later 'Supplementary Confirmatory Affidavit' Mr Mpshe said the following in para 19:

'I also did not know about McCarthy's discussions with Ngcuka, Mzi Khumalo or Ronnie Kasrils in the run up to the ANC's Polokwane conference. I became aware of this only during Zuma's representations. Although I gained the strong impression from listening to the recordings that McCarthy never agreed with Ngcuka, he nevertheless did as he was asked. Had I known what McCarthy's true motivation was, I would never have supported his decision to postpone the prosecution.'

In paras 24 and 25 Mr Mpshe stated the following:

'I met with the Minister during the evening of 5 December 2007. I raised with her the issue that the announcement would possibly by delayed. It was clear to me that she agreed that the prosecution should be delayed. She was concerned that the NPA would be perceived as targeting Zuma ahead of the Polokwane conference.

The following day (6 December 2007) I telephoned . . . Downer to inform him of the decision to delay the Zuma prosecution. I told Downer that I had taken the decision to postpone the prosecution independently. I told him that it was my decision and my decision alone. I did so because Downer was aware that I had met the Minister the previous day. I did not want him to think that the Minister had interfered or that the Minister had unduly influenced me.'

[78] Notes of meetings that Mr Mpshe held with the NPA management, with and without the prosecution team, reveal Mr Hofmeyr leading the charge to discontinue the prosecution. At a meeting held on 30 March 2009 he was recorded as saying:

'We will be criticised by those who want us to proceed

But the depth of the corruption was so deep'

Earlier during that meeting Mr Hofmeyr spoke of 'ulterior motives' and was recorded as being pessimistic about their chances of opposing an application for a permanent stay of prosecution. He also said that manipulation by Mr McCarthy and Mr Ngcuka had to be considered and that the timing of the prosecution was important.

[79] Much of Mr Hofmeyr's motivation for the discontinuation of the prosecution was based on the recordings attached to Mr Mpshe's press statement. We were careful during the debate before us to consider carefully, together with counsel on behalf of the NPA, how much reliance could be placed on them. Notes, the origins of which are unknown, were made in the margin of the transcripts of the recorded

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

[80] The picture that emerges from the documents filed in the court below is of an animated Mr Hofmeyr, straining to find justification for the discontinuation of the prosecution. Mr Hofmeyr discounted the objective facts set out in para 34, namely, that the indictment could in any event not be served before the ANC conference because it had only been finalised on 27 December 2007. One is, even at this point in time, left in the dark about how the service of the indictment after the Polokwane conference would ultimately and conclusively have impacted more severely on Mr Zuma than if it had been served before the conference. What is clear, however, is that whatever Mr McCarthy's design might have been, it was superseded by the fact that the indictment could only be served after the conference. Moreover, even if one accepts that Mr McCarthy had an ulterior purpose in seeking to have the indictment served after the conference, his conduct had no bearing on the integrity of the investigation of the case against Mr Zuma and did not impact on the prosecution itself. It also has to be borne in mind that Mr Mpshe himself and the Minister thought it wise for the sake of the stability of the country, to have the indictment served after the Polokwane conference. The fact that Mr McCarthy, for his own reasons, advocated to have the indictment served on 28 December 2007 rather than after 1 January 2008, which was what Mr Mpshe preferred, as pointed out in Mr Steynberg's note to Mr Hofmeyr, makes no material difference.[19]

[19] See para 23 above.

[81] I have already set out in some detail parts of Mr Hofmeyr's affidavit, which are but a small sample of the manner in which he approached the present litigation. He is an experienced litigator who should know better than to present the case in the manner described above. Professedly advancing the cause of the NPA's independence and integrity, he achieved exactly the opposite. One now has a better appreciation of the reluctance of counsel on behalf of the NPA to be associated with the affidavits filed on its behalf.

[82] The attack by the DA on Mr Mpshe's decision to discontinue the prosecution evolved into one based on rationality or, rather, the lack of it. Rationality review is concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand, and the purpose or end itself on the other. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred.[20] Rationality review also covers the process by which the decision is made. So, both the process by which the decision is made and the decision itself must be rational.[21] If a failure to take into account relevant material is inconsistent with the purpose for which the power was conferred there can be no rational relationship between the means employed and the purpose.[22]

[83] Mr Mpshe's stated purpose for discontinuing the prosecution was to preserve the integrity of the NPA and to promote its independence. From his media statement it appears that Mr Mpshe was willing to accept that the case against Mr Zuma was strong, that fair trial defences were not threatened and that there were no practical difficulties in continuing with the prosecution. The motivation for discontinuing the prosecution appears to have been policy aspects that militate against the prosecution. According to Mr Mpshe's statement, the transcripts of the recordings that he attached to his media statement contained material that 'was of vital

[20] See *Democratic Alliance v President of South Africa* [2012] ZACC 24; 2013 (1) SA 248 (CC) para 32.
[21] See *Albutt v Centre for the Study of Violence and Reconciliation & others* 2010 (3) SA 293 (CC) and *DA v President of the RSA* 2013 (1) SA 248 (CC) ibid paras 33 and 34.
[22] See *DA v President of the RSA* ibid para 40.

importance in the NPA reaching its decision'. Towards the end of the media statement the egregious conduct which Mr McCarthy was considered to be guilty of by Mr Mpshe and which in his view amounted to an abuse of process was 'the timing of the charging of the accused'.

[84] It appears to me to be inimical to the preservation of the integrity of the NPA that a prosecution is discontinued because of a non-discernible negative effect of the timing of the service of an indictment on the integrity of the investigation of the case and on the prosecution itself. There is thus no rational connection between Mr Mpshe's decision to discontinue the prosecution on that basis and the preservation of the integrity of the NPA. If anything, the opposite is true. In these circumstances discontinuing a prosecution in respect of which the merits are good and in respect of which there is heightened public interest because of the breadth and nature of the charges and the person at the centre of it, holding the highest public office, can hardly redound to the NPA's credit or advance the course of justice or promote the integrity of the NPA.

[85] The court below was right to take into account against Mr Mpshe, the contradictory accounts as to who had made the decision to delay the service of the indictment. It does not assist Mr Mpshe to explain that he had lied to Mr Downer in telling him that he alone had made the decision to delay the service of the indictment, when in fact it was Mr McCarthy who had made that decision. If anything affects the integrity of the NPA, it is an ANDPP lying to a senior prosecutor. The admitted deception compellingly affects the credibility of Mr Mpshe's motivation for discontinuing the prosecution.

[86] Furthermore, Mr Mpshe's reliance on *Latif* for his decision to discontinue the prosecution was misplaced. The abuse complained of in that case was that one of the accused persons had been incited by an informer and a customs officer to commit the offences in question and had lured him into the court's jurisdiction. The court in *Latif* held that it was for a court to consider whether the abuse complained of was such as to justify a stay of proceedings. Mr Mpshe assigned to himself the role reserved for courts. If he had had proper regard to the decision in *Latif*, he would not have used it to justify the decision to discontinue the prosecution. Thus, he ignored

relevant material such as the relevant dicta in *Zuma, Latif* and the appeal court judgment in *HKSAR*. The courts in the latter two cases were emphatic that allegations of abuse of process were within the remit of the trial court.

[87] It is significant, as pointed out in para 36 above, that parts of the media statement were plagiarised from the high court judgment in *HKSAR* without considering that they were inapplicable. More particularly, since that judgment was overturned on appeal.

[88] Moreover, Mr Mpshe ignored the dictum in the *Zuma* judgment by Harms DP that a bad motive does not destroy a good case. A prosecution brought for an improper purpose, so said this Court in that case, is only wrongful if, in addition, reasonable and probable grounds for prosecuting are absent. In the present case, on the NPA's own version, the case against Mr Zuma is a strong one. Once it is accepted that the motive for a prosecution is irrelevant where the merits of the case against an accused are good, the motive for the timing of an indictment to begin the prosecution must equally be so. Mr Mpshe and Mr Hofmeyr appear to have overlooked the effect of this judgment and uncritically adopted the 'ulterior purpose' justification first mentioned by Mr Hofmeyr in the meeting referred to in para 78 above.

[89] The exclusion of the prosecution team from the process leading up to the decision to discontinue the prosecution, especially the final deliberations that took place on 1 April 2009, was in itself irrational. The compelling conclusion is that this exclusion was deliberate. The prosecution team's subsequent memorandum protesting their exclusion is understandable. They were senior litigators steeped in the case, acquainted with the legal issues and had a critically important contribution to make regarding the ultimate decision to terminate the prosecution. They had invested a great deal of time and resources in gathering evidence and building a case that management in the NPA accepted was a strong one. The memorandum pointed out that the views of the two outside eminent senior counsel, who had been advising the NPA, were inexplicably also not solicited.

[90] In asserting that the timing of the service of the indictment after the Polokwane conference was influenced by Mr McCarthy and was the abuse of process that persuaded him to discontinue the prosecution, Mr Mpshe failed to consider a material fact, namely, that the indictment would in any event not have been ready for service before the Polokwane conference for the reasons set out in para 34 above. It will be recalled that there were errors in the indictment that required correction and could only be finalised on 24 December 2007, after the conclusion of the ANC's elective conference. This is a consideration that was material to arriving at a rational conclusion. The importance of this is that whatever the motivations of Mr McCarthy may have been in delaying the service of the indictment, the indictment was not ready to be served before the conference. What is more, Mr Mpshe also believed, following his discussion with the Minister of Justice and Constitutional Development early in December 2007, that it would be prudent to postpone the service of the indictment until after the conference to avoid the suggestion, that the service of the indictment before this was politically motivated. Seen in this light, Mr McCarthy's alleged motives for delaying the service of the indictment were ultimately immaterial.

[91] The submissions by the NPA set out in para 48 above, that when the prosecution itself believes that there has been an abuse of process, it could not be expected of them to prepare for a case on the basis that a court should later decide whether a stay of prosecution is justified. It was contended that, in those circumstances, it ought to be left to the discretion of the prosecuting authority to decide whether to continue with the prosecution. I disagree. It is incumbent on prosecutors to disclose to a court any fact which, in their view, may impact negatively on the prosecution and in favour of the accused. This is in line with constitutional values and the provisions of the NPA Act. It is in the interest of the NPA, accused persons and the public's confidence in the administration of justice, that decisions concerning allegations of abuse of process be made by a trial court.

[92] In the light of what is set out in the preceding paragraphs, it beggars belief that the present regime at the NPA, on its own version of events, saw fit to defend Mr Mpshe's decision as being rational. For all these reasons I can find no fault with the reasoning and conclusions of the court below that the decision to discontinue the

prosecution was irrational and liable to be set aside. A question one might rightly ask is why it took so long to come to the realisation at the eleventh hour that the case for both the NPA and President Zuma had no merit.

[93] I turn to deal with the concessions made by the NPA and Mr Zuma referred to earlier. Section 179(5)*(d)* of the Constitution clearly provides for a review by an NDPP of decisions made by Directors of Public Prosecutions, in terms of s 24 of the NPA Act read with s 179(2) of the Constitution. In terms of s 24(1) of the NPA Act, Directors of Public Prosecutions have the power to institute and conduct criminal proceedings and to carry out functions incidental thereto as contemplated in s 20(3).[23] In para 6 of the NPA's main heads of argument, they invoked s 179(5)*(d)* of the Constitution read with s 22(2)*(c)*[24] of the NPA Act as the basis for Mr Mpshe's decision to discontinue the prosecution. In essence, the contention on behalf of the NPA was that in reaching that decision Mr Mpshe was reviewing the earlier decision made by Mr McCarthy, a Director of Public Prosecutions, to institute criminal proceedings against Mr Zuma. In light of the decision in *Zuma*, that Mr Mpshe himself had made that decision to prosecute Mr Zuma, the NPA's reliance on s 179(5)*(d)* of the Constitution and s 22(2)*(c)* of the NPA Act, was misplaced. The concessions on behalf of the NPA and Mr Zuma referred to earlier, seen against the authorities referred to in paras 56 and 58 above, were undoubtedly correctly made.

[94] To sum up:

(i) The case presented by the NPA, principally through Mr Hofmeyr, was that Mr McCarthy's conduct, in influencing the timing of the service of the indictment so that it occurred after the ANC's Polokwane conference was so egregious that it amounted to an abuse of process to justify a discontinuation of the prosecution. This

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[23] Section 20(3) reads:
'Subject to the provisions of the Constitution and this Act, any Director shall, subject to the control and directions of the National Director, exercise the powers referred to in subsection (1) in respect of –
(a) The area of jurisdiction for which he or she has been appointed; and
(b) Any offences which have not been expressly excluded from his or her jurisdiction, either generally or in a specific case, by the National Director.'

[24] Section 22(2)(c) provides:
'In accordance with section 179 of the Constitution, the National Director –
. . .
(c) may review a decision to prosecute or not to prosecute, after consulting the relevant Director and after taking representations, within the period specified by the National Director, of the accused person, the complainant and any other person or party whom the National Director considers to be relevant. '

was based largely on conjecture and supposition. The allegations by Mr Hofmeyr of political machinations on the part of Mr McCarthy were irrelevant because they were unconnected to the integrity of the investigation of the case against Mr Zuma and the prosecution itself.

(ii) The authenticity and legality of the recorded conversations which Mr Mpshe considered vital to his decision to discontinue the prosecution are not beyond doubt. Since the recorded conversations were considered vital, greater thought ought to have been given by the NPA to these issues.

(iii) The manner in which the affidavits were drawn and the case conducted on behalf of the NPA was inexcusable.

(iv) The reasons for discontinuing the prosecution provided by Mr Mpshe do not bear scrutiny for the recordings themselves on which Mr Mpshe relied, even if taken at face value, do not impinge on the propriety of the investigation of the case against Mr Zuma or the merits of the prosecution itself.

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

(vi) The submission on behalf of the NPA and Mr Zuma, that Mr McCarthy had a central role in the timing of the service of the indictment is at odds with the contradictory account provided by the NPA in relation to who had made the decision about the timing of the service of the indictment. Mr Mpshe had told Mr Downer that the timing of the service of the indictment had been his decision alone. In a supplementary affidavit he explained that he had been untruthful in that regard in order not to bring Mr Downer under the impression that he had been influenced by the Minister of Justice and Constitutional Development. That explanation itself impacts negatively on Mr Mpshe's credibility and on the soundness of his decision to discontinue the prosecution.

(vii) The exclusion of the prosecution team from the final deliberations leading up to the decision to discontinue the prosecution appears to have been deliberate and is in itself irrational.

(viii) The case law that formed the basis for Mr Mpshe's decision to terminate the prosecution does not, in fact, support it. On the contrary, the cases, including an appeal court decision overlooked by Mr Mpshe, are to the effect that questions of abuse of process in relation to a prosecution should be decided by a trial court and not determined by way of an extra-judicial pronouncement.

(ix) In his media statement in which he provided reasons for terminating the prosecution, Mr Mpshe referred to the following dictum of this Court in *Zuma*:

'A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent, something not alleged by Mr Zuma and which in any event can only be determined once criminal proceedings have been concluded. The motive behind the prosecution is irrelevant because, as Schreiner JA said in connection with arrests, the best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal. The same applies to prosecutions.'

However, he missed its true meaning and import and misapplied it.

(x) In the circumstances set out above Mr Mpshe's stated purpose of preserving the integrity of the NPA and advancing the cause of justice, can hardly be said to have been achieved. The opposite is true. Discontinuing a prosecution in respect of which the merits are admittedly good and in respect of which there is heightened public interest because of the breadth and nature of the charges and the person at the centre of it holds the highest public office, can hardly redound to the NPA's credit or advance the course of justice or promote the integrity of the NPA. Regrettably, the picture that emerges is one of Mr Mpshe and Mr Hofmeyr straining to find justification for the termination of the prosecution.

(xi) Thus the conclusion of the court below, that the decision to terminate the prosecution was irrational, cannot be faulted.

(xii) In reviewing his own decision to institute criminal proceedings against Mr Zuma, and ultimately making the decision to terminate the prosecution, Mr Mpshe wrongly invoked and relied on s 179(5)*(d)* of the Constitution and s 22(2)*(c)* of the NPA Act. These provisions deal with the review by an NDPP of a decision of a DPP and were inapposite. Thus, the concessions on behalf of Mr Zuma and the NPA that, on that

basis, the decision to terminate the prosecution was liable to be set aside, were rightly made.

(xiii) In light of what appears above, it is difficult to understand why the present regime at the NPA considered that the decision to terminate the prosecution could be defended.

[95] The appeal must therefore fail. The DA sought the costs of three counsel which, in the circumstances of the case, is not without warrant. The NPA and the President made common cause and should be liable for the DA's costs jointly and severally, the one paying the other to be absolved.

[96] The following order is made:

1 The applications for leave to appeal are granted.

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

M S Navsa

Acting Deputy President

Appearances:

Counsel for the First Appellant:	H Epstein SC (with him A L Platt SC and P B Khoza) Instructed by: The State Attorney, Pretoria The State Attorney, Bloemfontein
Counsel for the Second Appellant:	K J Kemp SC (with him H Gani and J Thobela-Mkhulisi Instructed by: Hulley & Associates, Sandown Honey Attorneys Inc., Bloemfontein
Counsel for Respondent:	S P Rosenberg SC (with him H J De Waal, D P Bergström and S Vakele) Instructed by: Minde Shapiro & Smith Attorneys, Belville Symington & De Kok, Bloemfontein