IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Constitutional Court Case No.
Supreme Court of Appeal Case No. 573/08
Natal Provincial Division Case No. 8652/08 and CC273/07

In the matter between :

JACOB GEDLEYIHLEKISA ZUMA Applicant

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Respondent

AND IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPEAL TO THE CONSTITUTIONAL COURT IN TERMS OF RULE 19 OF THE RULES OF THE CONSTITUTIONAL COURT AGAINST A DECISION OF THE SUPREME COURT OF APPEAL HANDED DOWN ON 12 JANUARY 2009.

APPLICANT'S FOUNDING AFFIDAVIT

I, the undersigned, **MICHAEL HULLEY,** make oath and say that :

1.

(a) I am a duly qualified, admitted and practising Attorney. I practise under the name and style of Hulley & Associates. My offices are situate at 2nd Floor, Momentum House, corner Prince Alfred Street and Ordnance Road, Durban.

(b) I have acted in my professional capacity as the Attorney for **JACOB GEDLEYIHLEKISA ZUMA,** the Applicant, since during or about June 2005.

(c) I make this affidavit in support of the Applicant's application for leave to appeal. I am duly authorised to do so by the Applicant and I am advised that it is proper for me to do so in terms of Rule 19 (3) of the Rules of the Constitutional Court. I refer to the confirmatory affidavit deposed to by the Applicant. The general content of this has been clarified with the Applicant who

due to logistical issues may only sign it subsequent to the filing of this affidavit and the unsigned confirmatory.

2.

The facts herein deposed to are within my personal knowledge and belief save where otherwise stated, or where it appears otherwise from the context, in which event I believe the averments made to be true and correct. Submissions of law are made on the advice of Counsel.

THE PARTIES:

3.

The Applicant is **JACOB GEDLEYIHLEKISA ZUMA,** President of the African National Congress who resides at 8/10 Epping Street, Forest Town, Johannesburg, Gauteng (he will be referred to as the Applicant or Mr Zuma).

4.

The Respondent is **THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS** appointed by the President of the Republic of South Africa in terms of Section 179 of the Constitution, who is the Head of the National Prosecuting Authority of South Africa and who has his offices at VGM Building, 123 Westlake Avenue, Weavind Park, Silverton, Pretoria, Gauteng.

THE APPLICATION FOR LEAVE TO APPEAL:

5.

(a) The Applicant applies for leave to appeal in terms of Rule 19 of the Rules of the Constitutional Court against the decision handed down by the Supreme Court of Appeal on 12 January 2009 under Supreme Court of Appeal Case No. 573/08. A copy of the decision is annexed and marked **"A".** This will be referred to as the SCA judgment.

(b) The SCA decision upheld an appeal by the Respondent

against the decision of Nicholson, J. in the Natal Provincial Division under Case No. 8652/08 (and CC273/07) as Court of first instance. A copy of the judgment of Nicholson, J. is annexed hereto and marked **"B".** This will be referred to as the judgment of the Court **a quo** or the Court of first instance.

THE RELEVANT FACTS:

6.

Although the facts of the matter and the relevant sequence of events appear from the judgments of the Court **a quo** and the SCA, I set out below, for the convenience of this Court, a short summary of the most salient facts in their chronological sequence. The facts are largely common cause.

7.

In about mid-2001 (at the latest) an investigation was launched by the National Prosecution Authority **("the NPA")**, through its Directorate of

Special Operations **("the DSO")**, into any criminal wrongdoing by the Applicant and one Shabir Shaik **("Shaik")** relating, particularly, to the so-called arms deal and a possibly corrupt relationship between them. The investigation was intensive. It was completed by 23 August 2003.

8.

On 23 August 2003 Mr. Ngcuka (the then National Director of Public Prosecutions) announced at a televised media briefing that it had been decided by the NPA not to charge the Applicant. The reason stated was that, while there was a **prima facie** case against the Applicant, the case was not sufficiently strong **("winnable")**. However, Shaik was to be charged with various counts of corruption and fraud. I shall refer to Mr. Ngcuka's decision not to prosecute the Applicant as **"the Ngcuka decision"**.

9.

In June 2005 Shaik was convicted of the offences with which he was charged. The Applicant, who was then Deputy President of the

Republic of South Africa, was relieved of his duties by Mr. Mbeki, the then State President. Shortly thereafter, and also during June 2005, Mr. Pikoli, the then National Director of Public Prosecutions, decided to charge the Applicant with essentially the same offences with which Shaik had been charged, insofar as those offences related to the relationship between the Applicant and Shaik. It is common cause that the Applicant was not afforded an opportunity to make representations to Mr. Pikoli before Mr. Pikoli took the decision to charge him. Mr. Pikoli's decision to charge the Applicant will be referred to as **"the Pikoli decision"**.

10.

The criminal charges against the Applicant were terminated when the criminal case was struck from the Roll by Msimang, J. on 20 September 2006, the State's request for a postponement of the criminal trial having been refused and the State having indicated that it was not prepared to proceed with the trial.

11.

On 11 October 2007 the Applicant's attorneys wrote to the Respondent, requesting an opportunity to make representations should his matter be reviewed, the State having previously indicated that it had not as yet decided whether to prosecute the Applicant or not. On 12 October 2007 the Respondent notified the Applicant that his case was not the subject of a review or reconsideration by the Respondent and was still in the normal course of investigation by the DSO. It is self-evident from this that in the Respondent's view representations would have been premature at that stage.

12.

The Respondent says that on 27 December 2007 Mr. Mpshe, the Acting National Director of Public Prosecutions (Mr. Pikoli having been suspended), took a decision to charge the Applicant in respect of corruption involving the arms deal and his relationship with Shaik and certain ancillary charges which flowed from the main charges. This decision will be referred to as **"the Mpshe decision"**. The Mpshe decision was implemented by the service of an indictment on the

Applicant on 28 December 2007. It is common cause that the Applicant was not afforded an opportunity to make representations to Mr. Mpshe before the Mpshe decision was taken. It is also common cause that no attempt was made to call for the representations the Applicant asked to make on 11 October 2007, nor to inform the Applicant that the Respondent had in fact, in the interim, come to consider whether to indict the Applicant and that, therefore, if the Applicant was entitled or wished to make representations, the time was ripe for him to do so.

THE RELIEF SOUGHT BY THE APPLICANT IN THE COURT OF FIRST INSTANCE:

13.

In the Court of first instance the Applicant sought a declarator that the Pikoli and Mpshe decisions to prosecute the Applicant were invalid, and sought an Order setting aside the decisions and the Indictment.

THE APPLICANT'S CAUSES OF ACTION:

14.

(a) The Applicant contended in the Court of first instance (and contends before this Court) that the Mpshe decision (and the Pikoli decision) were invalid because they constituted a review and reversal of the Ngcuka decision not to prosecute the Applicant, announced on 23 August 2003. The Applicant contended that the Respondent was required to act under Section 179 (5) (d) of the Constitution in taking both the Pikoli decision and the Mpshe decision. It is common cause that at no stage prior to the Pikoli or the Mpshe decision was the Applicant afforded an opportunity to make representations as to whether the Ngcuka decision not to prosecute should be reviewed. Indeed, it is common cause that no attempt at all was made by the NDPP to comply with the provisions of Section 179 (5) (d). The Applicant contended that the Respondent's failure to allow the Applicant an opportunity to make representations was a clear, conscious and deliberate

negation of the constitutional pre-requisites under Section 179 (5) (d) of calling for representations, considering these if provided, and then making an informed decision whether to reverse the earlier Ngcuka decision and institute a prosecution or not.

(b) The Applicant further contended that the Mpshe decision fell to be set aside as unlawful, unreasonable or procedurally unfair within the parameters of Section 33 of the Constitution, **alternatively** that the Mpshe decision offended the principle of legality.

JUDGMENT OF THE COURT A QUO:

15.

Nicholson, J. held that the Applicant could not attack the Pikoli decision to prosecute him as the indictment which followed the Pikoli decision became a nullity once Msimang, J. struck the matter off the Roll (at [242]). Insofar as the Mpshe decision was concerned, he held that that decision fell within the parameters of Section 179 (5) (d) and that

because the Applicant had not been afforded the opportunity to make representations before the decision was taken, the decision was invalid and fell to be set aside. In addition, Nicholson, J. held that the Applicant had a legitimate expectation that the Respondent would take his representations before the Pikoli and Mpshe decisions were made (at [230] and [231]). The Court **a quo** subsequently gave the Respondent leave to appeal to the SCA.

THE SCA DECISION:

16.

The SCA held that on a proper interpretation of Section 179 (5) (d) of the Constitution, that sub-Section applied only to decisions taken within the National Prosecuting Authority by Directors of Public Prosecutions **("DPP"S)** and by persons for whom the DPP's are responsible. Section 179 (5) (d) did not apply to the Pikoli or Mpshe decisions because those decisions were taken by the National Director of Public Prosecutions, whether solely or jointly with a Deputy National Director of Public Prosecutions. Decisions of a Deputy National Director and of the Head of the DSO did not fall within the parameters

of Section 179 (5) (d) as these Prosecutors were not DPP's nor persons for whom DPP's were responsible. The SCA also rejected the Court **a quo's** finding that the Applicant had a legitimate expectation that the NDPP would take the Applicant's representations before deciding to reverse the Ngcuka decision and on the basis for such an obligation on the part of the NDPP, it was unlawful not to afford him an opportunity to make representations.

THE GROUNDS ON WHICH THE SCA DECISION IS DISPUTED:

17.

(a) The Applicant respectfully contends that the SCA erred in its interpretation of Section 179 (5) (d) of the Constitution.

(b) The Applicant further respectfully contends that the SCA erred in rejecting the finding that the Applicant had a legitimate expectation that the NDPP would take the Applicant's representations before deciding to reverse the Ngcuka decision and in finding that there was not an

obligation to hear such representations as the Applicant sought to make.

(c) The grounds of the Applicant's contentions are dealt with below.

FIRST GROUND OF APPEAL: THE INTERPRETATION OF SECTION 179 (5) (d) OF THE CONSTITUTION:

The Respondent's interpretation advanced before the Court a quo and the SCA:

18.

The Respondent argued in the Court of first instance and in the SCA that Section 179 (5) (d) applies only to decisions taken by DPP's. The rationale for this argument was, in the Court of first instance, that the DPP's were **"autonomous"** under Section 179 (3) (b) of the Constitution, and, in the SCA, that the powers of the DPP's were **"original"** and **"entrenched"**, also by virtue of the provisions of Section 179 (3) (b) which provides that national legislation must ensure that the DPP's are **"responsible for prosecutions in specific**

jurisdictions, subject to sub-Section (5)". The SCA held, correctly with respect, that the word **"responsible"** in Section 179 (3) (b) means that the DPP's are **"answerable, accountable; liable to account"** (at [59]). The person to whom they are answerable is the NDPP. This is the converse of the rationale for the argument that was advanced on behalf of the Respondent before both the Court of first instance and the SCA. The rationale for the Respondent's argument thus fell away.

19.

Once it is established that there is nothing **"original"** or **"entrenched"** about the DPP's powers, the Respondent's whole argument crumbles because that argument is premised on the need to **"strike a balance"** between the "**original and entrenched powers"** of the DPP and the powers of the NDPP - the correct position is simply that the NDPP is the Head of the single National Prosecuting Authority (Constitution, Section 179 (1) (a)) and the DPP's exercise their powers subject to his directions and control. (National Prosecuting Authority Act, No. 32 of 1998 **("the NPA Act")** - Section

20, particularly Section 20 (3)).

20.

Despite it having been established that the Respondent's interpretation of Section 179 (5) (d) was premised on a fallacy, the SCA upheld that interpretation, albeit under a completely different **ratio.** The **ratio** for the SCA's interpretation of Section 179 (5) (d) appears to be set out in a single, short paragraph at [62] of the judgment in which the SCA held that the power to review in the context of Section 179 (5) can only be a function of the Respondent, **qua** Head of the NPA and that Section 179 (5) (d) accordingly deals only with the review of a decision by the **"relevant"** DPP - it does not include a reconsideration of the NDPP's own decisions or that of a Deputy Director or a Prosecutor in the DSO.

21.

The Applicant respectfully contends that the SCA's **ratio** is flawed and that its interpretation of Section 179 (5) (d) is incorrect for at least the

following reasons :

(a) The **ratio** proceeds from an incorrect premise concerning the nature of a **"review"** under Section 179 (5) (d).

(b) Section 179 (5) (d) does not say what the SCA held it means.

(c) There is no contextual support for the SCA's interpretation of Section 179 (5) (d).

(d) The SCA's interpretation is not in accordance with the provisions of Section 39 (2) of the Constitution and is offensive to the equality provisions of the Constitution.

(e) The SCA's interpretation results in anomalies which create consequences which could never have been intended by the framers enacting the Constitution.

22.

Before dealing with these aspects I firstly set out the Applicant's contentions as to the meaning of Section 179 (5) (d) and the impact (constitutional and otherwise) of the consequences of the two competing interpretations.

23.

The Applicant respectfully submits that Section 179 (5) (d) simply does not say what the SCA held it to mean. What it does say is the following :

> ***"(The NDPP) 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".

24.

There is no qualification placed on the decision with reference to who took it. The sub-Section refers to **"a decision to prosecute or not to prosecute"** i.e. **any** decision of that kind.

THE INTERPRETATION OF Section 179 (5) (d):

25.

(a) **"A decision to prosecute or not to prosecute"** – The sub-Section contains absolutely no qualification or restriction on the phrase **"decision to prosecute or not to prosecute". Prima facie** it relates to any and all such decisions which the NDPP reviews. Whilst it is not expressly spelt out who made the decision to be reviewed by the NDPP, it obviously refers to a decision of the Prosecuting Authority, following on S179(2) which vests the power to make such decisions in the Prosecuting Authority after creating it and the components thereof being the NDPP, DPP's and Prosecutors (S1791(1)). See also the head note to S179 – **"Prosecuting Authority"**, which is then

described with reference to the NDPP, the DPP's and prosecutors (S179(1)). Interpretation in the context of the provision is the first rule of construction; S179 deals with the creation and functions and powers of the Prosecuting Authority:

(b) The sub-Section finds application whenever the NDPP then reviews (i.e. considers with a view towards reversing or maintaining) a decision by the Prosecuting Authority which includes the NDPP, the Deputy NDPP's, the DPP's and the Prosecutors appointed under the contemplated legislation (the National Prosecuting Authority Act No. 32 of 1998) **("the NPAA").**

(c) The remainder of Section 179 (5) (d) deals with what are obviously jurisdictional pre-requisites for the NDPP's review decision.

26.

Section 179 (5) (d) thus means exactly what it says. If a NDPP seeks to consider reversing any decision to prosecute or not, compliance with its consultative and hearing requirements must first be complied with.

The Pikoli and Mpshe decisions fall four square within those parameters.

27.

There is no sound reason why the Court should not give Section 179 (5) (d) the aforesaid ordinary literal grammatical meaning which the language and context conveys:

[See also: **S v TOMS; S v BRUCE 1990 (2) SA 802 (A) 807 H – 808 A quoted by the Court *a quo* Vol 15, p1248, par 67**].

28.

It would have been a simple matter, and would have made perfect grammatical sense, for the legislature to have enacted Section 179 (5) (d) in the following terms (bold [ ] = insertion; bold underlining = omission) :

> *"(The NDPP) may review a decision **[by a Director of Public Prosecutions]** to prosecute or not to prosecute, after consulting **[such Director]** (**the relevant Director of Public Prosecutions**) and after taking representations within a period specified by the National Director of 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".*

29.

The Applicant respectfully submits that the legislature's failure to spell out, in these simple terms, what the SCA held the sub-Section to mean, is a powerful indication that the sub-Section does not have the restricted meaning attributed to it by the SCA, and that it falls to be read in accordance with its ordinary literal grammatical meaning (or it could simply have stated by **"a Director of Prosecutions or any Prosecutor under his jurisdiction"** if even greater clarity was sought).

(By parity of reasoning compare **RAF v. Rampukar 2008 (2) S.A. 534 (SCA) at 541 B-C**) :

> ***"This agreement, of course, immediately gives rise to the question why, if this was indeed the legislature's intention, it failed to take the relatively simple step of introducing the restricting phrase".***

30.

The simple exercise, **in casu,** of qualifying the decision referred to in Section 179 (5) (d) was taken neither in respect of Section 179 (5) (d) of the Constitution nor in the like-worded Section 22 (2) (c) of the National Prosecuting Authority Act, No. 32 of 1998, enacted some two years later.

THE DIFFERENT CONSEQUENCES:

31.

On the Applicant's interpretation:

(a) The NDPP must implement the Section 179 (5) (d) process whenever he reviews any decision to prosecute or not, including his own or a decision of his predecessor or a deputy NDPP. In short, all persons affected by a potential change of a prosecutorial decision at NDPP level are treated equally in respect of the hearing of representations prior to such changes – they are entitled to have their representations considered. (Everyone affected by any prosecutor's decision is of course entitled to approach the NDPP and request him to review it and he obviously can do so or not in the exercise of his discretion). The SCA's interpretation holds that if the NDPP reviews the decision of a DPP or a prosecutor under a DPP, Section 179 (5) (d) applies; it does not apply to reviews of decisions of the NDPP himself and his predecessors, Deputy NDPP's, the DSO prosecutors. The rights of those affected by the

decisions and their changes are thus fundamentally different depending on who made the **"first"** decision. There appears to be no rational basis for this unequal treatment offensive to the equality provisions and principles which are at the core of the Constitution's values and none were identified by the SCA.

(b) The Applicant's interpretation generally promotes the prospects of a correct and informed NDPP apex decision on review as opposed to the situation countenanced by the SCA's interpretation wherein the change may be considered with input only of one opposing party's views (the complainant or the accused) or with no input of the persons directly affected, in all cases.

(c) The Applicant's interpretation promotes the values inherent in the **audi alterim partem** principle in all NDPP reviews and promotes the reasonable reliance by affected persons on NDPP decisions already made (a relevant value in terms of the Policy); the SCA's interpretation only recognises

these values in the limited instances where it says Section 179 (5) (d) applies.

(d) The Applicant's interpretation does not hold any negative consequences for the NDPP; it tends to enhance public confidence in the justification of changes in decision at NDPP level and promotes the considerations which require a party to be heard prior to the consideration of an adverse decision as opposed to subsequently (as accepted by the SCA in **AG v BLOM** (infra)). The SCA's interpretation deprives one category of review decisions of this (there is also no real logistical or pragmatic advantages in terms of a fixed practice the NDPP must consider representations so the exercise of considering these must be done, as set out hereafter).

(e) The Applicant's interpretation results in no anomalies in respect of Section 179 (5) (d); the Respondent's interpretation does – this is dealt with hereafter.

(f) The checks and balances in Section 179 (5) (d) are all measures that contribute to a better informed decision by the NDPP and also promotes transparency and increases public confidence in the reversal of prosecutorial decisions. Why should the decision of a NDPP (especially a joint one) be excluded? The SCA provides no explanation for this and the autonomy argument of the NDPP likewise. It is wholly irrational to seek to protect or safeguard the **"autonomy"** of the DPP's by giving the Accused **and** the Complainant and other relevant parties the right (but not the duty) to make representations. Why would this be added to the requirement of simple consultation with the DPP and how do the added requirements protect the DPP? At least one of them is going to try and wholly undermine the previous decision of the DPP to obtain a reversal thereof, if they make representations.

THE RATIONALE OF S179(5)(d):

32.

The purpose of S179(5)(d) is to protect the legitimate reliance especially an Accused and a Complainant place on a duly considered and announced decision to prosecute or not to prosecute and also their interest in the result of such decisions as these are the parties who generally are most directly and significantly affected by that. It protects this at the level of NDPP decision making. Prosecution Policy expressly recognises the legitimacy of such reliance (see **Vol 4, p295, lines 25 – 27**). The jurisdictional pre-requisites in S179(5)(d) also in effect clearly serve to limit arbitrary changes of the decision to prosecute or not, by the NDPP. The *dictum* quoted below in **CARLSON INVESTMENTS SHARE BLOCK (PTY) LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2001 (3) SA 210 (W)** (concerning S79(1) of the Income Tax Act No. 58 of 1962) is descriptive also of S179(5)(d) and its purpose: The pre-requisites are brakes on **"the arbitrary exercise of power" "In my view, it is important to understand that the power to reassess may be exercised only when the jurisdictional facts set out in s 79(1) are present. This in itself is a brake on the arbitrary**

exercise of power. If the respondent or any of the respondent's officials were to purport to exercise the power to reassess in the absence of such jurisdictional facts then such action is clearly challengeable in Court." 233 B – C (our emphasis).

See also: **SCAGGEL v AG OF THE WESTERN CAPE 1996 11 BLR 1446 (CC) [16] – [18].**

There is no rational reason to exclude a reversal at NDPP level of any decision to prosecute from its ambit.

33.

Generally the purpose of Section 179 (5) (d) must be to promote rational and informed reversals of prosecutorial decisions (and hinder potential political pressure in the process).

34.

THE NATURE OF A REVIEW UNDER SECTION 179 (5) (D) OF THE CONSTITUTION:

The nature of a review under Section 179 (5) (d) of the Constitution lies at the heart of the SCA decision. It is therefore necessary to establish precisely what is meant in Section 179 (5) (d) by a **"review"**.

35.

The SCA dealt with this topic at [61] of its judgment and, after pointing out that in its ordinary meaning, a review can include a reconsideration of one's own decision, started its discussion by reference, with rare approval, to a **dictum** by the Court **a quo** to the effect that a review usually assumes a role distant from the person whose decision is being reviewed. The SCA held that a review is carried out in the ordinary course on the existing record and on the facts that were before the person whose decision is being reviewed. The SCA then referred to the judicial review powers vested in Courts (mainly the High Courts) by various statutes. The SCA concluded, on this basis, that it is erroneous

to have regard to a dictionary meaning of the word **"review"** which includes the review of one's own decision. The meaning of the word **"review"** depends on the context in which it is used in Section 179 (5) (d) of the Constitution.

36.

The Applicant respectfully submits that there is no textual or contextual support to be found in the Constitution for the SCA's finding that the **"review"** referred to in Section 179 (5) (d) is the judicial review, or even a species of that review, by means of which the Courts exercise control over public power or the proceedings in lower Courts or other decision-makers. Indeed, a review in the narrow legal sense referred to by the SCA in paragraph [61] of its judgment is largely directed at and focused on the procedural fairness and propriety of the decision being reviewed - it is not focused on the merits of the decision.

37.

The Applicant respectfully submits that it is inappropriate to equate the

"review" procedure referred to in Section 179 (5) (d) to the review procedures exercised by Courts of law in the narrow sense referred to by the SCA. The plain purpose of the procedure envisaged in Section 179 (5) (d) is to arrive at a fair, final and **correct** decision, having considered all the relevant facts available to the NDPP at the time. The Applicant respectfully submits that it is inconceivable that the legislature could have envisaged that in reviewing a decision under Section 179 (5) (d) the NDPP would be limited to the record or the facts before the person whose decision was being reviewed, and that the NDPP therefore could not take into account the further facts or relevant circumstances which had either arisen subsequently or been overlooked by the person who had taken the decision to prosecute or not to prosecute. Indeed, such an approach would be inconsistent with the requirement that the NDPP must take representations from the complainant, the accused and any other relevant person - if the NDPP were restricted to the **"record"** before the original decision-maker, these requirements of Section 179 (5) (d) would make no sense. Moreover, the review process from which the SCA seeks to distil the meaning of review in Section 179 (5) (d) is one where a judicial officer **"reviews"** the decision of another body from certain

irregularities / irrationalities. Here it is the very decision taking body which reviews itself in order to arrive at a new decision without any referral back to the decision taken. It is wholly inappropriate to colour it by means of an analogy which is clearly inappropriate.

38.

It is indeed not odd to use the term review in respect of one's own decision or policy – indeed that is exactly what Mr Ngcuka stated in respect of the Ngcuka decision. Mr McCarthy used the same terminology and indeed the Code uses the term review clearly also in the context of a Prosecutor reconsidering his own decision. Cleary S179(5) does not refer to a review in the sense the High Court reviews decisions.

39.

The Applicant respectfully submits that the word **"review"** in Section 179 (5) (d) means no more than that the NDPP may consider and change (or not) a decision already taken to prosecute or not to

prosecute, after complying with the requirements of Section 179 (5) (d) and in the light of **all** the relevant facts and circumstances available to the NDPP. The New Oxford Dictionary of English records that to **"review"** means to **"examine or assess (something) formally with the possibility or intention of instituting change if necessary"**. The Applicant respectfully submits that this reflects the ordinary meaning of the word **"review"** which fits comfortably with the notion that the NDPP is also bound by the provisions of Section 179 (5) (d) when he reviews one of his own decisions (or any other decision to prosecute or not to prosecute).

40.

The Applicant respectfully submits that the plain purpose of Section 179 (5) (d) is that the NDPP must approach the matter with an open mind, armed with all the relevant facts and circumstances as are available at the time of his **"review"**. The purpose is to assess the previous decision's **correctness** after input from all relevant persons. In doing so, the NDPP will not be constrained by any of the restrictions imposed on a Court of law in the discharge of its judicial function of

reviewing the exercise of public power or the proceedings of inferior Courts or other decision-makers.

41.

In the circumstances, the Applicant respectfully submits that the SCA proceeded from an incorrect premise in categorising a **"review"** under Section 179 (5) (d) as a species of judicial review, as opposed to the wider ordinary meaning of that term. The incorrect premise infects the entire **ratio**, because, having started from the wrong departure point, the SCA took the short but, with respect, incorrect step (at [62]) to the conclusion that a review under Section 179 (5) (d) does not include a reconsideration of the NDPP's own decisions (at [62]).

42.

A further basis for the Respondent's contention that Section 179 (5) (d) applies only to the decisions of DPP's, appeared to be that Section 179 (5) (d) requires the NDPP to consult **"the relevant"** DPP. The SCA appears to have accepted this interpretation at [62] of the SCA

decision. The Applicant respectfully contends that the SCA's interpretation is incorrect -the interpretation relies on what is no more than a **procedural** requirement of Section 179 (5) (d), once that sub-Section is applicable, and elevates that **procedural** requirement to a **jurisdictional pre-requisite** to the operation of the sub-Section itself. The Applicant respectfully contends that this is to put the cart before the horse.

43.

The phrase **"relevant director"** indeed does not support the Applicant's interpretation – surely there was no reason at all why the clear formulation suggested above which accords with sensible expression would not have been adopted if that was meant to be conveyed. **"Relevant"** suggests quite plainly that the DPP to be consulted, is not necessarily he who made the decision.

44.

We submit that the **procedural requirement** that the NDPP consult the relevant DPP is no more than a practical recognition that, in the ordinary course, decisions to prosecute or not to prosecute would be taken by a DPP or some-one **under** him and that all prosecutions would occur in the jurisdiction of a DPP. The DPP's are, in terms of S179(3)(b), responsible for prosecutions, in specific (geographic) jurisdictions making up the whole of the RSA. Any decision to prosecute would then be relevant to **one** of them (certainly when the Constitution was passed). That **one** is **the relevant** one referred to in Section 179 (5) (d). We submit that Section 179 (5) (d) does not and cannot mean that the decision to prosecute or not to prosecute had to emanate from a **DPP** (himself or herself) before the sub-Section can come into operation. Such an interpretation would lead to absurd consequences. A DPP who suspects that the NDPP may change a decision under Section 179 (5) (d) could then simply tell an underling to make the decision and negate the powers of review in Section 179 (5) (d).

45.

The phrase **relevant** director indeed then implies the contrary of what the Appellant contends for. The DPPs' (the old AGs') combined jurisdiction covered the whole of the geographic jurisdiction of the RSA as recognised by S179(3)(b). A decision to prosecute or not would thus relate to the jurisdiction of one or other of them in the scheme and structure of S179; a Prosecutor (including the DPP himself) would normally have made the decision to be reviewed. Clearly the DPP in whose jurisdiction the case falls would be the relevant DPP – hence the reference to relevant as opposed to the DPP **"who made the decision".** In short, S179 contemplates that every prosecution would resort under some DPP.

46.

In the vast majority of cases, the decision on review, if it is to prosecute, will be implemented by a DPP in whose jurisdiction the prosecution is to be instituted, and will, in all cases, be prosecuted in a Court within the jurisdiction of **a** DPP who is therefore responsible (i.e. accountable) for that prosecution under S179(3). Moreover, it must be

borne in mind that in terms of the Constitution, the NDPP is a direct presidential appointment for which no appropriate qualifications such as the DPP's must have (S179(3)(a)), were set. Consultations with an appropriately qualified person do not seem out of place.

47.

Indeed, the insertion of the word **"relevant"** detracts strongly from the NDPP's interpretation; the grammatical construction and reading of Section 179 (5) (d) would sit far easier and more naturally with that interpretation if the word **"relevant"** was not used at all. In the NDPP's argument **"relevant"** is indeed a tautology or superfluity and there is a strong presumption against interpretations which yield such results – [compare **COMMISSIONER FOR INLAND REVENUE v GOLDEN DUMPS (PTY) LTD 1993 (4) SA 110 (A) 116 F – 117 B**].

SECTION 179 (5) (d) DOES NOT SAY WHAT THE SCA HELD IT TO SAY:

48.

What the Section says has been spelt out hereinbefore where the Applicant sets out the literal meaning of Section 179 (5) (d) – the SCA read a limitation not appearing in the words therein – without sufficient justification.

THERE IS NO CONTEXTUAL SUPPORT:

49.

The Applicant respectfully submits that there is no contextual support for the SCA's interpretation of Section 179 (5) (d).

50.

The DPP's are, in terms of Section 179 (3) (b), responsible for prosecutions in specific (geographic) areas in which they are seated, subject to Section 179 (5). The Applicant respectfully submits that the SCA correctly held that the word **"responsible"** means no more than

that the DPP's are accountable to the NDPP, as the Head of the NPA, for prosecutions within their respective areas of jurisdiction. The responsibility imposed on the DPP's gives the DPP within whose area of jurisdiction a prosecution is to be instituted and conducted, a very real interest in the prosecution itself. The Applicant respectfully submits that it is **that** DPP who is **"the relevant"** DPP referred to in Section 179 (5) (d) of the Constitution. It is that DPP who is responsible and accountable for the prosecution. The Applicant respectfully submits that the words **"the relevant DPP"** in Section 179 (5) (d) do not, in the context, denote that the DPP (or his or her subordinate) had to be the person who had taken the decision to prosecute or not to prosecute in the first place - the sub-Section recognises that the DPP within whose area of jurisdiction the prosecution is to take place, or may take place, is or will be responsible and accountable for that prosecution and therefore has a very real interest therein. (There is a DPP at the seat of every High Court). The Applicant respectfully submits, in addition, that there may be a range of cogent, practical reasons why that particular DPP's input may be required to enable the NDPP to make an informed decision under Section 179 (5) (d) - on the face of it factors such as the availability and expertise of the

prosecutorial staff available to that particular Director, the state of the Court Rolls, the anticipated duration of the prosecution and the complexity of the case what the policy in that jurisdiction is in respect of such offences etc may all be factors which require input from the DPP concerned. The obvious answer is of course that the overwhelming number of cases would have at least passed through the hands of a DPP or the Prosecutors under such DPP prior to landing n the NDPP's desk hence the consultation envisaged.

SECTION 39 (2) OF THE CONSTITUTION:

51.

Section 39 (2) of the Constitution provides that when interpreting any legislation, and when developing the common law or customary law, every Court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. The Applicant respectfully submits that the provisions of Section 39 (2) apply with equal force to the interpretation of Section 179 (5) (d) of the Constitution. On this basis, any Court interpreting Section 179 (5) (d) is enjoined to favour an interpretation that is expansive rather than limiting of the protections

and safeguards under Section 179 (5). As stated by the SCA in the context of a right to be heard - **MNGOMEZULU AND ANOTHER v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND ANOTHER 2008 (1) SACR 105 (SCA) par [6]**.

52.

The Applicant respectfully submits that the right to be heard is recognised as a core element of the concept of natural justice and the rule of law which is a justiceable, fundamental value which underlies the Constitution. In addition, Section 9 of the Constitution provides for **"equal protection and benefit"**. The Applicant respectfully submits that the SCA's interpretation draws an arbitrary line between those persons affected by a decision to prosecute or not to prosecute taken at DPP level or below, and a decision taken or confirmed above that level or in the DSO. Those affected by the former decisions have the rights correlative to the duties imposed on the NDPP under Section 179 (5) (d). Those affected by the latter class of decisions have no such rights under the SCA's interpretation.

53.

In the circumstances, the Applicant respectfully submits that the proper interpretation of Section 179 (5) (d) is the wide ambit embraced by the ordinary literal meaning of its provisions, thus promoting the values and objects underlying the Constitution. This is the mandatory canon of constitutional construction under Section 39 (2).

54.

The SCA rejected the Applicant's reliance on the equality provision (Section 9) of the Constitution. The SCA held at [67] that the question in this regard was whether the right to equality under the Bill of Rights was **"ousted by other considerations"** in the circumstances of Section 179 (5) (d). The SCA held that there were other considerations that trumped the right to equality under Section 9. It appears from the judgment that the considerations that trumped the right to equality were three in number, as follows :

(a) The underlying purpose of Section 179 (5) (d) was not to

protect the accused or the complainant, but to define the procedure for the exercise of the power of control of the NDPP.

(b) The positioning of the alleged right of the Applicant was strange - the SCA considered it odd that a right would be conferred on a person under a chapter of the Constitution dealing **"basically with structures concerned with the administration of justice and not rights"** - **"the Bill of Rights deals in great detail with the rights of accused persons, and is silent about the right to be invited to make representations concerning prosecutorial decisions"**.

(c) Section 179 (5) (d) **"discriminates"** on any basis, in the sense that the right to be invited to make representations does not extend to **"most prosecutorial reviews like those by a DPP or a prosecutor"** (at [67]).

55.

The Applicant respectfully submits that the SCA erred in all three of its reasons.

56.

The first reason concerned the underlying purpose of Section 179 (5) (d). The Applicant respectfully submits that the SCA incorrectly categorised the purpose of Section 179 (5) (d) as simply defining the procedure for the NDPP's exercise of the power of control as an end in itself. The Applicant respectfully contends that the purpose of Section 179 (5) (d) is to ensure and / or enable the NDPP to reach a well informed correct and final decision after following a fair procedure. In doing so, Section 179 (5) (d) expressly imposes certain duties on the NDPP. Correlative to those duties are rights conferred on the persons referred to in Section 179 (5) (d), including the person who is or may be accused of a crime, and a complainant. The SCA's reasoning does not answer the obvious question as why these procedures consist of giving a right to be heard to those directly affected by the NDPP's consideration. It is hardly procedure for the sake of procedure. The

recent jurisprudence of the SCA is replete with case law setting awards of public tenders pursuant to the provisions of S217 of the Constitution for lack of compliance with the requirements of that Section with the bidders relying for their right to do so on the provisions of S217.

57.

The second reason cited by the SCA is that one would not expect rights to be conferred under Chapter 8 of the Constitution - one would expect such rights to appear in the Bill of Rights under Chapter 2. The Applicant respectfully submits that the reasoning cannot be sustained. The reference to an **"accused person"** in Section 179 (5) (d) (i) is clearly not limited to a literal reference to a person who is accused in the sense that that person faces a charge. In the case where the decision under review is a decision not to prosecute, the sub-Section plainly refers to a person who would have been charged had there been a decision to prosecute. As far as I am aware, there is no provision in the Bill of Rights or elsewhere in the Constitution, save for Section 179 (5) (d) itself, conferring rights on such a person or on the complainants envisaged in Section 179 (5) (d).

58.

The approach that because S179(5)(d) is Section 179(5)(d) and part of Chapter 8 of the Constitution, as opposed to say Section 35(7) of Chapter II of the Constitution (and for the Complainant a similar provision under Section 33?), the purpose of S179(5)(d) was not to confer rights on Accused or Complainants, nor is it to be linked to rights in the Bill of Rights, is erroneously at odds with the SCA's own approach to the enforcement of Sections outside the Bill of Rights. The approach to tender processes offensive to S217 of the Constitution exemplified in the SCA jurisprudence on the subject, exemplifies this.

59.

An Accused's fair trial rights in S35(3) in any event encompasses more than the specifically enumerated rights which follow as sub-sections. The right to a fair prosecution is clearly included therein and the link to a lawful prosecution is equally clear. S179(5) was obviously the logical place to deal with legal requirements for a lawful prosecution.

60.

In addition, the Applicant respectfully submits that it is well established that it is plain that the Bill of Rights was not intended to be an exhaustive exposition of the content of the rights protected thereunder, and that there are several Sections in the Constitution which amplify, enhance or limit rights in the Bill of Rights

(Cf. **New National Party of South Africa v. Government of the Republic of South Africa and Others 1999 (3) S.A. 191 (CC).**

Doctors for Life International v. Speaker of the National Assembly and Others 2006 (6) S.A. 416 (CC).

Matatiele Municipality and Others v. President of the RSA and Others (No. 2) 2007 (6) S.A. 477 (CC) at [36]).

61.

The third reason cited by the SCA was that Section 179 (5) (d) is in any event discriminatory in the sense that the persons on whom rights are conferred by Section 179 (5) (d) have no rights in circumstances where a person lower in the hierarchy than the NDPP changes a decision to prosecute or not to prosecute. The Applicant respectfully submits that this reasoning is incorrect. The Applicant respectfully submits that the absence of any provision in the Constitution concerning the re-visiting by persons subordinate to the NDPP of decisions to prosecute or not to prosecute, cannot impact the interpretation of a Section of the Constitution which empowers the NDPP to review a decision to prosecute or not to prosecute, while simultaneously imposing procedural duties on him, and correlative rights on others, in the process. The Applicant respectfully submits that Section 179 (5) (d) falls to be interpreted in its own terms in the context in which it appears in the Constitution, and not on the basis of an underlying assumption (for it is no more than that) that persons subordinate to the NDPP have no such limitations because the Constitution does not expressly impose them.

62.

It further rests on a logical **non sequitur** – it reverses the proper sequential process of logic. The question is not why should Section 179 (5) (d) exist given the absence of such a process applying to **"lower"** prosecutors, it is why should, in the light of the existence of Section 179 (5) (d), such a process not apply to other prosecutors reversing a decision to prosecute or not? The Appellant's line of reasoning proceeds on the premise that the proposed NO safeguard process is correct – that is not so, even in the historical sense. The correct starting point in a constitutional dispensation is, however, surely the Section 179 (5) (d) safeguard process as the basic premise for it was a specific obligation enacted specially in the Constitution and entrenched against ordinary legislative change. It is not clear why the divergence of the Section 179 (5) (d) regime from the regime which governs other prosecutors in respect of changes in decision, render S179(5)(d) as interpreted by the Respondent anomalous, as opposed to rendering the other prosecutors' regime anomalous.

63.

It is with respect a cart before the horse approach to utilise this as a justification for giving S179(5) a restrictive interpretation. The framers of the Constitution dealt with the apex structure of the Prosecution. They decreed that the NDPP must comply with these dictates if he is to reverse a decision to prosecute or not. They also decreed the NDPP had to formulate binding legal Policy and directives for prosecutors, well aware of the injunction of S39 of the Constitution. They may well have considered that these Constitutionally prescribed instruments would contain similar *mutatis mutandis* provisions. It is submitted later that the sense of especially the Policy and Code indeed calls for a similar S179(5)(d) approach albeit on a basis of principle as opposed to a rule of thumb. What is clear, however, is that the lack of a similar and precise term to S179(5)(d) in these instruments cannot be utilised to interpret the Constitution. It may also be that because of the level of the NDPP's intervention and the finality thereof in a hierarchical sense as well as the political connotations to the appointment, the specific requirements were set. One cannot however, use the provisions of the NPAA and the structures there created to interpret the Constitution which is both the earlier and supreme law. Once this is recognised,

much of the basis of the argument seeking to restrict S179(5) simply disappears.

64.

In short, the lack of precise provisions governing all cases and requiring compliance with the type of safeguards in S179(5)(d) in the Code and Policy may be an indictment of the quality and validity of these instruments; it cannot however serve to interpret S179(5)(d) or limit its ambit as dictated by S39 of the Constitution.

65.

These principles have been endorsed by the Constitutional Court as to the interpretation of provisions of the Constitution.

[See: <u>ISLAMIC UNITY CONVENTION v MINISTER OF TELECOMMUNICATIONS AND OTHERS</u> 2008 (3) SA 383 (CC), at paragraph 57 read with the authorities cited at footnote 82. **"The disputed paragraphs cannot be used**

as an aid to interpret the impugned provisions, in the same way that regulations made in terms of legislation cannot be used as an aid to interpret that legislation."]

66.

The Applicant further respectfully submits, in any event, that the SCA's underlying assumption (i.e. that persons subordinate to the NDPP can freely change decisions to prosecute or not to prosecute) is unwarranted. Those persons are constitutionally bound under Section 179 (5) (a) by the prosecution policy, and, under Section 179 (5) (b) by policy directives issued by the NDPP. The prosecution policy provides in terms that, **inter alia** :

> ***"People should be able to rely on and accept decisions made by members of the Prosecuting Authority. Normally, when a suspect or an accused is informed that there will not be a prosecution or that charges have been withdrawn, that should be the end of the matter. There may, however, be special reasons why a prosecutor will review a particular case and restart the prosecution. These include :***
>
> **** an indication that the initial decision was***

clearly wrong and should not be allowed to stand ;

* ***an instance where a case has not been proceeded with in order to allow the police to gather and collate more evidence, in which case the prosecutor should normally have informed the accused that the prosecution might well start again ; and***

* ***a situation where a prosecution has not been proceeded with due to the lack of evidence, but where sufficient incriminating evidence has since come to light***

...

The decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused and their families. A wrong decision may also undermine the community's confidence in the prosecution system.

...

The review of a case is a continuing process. A prosecutor should take into account changing circumstances and fresh facts which may come to light after an initial decision to prosecute has been made. This may occur after having heard and considered the version of the accused and representations made on his or her behalf. Prosecutors may therefore withdraw charges before the accused has pleaded in spite of an initial decision to institute a prosecution ...

...

It is important that the prosecution process is seen to be transparent and that justice is seen to be done".

THE SCA'S INTERPRETATION OF SECTION 179 (5) (D) RESULTS IN ANOMALIES:

67.

Some of the anomalies arising out of the SCA's interpretation of Section 179 (5) (d) have already been referred to. In the circumstances, it is not necessary to belabour the point other than to illustrate it by reference to a single hypothetical example. The DPP KZN decides not to prosecute A(ccused). He conveys this decision to A and C(omplainant). C unsuccessfully endeavours to persuade the DPP to change his mind. C then approaches the NDPP. The NDPP decides to review the DPP's decision, and, as is common cause between the parties and would be the case under the SCA's interpretation, has to and does comply with Section 179 (5) (d). The NDPP therefore gives A and C an opportunity to make representations. He confirms the

decision not to prosecute and conveys it to the parties. Some time later the NDPP is suspended or resigns or is replaced. A new or Acting NDPP assumes office. C again endeavours to persuade the new NDPP to institute a prosecution against A. On the SCA's interpretation of Section 179 (5) (d) the NDPP may accede to that request without hearing C (or any other person). The previous NDPP could not have done so because when he reviewed the decision it was a decision of a DPP. However, by the happenstance that that decision had been confirmed in the interim by an NDPP, the new NDPP is not bound by the strictures of Section 179 (5) (d). The Applicant respectfully submits that the SCA's interpretation leads to arbitrary and anomalous results which could never have been intended by the framers of the Constitution Indeed, such results would be wholly irrational - there is no rational basis on which A would have no right to make representations simply because the DPP's decision had previously been confirmed at higher level. Indeed, that factor should strengthen, as opposed to destroy, A's right to be given an opportunity to make representations if a change is again to be considered.

68.

The SCA held at [68] that anomalies arise out of the Applicant's interpretation as well, but the Applicant respectfully submits that that conclusion is incorrect. The Applicant respectfully submits that on scrutiny it will be seen that the alleged anomalies are really not anomalies at all. They evaporate when the purpose of Section 179 (5) (d) is considered - the plain purpose is to ,maximise the prospects for a **final** and **correct** decision after a **fair** procedure has been followed. Fairness, finality and correctness are the hallmarks of Section 179 (5) (d). The Applicant respectfully submits that while a decision to prosecute or not to prosecute may be overturned at a lower level, subject to the provisions of the Prosecution Policy and the Code of Conduct promulgated under the NPA Act, any person aggrieved thereby may take the matter to the NDPP in the assurance that a fair and final decision will be reached in the matter by the apex Head of the NPA, apprised of all available relevant facts and circumstances. Absent Section 179 (5) (d), the remedy of an aggrieved complainant following a decision not to prosecute, is to embark on the costly and daunting prospect of approaching the High Court to set aside the decision and obtain a **mandamus**. An aggrieved accused would be in

an even worse position following a decision to prosecute, absent fraud or ulterior motive in the narrow sense referred to in the SCA judgment, because his right to review the decision is excluded by the provisions of Section 1 of the Promotion of Administrative Justice Act, No. 3 of 2000 which exclude under the definition of **"administrative action"** the right to review a decision to institute or continue a prosecution.

69.

The anomalies that the NPA complains of and the SCA's recognition of these are thus easily explained. However, there is a fundamental flaw underlying the anomalies posed and that is the failure to recognise that the process of inviting (and considering) representations from accused persons and complainants and other relevant parties precedes the making of a decision. In other words, the representations from all relevant parties are to assist in determining whether to reverse a prosecutorial decision to prosecute or not. At the time of such hearing, a decision to alter the prosecution decision has not yet been made. The anomalies posed by the NPA ignore this critical purpose.

70.

The steps in S179(5)(d) are to be taken before the decision is taken. The NDPP also does not at that stage know whether he is going to reverse or uphold the decision he is reconsidering. The Respondent reverse engineers the process in its logic. If the NDPP confirms the decision not to prosecute without hearing representations from the Complainant or the other relevant parties, his decision is **ultra vires** and offensive to legality.

71.

In the circumstances, the Applicant respectfully submits that the only rational interpretation of Section 179 (5) (d) which meets the plain purpose and is congruent with the context of Section 179 (5) (d) is that it means precisely what it says on its ordinary, literal, grammatical meaning i.e. it applies to **any** decision to prosecute or not to prosecute.

72.

Should a NDPP review a decision of his own office to prosecute or not as opposed to that of a DPP, there is no rational difference from the perspective of the interests of the relevant parties in S179(5)(d)(i) – (iii) in participating in the review process. Indeed, given at least as part of the rationale that such participatory rights serve to minimize or ameliorate political influence to change a decision, the mechanism of suspending or dismissing an NDPP to have a more **"compliant"** NDPP to reverse a decision, suggests that the fear or favour requirement dictates similar protection for the relevant parties where a change in the person of the decision-maker coincides with a review.

73.

The rejection of the alternative argument referred to in par [71] of the SCA judgment is in addition also unsound:

74.

The argument was simply this:

(a) A decision by the DSO prosecutors or deputy NDPP is covered by Section 179 (5) (d) – Section 179 (5) (d) when it was promulgated (assuming that an earlier NDPP decision is excluded) covered all other NPA decisions but that of the NDPP in the structure then envisaged. That intention is not frustrated by creating prosecutors not falling under a DPP but still part of the NPA.

(b) It was the NPA's case that the Ngcuka decision was a joint one – clearly it was not a decision of the NDPP alone.

(c) This does not self-destruct on the Mpshe decision being a joint one. Once the Ngcuka decision was taken also by Ngcuka, only a decision by the NDPP could reverse it given the NPA hierarchy. If the Mpshe decision was then not one by the NDPP, the Ngcuka decision has not been changed, and if it was one by the NDPP, Section 179 (5) (d) applies. (On the SCA's interpretation joint decision-making is an easy way to evade Section 179 (5) (d) – as long as the NDPP has someone deciding with him, Section 179 (5) (d) does not

apply – that could hardly have been the intention).

75.

In par 72 – 74 the SCA attempts to identify factors seemingly to support a finding that Mpshe's decision has no link to Ngcuka's decision because of various factors e.g. the evidence and judgment in the Shaik trial and that at least partially it may survive Section 179 (5) (d) but the NPA had such evidence when the decision was made (there is no suggestion that Ngcuka was ever thereafter approached on the basis of new evidence) and the judgment in Shaik was what Ngcuka anticipated – the NPA had a very winnable case. The Policy makes it very clear that past decisions may be **reviewed** if new evidence emerges – if no new evidence emerges and no other special circumstances exist, there should not even be a reconsideration – irrespective of the procedural requirement - of the decision in terms of the Policy (especially given the absence of limitation periods, save the 20 year general limit). The review in Section 179 (5) (d) indeed practically invites new evidence being placed before the NDPP. How the emergence of new evidence (which may in turn be newly

answered) changes the **procedure** for deciding whether it justifies change of the decision, other than by way of a legal **non sequitur**, is not understood.

76.

Similarly, it does not follow that because the counts against Mr Zuma have been added to, that the decision to prosecute is only to be set aside partially. The core conduct in all the indictments has remained the same; it is that conduct which is the focus of Section 179 (5) (d) – compare S35(3)(m) of the Constitution. Moreover, it is entirely speculative to reason that if the NDPP should have allowed representations on the core issues, he would still have decided to prosecute on ancillary charges (e.g. tax declarations) which are substantially dependent on the core charges. (This consideration also does not apply to the alternative argument and the SCA's analysis assumes the good may be severed from the bad, in result, in respect of a decision-making process which is flawed – the case law has often held that this is not feasible)

THE ALTERNATIVE BASIS ON WHICH THE SCA HELD AGAINST THE APPLICANT:

77.

The SCA held at [75] that the Mpshe decision was not a review of the Ngcuka decision not to prosecute, because the Ngcuka decision was no longer extant. The **ratio** for this conclusion appears to be that when Msimang, J. struck the criminal trial off the Roll in September 2006, **"the effect (was) ... that what went before the Mpshe decision was spent and a new decision to prosecute was required"**.

78.

The Applicant respectfully submits that the SCA erred in this regard because if the Applicant is correct in his interpretation of Section 179 (5) (d), then the Pikoli decision was invalid. Indeed, this would become common cause. The Pikoli decision was therefore a nullity and could not have affected the Ngcuka decision, which stood. Furthermore, the Mpshe decision, on the Respondent's argument, upheld by the SCA, depends, for the validity of the Mpshe decision, not on the **fact** of the Pikoli decision but the **validity** of the Pikoli decision,

for it was only if Pikoli's decision was valid that it could legally destroy Ngcuka's decision and leave Mr. Mpshe with the clean slate envisaged by the SCA.

(Cf. **Oudekraal Estates (Pty) Ltd. v. City of Cape Town 2004 (6) S.A. 222 (SCA) at [26] to [38].**

79.

The SCA's view further conflates the institution of charges which is what falls away, with the decision to prosecute which is a discrete legal act and survives the demise of the former (as is implicitly recognised in S342A of the Criminal Procedure Act).

80.

The Applicant therefore respectfully contends that the alternative basis on which the SCA held against the Applicant firstly depends on the proper interpretation of Section 179 (5) (d) and is no independent

basis for its decision.

81.

What is incomprehensible is why the striking off of a case which terminates the then current criminal court charges before Msimang J, undoes Ngcuka's decision which is wholly in accord with the result thereof – there are to be no charges.

82.

The SCA judgment does not deal with S39 and has not identified any legitimate Constitutional objective or advancement of the administration of justice, which is promoted by the restriction it seeks to read into S179(5)(d). This is because there is not one. The restriction results in extra-ordinary and irrational results which are wholly irreconcilable with the equality provisions of S9 – everyone is entitled to equal protection and **benefit** of the law.

83.

The Applicant thus contends that the prospects for success in respect of the interpretation dispute are strong and that the SCA interpretation should not stand as the basis and justification for differential and unequal treatment of the public in respect of decisions of great interest for those directly and indirectly affected thereby.

ALTERNATIVE ARGUMENT:

84.

The SCA in [76] – [80] rejected Mr Zuma's argument that even if the fact that the Ngcuka decision was made in part by a NDPP takes it outside the strict parameters of Section 179 (5) (d), there was still an obligation on the NDPP to at least afford Mr Zuma a meaningful opportunity to make representations prior to making his decision. The SCA, in respectful submission, erred in this regard for the reasons which follow.

85.

The SCA rejected this argument because no discrete undertaking to hear representations from Mr Zuma could according to it be identified in any specific document or event.

86.

The SCA further pronounced that the argument advanced on the alternative basis on behalf of Mr Zuma was opaque. This alternative ground was according to the SCA confined to a legitimate expectation argument.

87.

This was not the alternative basis set out in the founding affidavit or in the heads of argument in the Court of first instance or the SCA and pigeon-holing the case made by Mr Zuma in this manner was bound to give rise to difficulties in comprehension.

88.

Nor is the case about Mr Zuma's right to be invited to make representations. This pronouncement that it is about Mr Zuma arrogating such a right, shifts the attention from what the case was actually about:

(a) Whether a jurisdictional fact under S179(5) of the Constitution for a valid change in prosecutorial decision was present; that related to representations either actually made and considered or for which a meaningful opportunity was provided; or alternatively

(b) Whether outside Section 179 (5) (d) specific parameters, it was unlawful to change the earlier decision not to prosecute Mr Zuma without affording him an opportunity to present representations (Vol 1, p54 of the founding affidavit – **"This application is about the unlawful denial of an opportunity to make those representations."**).

89.

In the Heads of Argument before the SCA, the Applicant summarised its case as follows:

THE ALTERNATIVE BASIS RELIED ON BY THE RESPONDENT:

90.

"If the NDPP's interpretation that Section 179 (5) (d) applies only where the NDPP seeks to review a decision of a DPP and the Pikoli and Mpshe decisions do not do so, then the Respondent contends that in the circumstances of the case he had a right to make representations which was unlawfully negated by the NDPP"

91.

"The duty to invite representations contended for flows from the interpretation and application of the provisions of the Constitution, the NPAA and the Policy and Code and the conduct of the NPA in the circumstances of the case".

92.

The Prosecution Policy and the Prosecution Code form the legislative backdrop to the alternative in argument. Copies of these are annexed marked **"C"** and **"D"** for the convenience of the Court.

THE PROSECUTION POLICY:

93.

The Prosecution Policy is not simply to be treated as an internal declaration of Policy which the NPA can change at will and observe to the extent it deems meet. Compliance with the Policy is a Constitutional imperative (S179(5)(a)) and this is recognised as such in the Policy itself. It also recognizes that members of the public will rely on such a document and conduct themselves in accordance therewith. In short, the Prosecution Policy, though it must clearly not be read and interpreted as a Statute as it lays down principles rather than rigid prescriptions, is binding law which the NPA must comply with, and which the public can legitimately expect will be complied with and which, where individual interests are threatened, can be enforced.

Conduct contrary to it is clearly unlawful and contrary to the principle of legality which binds the NPA.

94.

S22(6) of the NPAA also requires a Code of Conduct which all members of the Prosecution Authority **must** comply with (the NPAA defines the Prosecution Authority to include the NDPP – Section 1 – and both the Code and Policy require input from the Government). See also the Policy and Code which themselves proclaim their binding nature.

95.

Under the heading **"Restarting a Prosecution"**, the Policy provides as follows:-

> **"People should be able to rely on and accept decisions made by members of the Prosecuting Authority. Normally, when a suspect or an accused is informed that**

there will not be a prosecution or that charges have been withdrawn, that should be the end of the matter.

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

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

96.

Under the heading **"Purpose of Policy Provisions"**, the Policy provides as follows:-

> **"... Since the Prosecution Policy is a public document, it will also inform the public about the principles governing the prosecution process and so enhance public confidence. ..."**

97.

Under the heading **"The Role of the Prosecutor"**, the Policy provides as follows:-

> **"...Members of the Prosecuting Authority must act impartially and in good faith. They should not allow their judgment to be influenced by factors such as their personal views regarding the nature of the offence or the race, ethnic or national origin, sex, religious beliefs,**

status, political views or sexual orientation of the victim, witnesses or the offender. …".

98.

Under the heading **"Criteria Governing the Decision to Prosecute"**, the Policy provides as follows:-

"…The decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused and their families. A wrong decision may also undermine the community's confidence in the prosecution system. …"

99.

Also under the heading **"Criteria Governing the Decision to Prosecute"**, the Policy provides as follows:-

"... Where the prospects of success are difficult to assess, prosecutors should consult with prospective witnesses in order to evaluate their reliability. <u>The version or the defence of an accused must also be considered, before a decision is made</u>. ...".

100.

Also under the heading **"Criteria Governing the Decision to Prosecute"**, the Policy provides as follows:-

"... <u>The review of a case is a continuing process</u>. Prosecutors should take into account changing circumstances and fresh facts which may come to light after an initial decision to prosecute has been made.

This may occur <u>after having heard and considered the version of the accused and representations made on his or her behalf</u>. Prosecutors may therefore withdraw

charges before the accused has pleaded in spite of an initial decision to institute a prosecution. …"

101.

Also under the heading **"Criteria Governing the Decision to Prosecute"**, the Policy provides as follows:-

"… • Whether there has been an unreasonably long delay between the date when the crime was committed, the date on which the prosecution was instituted and the trial date, taking into account the complexity of the offence and role of the accused in the delay.

The relevance of these factors and the weight to be attached to them will depend upon the particular circumstances of each case.

It is important that the <u>prosecution process is seen to be transparent and that justice is seen to be done</u>."

102.

It is thus imperative that the prosecution policy lays down binding constitutionally prescribed norms which must be complied with – the NPA cannot (lawfully) act contrary to these norms. The policy consists of legal norms expressly required by the Constitution and by the NPAA to be complied with by the NPA in the exercise of its powers and functions.

103.

The discretion to review a decision to prosecute or not must be exercised according to the law (which includes the Policy) and within the spirit of the Constitution. It is thus no answer to a call for such compliance that the Policy is framed more as a collection of principles than as Statutory provisions – it contains **"principles governing the prosecution process".** Such a source of law may well give more

latitude or be more fluid as to what conduct offends or complies, but that does not detract from the fact that prosecutorial conduct either complies with or offends the principles of the Policy. Conduct outside these parameters offends the principle of legality. Given the above, the injunction to heed S39(1) and (2) in interpreting the Policy and applying it to the facts to establish the NPA's compliance or not, take on even greater significance.

104.

The Code has a similar status : Constitution S179(7) read with S22(6) of the NPAA:

(a) It is intended to promote and ensure public confidence in the integrity of the criminal justice system

(b) The discretion to institute proceedings should be free from undue political interference.

(c) 3(h): **"take into account all relevant circumstances and ensure that reasonable enquiries are made about evidence, irrespective of whether these enquiries are to the advantage or disadvantage of the alleged offender;"**.

(d) 4.2(d): **"if requested by interested parties, supply reasons for the exercise of prosecutorial discretion, unless the individual rights of persons such as victims, witnesses or accused might be prejudiced, or where it might not be in the public interest to do so;"**

105.

South African law recognizes the Prosecution's overriding duty to act fairly which is owed to suspect, accused, complainant and the community generally and that an abuse of the prosecution process is unlawful.

106.

The alternative case Mr Zuma relied upon was premised on the following:-

(a) The NDPP can consider representations prior to making a decision to prosecute. This was expressly enunciated by Ngcuka in his August 2003 announcement where he recognised it as a duty in respect of representations received.

(b) Section 179 (5) (d) imposes such an obligation on the NDPP in the specific circumstances envisaged there.

(c) S179(5) and (7) contemplate and prescribe legally binding instruments such as the Policy Guidelines and legislation which would deal with the prosecution process and exercise of the power to prosecute.

(d) Such a process and exercise of powers would be subject to the Constitutional demands of rationality and legality.

(e) In the Policy, a change in prosecutorial decision is singled out and distinguished from a first decision. The relevant extract has been cited.

(f) In view hereof it is not correct that as a matter of law, it is always lawful to change a decision to prosecute or not, without having representations from the Accused or Complainant; the specific facts and circumstances may require that an opportunity to make representations be afforded for a lawful change of decision. A ready example would be if the NDPP expressly agrees not to change his decision prior to affording such opportunity. There is no closed category of facts and circumstances which would dictate that.

(g) Mr Zuma's case is that given the facts and circumstances relevant to especially the Mpshe decision, a lawful decision required that such an opportunity be afforded to him.

107.

The Applicant's case in respect of the facts and circumstances which gave rise to the duty to afford him an opportunity to make representations, is set out hereunder to reduce the opaqueness complained of.

108.

The most relevant facts and circumstances which found the duty to consider representations prior to making the Mpshe decision are the following:

(a) In the context of enunciating the process of deciding whether to prosecute a person even at NDPP level, Ngcuka in a televised press conference stated:

> **"We have never asked for nor sought mediation. We do not need mediation and we do not mediate in matters of this nature. However, we have no objection to people making representations to us, be it in respect of prosecutions or investigations.**

In terms of section 22(4)(c) of the [NPA] Act, we are duty bound to consider representations."

(b) In short, the NPA is under a legal duty to consider representations prior to making a decision to prosecute or not, hence the use of the term **"investigations"**, and also after a decision to prosecute or not has been made, hence the use of the term prosecutions.

(c) The only way this does not translate simultaneously also into a practice consistently observed by the NPA is if Mr Ngcuka was dishonest about the NPA's perception of what is its legal duty (with a corresponding right) or if despite this perceived duty, the NPA in defiance of what it perceived its duty to be acted contrary to that perception and thus unlawfully in respect of representations generally. There is no suggestion of either of these explanations or that either of these explanations is true – hence there is a practice that the NPA considers representations where made, prior to a decision to prosecute or not, as well as reconsider decisions

where representations are received after such a decision. Clearly Mr Ngcuka's statement also equated at the same time to an undertaking to act in accordance with the legal position as perceived by the NPA and this has never been renounced by the NPA.

(d) The Prosecutorial Policy provides legal principles governing the exercise of the decision to prosecute or not, which in terms of the Constitution, has to be complied with. Whilst it calls for great care and consideration of all relevant facts in making the decision to prosecute or not as of first instance, it calls for a very specific process and attention in changing a decision to prosecute or not, for it recognises that an additional important consideration enters into the equation. The relevant portion has been set out hereinbefore.

(It is the consideration that persons affected by a decision to prosecute or not are justified in relying on a decision to prosecute or not which is also conspicuous by its absence

from the SCA's deliberations concerning Section 179 (5) (d) which clearly by implication recognises this consideration).

In short, a decision not to prosecute a person may be changed only if there are special reasons why a decision may be reviewed and changed. Both the Constitution in Section 179 (5) (d) and the Policy thus recognises that a reconsideration of a previous decision stands on a different footing than a decision to prosecute or not made of the first instance. The Pikoli and Mpshe decisions were made subsequent to a decision not to prosecute Mr Zuma in respect of at least the very same conduct which remained at the core of the Prosecution's charges and case.

(e) In the agreement before Msimang J in mid-2006, it was pertinently raised on behalf of Mr Zuma that it is his contention that a decision to change Mr Ngcuka's decision is unlawful and of no force and effect unless he be afforded a prior opportunity to make representations with reference to the provisions of Section 179 (5) (d). On a literal reading of

Section 179 (5) (d) the contention at least at face value had merit (as the Court *a quo* found). The issue of representations was thus known to have special and specific significance in respect of the taking of a decision to prosecute Mr Zuma.

(f) After the Msimang judgment in September 2006, the NDPP repeatedly asserted that no decision whether to prosecute Mr Zuma again, had been made, nor could it be indicated when he would consider and make such a decision: investigations were still ongoing.

(g) In a letter dated 11 October 2007 sent to and received by the NDPP on that date, Mr Zuma requested an opportunity to make representations prior to Mr Mpshe making his decision. The text read as follows:-

"As you are no doubt aware we act for Mr J.G. Zuma.

The recent developments in the NPA inter alia;"

1. **The suspension of the National Director of Public Prosecutions;**

2. **The meeting of the Directorate of Special Operations of 25 June 2007;**

3. **The appointment of an acting National Director of Public Prosecutions has not gone unnoticed.**

Further it has been reported that our office is intent on engaging in a review of certain cases of which the case against Mr Zuma constitutes one such case.

Through the proceedings and the documentation filed of record between Mr. Zuma and the NDPP it is abundantly clear

that certain allegations have been made about the manner in which both the investigation and the prosecution have occurred.

Accordingly may we request that in the conduct of such a review, that we be afforded an opportunity to make representations either orally or in writing which may better inform the decision which we understand you are applying your mind to.

Your urgent response would be appreciated."

109.

It is important to note the following features:

(a) The Hulley letter does not invoke Section 179 (5) (d) and demand compliance thereof.

(b) The decision in question of the NDPP clearly deals with the consideration of whether to charge Mr Zuma or not.

(c) It **requests** an opportunity to make representations in the event of such a consideration prior to deciding whether to prosecute Mr Zuma.

(d) Mr Mpshe replied the next day in laconic terms:

> **"The J.G. Zuma matter is not a subject of a review. This matter is undergoing further investigations the normal route for a decision to be taken. It is still being dealt with by the DSO."**

(e) It is perfectly clear what the Mpshe letter means in the context of the preceding events spelled out hereinbefore. The matter is still being investigated by the DSO; a decision

will be taken thereafter. Hence the request is premature. It does not refuse an opportunity to make representations which only the NDPP will know when they are appropriate.

110.

The argument is an obvious one:

(a) The NPA has a practice which in their perception amounts to a legal duty, to consider proffered representations prior to making a decision to prosecute. Ngcuka publicly announced this in the context of the decision to prosecute Mr Zuma in the August 2003 Press Conference.

(b) The NDPP Mr Mpshe stated that he would at some stage when he is ready, decide on the re-prosecution of Mr Zuma.

(c) Mr Zuma in writing requested an opportunity to make representations about what the decision should be.

(d) The NDPP in writing stated that the matter is not yet before him for taking the decision. There was no express statement that the representations will not be considered. On the contrary, in context the clear implication was that the NDPP would consider these but that they would be premature at this stage. Clearly only the NDPP would know when the time was ripe for these.

(e) The NDPP thereafter and without informing Mr Zuma that the matter is now before him and hence if he wants to make representations, now is the time, decided to prosecute him.

111.

This is what the Applicant contends for is what is unlawful as contrary to the practice and thus concretisation of the principles in the Policy which the Constitution expressly demanded compliance with. It is when these events are considered as a whole that the practice and undertaking and its breach relied upon, becomes clear.

112.

This is the argument the Applicant is entitle to have considered and not rejected because it is considered opaque – it is either correct as contended for, or it is incorrect, it is not opaque.

113.

The argument is further bolstered by:

(a) The Applicant had already brought a permanent stay application; that case and how it has expanded clearly in terms of the Policy had to be considered in deciding to prosecute or not.

(b) If the NDPP was concerned with delay, why would he invite a challenge to his decision under Section 179 (5) (d) or on the alternative basis (he had been clearly pre-warned about the legitimate expectation type argument) when there was absolutely no adverse consequence in acceding to Mr Zuma's request. On the contrary.

(c) The Msimang J Judgment that the previous decision to charge Mr Zuma was ill-considered and premature. Clearly a considered careful decision to overturn the 2003 decision was called for – this is common cause.

(d) The awareness of the sentiments in the case law in cases such as **A G V BLOM** that a hearing post a decision is no substitute for a prior hearing. This approach is echoed in Section 179 (5) (d) – reversals of important NPA decisions at NDPP level require a process whereby the input of the Accused and other relevant parties are sought prior to the decision actually being reconsidered in a new decision making process.

(e) Mr Zuma's insistence on political motives influencing the decision making of the NPA and especially the NDPP as evidenced by the timing and content of his dismissal by his political rival President Mbeki and the Pikoli decision. They are engaged in a bitter political battle in 2007 at this time for the political leadership of the country. Political influence

in prosecutorial decisions must be avoided as a matter of law). In short, if there is ever a time to demonstrate this and openness and fairness, this is the time.

(f) The acting NDPP is aware of the fact that Mr Zuma has strenuously contended before Msimang J that there is no real new **evidence** which warranted the reversal of the Pikoli decision. In short, there were no special circumstances as envisaged by the Policy to warrant the change. This is supported by the contents of the November 2005 indictment. Mr Zuma maintains his innocence on the charges.

114.

Some time shortly after Mr Zuma wins the political leadership of the ANC at Polokwane in mid-December, Mpshe then decides to prosecute him and announces this to the world by charging him on 28 December 2007. At no stage from October 2007 till 28 December 2007, does he invite or inform Mr Zuma to make representations as Mr Zuma

requested. There is no explanation for this in the papers and no sound explanation seems feasible. The NPA simply does not identify the harm in or reason for not granting Mr Zuma such an opportunity to make representations. There was none which accords with sense and fairness.

115.

In Mr Zuma's request he states that one of the issues he seeks to make representations on, is the manner of the investigation against him. The DSO is hardly going to provide details of any unlawful activities on its part to Mr Mpshe. Clearly this aspect is covered by the public interest considerations which must be considered in terms of the Policy (part 4(c)).

116.

Any sensible or fair Prosecution authority would have heeded the call to be allowed to make representations. What could the Prosecution have lost if it heeded Mr Zuma's request – absolutely nothing save that

a reversal of the Ngcuka decision may have been demonstrated by the representations to have been improper – that is hardly a negative consequence for a Prosecution authority which is obliged **"to act in a balanced and honest manner"** and **"impartially and in good faith"** unaffected by the **"political views"** of the Accused (See Policy par 3) and **"fairly".**

117.

The positive consequences of doing so are legion; the most relevant in the current immediate context are:

(a) The transparency of the process and the fairness thereof would have been advanced or at the very least would have appeared to have been advanced, especially in the climate of the political motivations alleged.

(b) If successful the representations would have obviated the need for a very expensive trial, when a not guilty verdict

may ultimately render this interference wholly unnecessary and unproductive.

(c) Even from a tactical point of view it could have revealed useful insight by the NPA into the Accused's defence and complaints, something the NPA, on its own version, had been intent on doing when it applied for the search warrants in August 2005.

118.

It is submitted that in these circumstances there was a clear legal obligation on the NPA to allow Mr Zuma an opportunity to make representations before the Mpshe decision.

119.

In short, all reasonable expectations point to the NDPP informing Mr Zuma about the proposed charges and that he may make representations in respect of those and the public interest issues.

120.

There are also a number of pronouncements earlier in the judgment which while it preceded the Section 179 (5) (d) interpretation by the Court, clearly also coloured the SCA's approach to the alternative argument and resulted in it regarding it as opaque and/or rejecting it.

121.

The SCA in par 54 held that from June 2005, Mr Zuma did not make representations. **"Instead, he resisted all attempts by the NPA to further their investigation."**

122.

There is no basis for this finding in the papers before the Court and at no stage was Mr Zuma given an opportunity to deal with this on affidavit. Clearly the statement is not correct. There is unsurprisingly no reference at all in the passage to any part of the papers that reflect the said finding. The finding seems difficult to reconcile with the

earlier pronouncements in the judgment about the resolution of disputes on paper.

123.

The SCA further clearly enunciated in the immediate continuation in par 54 how this view coloured its perception of the case Mr Zuma sought to make out:

> **"[54] It is necessary to stress that the NDPP never refused to afford Mr Zuma a hearing. Mr Zuma knew from June 2005 that he was the subject of an investigation. He was soon thereafter served with 'interim' indictments. He had been told in the Ngcuka press release that he could make representations under s 22(4)(c) of the NPA Act and that the NDPP was duty-bound to consider them. He did nothing of the sort. Instead, he resisted all attempts by the NPA to further their investigation. <u>This case is accordingly not about the opportunity to be heard</u> – it is about Mr Zuma's**

alleged right to be invited to make representations and, concomitantly, a right to a statement setting out the criteria that were applied in not prosecuting him and how these had changed. In other words, he requires with the invitation an analysis of the case against him as considered by Mr Ngcuka against the facts in possession of Mr Mpshe."

124.

The case made out and what was correctly upheld by the Court **a quo**, is that the NDPP clearly decided not to afford Mr Zuma an opportunity to make representations **before** Mr Mpshe reconsidered the earlier decisions in respect of his prosecution and decided whether to prosecute him. Mr Mpshe signed the answer to Mr Zuma's letter of request , he made the decision to prosecute; he never told Mr Zuma he was now considering his prosecution so that if he wished to make representations now is the time. The facts conclusively show in retrospect, such refusal.

125.

Nor is the SCA correct in understanding the argument that no reliance was placed on Mr Ngcuka's dictum – of course it was still relied upon but as always in the context and as part of a number of interrelated facts as set out above.

126.

It is not clear on what facts before the Court of first instance justified the pronouncement that together with the invitation Zuma required an NPA analysis of the different facts which were before Ngcuka and Mpshe. In the letter of October 2007 there is no mention of such a requirement on the part of Zuma and there is no basis for construing such a demand on the papers. Whilst obviously some draft indictment would have been sought simply to provide a sensible format for the representations, it is not clear why the Court held that Zuma sought such an analysis. It is a pronouncement not based on any facts before the Court, nor was Zuma ever called to deal with this fact.

127.

It is undoubtedly so that Mr Zuma did not make representations as remarked by the SCA; it is also undoubtedly so that he would have made representations prior to the Mpshe decision which Mr Mpshe would, in accordance with the practice of the NPA, have had to consider prior to making the decision, if Mr Zuma were told that such decision is now under consideration. That is what the complaint is.

128.

The SCA held that any allegation in the papers of any fact or circumstance which may serve to infer that political pressures or influence affected the decision to prosecute Mr Zuma despite the earlier decision of the NPA (Ngcuka *et al*) not to do so, is irrelevant to the case Mr Zuma brought. Par 23 reads:

> **"[23] The test for irrelevance is whether the allegations do not apply to the matter in hand or do not contribute one way or another to a decision of that matter.[1]**

[1] *Meintjes v Wallachs Ltd* 1913 TPD 278 at 285-286 quoted with approval in *Beinash v Wixley* 1997 (3) SA 721; [1997] 2 All SA 241 (A).

Inadmissible evidence is by its very nature irrelevant.[2] **Mr Zuma said that he introduced the allegations to show that the decision not to ask for his representations was deliberate and politically motivated. Whether the failure to provide him with a hearing was deliberate or politically motivated has nothing to do with his causes of action. He was, as a matter of law, either entitled to a hearing or he was not. If he was entitled to one, the reason for the failure to afford him one is completely immaterial."**

129.

It is not clear where Mr Zuma expressed the above underlined sentiment attributed to him and no reference is given in the judgment. It is pointed out that this was not the case made by Mr Zuma. That case was the following:

(a) When Mr Mpshe, in December 2007, decided whether to prosecute Mr Zuma or not, he was aware that Mr Zuma had

[2] *Swissborough Diamond Mines (Pty) Ltd v Government of the RSA* 1999 (2) SA 279 (T) 336F-G.

requested an opportunity to make representations, and clearly to do so before Mr Mpshe made his decision.

(b) Whether Mr Mpshe was obliged to give him a hearing or not, depended on a number of facts in circumstances.

(c) If Section 179 (5) (d) applied, simply on an interpretation thereof, he had to give him a hearing prior to his decision – in that instance, the allegations would indeed be irrelevant.

(d) Mr Zuma's case was, however, framed in the alternative – if for some reason Section 179 (5) (d) had such a limited scope that it did not govern the factual position in this case, there was nevertheless as part of the Prosecution's duty to act fairly, read with the principles and injunctions of the Policy and the Code, in the specific facts and circumstances of this contemplated prosecution, a legal duty to give Mr Zuma an opportunity to make the representations he requested to make.

(e) One such fact and circumstance to be considered in deciding whether to afford him a hearing was the alleged political influence / considerations (the founding affidavit made it clear that the truth hereof was not the issue; but the existence of these averments in the public domain).

130.

Mr Zuma's case on this is simply that because Mr Mpshe as the acting NDPP was well aware that there is significant public debate whether politics were heavily involved in the prosecutorial process involving Mr Zuma and indeed imputations from various quarters to this effect and that at least some of these accusations at **prima facie** level seem to be indicated by facts and circumstances as having some merit, this should have caused him to provide Mr Zuma with an opportunity to make representations when Mr Zuma sought such an opportunity. This issue was not raised to raise an inference in these papers that Mr Mpshe's decision not to provide an opportunity for prior representations, was politically motivated. The SCA's conclusions as to the relevance of the political assertions were thus based on a

perception of a different dispute than the one raised on the papers by the Applicant and hence the gulf between its approach and that of the Court **a quo**.

131.

The SCA approach to the relevance of these averments is further flawed in principle. Firstly, it fails to recognise that the **prima facie** case aspect is but one aspect of decision-making regarding a prosecution. Policy considerations are another even when there is a **prima facie** case. Public interest considerations can have political colour and can affect the decision. The relevance issue is thus very much broader as a result of the Policy than the pre-Policy era recognised.

132.

Secondly, the legislation and legislative instruments which govern prosecutorial decision making in the post-Constitutional dispensation require an absence of political intermeddling and at least certain

political considerations in the decision-making process. This appears from the passages cited hereinbefore from the Policy, Code and Guidelines and the authorities cited by the Court **a quo**. Outside the time-warp of the pre-Constitutional common law, political intermeddling and manipulation are relevant because they are precluded, not irrelevant unless it takes on the dimensions sketched by the SCA in respect of the decision on the **prima facie** aspect.

133.

Thirdly, it ignores that the NPA presented the evidence of Hofmeyer to the effect that the broad mischief that Section 179 (5) (d) was to combat, was the potential political manipulation of the decision making of the NDPP by reason of him being a political appointee. Read with the injunctions of S39(2) of the Constitution there can be little doubt as to the relevance of the political intermeddling issue.

134.

Fourthly, the prosecutorial decision-making process is to instill public confidence in the independence and fairness thereof. Decisions where political meddling or manipulation played a role or where they were perceived to have played a role, do not advance this objective enunciated by the Policy which governs prosecutorial decision-making. If meaningful effect is given to the Policy which is clearly what S179(5) of the Constitution demands, it is with great respect, self-evident that the existence of allegations of political intermeddling is relevant to the decision whether to seek and hear or hear representations or not. Clearly Mr Zuma and indeed any reasonable person would legitimately expect in the light hereof that the NDPP would recognise the existence of allegations of political meddling as a relevant factor as to whether he should consider representations which deal also with this in order to promote confidence in the decision to be made. Because the SCA conflates the decision whether to invite or hear representations offered to be made, with the decision to prosecute itself (that is the process of decision-making with the result thereof), it failed to recognise the importance and thus relevance of the averments of political meddling

in respect of the decision as to whether representations should be facilitated.

135.

The SCA also commented on a cut and paste approach from previous affidavits which had **"seemingly"** been adopted in the papers by Mr Zuma and the NPA. There is nothing **"seemingly"** about it – it is clear from the papers that that was done (indeed it was spelt out) so that there could not be any dispute about what allegations and counters formed the backdrop to the decisions to prosecute Mr Zuma. It was clearly so understood by the parties; what was sought to be placed before the Court was the past state of accusation and denial not some new case in this regard (the past) for it was the past context which was relevant on Mr Zuma's approach. These cut and paste remarks illustrate that the SCA, with respect, misunderstood the relevance of these background materials which relate to the **"political issues"**.

136.

It is contended that the SCA's judgment is deeply and fundamentally flawed in that it takes no real cognisance of the new Constitutional dispensation and the divide it represents with the past jurisprudence and hence the reasoning employed is firmly based on pre-Constitutional jurisprudence. This is clearly manifested by the absence of the implementation of the provisions of S39(2) of the Constitution which gets no mention in the NPA's heads and scant regard in the SCA's judgment despite this Court's injunction that this is an imperative in weighing competing interpretations.

137.

The SCA judgment proceeds from the central premises per the pre-Constitution jurisprudence that there is no obligation to hear representations prior to deciding whether to prosecute or not in any given instance.

138.

The correct Constitutional approach on the other hand clearly starts with Section 179 (5) (d) requiring the NDPP to take representations in the process before altering a decision to prosecute. How other prosecutors are to exercise the discretionary power to prosecute, was clearly to be determined by the Policy which the Constitution imposed as the binding norm. The starting point is thus to establish from an interpretation of S179(5) read with the Policy and Guidelines, in accordance with the dictates of S39(2), what a Constitutional exercise of the power to change prosecutorial decisions, demands. In such a process, equality of treatment of those affected by such an exercise of this power would, given the central role of equality in the Bill of Rights and the well established rule of law approach that everyone is equal before the law, be afforded a pre-eminent significance.

139.

Given the SCA's flawed approach, it is thus not surprising to find the equality objective of the Constitution being readily **"trumped"**.

140.

The pertinent question is what does the Constitutional exercise of the power to reconsider a decision to prosecute or not to prosecute require in the particular circumstances of this case, given that the dictates of the Constitution read with the NPAA and particularly the Policy seeks to govern this issue on the basis of the application of the principles therein enunciated as opposed to rigid statutory formulations.

THE STRIKING OUT:

141.

It is necessary to raise this issue because the Applicant contends that the allegations he made regarding the existence of the controversy and disputes as to political interference and pressures in the political process, are relevant for the purposes outlined above. Of course all it is relevant to is the question as to whether Mr Mpshe should have given Mr Zuma an opportunity to make representations which would also have dealt with this aspect in dealing with the previous aspect.

142.

As the relevance in this respect is in submission clear the decision as to relevance cannot stand for the reasons set out hereinbefore.

143.

Much of the criticism of the Court **a quo** which recognised the relevance of the averments, is as a result misplaced and the pervasive attack on its approach and findings, with great respect, misconceived. Once the relevance of the allegations were grasped the issue which remained in the Court **a quo** when the strike out applications were persisted in albeit not for the purpose of striking out but for other purposes – costs, rebuke etc – related to the averments being vexatious or scurrilous.

144.

The onus to establish vexatiousness or the scurrilous nature was on the NDPP. Left with little or no guidance in the form of argument and debate, the Court *a quo* was required by the NPA to make a decision left largely to its own devices. It thus looked at all the material placed

by the NDPP before it, together with the Applicant's averments and concluded that on what was placed before it, there appears to be sufficient merit in the allegations of political meddling that it cannot dismiss these averments as vexatious or scurrilous.

145.

It is difficult to understand the NPA's complaint endorsed by the SCA that the Court **a quo** did not debate all these issues and incidents it raised to explain its findings with it prior to making its findings when the NDPP first eschewed debate and then later demanded a decision without debate. It got exactly that – a decision with the Court's reasons arrived at on the basis of the onus being on the State and the Court being left to its own devices to consider and infer from the material before it. Much of the criticism of the Court *a quo's* findings is, with great respect, misplaced and resulted in the reversal of the cost orders.

CONSTITUTIONAL MATTER:

146.

This application involves constitutional matter because the issue concerning Section 179 (5) (d) is an issue involving the interpretation, protection or enforcement of the Constitution, as envisaged in Section 167 (7) of the Constitution.

[Armbruster and Another v Minister of Finance and Others 2007 (6) SA 550, at paragraph 24.

Radio Pretoria v Chairperson, ICASA 2005 (4) SA 319 (CC), at paragraph 19].

147.

It is also the first time that this Court is being asked to consider the interpretation of Section 179(5)(d) of the Constitution.

148.

In addition, the Applicant contends that the proper approach to the interpretation of Section 179(5)(d) is, as this Court has held, through the **"prism"** of the Bill of Rights, including the rights he asserts in the Bill of Rights, such as the rights to dignity and equality and his entitlement to rely on the doctrine of legality, a cornerstone of rule of law.

Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and Another v Smith N.O and Others 2001 (1) SA 545 (CC), at paragraphs 21-22

Phumelela Gaming and Leisure Limited v Grundling and Others 2007 (6) SA 350 (CC), at paragraphs 26-28

149.

This argument concerning the proper approach to the interpretation of Section 179(5)(d) contended for by the Applicant is in itself a

constitutional issue alternatively is an issue related to the primary constitutional issue that is, is the meaning of Section 179(5)(d). It is to be noted that the SCA's approach to the interpretation of Section 179(5)(d) dealt with this issue by considering whether the Bill of Rights (in particular the right to equality) was **"ousted"** by the provisions of the Section (paragraph 67), which it is submitted runs counter to the principles of constitutional interpretation developed by this Court at the start of the new constitutional dispensation and developed since then.

S v Mhlungu and Others 1995 (3) SA 867 (CC) at paragraphs 8-9.

Phumelela Gaming, *supra*, at paragraph 28.

150.

It is submitted that both the interpretation of Section 179(5)(d) and the proper approach to the interpretation thereof are matters contemplated in Section 167(7) of the Constitution.

THE INTERESTS OF JUSTICE:

151.

The Applicant respectfully submits that this case raises important questions concerning:

(a) the circumstances in which the Respondent must comply with the provisions of Section 179 (5) (d) of the Constitution;

(b) the nature of the **"review"** which the Respondent may undertake under Section 179 (5) (d) of the Constitution ;

(c) the extent of the rights of persons who fall into the categories of persons described in Section 179 (5) (d) of the Constitution **and related duties on the Respondent**;

(d) the legality of the Mpshe decision (and, on the alternative basis relied on by the SCA, the Pikoli decision) to prosecute the Applicant.

152.

The Applicant respectfully submits that it is in the interests of justice **and in the public interest** that these questions be **finally** determined in this Court.

153.

It is a well established principle that an enquiry into the **"interests of justice"** involves a balancing of all relevant factors, which is a flexible test which takes into account case-specific factors but is informed by the broad requirement of whether the interests of justice will be advanced by hearing the case. It is submitted that the foregoing issues and factors are of sufficient public importance such as to satisfy this test. It is contended that the resolution of the dispute about the proper interpretation of Section 179 (5) (d) raises important issues regarding the correct interpretative approach and the outcome governs how the NDPP have to approach the extremely important issue of changing decisions to prosecute at the highest level which impacts very significantly on the future rights and expectations for all those directly affected by decisions to prosecute or not. In short the decision

transcends the immediate dispute between the NPA and Mr Zuma and has various operational implications for the Prosecuting Authority.

[Magajane v Chairperson, North West Gambling Board 2006 (5) SA 250 (CC), at paragraph 29.

Radio Pretoria, *supra*, at paragraph 19.

Armbruster, *supra*, at paragraph 24

Thint Holdings (Southern Africa) (Pty) Ltd and Another v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions 2009 (1) SA 141 (CC), at paragraphs 21-22].

154.

In addition, it is submitted that the Applicant has reasonable prospects of success on appeal given that the interpretation of Section 179(5) advanced by the Applicant is consistent with and gives full effect to the

principles of constitutional interpretation developed by this Court, does not result in anomalies and advances the normative value system inherent in the Constitution.

STATEMENT IN TERMS OF RULE 19 (3) (d):

155.

The Applicant has not applied and does not intend to apply for leave or special leave to appeal to any other Court.

WHEREFORE the Applicant respectfully requests an Order in terms of the Notice of Motion prefixed hereto.

_____

DEPONENT

I CERTIFY THAT the Deponent has acknowledged that he/she knows and understands the contents of this Affidavit which was signed and sworn to before me at on this day of 2009 under compliance with the Regulations contained in Government Notice No. R.1258 dated 21 July 1972 (as amended).

_____

COMMISSIONER OF OATHS

FULL NAME:

ADDRESS:

AREA:

CAPACITY:

/IS/MDS.0022X.AFF