IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED. Yes

DATE 29 April 2016 SIGNATURE

29/4/2016.

CASE NO: 19577/2009

In the matter between:

DEMOCRATIC ALLIANCE	**Applicant**
and	
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**First Respondent**
THE HEAD OF THE DIRECTORATE OF SPECIAL OPERATIONS	**Second Respondent**
JACOB GEDLEYIHLEKISA ZUMA	**Third Respondent**
THE SOCIETY FOR THE PROTECTION OF OUR CONSTITUTION	**Amicus Curiae**

QUORUM: LEDWABA DJP; PRETORIUS J and MOTHLE J

DATE OF HEARING: 1 TO 3 MARCH 2016

DATE OF JUDGMENT:

JUDGMENT

THE COURT:

INTRODUCTION:

1. This is a review application launched on 7 April 2004 by the Democratic Alliance ("DA"), the official political opposition party in the Republic of South Africa. The DA asks this Court to grant the following relief:

> *"2. Reviewing, correcting and setting aside the decision of the First Respondent, taken on or about 6 April 2009, to discontinue the criminal prosecution of [Mr] Zuma, in accordance with charges contained in an indictment of 27 December 2007;*
>
> *3. Declaring that the decision of the First Respondent referred to in paragraph 2 above to be inconsistent with the Constitution*

of the Republic of South Africa, 1996, and invalid;"

and appropriate cost orders.

2. The respondents opposing this application are as follows:

2.1 The first respondent is the Acting National Director of Public Prosecutions ("ANDPP"), who was at that time Adv. Mokotedi Mpshe SC ("Mr Mpshe");

2.2 The second respondent is the head of the Directorate of Special Operations ("DSO"), namely Adv Leonard McCarthy ("Mr McCarthy"). At the time when this application was launched, the DSO was still operational. It has since been disbanded;

2.3 The third respondent is Mr Jacob Gedleyihlekisa Zuma, *("Mr Zuma"),* the current President of the Republic of South Africa. At the time this application was instituted, Mr Zuma was not yet the President of the Republic of South Africa.

3. In addition to the respondents, an entity known as "The Society for the Protection of our Constitution" was admitted to the proceedings, as *amicus curiae* by authority of the court order dated 18 September 2015.

4. On or about 28 November 2007 a corporate decision to prosecute Mr Zuma afresh was made by Mr Mpshe, Mr McCarthy and the prosecution team. Previously charges preferred by the then National Director of Public Prosecution, Adv Pikoli, were struck from the roll by the Kwa Zulu Natal Division of the High Court during September 2007;

5. The decision to charge Mr Zuma in November 2007 was coincidentally taken at a period when the African National Congress (ANC) was about to hold its National Electoral Conference scheduled for 16 to 20 December 2007 at Polokwane. A president of the ANC was to be elected at the said conference. The main contestants for the presidency were Mr Zuma and the former President Mbeki.

6. The timing of the service of the indictment on Mr Zuma became an issue. The prosecution team, in particular, Mr Downer, wanted same to be served immediately, regardless of the pending ANC conference. The view of Mr Mpshe was that service should be affected in early 2008 after the Polokwane conference was held, so as not to present an appearance of political interference by the NPA, in influencing the outcome of the

leadership contest. Mr McCarthy's view changed and he wanted service to be delayed until after the conference.

7. The respondents' main reason for opposing this application is that Mr McCarthy unduly influenced and interfered with the service of the indictment for political reasons.

8. On 1 April 2009 Mr Mpshe took a decision to discontinue the prosecution against Mr Zuma and announced it publicly on 6 April 2009. The said decision to discontinue the prosecution triggered this application.

9. It took almost seven (7) years since this review application was launched, for it to be heard by this Court. The reason for the delay is, amongst others, that there were two main interlocutory applications which emanated from this review application, following each other, we briefly refer to the said applications:

   9.1 The first interlocutory application concerned a challenge that was raised by the ANDPP and Mr Zuma in the Gauteng High Court Division, Pretoria before Ranchod J. The ANDPP and Mr Zuma contended that the DA did not have *locus standi* to bring this

review application; raised the reviewability of the decision of Mr Mpshe and the question whether the ANDPP was compelled to furnish the record of his decision to the DA. The decision of Ranchod J granting the orders in favour of the ANDPP and Mr Zuma, was reversed on appeal by the Supreme Court of Appeal ("SCA") in the matter of **DA and Others v Acting National Director of Public Prosecution and Others**[1];

9.2 In the matter of **Democratic Alliance v Acting National Director of Public Prosecutions and Others** which came before Mathopo J in the Gauteng Division, Pretoria, the Court had to determine whether the transcript of the conversations as recorded in the tapes should be disclosed in terms of Rule 53 of the Rules of The High Court. The SCA upheld the judgment of Mathopo J that the transcript of the recordings should be disclosed and further ordered that the transcript of the recordings be redacted in order to protect the confidentiality concerning the

[1] 2012 (3) SA 486 SCA

representations made by Mr Zuma to the ANDPP.

BACKGROUND

10. The decision to charge and prosecute Mr Zuma was preceded by a protracted investigation that started in 2001.

11. Mr Mpshe was appointed as the ANDPP on 29 September 2007 after Mr Pikoli had been suspended. The prosecution team investigating the case of Mr Zuma consisted of Adv. Downer SC (Mr Downer), Adv A Steynberg (Mr Steynberg), Adv George Baloyi (Mr Baloyi) and Adv Du Plooy (Mr Du Plooy). The team and Mr McCarthy were also advised by two private senior counsel, namely Adv Wim Trengrove SC and Adv Breytenbach SC.

12. From November 2007, Mr McCarthy kept Mr Mpshe and his deputies in the NPA updated about the investigation of the matter of Mr Zuma. In preparation to finalise the charges, the application for centralization of charges in terms of section 111 of the Criminal Procedure Act 51 of 1977, was submitted to Mr Mpshe on 20 November 2007. The prosecuting team

briefed Mr Mpshe and his deputies on 29 November 2007 and the decision to prosecute was finally approved. It is common cause that the decision to prosecute Mr Zuma afresh was a corporate decision at the time.

13. In the beginning of December 2007 a report in terms of section 33 of the National Prosecuting Authority Act, 32 of 1998 ("the NPA Act") was submitted to Minister B. Mabandla ("the Minister") the then Minister of Justice and Constitutional Development. Mr Mpshe and the Minister had a conversation on 4 December 2007, where it is stated that the Minister raised concern regarding the safety and stability of the country, should the indictment be served before the Polokwane conference.

14. On 5 December 2007, the day after the meeting with the Minister, Mr Mpshe informed Mr Downer that the service of the indictment would be delayed until January 2008.

15. The indictment was served on 28 December 2007 on Mr Zuma.

16. In June 2008 Mr Zuma launched an application in terms of section 179 of the Constitution of the Republic of South Africa, 1996, ("the

Constitution") in the Kwa-Zulu Natal Provincial Division of the High Court for a review of the decision taken to prosecute him. On 12 September 2008, Nicholson J ruled in favour of Mr Zuma. The ANDPP challenged Nicholson J's judgment on appeal in the SCA. On 12 January 2009 the SCA overturned Nicholson J's judgment.

17. On 10 February 2009 the NPA received written representations from the legal representatives of Mr Zuma. These representations were made on behalf of Mr Zuma, but Mr Zuma did not confirm the representations under oath. We pause to mention that the national and provincial elections were scheduled to take place on 22 March 2009 and the inauguration of the President of the Republic of South Africa would take place on 9 May 2009.

18. On 20 February 2009 Mr Zuma's legal representatives made further oral representations to Mr Mpshe and his deputies, as well as Mr Mngwengwe. According to Mr Mzinyathi's notes forming part of the record of proceedings, the Browse Mole matter was discussed at this meeting. The Browse Mole Report was released in November 2007 by the Joint Standing Committee. The report revealed an unofficial attempt to besmirch the person and integrity of Mr Zuma. Mr McCarthy was implicated in the compiling of the report and was

openly criticised by the Committee, which recommended that action be taken against him. No action was taken against McCarthy.

19. On 3 March 2009 the prosecution team considered the representations made by Mr Zuma's legal representatives on 3 March 2009 and submitted a memorandum to Mr Mpshe dealing with both the written and oral representations, giving detailed reasons for the rejection of these representations. A material suggestion at the time was that the oral representations should be reduced to writing in an affidavit. This never took place.

20. During 6 to 16 March 2009 Mr Zuma's legal representatives allowed Mr Mzinyathi and Mr Hofmeyr to listen to the tapes of the intercepted telephone and SMS conversations between Mr McCarthy and Mr Ngcuka, as well as between Mr McCarthy and Minister Mabandla, and between Mr McCarthy and various other parties.

21. In the meeting, held on 18 March 2009 where Mr Mphse was also present, the NPA management informed the prosecuting team of the contents of the oral representations by Mr Zuma's legal representatives and came to the conclusion that they had a good case to be pursued against Mr Zuma.

22. There are two letters prepared in March 2009 in consideration of the representations and in which a response is prepared to Mr Zuma's attorneys by the prosecuting team and Mr Mpshe. These letters form part of the record of proceedings. Annexure "D18" is the draft that was sent to Adv Trengove SC to settle and annexure "D7" is the letter settled that was to be sent to Mr Hulley in response to the written and oral representations. It is not clear if the response was delivered to Mr Hulley.

23. The DA became aware that the legal representatives of Mr Zuma had made representations to the NPA concerning the pending prosecution. They also requested to make representations. On 20 March 2009 Mr Mpshe informed the DA as follows:

> *"You are most welcome to make written representations to me, I must however request that it reaches me on or before 27 March 2009 as this is the date I have set for myself to apply my mind to all the information supplied and still to be supplied. You will appreciate that due to the wide publicity in the matter it is in the interest of all concerned that I consider the representations as speedily as possible."*

24. On the same date, and after the prosecution team had received Adv Trengove SC's opinion and/or advice, they informed Mr Mpshe of the essence of it. The gist of the information submitted to Mr Mpshe is recorded as follows:

> *"He advised against acceding to the representations. The proper forum for evaluating the allegations and their relevance to fair trial was the court, as envisaged in the permanent stay arrangements that we had already settled with the defence and the Judge-President".*

25. On 23 March 2009 Mr Mpshe informed the DA that he was not at liberty to adhere to their request to have insight into Mr Zuma's representations as the representations had been made confidentially and without prejudice.

26. On 30 March 2009 a meeting took place between Mr Mpshe, his deputies, Mr Mgwengwe and the prosecuting team. According to Mr Mzinyathi's notes, which were recorded at the meeting, Mr Mpshe indicated that on 1 April 2009 he would make his decision. Mr Mpshe did not indicate as to the reason for making the decision on 1 April 2009.

27. Mr Mpshe said he was satisfied that they had a strong case on the merits of the case. Mr Mpshe, his deputies and the prosecution team had no

doubt that the prosecution would proceed. Importantly at that stage Mr Mpshe had been informed of the contents of the intercepted messages between Mr Ngcuka and Mr McCarthy.

28. On 30 March 2009 Mr Mpshe addressed a letter to Mr McCarthy informing him about the audio recordings regarding the contents of the tapes. Mr McCarthy replied on 31 March 2009 requesting more information regarding the intercepted communications, so that he could deal with the allegations against him.

29. At the time Mr Mpshe had indicated to the deputies that he wanted Mr McCarthy and Mr Ngcuka's responses to the tapes before making a decision.

30. Prior to 31 March 2009, Mr Mpshe had been reluctant to listen to the tapes. This is stated in the ANDPP's answering affidavit deposed to by Mr Hofmeyr, and confirmed by Mr Mpshe.

31. On 31 March 2009 the deputies and Mr Mpshe personally listened to the tapes in the evening. This after Messrs Hofmeyr and Mzinyathi had previously reported to Mr Mpshe and informed him and his deputies as to the contents of the tapes.

32. On 1 April 2009, the following day, Mr Mpshe met with his deputies and informed them that he had been disturbed at what he had heard on the tapes. He had decided to discontinue the prosecution.

33. The record of the proceedings reflects that Mr Downer recorded on 2 April 2009 that Mr Hofmeyr was of the view that the prosecution should be stopped, but both the prosecution team and the other deputies were of the view that the prosecution should continue. It is clear from the memorandum that on 2 April 2009 the prosecution team had not been informed of the decision already taken to discontinue the prosecution.

34. On 3 April 2009 Mr Downer was still of the same opinion, but unaware of the decision already made by Mr Mpshe on 1 April. He opined as follows: *"The recommendations should be declined along the lines of our draft letter to Mr Hulley which has now been considered".*

35. Mr Downer, furthermore set out the two questions as advised by Trengove SC, legal adviser to the prosecution team. These are:

> *"(a) Can I say that my decision to prosecute was not improperly influenced my (sic) Adv McCarthy's improper motives? [A simple sine qua non test can be applied here]; and if not*
>
> *(b) Am I now still satisfied, with ex post facto knowledge of Adv McCarthy's shenanigans, that the decision was on the merits*

the correct one?"

36. On 6 April 2009 Mr Mpshe met with the prosecution team led by Mr Downer to inform them of the decision he had made to discontinue the prosecution. He later publicly announced the decision, taken on 1 April 2009, to discontinue the criminal prosecution, stating his reasons in the press release.

37. Mr Downer, the leader of the prosecution team, records later in the memorandum dated 9 April 2009 as follows:

> *"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 advice on these issues."*

38. On 7 April 2009 the DA launched the present application. On 8 April 2009 the charges against Mr Zuma and Thint were formally withdrawn by the Kwa Zulu Natal Division of the High Court.

THE REASONS FOR MR MPSHE'S DECISION OF 1 APRIL 2009

39. The reasons to discontinue the prosecution against Mr Zuma were stated by Mr Mpshe in an address to the media on 6 April 2009. In essence, Messrs McCarthy, Nqcuka and others, are alleged to have manipulated the timing of the envisaged service of the indictment to Mr Zuma, against the latter for political reasons. The service of the indictment was supposed to be used to disadvantage Mr Zuma in his contest against Mr Mbeki, for the presidency of the ANC.

40. In announcing his decision to discontinue the prosecution, Mr Mpshe stated thus:

> *".....All members of the senior management and the prosecuting team participated in this discussion, and ultimately I take full responsibility for the decision I make...",*

He further stated that:

> *".....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 then that:

"....In the present matter, the conduct consists of the timing of the charging of the accused....

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.

McCarthy used the legal process for a purpose other than that 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....."

And he concludes as follows:

"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....."

Of importance he also stated that:

"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.*** *"* (Court's emphasis)

41. There are thus three important decisions at the centre of this review, namely:

41.1 The first decision was that of the NPA and DSO to prosecute Mr Zuma. This decision was taken on or about 28 November 2007;

41.2 The second decision, of 6 December 2007, concerns the timing of the service of the indictment on Mr Zuma. This is the decision

which concerned the alleged misconduct by Mr McCarthy. The questions raised herein are who took the decision, when and why?; and

41.3 The third decision of 1 April 2009 is the one made by Mr Mpshe to discontinue the prosecution of Mr Zuma. According to Mr Mpshe, the reason for this decision emanate from the alleged misconduct of Mr McCarthy as stated above. It is this decision that is the subject of this review.

42. The main reason for the 1 April 2009 decision to discontinue the prosecution is captured succinctly on the bottom of page 4 and the top of page 5 of Mr Mpshe's statement, where he opines as follows about how an abuse of process may occur on its own:

".....a) It will not be possible to give the accused a fair trial; or

b) It will offend one's sense of justice, integrity and propriety to continue with the trial of the accused in the particular case. Discontinuation is not a disciplinary process undertaken in order to express one's disapproval of abuse of process; it is an expression of one's sense of justice and propriety. (See Connelly v DPP 1964

AC 1254)"

43. It is against this background that the Court now turns to deal with the grounds of review of Mr Mpshe's decision to discontinue the prosecution of Mr Zuma.

THE DA'S GROUNDS OF REVIEW

44. When this review application was launched on 7 April 2009, the grounds of review supporting the relief sought were initially based on the provisions of s 6 of the **Promotion of Administrative Justice Act (PAJA),**[2] in line with the decision in ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others***[3]***.***

45. The reviewability of a decision to discontinue a prosecution was considered and dealt with by Navsa JA, in the matter of ***DA v Acting NDPP and Another***[4]***.*** After considering the question, the SCA concluded that a review of a decision to discontinue prosecution can

[2] Act 3 of 2000.
[3] 2004 (4) 490 (CC) at para 25, where O'Regan J held that the grounds of review are now based on PAJA as codified in s6 thereof, and no longer under common law.
[4] 2012 (3) SA 486 (SCA) at p494 from para 23.

be reviewable on the grounds of legality and irrationality.[5] This view was further endorsed in the matter of ***The NDPP v Freedom under Law***[6] where the Court stated in paragraph 29 as follows:

> *"[29] As demonstrated by the numerous cases since decided on the basis of the legality principle, the principle acts as a safety net to give the Court some degree of control over action that does not qualify as administrative under PAJA, but nonetheless involves the exercise of public power. Currently it provides a more limited basis of review than PAJA. Why I say "currently" is because it is accepted that 'legality is an evolving concept in our jurisprudence, whose full creative potential will be developed in the context-driven and incremental manner.' ... But for the present purposes it can be accepted with confidence that it includes review on grounds of irrationality and on the basis that the decision-maker did not act in accordance with the empowering statute (see: Democratic Alliance and Other v Acting National Director of Public Prosecutions and Others 2012 (3) SA 486 (SCA para's 28 to 30)."*

RATIONALITY AS A GROUND OF REVIEW

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[5] The SCA dealt with the history of the review as developed in ***Pharmaceutical Manufacturers Association of South Africa and Another In Re: Ex Parte the President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) and Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC).***

[6] 2014 (4) SA 298 (SCA).

46. In paragraph 32 of its judgment, the Constitutional Court in ***Albutt v Centre for the Study of Violence and Reconciliation and Others,***[7] explains rationality review as being really concerned with the evaluation of a relationship between means and ends – the relationship, connection or link between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. In paragraph 51, the Constitutional Court held thus:

> *"...But, where the decision is challenged on the grounds of rationality, Courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution."*

47. Rationality involves substantive and procedural issues.[8] It follows therefore that both the process by which the decision is made (the means) and the decision itself must be rationally related. This

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[7] 2010 (3) SA 293 (CC).
[8] Albutt supra at

principle was confirmed by the Constitutional Court in ***DA v President of the Republic of South Africa***[9].

48. In the matter of **Freedom Under Law v National Director of Public Prosecutions and Others**[10], Murphy J dealt with the question of the review grounds under PAJA, of a decision to prosecute. This matter went on appeal to the SCA[11], where the Court held that the decision to discontinue a prosecution or not to prosecute can be reviewable not under PAJA but on the basis of the principle of legality and irrationality. Importantly, further that in deference to the doctrine in separation of powers, it is not appropriate for a court seized with a review application, and upon setting aside the decision, to step into the shoes of the prosecution and grant orders and directives as to how the prosecution should be carried out from that point onwards.

49. The DA subsequently amended its grounds of review based on PAJA and narrowed them to the grounds of irrationality and legality, in line with the authorities cited above. The applicant and respondents' counsel, by agreement, mainly based their arguments on the ground of irrationality. The parties did not present arguments relating to the

[9] 2013 (1) SA 248 (CC)
[10] 2014 (1) SA 254 (GNP)
[11] 2014(4) SA 298 (SCA)

declaratory relief sought by the applicant that the decision of Mr Mpshe was unconstitutional.

THE REPONDENTS' CONTENTIONS

50. It was argued on behalf of the 1st and 2nd respondent, the ANDPP and the DSO, in essence, that having regard to the Browse Mole report criticising Mr McCarthy's conduct of leaking information to the media and the contents of the transcript, Mr Mpshe was justified in deciding to discontinue the prosecution of Mr Zuma and that his decision was rational.

51. Mr Zuma's counsel argued that even if the merits of the state's case were strong, the decision to discontinue was rational and justified because according to the contents of the recorded conversations the NPA's independence would be affected and it would be seen to be meddling with political decisions. Counsel further submitted that the fact that the plan of Mr McCarthy to negatively influence the election of Mr Zuma as President of the ANC was unsuccessful, was immaterial. The abuse by Mr McCarthy was of such a serious nature that the decision not to prosecute was rational.

52. In our view, the alleged conduct of Mr McCarthy as appears from the transcript of the recorded conversations, **if proven**, constitutes a serious breach of the law and prosecutorial policy. It is not even necessary to refer to his role in the Browse Mole report for which it seems he was not admonished. His conduct as alleged in the transcript, **again if proven**, certainly calls for intervention. This will involve an enquiry into the allegations, and if need be, also censure by a court of law.

53. On being informed by Mr Hofmeyr and Mr Mzinyathi about the content of the recordings, Mr Mpshe surprisingly did not immediately confront Mr McCarthy and his predecessor Mr Ngcuka about the allegations. He only did that on 30 March 2009 two days before he took the decision to discontinue the prosecution. Both officials, who were no longer in the employ of the prosecution authority, requested access to the content of the tape recordings before they could comment. This was a reasonable request. Mr Mpshe however felt it unnecessary to wait for their response and proceeded to make the decision on 1 April 2009. He thus made a half-hearted attempt at investigating and verifying the allegations before he took the decision. He had thus breached a cardinal rule of *audi alteram partem* i.e hearing the other side before making an intervention.

54. Mr Mpshe in his media address concedes that the substantive merits and the fair trial defences of the prosecution of Mr Zuma were not tainted by the alleged conduct of Mr McCarthy. However the form of censure Mr Mpshe chose, by discontinuing the prosecution, failed to demonstrate a connection or linkage to the alleged conduct of Mr McCarthy. That is the essence of this review. The submissions of respondents' counsel have similarly, in our view, not addressed the question of this required connection or linkage necessary to determine if the decision meets the test of rationality.

55. The *amicus curiae* argued that the DA should have brought the review application in terms of the provisions of PAJA and that bringing the application in terms of irrationality is unconstitutional. It was further argued that the decision to prosecute or not to prosecute is by law taken by the Deputy Director of Public Prosecutions, not the National Director of Public Prosecutions. Therefore, it is argued, Mr Mpshe could not have had the authority to take the decision as alleged.

56. The submissions of the *amicus curiae* are clearly way off the mark and not supported by any decided cases. Writing for the SCA in the matter of NDPP v Zuma *supra*, Harms DP explained the powers of the NDPP in reviewing a decision to prosecute in paragraphs 70, 71 and 75, thus:

"70. I *therefore conclude that s 179(5) (d) does not apply to reconsideration 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.*

71. ...The head of the DSO is a post-Constitution creation and is not a DPP but a deputy NDPP in terms of the NPA Act (s 7(3)). Further, the fact that he joined in the decision-making does not mean that the decision is no longer that of the NDPP. If the argument were correct, it would mean that the Mpshe decision was also not one made by the NDPP and would fall beyond the provision and destroy the basis of Mr Kemp's whole argument because it, too, was made jointly with the head of the DSO"

And at paragraph 75:

"75. In addition, as held by the Constitutional Court, as soon as the matter had been struck from the roll by Msimang J, the criminal proceedings were terminated and the proceedings were no longer pending. Removal of a matter from the roll aborts the trial proceedings. The effect of this is that what went before the Mpshe decision was spent and a new decision to prosecute was required. The Mpshe decision

was not simply a review of the Ngcuka decision, which was no longer extant. On these facts, s 179(5) (d) had, irrespective of whichever interpretation is correct, no application, and Mr Zuma's reliance on it was misplaced."

57. In regard to the submission that the DA should have brought the application for review in terms of PAJA, as submitted by Mr Omar, we refer to the decisions of DA v Acting NDPP supra and The NDPP v Freedom Under Law supra, where the two judgments deal extensively with the ground of review of a prosecution under PAJA and in terms of the principle of constitutional legality.

58. It needs to be mentioned that the *amicus curiae* has disappointingly failed to add any value to these proceedings.

RATIONALITY OF THE DECISION AND ABUSE OF PROCESS DOCTRINE

59. The NDPP derives his/her authority from s179 of the ***Constitution of The Republic of South Africa, Act 1996,***[12] ***("the Constitution")***, read with the National Legislation enacted in terms of Section 179(7),

[12] Act 108 of 1996.

being the NPA Act[13]. More specifically, s22 thereof which deals with the powers of the National Director, as well as the Regulations dealing with Prosecutorial Policy. The prohibited conduct of NPA officials, including offences and penalties are dealt with under s41. The National Director of Public Prosecutions is also empowered to issue Policy Directives which serve as a guide to prosecution. Part 2 of the Prosecution Policy Directives dated 1st June 2014 deals with the prosecution authority, while Part 5 thereof, deals with withdrawal of cases and stopping of prosecutions. The NDPP and all officials of the prosecution are required to act within the confines of these legal instruments.

60. One of the objectives of the legal framework is to protect and preserve the integrity of the prosecution authority and its processes. The objective sought to be achieved through the decision to discontinue the prosecution of Mr Zuma, was, in Mr Mpshe's view, to protect the integrity of the NPA and its processes.

61. Thus the decision to discontinue the prosecution was, according to Mr Mpshe, a response to the alleged abuse of power by Mr McCarthy, when the latter allegedly manipulated the timing of the service of the indictment on Mr Zuma, as a tool to achieve a political advantage for

[13] Act 32 of 1998, which has since then been amended.

President Mbeki, prior to the election of the leadership of the ANC at the Polokwane Conference.

62. In the 12-page media address announcing his decision to discontinue the prosecution of Mr Zuma, Mr Mpshe relies on the abuse of process doctrine. The DA submits that the words used by Mr Mpshe in his statement have 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**[14]. This decision was however overturned on appeal[15] where the Appeal Court stated as follows:

> "*184. 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 weight 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.*"

[14] Case number: HCCC 191/1999 (Unreported judgment of the Hong Kong High Court,
[15] HKSAR and Lee Ming Tee and The Securities and Futures Commission, Case number FACC No 1 of 2003.

63. In the same media address, Mr Mpshe also referred to the British case of **R v Latif**[16], as authority for the application of the abuse of process doctrine. The Court on page 360 H – J and 361 D – E states thus:

> "*If the Court always refuses to stay such proceedings, the perception will be that the Court condones criminal conduct and malpractice by law enforcement agencies. That would undermine public confidence in the criminal justice system and bring it into disrepute. On the other hand, if the Court were always to stay proceedings in such cases, it would incur the reproach that it is failing to protect the public from serious crime. The witnesses of both extreme positions leaves only one principle solution. The Court has a discretion; it has to perform a balancing exercise.*"

On page 361 D – E the court said:

> "*General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the Judge must weigh- in the balance between the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that*

[16] 1996 (1) WLR 104

the Courts will adopt the approach that the end justifies any means."

64. In making reference to this case, Mr Mpshe surprisingly omitted to mention that the Courts in both the HKSAR appeal and the Latif matters[17] were of the view that the determination of the principles of abuse of process was an exercise for a Court of law and not an extra-judicial pronouncement.

65. Mr Mphse disregarded, without given reasons, the recommendation of the prosecution team that, even if the allegations regarding Mr McCarthy are true, the decision to stop the prosecution was to be made by a court of law.

66. The Court in the Latif matter also held that the application of the abuse of process involved a balancing of two imperatives. The one imperative is where the Court does not act on misconduct and malpractice by law enforcement agencies. A failure to do so will raise the ire of the public. The second imperative is the instance where the trial is discontinued, such as in this case. In such an event the criminal justice system as a whole, and not only the NPA, will incur the reproach that it is failing to protect the public from serious crime.

[17] Supra

Mr Mpshe disingenuously omitted to consider or deal with this second imperative in his media address.

67. The manner in which the prosecuting authority must approach an allegation of abuse of process doctrine was also dealt with by the SCA in the ***NDPP v Zuma***[18] where the Court held thus:

> "*[37] 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..." (Court emphasis)***

68. A court of law is the appropriate forum to deal with the abuse of process doctrine, not extra- judicial process. Prior to 1 April 2009 and after he was briefed about the contents of the tapes, Mr Mpshe subscribed to the view advocated by Mr Downer and the prosecution team, that the allegations raised in the tape and the representation by Mr Zuma's legal team, must be subjected to judicial process, if anything, to test the veracity thereof. He concedes in the press statement that the prosecution team held this view, but on 1 April 2009, he inexplicably and irrationally abandoned this view. In the

[18] 2009 (2) SA 277 (SCA)

March 2000 draft letter to Mr Hulley referred to Mr Mpshe and the NPA officials expressed the view, that the matters raised in the representations made on behalf of Mr Zuma must be dealt with by a court of law during the trial.

69. It is interesting that Mr Mpshe decided to discontinue the prosecution although in March 2009 Mr Mpshe and the prosecution team recorded the following:

> *"....I do not consider that this matter in itself will prevent your client from having a fair trial. If your client believes I am wrong in this assessment, then he will have the opportunity to persuade the court in his intended permanent stay application or during the criminal trial itself".*

70. In February 2009 the Kwa Zulu Natal Division of the High Court issued an order, by agreement between the parties that Mr Zuma would file papers for a permanent stay of prosecution on 18 May 2009. This meant that such an application had to be filed in about six weeks' time. Mr Mpshe does not state why he could not wait for a further six weeks for the application for a stay of prosecution to be filed so that the court could ultimately deal with it. The matter has a protracted history since 2007 and we do not understand why Mr

Mpshe wanted to finalize the matter within a month after receiving representations from Mr Zuma's legal representatives.

71. The legal authorities cited above, of which Mr Mpshe should have been aware[19] or so advised, do not support the decision taken by him in an instance such as this one under review, where the abuse of process doctrine is applied in an extra-judicial exercise of public power, when the prosecution against an accused is discontinued. In this instance, the basis of the alleged abuse of process rested on legally untested allegations which were unrelated to the trial process and the charges. It is thus our view that Mr Mpshe, by not referring the complaint of abuse of process and the related allegations against Mr McCarthy to court, rendered his decision irrational.

72. In the answering affidavit by Mr Hofmeyr, confirmed by Mr Mpshe, it is stated that when he, Mr Mpshe, admitted to having told Mr Downer that the decision was his and no one else's, he was deliberately withholding the version that he had been influenced by Mr McCarthy to delay the service of the indictment. This particular version was not disclosed to Mr Downer during the conversation on 5 December 2007. Mr Mpshe, in his Supplementary Affidavit, presented *after* the

[19] The NDPP v Zuma judgment is dated 12 January 2009, well before the decision on 1 April 2009 and concerned the office occupied by Mr Mpshe as the appellant.

DA had delivered its Replying Affidavit[20] raised a new explanation when he stated under oath as follows:

"*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

[20] Mr Mpshe deposed to the first confirmatory affidavit, dated 30/03/2015 in support of the NDPP's answering affidavit of Hofmeyr. He then deposed to the second affidavit, stated as supplementary affidavit and dated 30/06/2015 after the DA's Replying affidavit.

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."

73. The paragraphs from Mr Mpshe's supplementary affidavit as quoted above, read with Hofmeyr's affidavit, as to who took the decision to delay the service of the indictment and why, presents three contradictory versions:

73.1 The first version is that he, Mr Mpshe took the decision, which was his and his alone. The reason being in consideration of the speech by the then President Mbeki calling for calm ahead of the ANC elections in Polokwane;

73.2 The second version is that he took the decision after being influenced by Mr McCarthy. He does not indicate when this alleged influence occurred and why he allowed himself to be so influenced whilst knowing of Mr McCarthy's participation in the Browse Mole matter since November 2007. He further stated in a draft letter to be sent to Mr Hulley in March 2009 that he was not influenced by Mr McCarthy. The decision to not withdraw the charges was set out in this draft as follows:

> *"After anxious consideration,* ***I have concluded that my decision to indict your client in 2007 was not influenced, improperly or otherwise, by Adv McCarthy****. This is notwithstanding the fact that we both agreed on the decision. Even in the event that I am wrong in this conclusion, having now again reconsidered the decision, even taking into account your representations, I remain convinced that it was and is the correct decision."* (Court emphasis)

This decision was the decision to prosecute.

73.3 The third version is that it was Mr McCarthy who took the decision and he Mr Mpshe, felt he had to support it. If this was indeed so, why did he have a difficulty in disclosing this unpopular decision that was not his, to Mr Downer, who at that time was reporting to Mr McCarthy?

74. It seems, from the reading of the answering affidavits of Mr Hofmeyr, confirmed by Mr Mpshe (on behalf of the NDPP) and Mr Hulley (on behalf of Mr Zuma) that an attempt is made to attribute the decision to postpone the service of the indictment, to Mr McCarthy. Mr Mpshe portrays himself first as a person who was in charge and independently took the decision; secondly, that he was not persuaded by the Minister but he was influenced by Mr McCarthy to delay the prosecution; and thirdly, that he (Mr Mpshe) acted as an official who was supporting a decision made by Mr McCarthy. It may well be that there is a plausible explanation for these contradictions. However, the consequence of failing to refer this matter to court as it was agreed among the prosecution team, the NPA and after so advised by Mr Trengove, shows that Mr Mphse's decision is irrational.

75. The DA submits, within the context of Mr Mpshe appearing to disown the decision to delay the service of the indictment, that Mr Mpshe lied when he failed to disclose the truth to Mr Downer on 5 December 2007. It seems reasonable to infer that Mr Mpshe was also persuaded by the discussion in the meeting with the Minister on the evening of 4 December 2007, the day before he telephoned Mr Downer. On his own version, he did not want Mr Downer to form an impression that he was influenced by the Minister, not Mr McCarthy as he now suggests in his supplementary affidavit. Significantly, he neither

mentioned to Mr Downer then that Mr McCarthy had influenced him, nor that the decision was made by Mr McCarthy. If it was Mr McCarthy's decision, nothing prevented Mr Mpshe from stating this to Mr Downer. The latter's anger or disappointment would then have been directed at Mr McCarthy.

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.

78. In an attempt to bolster this obvious irrational explanation, the NPA and Mr Zuma brought into their answering affidavits, the previous conduct of McCarthy in regard to his role in the Browse-mole report. The Browse-mole Report did not relate to the timing of the service of the indictment, which in this instance is the high water mark of Mr Mpshe's reason to discontinue the prosecution of Mr Zuma. It only served to describe the character of Mr McCarthy as an officer who is inclined to meddle in political affairs, nothing more. It was information well known to Mr Mpshe even before he heard the tapes of the recorded conversations. It is irrational to argue that it constitutes the basis upon which the prosecution was to be discontinued.

79. Thus the information on which Mr Mpshe based his decision to discontinue the prosecution of Mr Zuma, is inconsistent with, and does not support the allegation that by seeking to delay the service of the indictment, Mr McCarthy sought to influence the outcome of elections and therefore demonstrated an abuse of process. There is thus no rational link between the alleged misconduct of Mr McCarthy and the decision of 1 April 2009.

80. As already stated, the decision to discontinue the prosecution of Mr Zuma was taken0. The chronology of events stated earlier in this judgment, indicate that at all material times and since the 27 of

judgment, indicate that at all material times and since the 27 of November 2007, the decision of Mr Mpshe and senior members of the management team of the NPA had been to continue with the prosecution. The prosecution team led by Mr Downer also held this view, even after Mr Mpshe had, unknowingly to the prosecution team, taken the decision to discontinue the prosecution.

81. Even after the legal representatives of Mr Zuma had made representations to Mr Mpshe and senior members of the management of the NPA during February 2009, the view was consistently held that the prosecution must continue.[21] There is no record that there was a change of this view, right up to the evening of the 31 March 2009 when Mr Mpshe and other senior members of the management team listened to the tapes.

82. Mr Hofmeyr records in his affidavit that he and Mr Mzinyathi briefed Mr Mpshe and other senior members of the NPA, on the content of the tapes. Therefore, at the time when Mr Mpshe decided to listen to the tapes on 31 March 2009, he had been briefed about the content and knew what to expect. However, the following day on the 1 April 2009, Mr Mpshe announced to the NPA Senior Management that

[21] This appears from the Answering Affidavit of Mr Hofmeyr as well as the draft memoranda and letter included in the record as D7 and D8.

after listening to the tapes, he was angry and felt betrayed and therefore have decided to discontinue the prosecution.

83. When Mr Mpshe announced his decision on 1 April 2009, no discussion was held with Senior Members of the NPA to source their views on this subject. This omission is critical, considering that up to 31 March 2009, they have been collectively discussing and agreed to continue with the prosecution. They too had been briefed on the content of the tape and on the evening of 31 March 2009, they heard the tape with Mr Mpshe. It is expected that they individually would have formed some views on the matter. Failure to source their views under the circumstance was irrational.

84. Mr Mpshe did not reveal that he had heard new information on the tape, which was not stated to him previously by Messrs Hofmeyr and Mzinyathi during their briefing and which caused him to change his mind. There is no evidence that after he had listened to the tapes, there was something specifically that he had heard which was not brought to his attention during the briefing. The record reflects that he still held the view that the prosecution must continue, even after he was briefed on the content of the tapes. His sudden inexplicable turnaround on this matter is clearly irrational.

85. Mr Mpshe referred to the pressure exerted on the NPA concerning the fate of the intended prosecution of Mr Zuma. During argument, counsel for Mr Zuma stated that his client needed a response from the NPA as he was due to be sworn in as President of the Republic of South Africa within a few weeks.[22] Mr Mpshe was subjected to such pressure that he could not afford the time and space to properly apply his mind on the implication of what he was about to do. He failed to exercise and apply the balancing act of the two imperatives necessary for the consideration of the abuse of process doctrine.

86. Mr Mpshe ensured that the prosecution team and Mr Downer were not informed of the decision, until 6 April when he was to announce it to the public. If indeed the decision had been rational and above board, why the secrecy? Needless to state that Mr Downer, unaware that the decision had been taken on 1 April 2009, the following day on 2 April 2009 submitted a comprehensive memo, motivating why the prosecution needed to continue.

87. Mr Mpshe did not allow, or offer an opportunity to Mr Mngwengwe, the Director of Public Prosecution in Kwa Zulu Natal, who had authorised the indictment and thus the prosecution, to listen to the

[22] In fact, Mr Zuma was sworn in as President on 9 May 2009, the month after the decision to discontinue the charges was taken.

tapes and state his views. It was, after all, the indictment he had signed concerning a case he had authorised prosecution, which was being discontinued.

88. Mr Mpshe failed to explain how the information he had heard on the tape could be said to have affected, compromised or tainted the envisaged trial process and the merits of the intended prosecution. In fact, in his media address, he concedes that the alleged conduct of Mr McCarthy had not affected the merits of the charges against Mr Zuma. There was thus no rational connection between the need to protect the integrity of the NPA and the decision to discontinue the prosecution against Mr Zuma.

89. He totally ignored the concerns he had personally raised prior to making the decision; that the information from the tape and the representation from Mr Zuma's lawyers had to be investigated, verified and the tapes authenticated.

90. Mr Mpshe in his own words on 1 April 2009 stated that he felt angry and betrayed. It is the view of this Court that his feelings of anger and betrayal caused him to act impulsively and irrationally, considering the factors as stated in the preceding paragraphs. He did not allow himself time to consider the question whether the very decision he

was about to take, could be regarded by other people facing similar charges throughout South Africa, as a breach of the principles of equality before the law or that it would be an abuse of process to discontinue charges against people of high profile or standing in the community.[23] The NPA ignored its own view as set out in the draft letter that was to be sent to Mr Hulley which conveyed:

> *"The conflict between your client's defence and the prosecution's evidence can only be determined if all the evidence the prosecution and your client wish to adduce is presented and tested in a court of law."*

91. For the reasons set out above, this court finds that there are no substance in the submissions of the respondents and the *amicus curiae.*

CONCLUSION AND FINDING

92. Having regard to the conspectus of the evidence before us we find that Mr Mpshe found himself under pressure and he decided to discontinue the prosecution of Mr Zuma and consequently made an irrational decision. Considering the situation in which he found himself, Mr Mpshe ignored the importance of the oath of office which

[23] See the R v Latiff supra.

demanded of him to act independently and without fear or favour.[24] 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.

93. The respondents further argued that since the charges against Mr Zuma were formally withdrawn in court on 8 April 2009 after Mr Mpshe decided to discontinue the prosecution the order sought in the notice of motion may be of no consequence. We are constrained to state that said technical argument was not raised in the papers and it cannot render the order we are to make herein inept and ineffective.

94. This Court, for the reasons stated above, finds that the decision of 1 April 2009 by Mr Mpshe to discontinue the prosecution of the case against Mr Zuma is irrational and should be reviewed and set aside.

COSTS

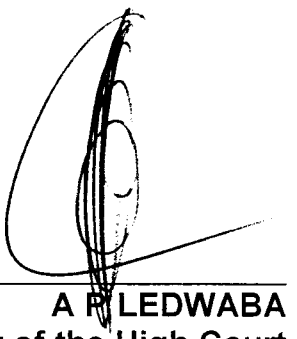
95. The costs follow the result and the respondents should bear the costs of this application, jointly and severally, the one paying the others to be absolved.

[24] See s32 of the NPA Act for the full text of the oath.

96. Concerning the *amicus curiae,* in exercising our judicial discretion, we think it would not be appropriate to make a cost order against it because it was admitted by the court and the opposition to its application was withdrawn by the applicant. Furthermore, the applicant did not persist that a cost order should be made against the *amicus curiae.*

97. In the premises it is hereby ordered:

    1. The application succeeds.
    2. The decision of the first respondent, dated 1 April 2009, to discontinue the prosecution of the case against the third respondent in accordance with the indictment served on him on 28 December 2007 is reviewed and set aside; and
    3. The first, second and third respondents are ordered, jointly and severally, to pay the costs of the applicant, including the costs of three counsel.
    4. No cost order against the *amicus curiae.*



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