IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO: 19577/09

In the matter between:

DEMOCRATIC ALLIANCE	Applicant
and	
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECTIONS	1st Respondent
HEAD OF DIRECTORATE OF SPECIAL OPERATIONS	2nd Respondent
JACOB GEDLEYHLEKISA ZUMA	3rd Respondent
and	
RICHARD MICHAEL MOBERLY YOUNG	1st Respondent
CCII SYSTEMS (PTY) LTD	2nd Respondent

FILING NOTICE

ON ROLL:

DOCUMENT: **FIRST RESPONDENT'S HEADS OF ARGUMENT**

FILED BY: **1ST & 2ND RESPONDENT'S ATTORNEYS**
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2010 -05- 24

TO: THE REGISTRAR OF
THE ABOVE COURT
PRETORIA

AND
TO: **MESSRS EDELSTEIN – BOSMAN INC**
APPLICANT'S ATTORNEYS
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AND TO: **MESSRS HULLEY & ASSOCIATES**
THIRD RESPONDENT'S ATTORNEYS
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PRETORIA
REF: Y LANDSBERG/HULLEY/MH/Z060

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CASE NO: 19577/09

In the matter between:

DEMOCRATIC ALLIANCE	*Applicant*
and	
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	*First Respondent*
HEAD OF DIRECTORATE OF SPECIAL OPERATIONS	*Second Respondent*
JACOB GEDLEYIHLEKISA ZUMA	*Third Respondent*
and	
RICHARD MICHAEL MOBERLY YOUNG	*First Intervening Party*
CCII SYSTEMS (PTY) LTD	*Second Intervening Party*

FIRST RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1 The applicant ('*the DA*') has brought an application to review, correct and set aside the decision of the first respondent to discontinue the criminal proceedings of the third respondent ('*President Zuma*').

2 The review application is purportedly brought under the Promotion of Administrative Justice Act, 3 of 2000 ('*PAJA*'), and sections 1(c) and 33 of the Constitution.[1]

3 The first respondent took the decision on 6 April 2008. We refer to the decision as '*the NDPP's decision*'.

4 The NDPP's decision and the reasons for it are reflected in a statement that was released publicly on 6 April 2009. A copy of the statement is attached to the DA's founding affidavit and marked 'JS10'.[2]

5 In May 2009 the DA brought an application in terms of Rule 6(11) of the Uniform Rules for an order directing the first respondent to dispatch what it calls a 'reduced record' of the proceedings under review ('*the reduced record*'). At the same time the first and second intervening parties ('*Mr Young*' and '*CCII*') brought an application for leave to intervene as second and third applicants in the review application.

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1 Constitution of the Republic of South Africa, 1996

2 Annexure 'JS10' p 118.

6 This Court made an order which directed how the two applications brought by the DA and the intervening parties were to be dealt with. The order is at page 31 of the record in the applications in terms of section 6(11) and for intervention.

7 Pursuant to the above order, the first respondent filed an answering affidavit and raised certain *in limine* matters. We submit that it would be convenient for the Court and for the parties, and in the interests of justice, for this Court to determine the *in limine* matters prior to deciding on the applications for the reduced record and for intervention. If our *in limine* objections are upheld, this would render academic and dispose of the relief sought by the DA and the intervening parties.

8 Those *in limine* matters are the following:

8.1 the lack of *locus standi* on the part of the DA, Mr Young and CCII to seek the review and setting aside of the NDPP's decision;

8.2 that the NDPP's decision does not constitute administrative action that is reviewable under PAJA;

8.3 that the Court should, even at this stage of the proceedings, exercise its discretion against reviewing and setting aside the NDPP's decision even if it is shown to have been unlawful as the DA contends.

9 These heads of argument deal with the three *in limine* matters to be decided before the merits are dealt with, as well as the applications by the DA, Mr Young and CCII for the reduced record and for intervention respectively.

10 Although in the normal course the matters that the first respondent submits must be decided *in limine* would be decided after the exchange of all affidavits, we submit that the circumstances of this case are unique; there are unlikely to be any further facts that the DA, Mr Young and CCII can put up that are necessary to determine the matters raised *in limine*. All the relevant facts are before the Court. The Court is in a position to determine the matters raised *in limine* prior to the exchange of all affidavits.

11 For the avoidance of any doubt, the first respondent makes it clear that it accepts that the NDPP's decision can be reviewed for non-compliance with section 1(c) of the Constitution as contended by the DA in paragraph 13 of its founding affidavit.[3] We submit, however, that the DA, Mr Young and CCII lack standing to bring such a review based on section 1(c) of the Constitution in the circumstances of this case. Furthermore, on the facts of this case, the Court should exercise its discretion against granting the remedy of review even in terms of section 1(c) of the Constitution.

12 We deal with our submissions in the following format:

12.1 we highlight for the Court certain matters by way of

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3 Founding Affidavit ('*FA*') p 14

background;

12.2 we then deal with the three points raised *in limine* sequentially, starting with the issue of standing, as well as the intervention application;

12.3 we then deal with the issue of the reduced record;

12.4 finally we provide our conclusion.

BACKGROUND

13 The history of this matter has been set out in various affidavits filed in several Court proceedings before the High Courts, Supreme Court of Appeal and Constitutional Court.

14 By the time the NDPP's decision was made, the criminal proceedings in respect of President Zuma had been pending for a long period of time.

15 The history of the matter through the various Court challenges is reflected in *inter alia* the following decisions:

15.1 *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA); and

15.2 *Thint (Pty) Ltd v National Director of Public Prosecutions and*

others; Zuma v National Director of Public Prosecutions and others 2009 (1) SA 1 (CC).

16 A significant period of time will also elapse before the review application is finalised. By that time the period from the institution of the criminal proceedings would have increased by a considerable period of time.

LOCUS STANDI

17 The question of standing in this case is entirely distinct from the merits of the application. It is simply concerned with whether the allegations in the founding affidavits of the DA, Mr Young and CCII establish that they have the necessary legal standing to seek the review and setting aside of the NDPP's decision.

18 We submit that any further facts that may emanate even from the reduced record and may form the basis of the DA supplementing its founding affidavit will not have any bearing on the issue of standing.

19 In the case of the DA the issue of standing can be decided on the basis of the facts alleged in its founding affidavit – almost as though the Court was dealing with the issues on exception. This is so because the first respondent does not, in its answering affidavit, place in dispute the allegations that the DA makes in support of its claim that it has standing. Those undisputed allegations can therefore be assessed to test whether the DA has established that it has the necessary standing. It is competent to

raise and decide the lack of *locus standi* at the stage of an exception.[4]

20 In the case of Mr Young and CCII the approach should be different. Unlike in the review application, the necessary affidavits relating to the application for intervention have been filed. The first respondent has answered to the allegations made by Mr Young and CCII in support of their claim that they have the necessary standing. The answering affidavit raises certain disputes of fact. In determining the application, the *Plascon Evans* test[5] should be applied. There is no reason to depart from it.

21 The DA, CCII and Mr Young bear the onus of proving that they have the necessary standing to bring the review application to seek the review and setting aside of the NDPP's decision.[6] The standing has to appear from allegations made in their founding affidavits.[7]

The DA

22 The only basis advanced in the founding affidavit upon which the DA claims to have standing to bring the review application is section 38 of the Constitution. The DA states the following in this regard:

> "*16. In bringing this application, the DA acts:*

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[4] *Ahmadiyya AIIL (SA) v Muslim Judicial Centre* 1983 (4) SA 855 (C); *Anirudth v Samdei and Others* 1975 (2) SA 706 (N)

[5] See the restatement of the *Plascon Evans* test in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA).

[6] *Mars Inc v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) 575; *Kommissaris van Binnelandse Inkomste v Van der'Heever* 1999 (3) SA 1051 (SCA) para 10.

[7] *Eagles Landing Body Corporate v Molewa NO and others* 2003 (1) SA 412 (T) para 36.

> *16.1. In its own interests and the interests of its members and supporters (in terms of sections 38(a) and (e) of the Constitution, who all have an interest in the State acting lawfully and in accordance with the constitutional and statutory requirements; and*
>
> *16.2. In the public interest (in terms of section 38(d) of the Constitution*"[8]

23 We submit that the DA is not entitled to rely on standing in terms of section 38 of the Constitution for purposes of the review application. This applies to the review application both in terms of PAJA and section 1(c) of the Constitution. Even if it could rely on section 38, it does not meet the requirements of the section.

Standing under PAJA

24 Section 6(1) of PAJA provides that 'any person may institute proceedings in a court or a tribunal for the judicial review of administrative action'.

25 The phrase 'any person' in section 6(1) of PAJA does not mean that any person may challenge any unlawful administrative action purely as a member of the public – even if such a person is completely unconnected with the administrative action and unaffected by it in his or her rights. More is required, as set out below.

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8 FA p 15.

26 Furthermore, for purposes of a review under PAJA,[9] the legal standing of the DA to review the NDPP's decision must be established in terms of PAJA and not in terms of section 38 of the Constitution. This is so because PAJA covers the field and litigants are not permitted to rely directly on the provisions of section 33 of the Constitution and thereby avoid PAJA.[10] For this reason also, it is not competent for the DA to challenge the NDPP's decision on the basis that:

> "*13. Even if the NDPP's decision is not "administrative action" as defined in PAJA, it is administrative action as contemplated in section 33 of the Constitution.*"[11]

27 Under PAJA the DA must show that it has a direct and substantial legal interest in the review of the NDPP's decision. This it lacks as the NDPP's decision does not adversely affect any of its legal rights.

28 The DA would only have standing if it can prove that it has a direct and substantial interest in the prosecution of President Zuma, or some legally enforceable right to assert in respect of the prosecution, and thus the NDPP's decision.[12] The Court set out the common law test as follows in *Jacobs en 'n ander v Waks en andere*[13]:

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9 Promotion of Administrative Justice Act, 3 of 2000.

10 *Minister of Health and Another v New Clicks SA (Pty) Ltd and Others* 2006 (1) BCLR 1 (CC) paras 96 and 97.

11 FA p 14.

12 *Trakman NO v Livshitz and others* 1995 (1) SA 282 (A) at 287E/F.

13 *Jacobs en 'n ander v Waks en andere* 1992 (1) SA 521 (A) at 533J-534E.

> *"Die weg is nou gebaan vir 'n oorweging van die locus standi van die applikante. In die algemeen beteken die vereiste van locus standi dat iemand wat aanspraak maak op regshulp 'n voldoende belang moet hê by die onderwerp van die geding om die hof te laat oordeel dat sy eis in behandeling geneem behoort te word. Dit is nie 'n tegniese begrip met vas omlynde grense nie. Die gebruiklikste manier waarop die vereiste beskryf word, is om te sê dat 'n eiser of applikant 'n direkte belang by die aangevraagde regshulp moet hê (dit moet nie te ver verwyderd wees nie); andersins word daar ook gesê, na gelang van die samehang van die feite, dat daar 'n werklike belang moet wees (nie abstrak of akademies nie), of dat dit 'n teenswoordige belang moet wees (nie hipoteties nie) - sien, in die algemeen, Cabinet of the Transitional Government for the Territory of South West Africa v Eins 1988 (3) SA 369 (A) op 387J-388H, 398I-390A, en die vorige beslissings wat daar bespreek word (sommige waarvan hieronder genoem sal word). In die omstandighede van die huidige saak is dit veral die vereiste van 'n direkte belang wat op die voorgrond staan. Wat dit betref, is die beoordeling van die vraag of 'n litigant se belang by die geding kwalifiseer as 'n direkte belang, dan wel of dit te ver verwyderd is, altyd afhanklik van die besondere feite van elke afsonderlike geval, en geen vaste of algemeen geldende reëls kan neergelê word vir die beantwoording van die vraag nie (sien bv Dalrymple and Others v Colonial Treasurer 1910 TS 372 per Wessels R op 390 in fine, en vgl Director of Education, Transvaal v McCagie and Others 1918 AD 616 per Juta Wn AR op 627). Vorige beslissings kan behulpsame algemene riglyne vir bepaalde soort gevalle aandui, maar meestal het dit weinig nut om die besondere feite van een geval te vergelyk met dié van 'n ander. Met dit in gedagte benader ek die feite van die onderhawige saak."*

29 PAJA has not altered the common law requirements for standing to review administrative action (except to the extent that PAJA has imposed the additional requirement that a review applicant must show that its rights have been materially and adversely affected by the impugned

administrative action).[14]

30 In *Vandenhende v Minister of Agriculture, Planning and Tourism, Western Cape* [15] the Court said the following in relation to section 24 of the Interim Constitution[16] (the right to lawful administrative action):

> *"Mr Grobler argues that this provision, more particularly s 24(a) and (d), confers locus standi on the applicant, even if he did not enjoy it before.*
>
> *Now, it seems clear to me that, in enacting this provision, the framers of the Constitution did not intend to clothe all and sundry with locus standi to demand lawful, procedurally fair, justifiable administrative action, or to demand reasons for it: in each case the right to demand these things is confined to those persons variously whose 'rights', 'interests' or 'legitimate expectations' are 'affected or threatened', as the case may be, by the administrative action concerned, slightly different formulations being used for the different categories of entitlement. The Legislature is generally presumed to be familiar with the existing law as interpreted and applied in the decisions of the superior Courts of the country, and to wish to alter it as little as possible: see Steyn Die Uitleg van Wette 5th ed at 97 - 8, 132. To hold the converse would be to create a morass of uncertainty where there was previously certainty: so that the framers of the Constitution must be taken to have been aware of the authorities to which I have referred and to have sought to bring about as few changes to the existing law as possible as regards the locus standi of persons aggrieved by administrative action. ..."*[17]

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14 PAJA s 6(1), read with the definition of "administrative action".

15 *Vandenhende v Minister of Agriculture, Planning and Tourism, Western Cape* 2000 (4) SA 681 (C) at 694D-F.

16 Constitution of the Republic of South Africa, 1993.

17 *McDonald and others v Minister of Minerals and Energy and others* 2007 (5) SA 642 (C) para 27: an applicant must show that the decision has adverse effects on its rights.

31 The reasoning of the Court in *Vandenhende* in relation to section 24 of the Interim Constitution remains correct for purposes of section 6(1) of PAJA, which gives effect to s 33 of the current Constitution. A person seeking the review of administrative action has to show that his or her rights, interests or legitimate expectations have been materially and adversely affected by the administrative action. The allegations made by the DA in its founding affidavit plainly do not meet this requirement.

Standing for purposes of reliance on section 1(c) of the Constitution

32 The DA's attempt to rely on the broad standing provisions of section 38 of the Constitution in respect of its challenge based on section 1(c) of the Constitution cannot succeed.

33 Section 38 of the Constitution provides as follows:

> "***38 Enforcement of rights***
>
> *Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –*
>
> *(a) anyone acting in their own interest;*
>
> *(b) anyone acting on behalf of another person who cannot act in their own name;*

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) *an association acting in the interest of its members."*

34 It is clear from the provisions of section 38 that it applies only in the case of an enforcement of fundamental rights in the Bill of Rights.[18]

35 The review application is not concerned with the enforcement of rights but the review of administrative action on the grounds set out in section 6 of PAJA, or on the grounds of legality in terms of section 1(c) of the Constitution. In its heads of argument the DA makes it clear that the review application concerns compliance with the rule of law[19] and, we submit, not the enforcement of rights protected under Chapter 2 of the Constitution.

36 For purposes of standing, the enforcement of section 1(c) of the Constitution is to be treated in the same way as challenges to the constitutional validity of legislation brought on the basis that, as an abstract and objective proposition, the legislation in question is inconsistent with the Constitution – as opposed to challenges based on infringements or threatened infringements of rights in the Bill of Rights. A person bringing such a constitutional challenge has to show that he or

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18 *Caxton and CTP Publishers and Printers Ltd v ICASA and others*, Case number 13300/08 para 28, (unreported judgment of the North Gauteng High Court).

19 Heads of Argument para 42.

she is directly affected by the unconstitutional legislation. This was confirmed by Ackermann J and Chaskalson P in *Ferreira v Levin and others.*[20] They both concluded that an applicant in such circumstances has to prove that he or she is directly affected by the unconstitutional legislation.[21]

37 The exact issue did not arise in *Lawyers for Human Rights v Minister of Home Affairs*[22] because in that case rights were infringed or threatened as contemplated in section 38 of the Constitution.

38 In *Kruger v President of South Africa and others*[23] (referred to in the applicants' heads of argument)[24] the Constitutional Court again made it clear that section 38 of the Constitution did not apply because the case did not concern a challenge based on a fundamental right in Chapter 2 of the Constitution.[25]

39 The DA seeks to rely on the fact that the Constitutional Court in the *Kruger* case nevertheless said it must adopt a generous approach to standing. But the Court went on to clarify what this generous approach meant. It meant 'an expanded understanding of what constitutes a direct

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20 *Ferreira v Levin and others* 1996 (1) SA 984 (CC).

21 At paras 31 *et seq* and 166-168.

22 *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC).

23 *Kruger v President of South Africa and others* 2009 (1) SA 417 (CC).

24 Heads of Argument para 38.

25 Para 23 at 428C.

and personal interest'.[26] Skweyiya J did not mean that the applicant did not have to show a direct and personal interest. A "*generous approach*" does not mean that it is open-ended.

40 As a political party the DA does not have a direct and personal interest in the NDPP's decision not to prosecute President Zuma. Whatever general interest it might have is no different from that of any member of the public in South Africa. It would be wrong on legal principle to contend that all members of the public in South Africa have a direct and personal interest sufficient to clothe them with standing to seek the review and setting aside of the NDPP's decision. There is no way in which every member of the public in South Africa can demonstrate, on the facts of this case, that the decision to discontinue the prosecution of President Zuma has a direct effect on any of their rights – even in the expanded sense in which the Constitutional Court construed direct and personal interest in the *Kruger* case.

41 The DA contends that because it made submissions to the first respondent regarding the possible decision to discontinue the prosecution of President Zuma it has a direct and personal interest in the outcome of those representations. This contention has no merit or basis.

42 The DA accepts that the representations it made were not made in terms of section 179(5)(d) of the Constitution.[27]

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26 Para 24.

27 Heads of argument para 62.1.

43 The representations were, in the circumstances, not made pursuant to any legislative or constitutional entitlement on the part of the DA to make them. They were not made, or accepted by the first respondent, on the basis that the DA was a relevant party within the meaning of section 179(5)(d)(iii) of the Constitution. This being the case, the making of the representations did not create any entitlements on the part of the DA which make it a party directly and personally affected in its rights by the NDPP's decision. Its position is no different from numerous members of the public who expressed, in one form or another, their views as to the appropriate course to be followed by the first respondent with regard to the prosecution of President Zuma.

The basis for relying on section 38 of the Constitution

44 The DA summarises in paragraph 56.1 of its heads of argument the bases upon which it relies for invoking section 38 of the Constitution. It says that it is entitled to rely on this section because it has alleged that sections 9 and 33 of the Constitution were violated by the NDPP's decision. It further says that the same broad approach to standing applies even if the allegation is merely that the rule of law has been impaired.[28] We have addressed the latter submission above which falls to be dismissed.

45 The contentions regarding sections 9 and 33 are, with respect, plainly wrong.

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[28] Heads of argument para 56.1.

45.1 First, that is not what the DA alleges in the section in its founding affidavit which deals with standing.[29]

45.2 Second, reliance on section 33 of the Constitution constitutes a circular argument. The right to lawful administrative action is given effect by PAJA. A litigant, such as the DA, is required to vindicate its rights to lawful administrative action by recourse to PAJA and not directly under section 33 of the Constitution. The DA cannot therefore rely directly on the provisions of section 33 in order to establish standing to vindicate its rights under PAJA.

45.3 The DA relies on a decision of the Free State Provincial Division in *National & Overseas Modular Construction v Tender Board, FS*[30] in which the Court said '[s]ection 33 forms part of the Bill of Rights contained in chap 2 of the Constitution and applicant clearly falls in category (a) referred to in s 38'.[31] This decision is unhelpful.

45.3.1 The Court found that the applicant had a sufficient interest in the subject matter of the litigation in order to have standing as an unsuccessful tenderer in a

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29 Para 16 p 15 *et seq*.

30 *National & Overseas Modular Construction v Tender Board, FS* 1999 (1) SA 701 (OPD).

31 At 704D.

tender process.[32] This was correct and indeed the *ratio* for the decision. The rest of what was said on standing was said *obiter*.

45.3.2 The matter was heard and judgment rendered before the *New Clicks* matter in which the Constitutional Court made it clear that PAJA covers the ground and that a litigant vindicating a right to lawful administrative action has to come under PAJA and not directly under the Constitution.[33]

45.3.3 The *National and Overseas* finding is, with respect, clearly wrong. It is eminently problematic to accord standing to persons under any of the subsections of section 38 (except for subsection (a)) where the person challenges the award of a tender.

45.4 The right to equality is invoked in the following manner by the DA in its founding affidavit:

> "*11.4 The right to equality enjoyed by all South Africans is infringed (or will be infringed) when and if a powerful and influential State official or prominent figure in public life such as Mr Zuma is shown to have avoided prosecution by reason of his prominence,*

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32 At 703I.

33 See FA paras 8 and 11 pp 9-12, where the right to lawful administrative action is invoked.

position and influence".[34]

45.5 This general and bald allegation is by no means a valid and serious allegation of any infringement or threatened infringement of any particular individual's right under section 9 of the Constitution.

45.5.1 It does not say which provision of section 9 is infringed or threatened with an infringement. It does not say in what way such an infringement has taken place or is expected to take place.

45.5.2 If the sting of the allegation is that an unspecified provision of section 9 is infringed because President Zuma has been shown to have avoided prosecution by reason of his prominence, position or influence, then this is merely a perception which the DA does not go on to prove in its founding affidavit. It is simply a throw away remark which cannot be given any credence or serious consideration.

45.5.3 It is, with respect, a populist allegation which is consistent with the narrow political interests of a political party which is the official opposition. It shows up the application as not one genuinely in the public interest, a factor which constitutes a significant

[34] FA p 13

consideration for purposes of standing in terms of section 38(d) and (e) which the DA invokes. In *Lawyers for Human Rights*[35] Yacoob J said '[t]he issue is always whether a person or organisation acts genuinely in the public interest.'[36] The Court cannot, with respect, permit itself to be used as a surrogate for political processes.

45.6 Even if the Court finds that section 38(d) and (e) applies in this case, the requirements for the broad standing are not met. As for section 38(a), the DA must fail on the basis that it has not proved a direct and personal interest. Section 38(a) reflects this test.[37]

45.7 The Court has to be circumspect in permitting reliance on public interest. O'Regan J said the following in *Ferreira*, which has been endorsed by the Constitutional Court in subsequent cases:[38]

> *"[234] This Court will be circumspect in affording applicants standing by way of s 7(4)(b)(v) and will require an applicant to show that he or she is genuinely acting in the public interest. Factors relevant to determining whether a*

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35 *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC).

36 Para 18.

37 Hoexter *Administrative Law in South Africa* at 439.

38 Such as in the *Lawyers for Human Rights* case.

> *person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court. These factors will need to be considered in the light of the facts and circumstances of each case."* (Emphasis added)

45.8 This Court has to be particularly circumspect in affording a political party standing in the public interest. The underlying motivation for this application is political and, as we submit above, the Court should not permit itself to be used as a surrogate for political processes for the airing of grievances in which there is no demonstrated public benefit other than an attempt to secure political mileage.[39]

CCII and Mr Young

46 Mr Young and CCII have to prove that they have a direct and substantial legal interest in the outcome of the review application, i.e. the review and setting aside of the NDPP's decision, in order to succeed with their application for intervention. This was confirmed by the SCA recently in

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[39] See the reference to Peter Cane 'Standing up for the Public' 1995 Public Law 276 in Hoexter *Administrative Law in South Africa* at 452.

National Director of Public Prosecutions v Zuma.[40]

47 We submit that they fail to satisfy this requirement for intervention. They also fail to satisfy the requirement for purposes of standing. Even if they had such legal standing, they cannot pursue the review application to the extent that it is based on the provisions of PAJA for the reasons set out below, where we address the reviewability of the decision under PAJA.

48 The real reason for Mr Young and CCII's application for intervention application is to attempt to cure the problems of standing on the part of the DA. This is made clear in the following passage in their founding affidavit:

> "6. *Applicant disputes the contention on behalf of First Respondent that it lacks standing in the main application, as will be confirmed by it in an affidavit of Mr Selfe which will be delivered together with this affidavit. Nevertheless, in order to obviate any possible difficulties in this regard, CCII Systems and I seek to intervene as Second and Third Applicants.* ..."[41] (Emphasis added)

49 We submit with respect that this is an impermissible basis for a party to rely upon in seeking admission as a party in proceedings.

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[40] *United Watch & Diamond Co (Pty) Ltd and others v Disa Hotels Ltd and another* 1972 (4) SA 409 (C) at 415-417; *Nelson Mandela Metropolitan Municipality and others v Greyvenouw CC and others* 2004 (2) SA 81 (SELD) para 9; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 85.

[41] FA (Intervention) p 7.

50 An application for intervention is treated as a facet of joinder.[42] It follows that it must be clear that the real reason for the application is to permit the applicant to air serious and real issues that cannot be resolved by the Court without hearing him or her. This is not the case here. The only real reason here is to resuscitate an ill-fated application by the DA due to lack of standing on its part.

51 There is another reason why the application for intervention should not be allowed even before considering the insufficiency of any claimed interest in the review application. This is that an applicant for intervention must also show that it has a *prima facie* case that it wants the Court to determine – which serves to demonstrate that the application is seriously made.[43] In this case Mr Young and CCII do not even attempt to demonstrate how it is that there is a *prima facie* case on review. They must fail on this basis alone.

52 The more fundamental defect in the application is that Mr Young and CCII do not prove a direct and substantial interest in the review and setting aside of the NDPP's decision. The facts that they allege in their founding affidavit show only a very tenuous connection, if any exists, with the prosecution of President Zuma and the NDPP's decision.

53 As for Mr Young, there is an implicit acceptance that he does not have any direct and substantial interest in the prosecution of President Zuma and the

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42 Erasmus *Superior Court Practice* at B1-101.

43 Erasmus *Superior Court Practice* at B1-103.

NDPP's decision.[44] He implicitly accepts that it is in reality only CCII that may arguably claim some kind of connection to the investigation and prosecution of President Zuma. But even that connection with regard to CCII is not sufficient for purposes of the intervention application.

54 The nub of the factual allegations made by Mr Young and CCII in support of the intervention application is that CCII was the original complainant whose complaint led to the investigations concerning the arms deal. They allege that these investigations resulted in the prosecution of Mr Shaik. Further investigations resulted in the prosecution of President Zuma.[45]

55 Except for making the allegations at this level, there is no allegation which indicates the manner in which the prosecution of President Zuma would vindicate any rights of Mr Young or CCII, or how it would directly affect their legal rights. Once this is the position, the decision to discontinue the prosecution of President Zuma could not directly affect any of their legal rights.

56 In fact, the first respondent and President Zuma explain on affidavit that the complaint lodged by CCII did not relate to the leg of the arms deal investigations which resulted in the prosecution of President Zuma.[46] Mr Young and CCII dispute this. This dispute ought to be resolved in favour of the first respondent and President Zuma on the *Plascon Evans* test.

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44 FA (Intervention) paras 18 and 29 pp 11 and 14-15.

45 FA (Intervention) paras 24-30 pp 13-15.

46 Pp 100-103; 251-253.

57 Furthermore, it is common cause that any complaint of a civil nature concerning CCII and its tendering in the arms deal was settled between CCII and the relevant government agencies. No legal rights that could be affected by the NDPP's decision remain in this regard.[47]

58 As regards representations made by Mr Young to the first respondent, the same submissions made in relation to the DA apply. The making of any representations did not create any legal rights on the part of Mr Young or CCII that would be directly affected by the NDPP's decision.

59 We submit therefore that the application for intervention should be dismissed with costs.

60 The application should be dismissed also for lack of standing on the part of Mr Young and CCII. The lack of standing stems from the same basis of a lack of any direct interest in the review and setting aside of the NDPP's decision.

61 Mr Young and CCII do not purport to rely for their standing on section 38 of the Constitution. In any event, such reliance would fail for substantially the same reasons as apply to the DA.

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[47] Answering Affidavit (Third respondent) p 102 para 46.

THE DECISION DOES NOT CONSTITUTE REVIEWABLE ADMINISTRATIVE ACTION UNDER PAJA

62 Under the Constitution and PAJA a decision to prosecute is not administrative action and is not susceptible to review.[48]

63 Whether or not a decision to discontinue a prosecution constitutes administrative action was left open in *Kaunda and others v President of the Republic of South Africa*[49] on the basis that PAJA does not deal specifically with a decision not to prosecute. This position is conceded by the applicants.[50] We do not make this concession except only that PAJA does not expressly refer to a decision to discontinue a criminal prosecution. But we submit that on a proper and purposive interpretation a decision to discontinue a criminal prosecution is covered by the exclusion.

64 The applicants rely on the judgment of the High Court in *Zuma v National Director of Public Prosecution*[51] as the only authority that a decision not to prosecute is subject to judicial review, presumably under PAJA.[52] This was an *obiter dictum*. The Court was dealing with a decision to prosecute President Zuma and not a decision to discontinue his prosecution. It is

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48 *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) paras 35-36 and the cases cited therein;

49 *Kaunda and others v President of the Republic of South Africa*2005 (4) SA 235 (CC) para 84.

50 Heads of argument p 43 para 72.4.

51 *Zuma v National Director of Public Prosecution* 2009 (1) BCLR 62 (N) para 58.

52 Heads of argument p 43 para 72.4.

also not apparent from paragraph 58 of the judgment that the Court analysed the requirements of PAJA to determine whether a decision to discontinue prosecution constitutes reviewable administrative action under PAJA. The Supreme Court of Appeal did not have to address the issue even though it also said *obiter* in footnote 33 that a decision not to prosecute is not excluded by PAJA.[53] It did not consider whether it in fact constitutes administrative action reviewable under PAJA. We submit, with respect, that the *obiter dicta* were wrong for the reasons that we develop below.

65 Although one starts with section 33 of the Constitution to determine whether an act constitutes administrative action, '[w]hat is or is not administrative action for the purposes of PAJA is determined by the definition in section 1' of PAJA.[54]

66 We make two submissions on the basis of the definition of administrative action in PAJA.

66.1 First, a decision to discontinue prosecution does not constitute administrative action.

66.2 Second, even if it did, it is excluded from the ambit of PAJA by the definition.

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53 *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 35 footnote 33.

54 Chaskalson CJ in *Minister of Health and another v New Clicks SA (Pty) Ltd and others* 2006 (1) BCLR 1 (CC) para 132.

The NDPP's decision does not constitute administrative action

67 For purposes of this application, the following provisions of the definition of administrative action in PAJA are relevant:

> *'**administrative action**' means any decision taken ... by –*
>
> *(a) an organ of state, when –*
>
> *(i) exercising a power in terms of the Constitution or a provincial constitution; or*
>
> *(ii) exercising a public power or performing a public function in terms of any legislation; or*
>
> *(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,*
>
> *which adversely affects the rights of any person and which has a direct, external legal effect, but does not include ...".*

68 The NDPP's decision fails to satisfy the requirement that it must 'adversely' affect the rights of any person.

69 The Supreme Court of Appeal has said in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*[55] that this qualification will be satisfied only in the following circumstances:

> *"[23] ... The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals."*

70 The legal rights contemplated do not connote anything that falls short of rights, such as interests.[56]

71 The NDPP's decision does not have capacity to affect any person's rights, and, in particular, the rights of the DA.

72 The best that the DA suggests in its founding affidavit is that the NDPP's decision has direct legal consequences for President Zuma.[57] Even if this is accepted to be correct, the allegation does not satisfy the 'two qualifications in tandem' – external legal effect and adverse effect on rights as contemplated in paragraph 23 of Nugent JA's judgment in *Grey's Marine*.

73 The DA accepts that 'it may well be that a decision not to prosecute does not affect rights or prospective rights'.[58] We submit that this is indeed correct.

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55 *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA).

56 At para 30.

57 FA para 12 p 13.

74 It is precisely for the reason that a decision to discontinue a criminal prosecution does not constitute administrative action that this is not expressly stated in the exclusion in section 1(ff) of PAJA.

75 In the circumstances, the NDPP's decision is not reviewable administrative action under PAJA.

The NDPP's decision is excluded from PAJA

76 The following submissions are made only in the event that the Court finds that the NDPP's decision constitutes administrative action under PAJA.

77 The submission for the DA is that section 1(ff) of PAJA only excludes a decision to institute or continue a prosecution and that this means that a decision to discontinue a criminal prosecution is not excluded.

78 We submit that this interpretation is too narrow and wrong. A proper interpretation of the exclusion is that it covers all prosecutorial decisions.

79 There are reasons of policy for the exclusion of a decision to institute or continue a prosecution from the ambit of PAJA which the SCA has acknowledged.[59]

80 Even in jurisdictions like the UK, where decisions not to prosecute may be

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58 Heads of argument para 77.

59 *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) footnote 31.

reviewed on very exceptional grounds, it is accepted that Courts are slow to do so *inter alia* because of:

> "*the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits*".[60]

81 As Harms DP points out in *National Director of Public Prosecutions,* the exclusion of decisions to institute or continue prosecutions from the ambit of PAJA is for policy reasons. These policy reasons and the polycentric character of prosecutorial decisions apply to decisions to discontinue prosecutions as well. We refer to the full description of prosecutorial decisions in the first respondent's answering affidavit.[61] Precisely the same reasons that led the legislature to provide for the exclusion in section 1(ff) of PAJA apply equally to decisions to discontinue prosecutions.

82 As the first respondent points out in its answering affidavit, it is in fact illusory to speak of a decision to institute a prosecution and a decision not to institute a prosecution as if they were disparate decisions. A decision to prosecute implies that the opposite decision was not preferred. The first respondent's answering affidavit demonstrates how in cases involving multiple offenders the distinction is illusory rather than real or helpful. It is

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60 *R (Corner House Research) and another v Director of The Serious Fraud Office* [2008] WLR (D) 106 (HL).

61 Answering Affidavit (First respondent) p 230 *et seq*.

in substance one decision with two possible outcomes.[62]

83 A literalist interpretation that the exclusion (in section 1(ff) of PAJA) involves only decisions to institute prosecutions or to continue prosecutions misses the essence of the reasons for excluding prosecutorial decisions from the ambit of PAJA. That is, to make these decisions not susceptible to the wide grounds of review under section 6 of PAJA and to permit a review only in exceptional cases.

REVIEW IS A DISCRETIONARY REMEDY

84 It is trite that judicial review is a discretionary remedy.

85 We submit that there are significant considerations at this stage of the proceedings which warrant the Court declining to review and set aside the NDPP's decision even if the DA were ultimately to succeed on the merits of the review.

86 It is contended on behalf of President Zuma that a sitting President cannot be prosecuted. If the Court accepts this submission it should decline to review and set aside the NDPP's decision. Not to do so would mean that the first respondent would be hamstrung from taking any action upon the matter being referred back to it (after review) until President Zuma ceases to be the President of Republic of South Africa and can competently be charged. He would have to serve his full term of office, which might even

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62 Answering Affidavit (First respondent) p 230 *et seq*.

extend to a second term. Only then could he be competently charged criminally.

87 By the time that President Zuma's term of office ends, a significant period of time would have elapsed such as to affect his fair trial rights in terms of section 35(3)(d) of the Constitution. He would also have advanced in age.

88 We submit that the interests of justice would not be served by a review and setting aside of the NDPP's decision should the submission made on President Zuma's behalf be upheld that a sitting President cannot be charged and prosecuted criminally.

THE RULE 53 RECORD

89 In the event that the Court dismisses all of the *in limine* objections raised by the first respondent, or declines to deal with them at this stage of the proceedings, it must nevertheless dismiss the application in terms of Rule 6(11) by the DA.

90 A *"record of proceedings"* under Rule 53 of the Uniform Rules relates to that part of the record which is relevant to the decision sought to be reviewed and set aside. This part of the record needs to be furnished for purposes of a review application.

91 In its application in terms of section 6(11) the DA seeks the production of what it calls a 'reduced record'. It is common cause that the parts that it

concedes may be excluded are relevant to the NDPP's decision.[63] These parts of the record cannot be disclosed for various reasons related to: privilege, confidentiality, and the fact that these parts of the record contain private information obtained through coercive powers of the first respondent.[64]

92 The DA contends that for a proper exercise of its review powers, this Court ought to be placed in possession of the record (i.e. every part that is relevant to the NDPP's decision). This contention is not consistent with the demand for a reduced record. The consequence of producing a reduced record is that the Court will not be placed in a position to properly exercise its review jurisdiction and justice will not be done. We submit that the consequences of this situation are the following:

92.1 It is a clear indication that the nature of prosecutorial decisions is such that they cannot be subjected to the wide PAJA review on record. They must only be reviewed in exceptional circumstances and on narrow grounds. One of the grounds may be the legality standard in the Constitution. This standard is easily met as demonstrated in the *dicta* of the Constitutional Court in the *Pharmaceutical Manufacturers Association* case at paragraph 90.[65] It does not require the scrutiny of all relevant material placed before the decision maker and does not warrant

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63 FA (Rule 6(11)) paras 11-12 pp 15-18.

64 Answering Affidavit (First respondent) pp 246-247.

65 *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC).

an order for the production of a record, reduced or complete.

92.2 If the decision is subject to a wider review which requires a record, then the Court must order the production of the entire record (i.e. relevant material) or none at all if it is to do justice. We submit that the implicit concession by the DA that certain material may not be produced for reasons advanced in the first respondent's answering affidavit must mean that it waives the benefit of having a record produced at all. It cannot insist on the production of a reduced record, for that would demonstrably undermine the interests of justice and the obligation of the Court to do justice to all the parties before it. The description of what the DA considers to be forming part of this (notional) reduced record makes clear that a significant number of documents that the first respondent considered in making its decision will be excluded, including the representations made on behalf of President Zuma.

93 We submit that even if the *in limine* matters are dismissed, the Court should dismiss the application in terms of Rule 6(11) with costs.

CONCLUSION

94 We respectfully submit for the reasons set out above that:

94.1 the first respondent's *in limine* objections should be upheld with

costs;

94.2 the applications for intervention and for a reduced record should be dismissed with costs;

94.3 in each instance the costs should include the costs of two counsel.

Paul Kennedy SC

M Chaskalson SC

N H Maenetje

First Respondent's Counsel

Johannesburg Chambers
21 May 2010