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

CASE NO: 19577/09

In the matter between:

DEMOCRATIC ALLIANCE Applicant

and

THE ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS First Respondent

THE HEAD OF THE DIRECTORATE OF SPECIAL OPERATIONS Second Respondent

JACOB GEDLEYIHLEKISA ZUMA Third Respondent

THIRD RESPONDENT'S HEADS OF ARGUMENT : RULE 6(11) APPLICATION

THE RELIEF SOUGHT:

1.

The Applicant (**"the DA"**) seeks an order in terms of which parts of the Record of Decision (**"the Reduced Record"**) relating to the NDPP's decision (**"the Decision"**) to discontinue the prosecution of Mr JG Zuma (now the President of

the RSA), be produced and delivered to the DA. This relief is opposed by the Respondents.

APPROACH TO THE RECORD APPLICATION:

2.

This order is sought as **intermediate** relief in the review application in respect of the Decision wherein the Applicant seeks to have such Decision reviewed and set aside by this Court.

3.

In order to establish whether the Applicant is entitled to such intermediate relief, the Intermediate application and the aspects of the review application raised therein must be considered.

4.

The Intermediate application brought is incidental to the review application and sub-ordinate and accessory thereto albeit distinct thereof.

Compare: **ANTARES v HAMMOND 1977 (4) SA 29 (W) 30 D – F**.

5.

It is also an order for final relief in respect of the separate and distinct relief

sought. Once private, confidential documents are delivered and pored over by the other party who learns the information therein as he sought, the effect is permanent.

6.

This is not an Interlocutory application for interim relief as the DA suggests in reply and in its heads of argument – it is an Accessory application for final relief no less than an application for a search and seizure warrant; such orders clearly are not for interim relief. Especially, given the provisions of Section 41(6) of the NPA and the rights these protect, this is an application for a final order that is not merely procedural. If the order was brought with specific reference to Section 41(6), no one would even have suggested otherwise and on analysis that is still the decision to be made.

7.

There is no merit in the contention that the Respondents were obliged to seek a separation of issues to determine the issues they have raised in their answering affidavits in the interlocutory application brought by the Applicants. If the Applicants have no standing in the main application, they have none in the interlocutory application; if the decision is not reviewable in the main application, then there is no entitlement to and / or no need to deliver a record of any nature or kind; and if the relief being pursued in the main application is defective, it

remains so for the purposes of the Rule 6(11) application which seeks final relief.

8.

The Rule is that the DA *qua* Applicant must make out its case in its founding papers.

See: **DIRECTOR OF HOSPITAL SERVICES v MISTRY 1979 (1) SA 626 (A) 635 H – 636 A:**

> **"When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by KRAUSE J in Pountas' Trustee v Lahanas 1924 WLD 67 at 68 and as has been said in many other cases:**
>
> > **"... an Applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the Respondent is called upon either to affirm or deny".**

Since it is clear that the Applicant stands or falls by his petition and the facts therein alleged,

"it is not permissible to make out new grounds for the application in the replying affidavit"."

9.

The Applicant in the review application sought the Record of Proceedings in terms of Rule 53(1). It is clear that the DA contends that by reason of R53(1) they are entitled to the Record without more (see p10, par 12 and 13; p12, par 16)

10.

It follows that if the issues raised by the Respondents negate the DA's right to pursue the review application, it is also destructive of the accessory or subordinate relief sought in the Intermediate application.

11.

It further follows that the Intermediate application is to be determined on the Respondent's version of such factual matters as are relevant to the decision of this application.

See: **PLASCON-EVANS PAINTS V VAN RIEBEECK PAINTS 1984**

(3) SA 623 (AD), 634E-635C

THE RECORD APPLICATION:

The Record:

12.

In principle the Record of Decision in the present case must necessarily encompass all the documents, statements, information, representations, etc. that are relevant thereto (otherwise the NDPP ignored relevant material).

See: **MEC FOR ROADS AND PUBLIC WORKS, EC V INTERTRADE TWO (PTY) LTD 2006 (5) SA 1 SCA, at paragraph 15** approving **JOHANNESBURG CITY COUNCIL v THE ADMINISTRATOR TRANSVAAL AND ANOTHER (1) 1970 (2) SA 89 (T) 91 G – 92 A.**

SECTION 41(6) AND (7) OF THE NPAA:

13.

The documents the DA seeks access to clearly encompass disclosure of the documents and information covered by Section 41(6) and Section 41(7) of the National Prosecuting Authority Act 32 of 1998 ("NPAA"). These sections read as follows:

"41 Offences and penalties

...

(6) <u>Notwithstanding any other law</u>, no person shall without the permission of the National Director or a person authorised in writing by the National Director disclose to any other person-

(a) any information which came to his or her knowledge in the performance of his or her functions in terms of this Act or any other law;

(b) the contents of any book or document or any other item in the possession of the prosecuting authority; or

(c) the record of any evidence given at an investigation as contemplated in section 28 (1),

except-

(i) for the purpose of performing his or her functions in terms of this Act or any other law; or

(ii) when required to do so by order of a court of law.

(7) Any person who contravenes subsection (6) shall be guilty

of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 15 years or to both such fine and such imprisonment."

14.

The Record of Decision and indeed the Reduced Record cannot but exist in the form of material or documents covered by these sections.

15.

It was incumbent on the DA to make out a case why the confidentiality this section clothes these documents with, with no cut off date or event on pains of potential imprisonment for up to 15 years, should be disregarded in these circumstances. It is no answer for a third party to contend that the sub-section does not apply where the documents are sought from the NDPP himself. Of course, if he supplies it himself, he does so with **"his"** permission in a matter of speaking. The Section obviously seeks to protect not only the interest of the NPA, but also the confidentiality of the information and documents it has. It cannot be that if the NDPP would not, on considering Section 41(6), have permitted that one of the NPA staff reveal the materials covered therein, he has no obligation to consider and likewise preserve confidentiality when **he** is asked to produce such materials.

16.

The DA did not make such a case – it simply assumed that review Proceedings automatically leads to and results in an order of disclosure under Section 41(6). There is no sound basis for this contention. Any Court approached for an order negating the protection of Section 41(6) must consider, in factual context, whether the negation of the Section 41(6) protection is justified. The reviewing parties consider that all any party has to do to negate Section 41(6), is to bring a review application no matter how paltry or speculative the basis for that is – if you are willing to draw such papers you get the Section 41(6) material in any given case. That cannot be without making a mockery of the intention of the Legislature.

17.

The DA sought to make out a case for the production of the Reduced Record, well aware of the fact that especially the Third Respondent objected to material from the NPA being produced and that the NDPP had aligned himself with this approach and recognised the protectable interests which these provisions indeed cover.

18.

Section 41 prohibits the disclosure of documents and information in the possession of the NPA **"notwithstanding any other law"**. Even if Rule 53 is

to be regarded as another law in the form of subordinate legislation governing procedural issues (Compare: **UNITED REFLECTIVE CONVERTERS (PTY) LTD v LEVINE** **1988 (4) SA 460 (W) 463** the provisions of Section 41(6) must prevail by reason of:

(a) Sub-ordinate legislation yielding to national legislation in the event of any clash.

(b) The above introductory and elevating phrase in Section 41(6).

(c) The express initial sub-ordination in Rule 53(1) of the review process, including the production of the Record of review, to other laws –

"Save as where any law otherwise provides.".

19.

The Applicant (assuming its *locus* and other requirements) is indeed entitled as a matter of procedure to bring and proceed with his application for review without the Record or a partial Record:

Compare: **MOTAUNG v MUKUBELA AND ANOTHER, NNO; MOTAUNG v MOTHIBA, NO** **1975 (1) SA 618 (O) 625**

H – 626 A.

This frequently happens.

20.

The DA has elected, despite the express prohibition in Section 41(6) to indeed seek part of the Record without addressing in any way the considerations which underlie the provisions of Section 41(6). It simply alleged that because it has instituted a review, it is entitled to the Record being produced to it. It ignored the qualifying opening phrase in both Rule 53(1) and Section 41(6) of the NPAA.

21.

It is submitted that the DA, in order to obtain an order negating the interests Section 41(6) of the NPAA recognises, had to show at the very least:

(a) A direct and substantial interest in the provision of the material covered by the Section, to it.

(b) That the material to be of assistance in the exercise or protection of its right of review (compare **CAPE METROPOLITAN COUNCIL v METRO INSPECTION SERVICES (WESTERN CAPE) CC AND OTHERS 2001 (3) SA 1013 (SCA) par [28]** for the principle:

> **"Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information in terms of s 32, an Applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right."**

(c) That significant prospects of success in respect of the existence and enforcement of its competing right or interest exist (Courts do not make orders *in vacuo* - **BEZUIDENHOUT v REITZ WAARDASIEHOF EN 'N ANDER 1964 (1) SA 838 (O) 840 F.**

(d) That the interest it seeks to advance outweighs the protected interests under Section 41(6). It has demonstrated none of these.

22.

The Third Respondent has indicated why the DA's access to the Record would gravely infringe and impinge on the privacy and dignity of a number of persons including himself.

See: **Record, Volume 2, Third Respondent's Answering Affidavit, p76-77, paras 68-69.**

The First Respondent has also highlighted this.

23.

None of these averments has been disputed – they are all accepted.

24.

The DA's reply, with respect, does not take its case for the production of the Record any further. It has suggested that the Record be censored – it is not quite clear who must censor it and what all is to be removed based on what principle and how supervised.

25.

A diluted Record or confidentiality undertakings by legal representatives would simply not effectively serve the vital purpose a Record in a case of a decision such as the Decision impugned herein serves.

Compare: **SACCAWU AND OTHERS v PRESIDENT, INDUSTRIAL TRIBUNAL, AND ANOTHER 2001 (2) SA 277 (SCA) par 7: "... Moreover - and this is of particular**

significance in the present matter - an Applicant who does not furnish the record to the Court runs the risk of not discharging the onus, especially where the allegations upon which it relies are put in issue."

Any suggestions of bias and improper motive are wholly denied.

26.

In reply, the DA states as the reason it requires the Record:

> **"I have dealt elsewhere with the distinction to be drawn between documents which '*pertain to the prosecution of Mr Zuma*' and documents forming part of the reduced record. It is up to the First Respondent to identify the reduced record and to indicate whether there are any further documents or category of documents which for particular reasons ought not to be filed with the record".**

Record, Volume 2, DA Replying Affidavit, p 173, para 61 (read with First Respondent's Answering Affidavit, pp 246-247, paras 57-58 and DA reply at page 157, para 30)

27.

In short, the DA acknowledges that the concerns above are very real. The question is, however, not whether documents should be excised, but what can conceivably be contained in the Reduced Record.

28.

More significantly, the DA seeks in reply to negate the protection of Section 41(6) on the off-chance that the Record may either provide the necessary basis for a review or indicate there is no proper basis for that: it acknowledges the speculative value of the Reduced Record.

29.

Even if one has to weigh up against one another the specific and express protection of Section 41(6) and the obvious and real infringement of the privacy and dignity rights which the Third Respondent and others will be subjected to, should the Reduced Record be produced, such protection far outweighs the DA's interest. The DA and the Third Respondent and his political party are foes; the DA is also the official opposition and opposed to the Third Respondent's Presidency. His entire life must now be made available through financial and other documents and statements by person of such material and the subsequent publication thereof in the press is real and significant.

30.

The DA has made out no case for a Court Order for the production of the Reduced Record (some of these aspects relevant hereto are addressed in the ABUSE rubric to avoid duplication). The SA Courts have consistently emphasised the importance of safeguarding privacy and dignity of those subject to criminal proceedings and search and seizure operations and that the infringement of such rights must be limited and not to exceed what invasion is strictly necessary for purposes of the criminal process.

See: **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)**;

POWELL NO AND OTHERS v VAN DER MERWE NO AND OTHERS 2005 (1) SACR 317 (SCA).

31.

The proclaimed right to access to the documentation making up the Record of Decision in instances of a decision to prosecute is in its terms an extremely invasive and drastic right. It has every potential to constitute a real and grave infringement of the would be Accused's constitutional (Section 10 and 14 of the Constitution) and common law rights of privacy and dignity.

32.

In the Third Respondent's instance, it is a matter of public record and judicial decision that country wide search and seizure operations to secure and remove into the possession of the Prosecution all documents pertaining to the Accused's affairs, were carried out. In the process his and his family's homes, bedrooms, studies were searched and materials were seized and considered in the process of deciding to prosecute him or not.

33.

The DA's interest (and also those of the intervening parties) in having the Reduced Record produced is also greatly detracted from by the following considerations.

34.

The very invasive processes of search and seizure which the SAPS and the Prosecution are by law given the capacity to execute have, despite the serious infringements of privacy and dignity they represent, been sanctioned, inter alia, by the Constitutional Court, based on the utility of these procedures in the proof and prosecution of criminal offences.

See: **INVESTIGATING DIRECTORATE: SERIOUS ECONOMIC OFFENCES AND OTHERS v HYUNDAI MOTOR**

DISTRIBUTORS (PTY) LTD AND OTHERS; IN RE HYUNDAI MOTOR DISTRIBUTORS (PTY) LTD AND OTHERS v SMIT NO AND OTHERS 2001 (1) SA 545 (CC).

35.

At the same time, the law's stance has been to limit the invasion of privacy and dignity to invasion by those who have to engage in this process and to protect those whose interests of privacy and dignity and property are infringed, by not allowing others access to this material. The access of others than those who need to have access for the purposes of investigation and prosecutorial decision making, are thus limited by legislation.

See: NPAA, Section 40A

Section 41(6).

36.

The appropriate remedy for an interested party who takes issue with a decision not to prosecute, is to bring a private prosecution. A private prosecution can only be brought by a party who demonstrates:

See: **VAN DEVENTER v REICHENBERG AND ANOTHER [1996] 1 All SA 125 (C) 134** and see the Authorities referred to at 134:

"A private person's title to institute a private prosecution is thus dependent upon his establishing:

(i) that he has an interest in the issue of the trial;

(ii) that the interest is substantial and peculiar to him;

(iii) that the interest arises from some injury which he individually suffered; **and**

(iv) that the injury was suffered as a consequence of the commission of the alleged offence."

(These requirements overlap to a considerable extent. Compare **PHILLIPS v BOTHA 1999 (2) SA 555 (SCA) 567**).

37.

All such a party with a substantial, peculiar and individual right is entitled to is a certificate of *nolle prosequi* from the NDPP – he is not entitled simply because he brings a prosecution, to the materials covered by Section 41(6). The CPA and the NPAA contain no provision giving him access to such materials. Why a reviewing party with no interests or interests which fall far short of what is required from the private prosecutor would then have more or better rights than the private prosecutor, is incomprehensible.

38.

It is clear that none of the reviewing parties have such an interest in the subject matter of the Decision so as to qualify them to institute a private prosecution. Compare the requirements hereof. In addition CCII is a company which excludes it as a private prosecutor and Young a shareholder who is not the wronged party if the company was wronged. At the very best for all the parties, the alleged conduct of the Third Respondent has but a **very** indirect and remote link to **any** harm suffered by them.

39.

There are a number of factors which further reduce the weight of the DA's interests to access the Reduced Record compared to the competing interests protected inter alia by Section 41(6). These are set out hereafter with (b), (c), (d) and (e) being dealt with as separate rubrics.

(a) THE VALUE OF THE REDUCED RECORD:

40.

The Applicant seeks the Reduced Record, i.e. the Record shorn of the Third Respondent's Representations and Memoranda etc. relating to that. What remains? The investigation documents relating to the guilt of the Accused and the documents which relate to his conduct of his life over the years which are not necessarily incriminating in the main. These the DA now also seeks to eschew. Materials which relate to policy aspects of the prosecution of necessity

identify and lead to the Third Respondent's representations being laid bare.

41.

The DA has repeatedly made the case that the NPA had stated that it had a good case on the merits. That was still the case according to the NPA in the Decision – see: **Record, Volume 1, NPA Statement, "JS10", p120 at p 121.**

42.

The Third Respondent had indeed addressed the merits and contended that the NPA's case was not likely to succeed (see Decision **at Volume 1, page 121** contrary to what is suggested in the intervening reply).

43.

It follows that the **"merit"** documents in the Reduced Document in question can only be relevant to the issue as to whether the Decision (not to prosecute) should not also have been based on the merits or lack thereof. That is, however, the Third Respondent's concern and such concern has no practical effect – it does not go to result of the Decision but only its reasons.

44.

The Reduced Record is simply not relevant to what the DA professes to achieve as relief herein – the setting aside of the Decision. In short, the material sought

can only relate to that part of the decision regarding the merits which the DA does not take issue with and which the Decision assumed and the DA clearly accepts, sufficed to continue the prosecution. The other part is inextricably bound up with the Representations made by the Third Respondent. They either form factual links in the Third Respondent's representations or constitute investigations or considerations thereof or responses thereto. The Reduced Record can thus, if the professed battle lines are the true battle lines, add very little to the DA's case for setting aside.

45.

The obvious and most likely inference to be drawn from the DA's insistence on the Reduced Record, is that its purpose is to extract some political gain from this. It is for an ulterior motive and not for the professed purpose of impugning the Decision in its relevant aspect to get it set aside (Compare the reasoning in **NEDCOR BANK LTD AND ANOTHER v GCILITSHANA AND OTHERS 2004 (1) SA 232 (SE)**).

46.

Only those portions of the Record which are relevant to a review, need in any event be produced under Rule 53.1:

See: **MULLER AND ANOTHER V THE MASTER AND OTHERS 1991**

(2) SA 217 (N), at 220 D-F.

47.

The specific point being made here, is that it is this limited and / or distorted value of the Reduced Record to the DA which is to be weighed against the serious inroads into the privacy and dignity of a large number of people including the current President and / or the NDPP's investigation and responses to the Third Respondent's representations.

48.

What is sought is not what Rule 53 sought to provide for and the purpose for which it allowed a right to the Record.

49.

Even if the Reduced Record relating to the merits or such investigations and considerations has some relevance given that the representations also addressed the merits, their production cannot effectively assist the DA to obtain the relief sought. No issue has been taken with the Third Respondent's assertion that the written **and** oral representations played a very significant if not decisive role in the Decision arrived at (See: **Record, Volume 2, Third Respondent's Answering Affidavit, p 33,, para 2(d) read with DA Replying Affidavit, 161, para 36**).

50.

It is very difficult to perceive how the Reduced Record can play any significant part in deciding whether to set aside the Decision when the crucial parts of the Record which directly informed the Decision are not before the Court. It is rather like Counsel asking the Appeal Court to set aside the order below armed with a record of 4 days of evidence out of 10 and he accepts that the other 6 days evidence is what the order (which is within the Court's capacity) is based on and he has little or no idea of what such evidence was. The DA has simply not provided a rational basis on which the Reduced Record will assist it in enforcing its proclaimed right to set the decision aside.

51.

Even in respect of rationality, the reviewing Court must ask itself: was there a rational objective basis justifying the connection made by the NDPP between the material available and the conclusion arrived at? (**TRINITY BROADCASTING (CISKEI) v INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA 2004 (3) SA 346 (SCA) par [21]**). Clearly that question can never be answered in the negative, without the representations and materials pertaining to these. The reviews should alternatively really demonstrate that the decision was so outrageous that no sensible person could have come to it. Again without the full Record this is a waste of time.

52.

The Reduced Record sought does not and cannot serve the purpose of Rule 53 in providing for its production.

Compare: **SACCAWU, *supra*, at para 7.**

53.

What remains in this case, in the absence of a full Record, is a costly and time-consuming exercise in futility save to tarnish the image of the country, the President and the NPA. The review cannot succeed on an administrative law basis if the material information is not before the reviewing Court.

54.

The new argument appearing in paragraphs 32-26 of the Applicant's heads of argument that the reduced record ought to be placed before this Court was not raised on the papers. Instead it was contended that the first Respondent had to make the determination on what was **"privileged"** and what could be produced. A fourth set of affidavits would have been necessary for the Respondents to deal with why the approach now suggested cannot work. Moreover, this argument begs the first question – what is the Reduced Record to be placed before the Court, for this clearly must be information which may assist the reviewing parties in having the decision reversed, and who decides on this Reduced Record?

55.

More importantly, the issues in limine raised by the Respondents point to significant weaknesses in the Applicants' standing, the merits of the main claim and whether the matter is justiceable at all. If there is the slightest prospect of any of these arguments succeeding (which it is submitted there are), then the attendant dangers of production to the Court of confidential and / or privileged material are heightened.

(b) THE APPLICANTS LACKS LOCUS STANDI

56.

The DA (and the intervening parties) has a very shaky claim to *locus standi*; it has no direct and substantial interest and none of its rights were affected by the **result of the decision**. Indeed what the right or interest precisely is, is not clear. This is dealt with as a special rubric.

(c) NO PRACTICAL RESULT CAN FOLLOW

57.

Even the setting aside of the decision is unlikely to result in the prosecution of the Third Respondent. The question of the immunity of the holder of the Presidency whilst functioning as such; the very unfairness of resuming the prosecution given the delays since 2001 and the *nemo bis vexari* doctrine all combine to render this an extremely unlikely outcome. Moreover, the CC has

admonished that great care should be taken by the Courts to recognise and **"ensure that the status, dignity and efficiency of the office of the President is protected."**

See: **<u>PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS v SOUTH AFRICAN RUGBY FOOTBALL UNION AND OTHERS</u> 2000 (1) SA 1 (CC) par [241] – [245]**.

(d) THE DECISION IS NOT REVIEWABLE UNDER PAJA

58.

It is highly controversial as to whether the Decision constitutes administrative action and whether it is at all susceptible to review on such grounds. The Third Respondent contends that it is not. There is no credible attack on the Decision based on the remaining constitutional requirements (such as legality and rationality) for such a case: the statements made in this regard are wholly speculative.

59.

Even if the Decision is reviewable on a wider front the Courts will be extremely loathe to set it aside.

See: **<u>KAUNDA AND OTHERS v PRESIDENT OF THE REPUBLIC OF</u>**

<u>SOUTH AFRICA AND OTHERS</u> 2005 (4) SA 235 (CC), at paras 77-81

60.

In short, on the merits of the review, the Applicant has to go a long way in impugning the Decision as truly irrational before the Court will set it aside. No semblance thereof appears from the founding papers.

(f) ABUSE OF COURT PROCESS

61.

The application is an abuse of process with clear political gains in mind.
(We deal with the above considerations).

<u>THE DA'S *LOCUS:*</u>

62.

The DA has brought the review application on the basis of its standing as a political party (p6 – 7, par 3) and the fact that it made representations to the NDPP prior to the Decision concerning the Decision. The issue of *locus* is specifically addressed in par 16 – 21 (p15 – 17) of the review application and the DA's case is made there.

63.

The actual interest in the result of the Decision is not clearly spelt out. If the rhetoric including that a prosecution of the Third Respondent would be in his own interest, is discarded, it is clear that the DA's interest is that a (successful) prosecution would remove the Third Respondent as the President and score considerable political points in the process. Clearly the concern is not with the decision making **process** of the NPA re prosecutions – very different remedies should then have been sought so as to **"improve"** or control such process.

PRINCIPLE OF *LOCUS:*

64.

It is trite law that any Applicant seeking to review an administrative or other decision of an organ of State must have a sufficient interest in the subject matter of the decision to allow him to seek such relief in a Court of law.

65.

The question is whether the Applicant has a sufficient interest in the sense of a recognised, direct and personal or special interest in the subject matter of the Decision.

See generally: **KOMMISSARIS VAN BINNELANDSE INKOMSTE V VAN DER HEEVER 199(3) SA 1051 (HHA), at**

paragraph 10 and the authorities cited there.

66.

Such *locus standi* is a **"threshold"** requirement an Applicant litigant must meet.

67.

The requirement of *locus standi* has in the pre-Constitutional law been summarised as follows:-

> **"The general rule of our law is that no man can sue in respect of a wrongful act unless it constitutes the breach of a duty owed to him by the wrongdoer or unless it causes him some damage in law … And the rule applies to wrongful acts which affect the public as well as to torts committed against private individuals."**

> **DALRYMPLE V COLONIAL TREASURER 1910 TS 372** at 379: (Per Innes CJ)

68.

What qualifies as a sufficient interest is now to be assessed in the light of the Constitution and the fundamental rights and dispensation recognised therein. Although the Constitution widens the scope of standing, the fundamental

principle is the same. **FERREIRA v LEVIN NO AND OTHERS 1996 (1) 984 (CC)** at paragraph 231:

> **"However, standing remains a factual question. In each case, Applicants must demonstrate that they have the necessary interest in an infringement or threatened infringement of a right. The facts necessary to establish standing should appear from the record before the Court ..."**

69.

An affected right or legitimate expectation is a requirement to justify an invocation of administrative law in the first place. **WALELE V CITY OF CAPE TOWN AND OTHERS 2008 (6) SA 129 (CC)** at paragraph 42. See also, **GREY'S MARINE HOUT BAY (PTY) LTD V MINISTER OF PUBLIC WORKS (6) SA 313 (SCA)** at paragraphs 29 to 31.

> See also: **CABINET OF THE TRANSITIONAL GOVERNMENT OF SWA v EINS 1988 (3) SA 369 (A)** at 388H:
>
> > "... **(B)y our law any person can bring an action to vindicate a right which he possesses (*interesse*) whatever that right may be and whether he suffers special damage or not,**

provided he can show that he has a direct interest in the matter and not merely the interest which all citizens have.

70.

<u>GREY'S MARINE</u>, *supra*, illustrates the need for "a peculiar interest transcending those enjoyed by the public at large."

71.

It can be accepted that any and every person in South Africa generally has a recognised interest in the NPA making correct decisions and following the correct procedures in the exercise of its discretion whether to prosecute or not, any person for any alleged offence. Each and every person would likewise have an interest in all decisions of all State organs being correct and lawful decisions – good governance is in everyone's interest. This does not translate into a right of any and every person in South Africa to take every decision not to prosecute, on review.

72.

As a general principle an interest in the subject matter of a decision which does not go beyond what each and every other person has in South Africa does not suffice for *locus* to impugn that decision.

73.

The DA in effect is stating that it is entitled to:

(a) review each and every State decision not to prosecute any legal entity or natural person for any crime.

(b) In the process obtain the full Record of prosecutorial / police investigation including all witness statements, documents obtained in search and seizure operations, expert reports, etc.

74.

The only curtailment of this untrammelled right and powers are factual: the DA's (political) will to engage in the exercise and the costs factor i.e. which cases it decides to have a go at.

75.

The DA's contention that the NDPP by accepting their proffered representations, clothed it with *locus*, has no merit. It is firstly a *non-sequitur* that a person who does not have to take representations or allow a person to advance contentions but does, thereby clothes such person with an interest in the subject matter of his subsequent decision which that person would otherwise not have had.

Compare: **(<u>UNITED BUILDING SOCIETY AND ANOTHER v LENNON LTD</u> 1934 AD 149 at 160.**

76.

In the case of **<u>NINIAN & LESTER (PTY) LTD v CROUSE NO & OTHERS</u> (2009) 30 ILJ 2889 (LAC) par [18] and [29]**, persons had a **<u>right</u>** to file objections to an application, but that plus the fact that they actually did, did not qualify them as persons aggrieved by the decision on the application. In the absence of any evidence of the Applicant's legal interest in a matter, the Applicant is in no better position than that which our courts have described as a busybody interfering in things which do not concern it.

Francis George Hill Family Trust v South African Reserve Bank and Others 1992 (3) SA 91 (A) at 101 A-D, quoting **Attorney-General of the Gambia v Njie [1961] 2 All ER 504 (PC)**: **"They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person with a genuine grievance because an order has been made which prejudicially affects his interests".**

(The reviewing parties retort seems to be that since they have been busy bodies, they have a right to make representations).

77.

It is submitted that the claim that this application is in the public interest does not assist the DA (nor the intervenors). These references to the interests of the public cannot be elevated to a level sufficient to vest the Applicant with the required legal interest in this matter. It is in any event very difficult to comply with the tests established by the Constitutional Court to approach the court in the public interest and a range of factors must be considered – no factors have been suggested by the DA (or the intervenors) to meet such established tests.

See: **LAYWERS FOR HUMAN RIGHTS AND ANOTHER V MINISTER OF HOME AFFAIRS AND ANOTHER 2004 (4) SA 125 (CC), at paragraphs 16-18** where Yacoob J endorsed a view that a court must be "circumspect" in affording standing in the public interest and on the need to distinguish between the subjective position of the person claiming to act in the public interest and whether objectively speaking it is in the public interest for the claim to be brought at all.

78.

The DA (nor the Intervenors) does not have *locus*.

THE DECISION AS ADMINISTRATIVE ACTION:

79.

The DA contends on *exclusio unius, alterius inclusio* reasoning for the proposition that the Decision constitutes administrative action and hence is reviewable. The case it made was, on analysis, wholly based on the premises of administrative action and the bases for a review of such conduct. That is the case the Third Respondent meets and seeks to meet.

80.

The DA's case is that a decision to prosecute is expressly excluded from **PROMOTION OF ADMINISTRATIVE JUSTICE ACT 3 OF 2000 ("PAJA)** – Section 1(ff); hence a decision not to prosecute is included. This reasoning is fundamentally flawed in that it reads such inclusion into Section 1 of PAJA when the Section neither on an ordinary grammatical reading or in its scheme says that.

81.

PAJA is the concretisation of Section 33 of the Constitution and covers the right to fair administrative action which PAJA defines and hence defines the scope of such right and reviews based on that. A litigant seeking to enforce such right of review must then bring his case within the four corners of PAJA and not the Constitution or the common law directly.

See: **BATO STAR FISHING (PTY) LTD V MINISTER OF ENVIRONMENTAL AFFAIRS 2004 (4) SA 490 (CC), at paragraphs 22-25.**

82.

Section 1 of PAJA defines administrative action, broadly summarised, as the exercise of a Constitutional or Statutory power or public power or function which adversely affects the rights of any person and which has a direct external legal effect. In order to qualify as administrative action, the conduct in question must thus meet the requirements of actions of a certain nature flowing from a Statutory provision and having two different effects. This is a general principle orientated definition against which any conduct is to be measured to determine whether it qualifies as administrative action falling under PAJA.

83.

It then lists certain actions which even if they meet or should meet all the above three requirements, are not to be classified and treated as administrative action. Sub-para (ff) is on such **"a decision to institute or continue a prosecution"**.

84.

That is the scheme of the definition. It defines administrative action generally

and then excludes specific forms of conduct which would or may otherwise fall within the definition.

85.

If the issue then arises whether certain conduct constitutes administrative action, the conduct is analysed to establish whether it meets the three requirements. If not, it is not administrative action and falls outside the purvey of PAJA. If yes, the remaining question is whether it falls within one of the exceptions. If not, it is administrative action; if yes, it is not.

86.

The test is not whether the conduct is not mentioned in the exceptions. The *unius inclusio, est alterius exclusio* argument is not only recognised in the case law as an unconvincing pointer to the meaning of Statutory provisions (see **CONSOLIDATED DIAMOND MINES V ADMINISTRATOR, SWA 1958 (4) SA 572 A, at 648 G-H**) but indeed is wholly inappropriate given the scheme of PAJA and the structure of the definition of administrative action.

87.

A decision to prosecute obviously falls within the general positive part of the definition – it affects the rights of the Accused e.g. his freedom of movement. He is to face criminal charges in Court. It has a direct external effect – the State

machinery is set in motion to physically present him to Court and inflict physical harm in the form of incarceration (which impinges on almost all his basic rights) or a fine (which affects property). It has thus been recognised in recent case law that but for the exception, such conduct would fall within the ambit of the definition.

88.

The reason why such a decision has been excluded as a specific exception is to avoid a multiplicity of decisions on the merits – the Criminal Court is going to deal with that in any event (reliance in reasoning was placed on **WISEMAN v BORNEMAN** **1971 AC 297 HL** and **PARK-ROSS v DIRECTOR: OFFICE FOR SERIOUS ECONOMIC OFFENCES** **1998 (1) SA 108 (C) [14] – [25]**.

89.

A decision not to prosecute does not meet the effect requirements of the definition. If the NPA considers whether X is to be charged with corruption and it decides not to do so, no one's **rights** have been affected and there is no direct external legal effect of that decision (compare also **NINIAN & LESTER** ***supra*** **par [29]**. In short, the status *quo* as to rights and external legal effect is exactly the same as prior to the decision. Indeed, the NPA can even at any time again decide on the issue (which indeed is exactly what it initially did in respect of the Third Respondent – see the brief history recounted in **NATIONAL**

DIRECTOR OF PUBLIC PROSECUTIONS v ZUMA 2009 (2) SA 277 SCA at paras 3-6).

90.

In **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS v SOUTH AFRICAN RUGBY FOOTBALL UNION AND OTHERS 2000 (1) SA 1 (CC)**, it was stated **[143]**:

> **"… The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and**

ethical public administration. This can best be done on a case by case basis."

See also: **GREY'S MARINE** ***supra*** **par 24**

TRANSNET LTD AND OTHERS v CHIRWA 2007 (2) SA 198 (SCA) par 14.

91.

It is submitted that there are a number of features regarding the subject matter of the discretionary power not to prosecute which involves policy issues which support the view that a decision not to prosecute is not administrative action either in terms of PAJA or Section 33 of the Constitution.

92.

(a) **CONSISTENCY IF THE DECISION CONSTITUTES ADMINISTRATIVE ACTION:**

The point is well made by the NDPP that since the outcome of a decision to prosecute or not, is not, in principle, predictable, Sections 3,4 and 5 of PAJA must be adhered to. That would simply, from an implementation point of view, make decisions to prosecute, completely unwieldy and delay the legal process. Even the would be Accused would then be entitled to review the decision not to

prosecute him : this is not a silly scenario. If the Accused knows the prosecution cannot now muster a case he may well secure an acquittal (and then have Section 35(3)(m) of the Constitution available) or clear his name (as the DA suggests or find out who his accusers were and what they said) or to prevent extradition (see **ABEL V MINISTER OF JUSTICE AND OTHERS 2001 (1) SA 1230 (C)** and **GEUKING V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2003 (3) SA 34 (CC)**).

(b) The NDPP is indeed in an adversarial system the direct adversary of the Accused or would be Accused. Decisions to litigate against one another simply are not decisions which lend them to classification as administrative actions and to administrative review. A decision not to prosecute is a polycentric one involving value judgments (on witnesses, etc), legal opinion (e.g. re on the admissible of evidence), practical and cost and policy implications. It simply does not readily lend it to administrative action treatment (Compare, in the context of a decision to discontinue an investigation: **R (CORNER HOUSE RESEARCH) V DIRECTOR OF SFO [2008] 4 All ER HL 927 at 980, per Lord Bingham at paragraph 31:**

"**The reasons why the courts are very slow to interfere are well understood.**

'**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**.'

Thirdly, the powers are conferred in very broad and unprescriptive terms.")

As to the South African position on polycentricity, see **BATO STAR FISHING (PTY) LTD 2004 (4) SA 490 (CC), at paras 46-48**

(c) Many complexities arise on a consistent recognition of a decision not to prosecute as an administrative issue. Is acceptance by the prosecution of a plea to a lesser offence or on certain facts, reviewable then? Likewise, an acceptance of mitigating factors or that minimum sentences do not apply in certain cases? Does the plea bargaining process constitute such? (Generally decisions to litigate or not do not fit the administrative mould. See **SMITH v KWANONQUBELA TOWN COUNCIL 1999 (4) SA 947 (SCA) 952; EASTERN METROPOLITAN SUBSTRUCTURE v PETER KLEIN INVESTMENTS (PTY) LTD 2001 (4) SA 661 (W) [12] –**

[16].

The specific treatment in legislation of many of these issues such as when an NDPP has to consult and call for representations, etc (Section 179(5) of the Court which on the SCA's judgment in **NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v ZUMA 2009 (2) SA 277 SCA** was simply not applicable to the Decision) and plea bargaining (CPA) simply demonstrates that administrative action in PAJA is not the appropriate touchstone for testing the validity of the prosecutorial discretion (It is not contended that a review on legality or other such Constitutional basis, may not be available in respect of such discretion).

(d) Case law history – there is very little case law recognizing that the prosecutorial discretion is subject to administrative law review. We could find no such case in SA law dealing with a decision not to prosecute – indeed the decision to prosecute has likewise never been interfered with even when challenged by the Accused.

(e) Specific sections (e.g. Section 41(6) of the NPAA) which make review very difficult on administrative law grounds given the obvious importance of the Record in the vast majority of reviews, indicate that

administrative law does not cover the prosecutorial discretion.

LEGALITY REVIEW:

93.

The Applicants recognise that the question whether the decision is reviewable under PAJA is controversial and possibly weak. They contend nevertheless that this Court may nevertheless review the decision by approaching the matter on the basis of legality review – the foundations for such a review in the papers to the extent that there are such contentions are, however, wholly speculative.

94.

As with the difficulties confronting the Applicants with respect to whether the Decision is reviewable under PAJA, there are deeper difficulties confronting the Applicants on this argument. Legality review (as an incidence of the Rule of Law) posits a far more deferential standard of review.

95.

It is also a well established principle of our law that legality review asks the question whether the decision is rationally related to the purpose for which a power is given and, viewed objectively, whether the decision is related to a legitimate government purpose. If it is so, then it matters not that the power could have been exercised differently or that other decisions could have been

taken instead. Our courts do not sit in judgment of the correctness or otherwise of the decision.

See: **MASETHLA V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND ANOTHER 2008 (1) SA 566 (CC)**, **at paragraphs 80-81 and the authorities referred to there.**

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT V CHONCO AND OTHERS as yet unreported decision of the Constitutional Court delivered on 30 September 2009 – Case CCT 42/09; [2009] ZACC 25

PHARMACEUTICAL MANUFACTURERS ASSOCIATION OF SOUTH AFRICA AND ANOTHER: IN RE EX PARTE PRESIDENT FO THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2000 (2) SA 674 (CC), at 709 E-H:

> **"Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of**

the standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested as long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively is rational, Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, the Court has the power to intervene and set aside the irrational decision..."

96.

The first Respondent has explained his decision. He has demonstrated a rational basis for his decision. That, with submission, is the end of the matter.

97.

As to the position in the UK, the comparable test is as follows:

"**[41] The Director was confronted by an ugly and obviously**

unwelcome threat. He had to decide what, if anything, he should do. He did not surrender his discretionary power of decision to any third party, although he did consult the most expert source available to him in the person of the Ambassador and he did, as he was entitled if not bound to do, consult the Attorney General who, however, properly left the decision to him. The issue in these proceedings is not whether his decision was right or wrong, nor whether the Divisional Court or the House agrees with it, but whether it was a decision which the Director was lawfully entitled to make. Such an approach involves no affront to the rule of law, to which the principles of judicial review give effect. See *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23 at [73], [2001] 2 All ER 929 at [73], [2003] 2 AC 295, per Lord Hoffmann)."

CORNER HOUSE, *supra*

98.

There is no suggestion that the NDPP did not have the authority to make the decision he did and to do so on policy and other considerations; he is expressly given such a discretion – see the Policy document (approved by Parliament). There can be no suggestion that he exceeded the bounds of his authority when

he took the Decision. The Applicant's essential complaint is that they do not like the decision and they want the Court to endorse this finding which on the applicable legal principles, this Court simply cannot do.

PRESIDENTIAL OFFICE IMMUNITY:

99.

The Third Respondent contends that the incumbent of the Presidential Office is not, whilst in office, susceptible to criminal prosecution. This contention does not rest on any arrogance of office or any perceived elevation above the law and its processes or on any individual or personal claim to special and favoured treatment but ultimately on the separation of powers doctrine which is a fundamental building block of the South African legal dispensation. The Third Respondent raises this contention on advice.

100.

The President is not to be treated like any other litigant even in civil litigation.

See: **PRESIDENT OF THE RSA V SOUTH AFRICAN RUGBY FOOTBALL UNION 2000 (1) SA 1 (CC), at paras 240-245**

101.

Similarly, in terms of section 84(2)(j), the President has the power of pardon in respect of any offence. The President is the repository of this and other unique

powers because he is the Head of State and the Head of the National Executive (section 83(a)).

102.

The breadth of power entrusted by the Constitution to the President emerges from a consideration of the presidential powers in sections 83-85 of the Constitution, in respect of Cabinet (s 91(2)), the judiciary (s 174), prosecution (s 179(1)(a), Commander in Chief of the Defence Force (s 202(1)), the South African Police Services (s 207(1) and the intelligence services (s 209(1) and (2). This is why the framers of the Constitution provides a specific process for the removal of a President by the national Assembly (s 89 and s 102 provide two processes for the removal of a President which are inspired by different rationales).

103.

There is nothing novel or peculiar about the notion that certain functionaries enjoy relative or absolute immunity from legal proceedings including prosecution or indeed a moratorium from being subjected to such proceedings. Examples are:

(a) Persons who have diplomatic immunity.

(b) Persons on active military service.

(c) Judges.

104.

It has never been suggested that these functionaries are arrogant because they avail themselves of these immunities / moratoriums.

105.

What the scheme of the Constitution suggests is that the indictment or prosecution of a sitting President would precipitate a constitutional crisis because the doctrine of separation of powers in our Constitution prohibits any branch of government from crippling another branch of government. What the Applicant seeks to achieve is forbidden by the scheme of our Constitution. In this case it would mean that the executive branch of government, represented by its Head, the President, elected by the people's representatives, would be reduced to a non-functioning entity attending a criminal case for some 6 months as opposed to performing his functions. (The reviewing parties know that this would make it impossible for him to function effectively as Head of the Executive. The Constitutional resolution is, however, the inverse of what they seek – any criminal charges await the time when he is no longer the President). The Constitution provides for an impeachment process through elected representatives of the people and not by judicial officers should such an issue arise.

106.

In this regard, our Constitutional scheme is no different from most European countries and accords with the policy approach adopted in the United States, most recently codified in a Memorandum for the Attorney-General dated 16 October 2000 by the Office of the Legal Counsel.

107.

The criminal prosecution of the President carries with it certain impracticalities. The imposition of a criminal sentence of imprisonment would make it impossible for the President to carry out his constitutional duties. The stigma and opprobrium during the process of the trial would not only hamper a President's ability to execute his duties but would affect public and foreign relations both domestically and internationally. That is the practical effect of what the Applicant and the intervenors want to achieve. The embarrassment to this country, particularly during the World Cup Soccer, will be untold.

108.

The following considerations which inform the USA position on the indictment or prosecution of a sitting President are of relevance:

109.

The policy position adopted by the Attorney-General of the United States is that **"[t]he indictment or criminal prosecution of a sitting President would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions."** This policy is recorded in a Memorandum for the Attorney-General dated 16 October 2000 by the Office of the Legal Counsel **("OLC Memorandum")**.

110.

"The proper approach is to find the proper balance between the normal functions of the courts and the special responsibilities and functions of the Presidency".

111.

"The criminal proceedings against a sitting President should be barred by the doctrine of separation of powers because such proceedings would 'unduly interfere in a direct or formal sense with the conduct of the Presidency".

112.

"The President is the symbolic head of the Nation. To wound him by a criminal proceeding is to hamstring the operation of the whole

government apparatus, both in foreign and domestic affairs".

113.

"An indictment hanging over the President while he remains in office would damage the institution of the Presidency virtually to the same extent as an actual conviction".

114.

The **"public stigma and opprobrium occasioned by the initiation of criminal proceedings"** would compromise the President's ability **"to fulfil his constitutionally contemplated leadership role with respect to foreign and domestic affairs and, the mental and physical burdens in the preparation of a defence for criminal proceedings could severely hamper the President's performance of his official duties."**.

115.

"Supplementing this constitutionally prescribed process by permitting the indictment and criminal prosecution of a sitting president would place into the hands of a single prosecutor and grand jury the practical power to interfere with the ability of a popularly elected President to carry out his constitutional functions."

116.

The President was the chief constitutional officer of the Executive branch **"entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity"**. In addition to this executive power, other provisions in the Constitution pointed to the **"broad scope and important nature of the powers entrusted to the President"** eg. the execution of laws; the power to grant reprieves for offences against the US; the power to negotiate treaties and to receive ambassadors and other public ministers; the sole representative to foreign nations; the power to appoint judges of the Supreme Court and the principal officers of government; and the power to recommend legislation to Congress.

117.

"The distinctive and serious stigma of indictment and criminal prosecution imposes burdens fundamentally different in kind from those imposed by the initiation of a civil action". This was heightened if the criminal trial was serious and lengthy.

118.

"Nothing in the Supreme Court's recent case law draws into question the Department's previous judgment that 'to wound [the President] by

a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs."

119.

"Criminal litigation uniquely requires the President's *personal* time and energy, and will inevitably entail a considerable if not overwhelming degree of mental preoccupation."

120.

"Thus, the constitutional concern is not merely that any *particular* indictment and criminal prosecution of a sitting President would unduly impinge upon his ability to perform his public duties. A more general concern is that permitting such criminal process against a sitting President would affect the underlying dynamics of our governmental system in profound and necessarily unpredictable ways, by shifting an awesome power to unelected persons lacking an explicit constitutional role *vis a vis* the President. Given the potentially momentous political consequences for the Nation at stake, there is a fundamental, structural incompatibility between the ordinary application of the criminal process and the Office of the President."

121.

The OLC memorandum concludes **"For these reasons we believe that the Constitution requires recognition of a presidential immunity from indictment and criminal prosecution while the President is in office."**

122.

These considerations are of similar import and significance in the South African model.

123.

Any further proceedings against the Third Respondent will seriously compromise the Executive branch of government, the ability of the Head of State and head of the Executive to function and will lead to an infraction of the separation of powers model in our Constitution.

ABUSE OF PROCESS AND DELAY:

124.

> **"What does constitute an abuse of the process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of 'abuse of process'. It can be said in general terms, however, that an abuse of process takes place where the**

procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective"

<u>BEINASH V WIXLEY</u> 1997 (3) SA 721 (SCA) at 734 F-H (and see the authorities cited there).

See also: **<u>PHILLIPS v BOTHA</u>** ***supra*** **565 D – H.**

125.

The purpose of the review application is, shorn from rhetoric, to compel the NPA to reinstate the charges against the Third Respondent.

126.

The review applications are clear attempts to force a public prosecution by those who lack the necessary interest to bring a private prosecution.

127.

The Court has an inherent jurisdiction to halt proceedings which constitute an abuse of process. It has used this power to preclude private prosecutions where the prosecution ostensibly met the requirements for resort to such a process.

See: **<u>VAN DEVENTER</u>** ***supra;*** **<u>NEDCOR</u>** ***supra*.**

128.

In this case, the review is clearly aimed at circumventing the lack of *locus* for a private prosecution and to further the political aims of the parties, in particular, to bring the ruling party in disrepute and / or force the prosecution of a sitting President.

129.

It is submitted that on any conspectus of the history and pursuit of this matter, the true purpose behind this application is one of abuse, rather than to facilitate the pursuit of truth.

130.

The letter **"JS3"** (18 March 2009, Volume 1, page 100), review application, which was both insulting and an attempt to put pressure on the NDPP to exercise his discretion to continue with the prosecution and dismiss the representations that Mr Zuma like any other Accused, was entitled to make, reveals the true purpose of the DA. Once again this was an exhortation to treat the Third Respondent less equally than others. The message is clear – prosecute the Third Respondent who is a powerful politician (indeed a popular one), specifically because he is a powerful politician.

131.

The DA knew full well before launching the review application that the representations of the Third Respondent were regarded as confidential and made on a without prejudice basis (see p106, **"JS7"**) and access to these were denied.

132.

The DA contended that the NDPP's refusal to allow access to the Third Respondent's representations hampers their ability to make **"proper and adequate"** representations to the NDPP as to why the prosecution should continue (see **"JS8"** on p107, par 3).

133.

The DA adopted a coercive stance in their representations – prosecute the Third Respondent or the inevitable interference is that you bowed under political pressure not to prosecute the Third Respondent (p113). This was simply an attempt to create an artificial basis for a review.

134.

In the review application, the DA states in numerous passages in its documents that the NPA had contended that it had a strong case against the Third Respondent on the merits (p112, par 22; p116, par 38). The First and Second Respondents made it clear prior to these proceedings that they held this view.

The announcement quashing the charges dealt with other issues, beyond the merits.

135.

In these proceedings, the DA first sought access to what it knew were confidential records, then concedes that it might not want to debate this point and now seeks a Reduced Record. For the first time in its heads of argument, there is some suggestion that the process now contended for is for the reduced record to be placed before the Court to determine what is privileged and what is not. The constant shifting of the goal posts is not only impermissible but indicative of the true intention of these proceedings.

136.

The DA does not take issue with the factual averments in the Third Respondent's heads of argument setting out the facts demonstrating the DA's inordinate delay and historical treatment of this matter (Third Respondent's affidavit, pages 71-74, paras 58 -65; Reply, pages 171-172, para 56). The sole contention in reply is that the first and second Respondents have always had a strong case against the third Respondent and that the reasons proffered for withdrawing the prosecution "do not withstand scrutiny". What then is the purpose of the request for the reduced record in the light of the concession that the matters deemed relevant to the Decision were based largely on confidential material

received by the first and second Respondents, if not solely to embarrass the ANC, and the third Respondent? The inference that all of this is merely for political gain is the only one to be drawn.

137.

The lengthy history of the matter against the Third Respondent is undisputed on the papers. In these circumstances it is submitted that the trite principle of our law that enables this Court to exercise its discretion against granting relief must weigh heavily in favour of the Third Respondent. The interests of finality simply demand that.

See: **ASSOCIATED INSTITUTIONS PENSION FUND AND OTHERS V VAN ZYL 2005 (2) SA 302 (SCA)**.

138.

The Court has indeed a discretion not to interfere with an invalid administrative act. If there ever was a proper occasion to halt proceedings it is the current process.

See: In particular and specifically **CHAIRPERSON, STANDING TENDER COMMITTEE AND OTHERS v JFE SAPELA ELECTRONICS (PTY) LTD AND OTHERS 2008 (2) SA 638**

(SCA) par [27] – [28].

139.

It is submitted that the application for the Reduced Record be dismissed and that the application for review be likewise dismissed. The papers, shorn of any Record, simply do not make a case for a setting aside of the exercise of the NDPP's discretion. The difficulties, in principle, to the obtainment of such an order, have been wholly compounded by the specific facts in this instance. The Third Respondent seeks that the costs of two Counsel be awarded.

140.

The Third Respondent will provide the Court with copies of the OLC Memorandum (and the other parties as well) before the hearing and any other Authorities required and expand on the arguments at the oral hearing.

KJ KEMP SC

AA GABRIEL

Chambers, Durban

21st May 2010.