THE HIGH COURT OF SOUTH AFRICA

NATAL PROVINCIAL DIVISION

CASE NO.: CC358/2005

In the matter between :

THE STATE

and

JACOB GEDLEYIHLEKISA ZUMA First Accused

THINT HOLDING (SOUTHERN AFRICA) (PTY) LTD (as represented by PIERRE JEAN-MARIE ROBERT MOYNOT) Second Accused

THINT (PTY) LIMITED (as represented by PIERRE JEAN-MARIE ROBERT MOYNOT) Third Accused

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FIRST ACCUSED'S REPLYING AFFIDAVIT

I, the undersigned,

JACOB GEDLEYIHLEKISA ZUMA

do hereby make oath and state:

1.

I am Accused 1.

2.

Save as may otherwise be stated herein or as may appear from the context, the facts herein deposed to are within my personal knowledge and belief.

3.

I have read the answering affidavits delivered by the State. I reply thereto as set out below.

4.

This affidavit is filed one day late in relation to the set court date. I apologise for the same. The prosecution only delivered the answering papers on Tuesday 15 August 2006. This was agreed to by the defence and no point is made of this. These matters should subject to the court's overall powers, always be capable of agreement. The defence has thus only utilised the intended time for this reply.

Insofar as formally necessary we ask the court to condone this. The remainder of the schedule will obviously not be affected.

5.

STRUCTURE OF THIS AFFIDAVIT

In this affidavit I shall deal with the following :

(a) Firstly, I shall deal with the new and entirely contradictory stance adopted by the State in respect of the State's application for the postponement of the matter.

(b) Secondly, I shall deal with the manner in which the State has seen fit to answer my application for a permanent stay of the prosecution against me, and I shall show that the consequences of the State's approach to the matter are prejudicial to me.

(c) I shall deal, in outline, with some of the main issues in my application for a permanent stay, and I shall show that the State has failed to address those issues. I submit that the State has failed to do so because the State cannot do so.

(d) Lastly, I shall deal with the contents of the State's affidavits delivered in answer to my application for a permanent stay.

6.

STATE'S POSTPONEMENT APPLICATION

I respectfully submit that sight should not be lost of the fact that my application for a permanent stay was brought as a result of, and in answer to, the State's application for a postponement of the trial on 31 July 2006. The date of 31 July 2006 was arranged in October 2005 by the prosecution and my defence team with the Honourable Judge President of this Division in the Judge President's Chambers. It was agreed that the trial would run for at least four months.

7.

On 26 June 2006 the prosecution wrote to my attorney and informed him that the State sought a postponement of the criminal trial until February 2007 ("JDP8"). The State relied on four grounds in "JDP8". The four grounds expressly relied upon were the following :

(a) Ground 1

The State's applications for leave to appeal, and the appeals if the applications for leave were granted, had not been finalised in the search warrant applications.

(b) Ground 2

The State's forensic audit report was not ready.

(c) Ground 3

The request for assistance in Mauritius had not been finalised.

(d) Ground 4

The Shaik appeal had not been finalised.

8.

The above four grounds were repeated in the State's application for a postponement delivered on or about 19 July 2006.

9.

(a) The State has now done an about turn. Grounds 1 and 3 have now fallen away. I refer to paragraph 152 of McCarthy's affidavit. Just as striking as the about turn itself, is the absence of any explanation therefor. What were previously alleged to be material factors in seeking an application for postponement are suddenly no longer factors at all. Grounds 1 and 3 have been summarily abandoned. I respectfully submit that the only reasonable inference to be drawn is

that Grounds 1 and 3 were not advanced ***bona fide*** in the first place.

(b) Moreover, the Shaik appeal has been rescheduled for late September 2006. The State is now quite happy to agree to a timetable without any knowledge of what the outcome or when the outcome of the Shaik appeal will be. This is perfectly proper - even the issues of admissibility in Shaik fall to be decided on entirely different grounds and factual circumstances. Ground 4's irrelevance as a factor influencing an adjournment has thus effectively been conceded - it is difficult to perceive how it ever could have been considered relevant enough to warrant a postponement.

(c) Of course, it will not have escaped the attention of this Honourable Court that the timetable proposed by the State in McCarthy's affidavit achieves in effect exactly what the State set out to achieve in their application for postponement. They set out to achieve a postponement until the first half of 2007. That is exactly what they would have achieved were this Honourable Court to accede to the State's proposed timetable. The State would have achieved that end without putting up any explanation of any nature whatsoever for their failure to have produced their forensic auditor's report by March 2006 (the originally promised date) or, at the very latest, in

accordance with the absurdly meaningless undertaking of "as soon as possible after 31 July 2006" (sic) (**Du Plooy, para.36**).

10.

To make matters worse, McCarthy's affidavit contains the assertion that "since the hearing on 31 July 2006 the KPMG forensic auditors have been working of (sic) their report" (**McCarthy, para.125**). The implication is that the State's alleged instruction to KPMG, belatedly given as it was on 23 May 2006 (see **McCarthy, para.116**), was either not a serious instruction requiring compliance, or was simply ignored. There can be no other explanation for the lacuna between 23 May 2006 and 31 July 2006 when KPMG forensic auditors allegedly commenced or recommenced their work.

11.

I also point out that, in any event, there is no explanation as to why the State's forensic auditors were not instructed to proceed with the material at their disposal in June 2005 (when the decision to prosecute me was allegedly taken and by which time the State must have believed, contrary to its alleged belief in August 2003, that there was sufficient admissible evidence against me to secure a conviction). Had this course of action been adopted, there could be no excuse for the State's failure to long-since have produced the forensic report which it says

it requires. Indeed, it seems that the process of compiling that report would have been a relatively simple one. An extremely detailed and voluminous report is said to have been put up in the Shaik trial and that would surely have formed a convenient starting point and framework for my trial, dealing, as it apparently will, with the same material. Any additional material which came into existence thereafter could have been dealt with by way of a supplementary report, if necessary and permissible. However, there is no explanation for the State's failure to deal with the matter in this way.

12.

Equally, there is no explanation for the State's failure to have sought, by March 2006, such amendments as the State wished to apply to make to the existing indictment. Plainly, on the State's version, it believed it had sufficient admissible evidence to secure a conviction against me in June 2005. The failure, for more than a year, to prepare an indictment on which the State is prepared to proceed, is inexcusable.

13.

In conducting the prosecution in this way, I respectfully submit that the State has infringed my rights to a speedy trial. It has also conducted itself in a manner which is grossly discourteous and disrespectful to this Court, having regard to the

arrangements made in the Chambers of His Lordship the Judge President during October 2005 that the trial would commence on 31 July 2006 and continue for a period of four months.

14.

In the circumstances, I respectfully submit that there is reason to believe that the State has set out to engineer a position in which the trial will proceed when the State is good and ready to proceed. I say that the State has been arrogant and that my belief is incontrovertibly backed by the fact that this Court has been told from the Bar that members of the prosecution team had made arrangements, as at 31 July 2006, to be absent from the country during the early part of September 2006. I respectfully submit that the State's conduct is unacceptable and that it justifies a permanent stay, alternatively that the matter be struck off the roll.

THE MANNER IN WHICH THE STATE HAS ANSWERED MY APPLICATION FOR A PERMANENT STAY OF THE PROSECUTION

15.

The State has seen fit to deal with my application for a permanent stay, and what I am informed is an application for more or less the same relief by Accused 2 and 3, in a single all-encompassing set of affidavits (I have no objection to the stay and postponement being dealt with together) I am advised and respectfully submit

that this is neither an appropriate nor permissible way in which to deal with my application for a permanent stay. I respectfully point out that my application has nothing to do with the application by Accused 2 and 3. It stands entirely separately therefrom. I am informed that the issues raised are distinct and that my application falls to be determined on its own merits, regardless of any application by Accused 2 or 3 or the outcome thereof.

16.

In these circumstances, I find it surprising that the State has purported to put up affidavits, and hundreds of pages of annexures thereto, that deal, in many instances, with issues that are irrelevant to the issues in my application and, at best for the State, can only be relevant to issues raised by Accused 2 and 3. Quite apart from their irrelevance to my application, I submit that many of the contents of the State's affidavits, and the annexures thereto, are in any event inadmissible against me on any basis. I respectfully submit that the contents of the affidavits, and several of the annexures, are prejudicial to me in that the State seeks to draw adverse inferences therefrom. Insofar as those inferences pertain to a charge or charges against me in the "provisional" indictment, I respectfully submit that the contents of the State's affidavits and the annexures thereto are prejudicial to me. I respectfully submit that they have no place in an application for a permanent stay. In effect, what the State has done is to preview, by entirely inadmissible means, and through the mouths of persons who are members of the prosecuting

authority, and whose evidence in the trial against me would, at best, be hearsay, matters relevant to the merits of the charges. All this has unfolded before the trial Judge.

17.

I confess that I have difficulty with the notion that the State has not brought about this state of affairs on purpose. However, whatever the purpose, the effect remains. Irrelevant and inadmissible materials, which are highly prejudicial to me, have been disclosed to the trial court as if it is part and parcel of the case against me which it clearly is not. I respectfully submit that my rights to a fair trial have further been violated by the State's conduct. It is a forerunner of what is anticipated at the trial. I am advised that, in the circumstances, it is necessary to seek an order striking out those portions of the State's affidavits and the annexures thereto of which I complain. I shall identify the offending contents and annexures when I reply to the State's affidavits and the annexures thereto. However, I respectfully submit that a strike out application, even if it is successful, is a largely hollow remedy. The damage has been done. The materials have been disclosed and inferences sought to be drawn therefrom against me on matters which, on the face of it, are directly relevant to the charges I face. I respectfully submit that my rights to a fair trial have been irretrievably infringed. I rely on this ground in my application for a permanent stay.

18.

STATE'S FAILURE TO ADDRESS THE ISSUES IN THE APPLICATION FOR A PERMANENT STAY

I respectfully submit that the affidavits and annexures delivered by the State, despite their volume, singularly fail to address crucial issues raised in my application for a permanent stay. Protestations of indignation and outrage spew forth from the mouths of senior officials past and present, of the National Prosecuting Authority and the National Ministry of Justice. Yet their howls of innocence, when subjected to analysis, are shrill and hollow. I am advised that analysis is a matter for argument and that it is not necessary for me to burden already voluminous papers with detailed submissions concerning matters of law or inferences from the facts. In outline, and without in any way purporting to be exhaustive of matters that will be advanced in argument, I point out that the State has no answer to at least the following aspects of the matter :

(a) the inordinate and prejudicial delay thus far;

(b) the impact on me of the investigation since mid-2001, and, especially since November 2002 when I first read about it in the press;

(c) the impact on me of Ngcuka's media release on 23 August 2003;

(d) the impact on me of the decision to prosecute me in June 2005;

(e) the purpose of the investigation and charges against me;

(f) the lack of objectivity in the prosecution, as evidenced by :

(i) the cynical extension in October 2002 of an investigation ***de facto*** commenced and intensively conducted since mid-2001, in order to ostensibly legitimise what had gone before and what was to come;

(ii) the cynical abuse of power in further extending the investigation in August 2005 to include allegations concerning defrauding parliament and tax evasion;

(iii) the overbreadth and cynical abuse of the State's powers in executing the search warrants raised in August 2005;

(iv) the total reliance on the judgment in Shaik's case;

(v) the continued reliance on the letter to SCOPA dated 19 January 2001;

(g) the impact on me of the further postponement of the matter, as sought to be engineered by the State.

19.

THE DELAY THUS FAR

It is apparent that I have been the main focus and thrust of the NPA's investigations since, at the latest, early 2001. I refer to McCarthy's affidavit at paragraphs 20 and 21. For the reasons explained above, there is no explanation as to why, after a period of more than 5 years of investigations, the State has still not presented me with what it regards as the "final" indictment, or even to have ready what is apparently the most material piece or mustering of evidence on which they will rely, namely the forensic audit report.

20.

IMPACT OF THE INVESTIGATION

The investigation against me has been public knowledge since, at the latest, November 2002. I respectfully point out that the State's allegations that they were the souls of discretion in this regard are absurd. At best for the State, the contentions are naïve. The State must have known full well that it was impossible for the State to investigate the matter, summon a firm of international auditors, employees and directors of Accused 2 and 3, as well as Shaik, and carry out simultaneous raids in four different countries in October 2001, without

accompanying rumour and speculation that I, as Deputy President of South Africa, was the main focus of the investigation. This is precisely what happened. The personal strain on my family and myself was immense. It was extremely difficult for me to carry out my duties as Deputy President, and my status and reputation were undermined.

21.

NGCUKA's PRESS RELEASE ON 23 AUGUST 2003

There is no explanation for this extraordinary event. It is plain that the ultimate decision makers were McCarthy and Ngcuka. They decided that they did not have sufficient evidence to prosecute me. There is no explanation for why they did not say that. Instead, Ngcuka and Maduna called what I have no doubt in saying is one of the most widely publicised press conferences in South African history and pronounced that, although they had a "***prima facie*** case of corruption against the Deputy President, our prospects of success are not strong enough. That means that we are not sure if we have a winnable case". No-one could have failed to foresee the effect such a pronouncement would have on me. Maduna's presence is inexplicable; his comments there only exacerbated the harm. The tenor and content of their press release was that the NPA believed that I was guilty of corruption but that they were not sure that they could prove it. I was branded a crook who had covered his tracks well. I was banished to political purgatory. The media and parliamentary opposition howled indefatigably for my resignation. The

ongoing stress and humiliation to which my family and I were subjected need hardly be stated.

22.

It is plain that the elements of the offences with which I stand charged differ and are distinct from the offences with which Shaik was charged. Nevertheless, in the public eye, I was tried and convicted together with Shaik. My sentence was publicly pronounced by the President in the joint sitting of the Houses of Parliament on 14 June 2005 when I was dismissed as Deputy President of South Africa. I was effectively excommunicated from my leadership role within the government. My humiliation was complete.

23.

THE IMPACT UPON ME OF THE CHARGES

I respectfully submit that, despite several pages devoted to the topic by McCarthy (**para. 88**) and Pikoli (**paras. 6-13**), there is not a shred of substance to the contention that the evidence available to the National Prosecuting Authority in June 2005 was any different to that available in August 2003 when the decision not to prosecute me was announced. The so-called "new evidence" which is alleged to have come to light during Shaik's trial is not identified, for reasons unexplained.

24.

I further respectfully submit that it is ludicrous to suggest that I was dismissed as Deputy President of South Africa without a decision having been taken to charge me with any offence. I respectfully point out that it would have been absurd for me to have been dismissed as Deputy President on 14 June 2005 (as I was), but for the National Director of Public Prosecutions to have announced thereafter that I would not be prosecuted. I respectfully submit that the only inference to be drawn from the State's conduct is that the decision not to prosecute me in August 2003, but to prosecute Shaik only, was a deliberate stratagem to try me and convict me, in the public eye, in absentia, and then to sentence me to dismissal from my position. I respectfully submit that this cannot be gainsaid by the State. It is incontrovertibly backed by Ngcuka's conduct, which must surely be unprecedented, of calling a selective and no doubt receptive editorial briefing for the purpose of disseminating information which Ngcuka wished to disseminate. I respectfully submit that there can be no clearer example of an abuse of power than such conduct. In this regard, it is significant that Ngcuka, as National Director of Public Prosecutions at all times had his own press spokesman, one Sipho Ngwema, who was never less than prolific in National Prosecuting Authority press announcements. It is significant that Ngcuka had the platform available to him to make an open media statement concerning allegations against him, but failed to do so. Of course, he also had the rights of any other citizen to seek redress in the Courts of law. Instead, he elected to embark upon his own private counter

intelligence campaign to disseminate information from sources which he clearly thought would favour him.

25.

THE "EXTENSION" OF THE INVESTIGATION IN OCTOBER 2002

McCarthy's own version is that the investigation against me commenced in about mid-2001. This is also plain from Downer's 24 August 2001 affidavit ("LM5"), which I contend falls to be struck out and with which I shall deal below. In the circumstances, McCarthy is unable to explain, credibly or at all, how it came about that the alleged investigation was "extended" in October 2002 ("LM14") to include the very conduct which the State had been intensively investigating since, on their own version, mid-2001.

26.

THE "EXTENSION" OF THE INVESTIGATION IN AUGUST 2005

The aforesaid cynical abuse of power is echoed in the alleged extension of the investigation against me in August 2005 to include fraudulent declarations to parliament and alleged tax charges, which have never seen the light of day. The alleged evidence for these charges was well within the knowledge of the prosecuting authorities on 23 August 2003. I refer to Ngcuka's press statement dated 23 August 2003. If anything the extension seems aimed at placing

something seemingly never raised before the Judge to be taxed with the warrant application - the timing certainly suggests that.

27.

THE LACK OF OBJECTIVITY IN THE PROSECUTION

There is no answer to the contention that the State has shown a complete lack of objectivity in the prosecution. More particularly, there is no answer to the allegation that the State relies, apparently mindlessly, on the judgment in the Shaik case. As I have pointed out above, it is elementary that the offences with which I am "charged" in the "provisional" indictment, differ and are distinct from the charges in Shaik in their application to me. Even in cases where those charges are so-called "mirror images", I am advised and respectfully submit that a conviction of Shaik does **not** mean or even remotely imply that my conviction will necessarily follow. If necessary, argument will be addressed to the Court in this regard.

28.

LETTER TO SCOPA DATED 19 JANUARY 2001

There is no answer of any substance to my challenge in this regard. Maduna offers a token criticism of my signature of the letter in question, which overlooks the fact that the contents of the letter are indisputably the view of the government of the day which I was asked to express by the President, in words framed by the

President, and that my personal views on the matter were consequently irrelevant. I might say that Maduna's remarks in this regard lie ill in the mouth of a man who, on his version, called and presided over Ngcuka's infamous press conference on 23 August 2003 when he had not the foggiest notion of what Ngcuka was going to say, or how he was going to say it.

29.

THE FUTURE DELAYS AND THEIR IMPACT ON MY RIGHT TO A SPEEDY TRIAL

I have already made the submission that the State has effectively engineered the end which it sought on 31 July 2006, i.e. to commence the trial during the first half of 2007, when the State is ready to do so. In the interim, my fate hangs in the balance. Substantial legal costs will be wasted as a result of the delay, and considerable further costs will have to be incurred in 2007. I shall put up, later in this affidavit, copies of the correspondence exchanged between my attorneys and the State attorneys evidencing the State's cynical attitude in this regard.

30.

Of course, were the State's proposed timetable to be accepted, one would only have the word of the State that the undertakings would be complied with. Thus far, the undertakings concerning the furnishing of the "final" indictment and the forensic audit report have proved to be empty.

31.

In the interim, the cloud over me will remain. The current uncertainty over my political future will continue. I respectfully submit that this is an untenable aspect of the matter which cannot be allowed to be perpetuated.

32.

It is not disputed that I have at all times asserted my right to a speedy trial. It is significant that Pikoli himself, who is otherwise intent on raising disputes of fact, acknowledges that Pikoli "expressed the hope to (me) that the (trial) should be resolved as soon as possible one way or the other". (**Pikoli, para.15**). Pikoli is choosing his words carefully. What in fact happened was that Pikoli gave me the assurance that the trial would start and conclude as soon as possible.

AD McCARTHY'S AFFIDAVIT

33.

(a) As I have stated above, I intend to be as brief as possible in dealing with the contents of the State's affidavit. I am advised that it is not necessary for me to be drawn into unnecessary disputes of fact which are irrelevant to the issues in this application. I furthermore

advise that it is not necessary for me to be drawn into allegations concerning the merits, if there are any, of the charges against me.

(b) Similarly, I have been advised as far as possible, not to react to insults or accusations of being insulting and to avoid legal argument insofar feasible. Given the constitutional nature of some of the disputes I have been constrained to react to the very argumentative tone adopted.

34.

AD PARAGRAPHS 1 to 3

I note the allegations in these paragraphs.

35.

AD PARAGRAPH 4

I dispute the contents of this paragraph.

36.

AD PARAGRAPHS 5 and 6

I note the allegations in these paragraphs.

37.

AD PARAGRAPH 7

It is accepted that the State has always regarded this case as one of the highest importance but, with respect, for all the wrong reasons.

I have already dealt with the alleged integrity, impartiality and fairness of the prosecution. I dispute that the prosecution bears any of these hallmarks. I further dispute that the matter has been conducted in the "highest tradition of the administration of justice in this country". Save as aforesaid, I note the contents of this paragraph.

38.

AD PARAGRAPH 8

I deny the contents of this paragraph. The substance of my denial has already been set out.

39.

AD PARAGRAPH 10

The Defence does not seek a review of the decision to prosecute. If that was intended such an application would have been brought. The prohibition against the review of a decision to prosecute or continue relates to reviews under Act 3 of 2000. This does not mean that there are not other remedies to prevent abuses of fair trial rights. The suggestion that the prosecution is not accountable for their decisions and actions, is both wrong and regrettable.

I am advised that the contents of this paragraph are matters of law which will be dealt with in argument. Suffice it to state that I deny the allegations.

40.

AD PARAGRAPH 11

(a) The contents of this paragraph are denied. The defence blames the State for the delays. The State decided on the timing of the charges against me. They were aware that that step triggered the fair trial rights of an accused. They are the author of their own difficulties.

(b) The State's contentions advanced overlook the fact that the State brought the application for a postponement. The application for a postponement was the final straw which precipitated the application for a permanent stay of prosecution. To suggest that the application for a stay resulted in the delay of the matter, precipitated as that application was by an application for a postponement, is startlingly inappropriate. The contention demonstrates the arrogance and lack of objectivity which has characterised the prosecution.

41.

The application was brought as a counter application. It was triggered by the State's application for a postponement. The defence is quite sensitive about the applications it brings : any setback is greeted with banner lines such as "Zuma fails", "Blow for Zuma" etc. If an explanation is necessary it is simply this - the decisive catalyst for the defence application (which really suggest how the postponement application is to be dealt with) was the application for an adjournment which threatened to be years, if not for spurious grounds, as these have now turned out to be. There is nothing to explain.

42.

AD PARAGRAPH 12

(a) I must say that it is not clear to me, nor is it suggested, how my "co-operation" will assist the State in drawing an indictment, preparing their long-awaited forensic audit report, providing me with the further particulars I have requested, or providing me with copies of the documents in the State's possession (lest I be misunderstood in this regard, I state plainly that providing me with a virus-riddled and pornographic strewn hard-drive does **not** constitute providing me with copies of **any** documents). I say that the contents of this paragraph are a transparently contrived attempt to deflect blame from the State onto me.

(b) The fact of the matter is that the State agreed in the Judge President's Chambers in October 2005 that the matter would proceed on 31 July 2006. No conduct on my part has been suggested that would have precluded that from happening, had the State undertaken proper preparations for the trial.

43.

AD PARAGRAPH 13

(a) I have already pointed out that the State's application has **not** been "met with a counter-application by all three accused for a permanent stay of prosecution". It cannot have been more obvious to the State than that there are two applications for a permanent stay of prosecution. There is my application, and I believe there is an application by Accused 2 and 3. The two applications have nothing to do with each other.

(b) As I have stated above, I find it difficult to believe that the State has not purposely seized, however transparently and misguidedly, on the fact that there are two counter-applications, in order to endeavour to place materials before this Court which are irrelevant to my application, and inadmissible on any basis against me. I have referred above to the prejudice which I have suffered as a result, and the objection which I have to that conduct.

44.

AD PARAGRAPH 14

It is not possible to comment on these averments. I have no idea what broad allegations of impropriety were made and the deponent has seen fit not to disclose these.

I have no knowledge of the origins of the NPA's investigations into the arms deal. It is apparent that none of the deponents to the State's affidavits have any personal knowledge either. I note, however, that it is plain from paragraph 14 of McCarthy's affidavit that I was allegedly implicated from the outset (i.e. in September 1999) as having been a party to "the very broadest range of possible irregularities, improprieties and offences".

45.

What is not clear is why if these allegations were taken seriously and they arose in September 1999 the arms deal was signed in December 1999.

46.

AD PARAGRAPH 15

(a) I have no personal knowledge of the exact contents of the JIT report. I request a copy thereof.

(b) I respectfully point out that McCarthy quotes very selectively from the findings of the JIT report, to which the National Prosecuting Authority was a party with an apparent specific presidential mandate to "focus on allegations and suspicions of criminal conduct" (**McCarthy, para.15.5**).

(c) McCarthy does not quote the following conclusion of the JIT report submitted to Parliament on 14 November 2001 :

> "No evidence was found of any improper or unlawful conduct by the Government. The irregularities and improprieties referred to in the findings contained in this report, point to the conduct of certain officials of the Government departments involved and cannot, in our view, be ascribed to the President or the Ministers involved in their capacity as members of the Ministers' Committee or Cabinet. There are therefore no grounds to suggest that the Government's contracting position is flawed."
>
> **Annexure "L", Public Protector's Report, para.2.3.4**

(d) I was appointed Deputy President in June 1999. I was a member of the Cabinet from that time. Before that I was not a member of the Government. It therefore follows that it was the view of the National Prosecuting Authority in November 2001 that no irregularities or improprieties referred to in the JIT report could be ascribed to me.

(e) In the light of the above finding of the JIT, on the basis of the NPA's investigations, I respectfully submit that it is perplexing that the NPA continued, after November 2001, to investigate intensively all of my affairs, ostensibly under the auspices of an investigation into the arms deal authorised under "LM3" to McCarthy's affidavit dated 24 August 2001. Not only is this conduct perplexing, but it is also plain that I was the main focus and thrust of that investigation, despite the misleading terms under which it was initiated. I respectfully submit that the existence of the ulterior motive to which I have referred in my founding affidavit, and in this affidavit, is irresistible.

47.

AD PARAGRAPH 15.3

One would have expected the deponent to await the development of the JIT and then decide on a preparatory examination.

48.

AD PARAGRAPH 15.5

A copy of the decision of the President is requested.

49.

AD PARAGRAPH 15.7 AND 15.8

I note the averment that I either was a Minister who had no involvement in the process or that no suspicion attached to me by 14 November 2001 despite the searches and seizures, or else the report supported by the deponent was false.

50.

AD PARAGRAPH 17

I do not accept the averment.

I deny that the DSO investigation against me was conducted in the normal course according to the legislation.

51.

AD PARAGRAPH 18

It is clear that "Chippie" Shaik's conduct had according to the deponent no effect at all on the selection process.

I have no knowledge of the contents of this paragraph. I deny that they are in any way relevant to my application for a permanent stay.

52.

AD PARAGRAPHS 19 to 23

(a) A copy of the documents embodying the reference in paragaph 19 is requested.

(b) I ask that the contents of these paragraphs be struck out as against me.

(c) The paragraphs are irrelevant to the issues raised in my application for a permanent stay.

(d) The allegations are hearsay and are therefore inadmissible.

(e) The attempt to introduce the allegations in these paragraphs into these proceedings constitutes a contravention of the provisions of Section 28(8)(b) of the National Prosecuting Authority Act, No.32 of 1998. I cannot but believe that the National Prosecuting Authority is well versed in the provisions of that Act.

(f) The allegations are prejudicial to me in that they constitute an attempt to place before this Court impermissible materials and draw inferences therefrom relevant to the merits, if there are any, of the charges against me.

(g) I also ask that annexure "LM2" to McCarthy's affidavit be struck out, for the reasons set out above.

53.

AD PARAGRAPH 23

It is odd that the obvious was not investigated.

54.

AD PARAGRAPHS 24 and 25

(a) The sensitivity ascribed to Ngcuka contrasts starkly with what he said and how he said it at the press conference. Moreover, Ngcuka's version of what initiated the investigation into my affairs differs markedly from that of the deponent.

(b) I respectfully point out that "LM3", the authorisation dated 24 August 2001, is a detailed document. It is not the omission of my name which is surprising, but rather the omission of any reference to the event allegedly being investigated, i.e. the alleged bribe. By comparison,

there is no such omission in relation to the other entities referred to in "LM3", e.g. Daimler Chrysler.

(c) I further respectfully point out that, on McCarthy's version, it is evident that by the time "LM3" was signed by him on 24 August 2001, the NPA was already allegedly in possession of information concerning the alleged payments to me. The real purpose of "LM3" seems to have been to pave the way for the search warrants in Downer's affidavit deposed to on the same day, 24 August 2001.

(d) It is furthermore evident, on McCarthy's version, that on the very same day, i.e 24 August 2001, Downer signed an affidavit ("LM5"), (which falls to be struck out, and with which I shall deal with below), in which Downer sought search warrants for, ***inter alia***, documents evidencing payment by Shaik and/or Nkobi entities to me. It was for this very reason that a search warrant was apparently sought and granted to search the residence of one Isaacs, allegedly the financial director of the Nkobi Group, as well as the premises of all the Nkobi entities. In the circumstances, it is perplexing that it was only some 14 months later, on 22 October 2002, that an extension of the existing investigation was authorised to encompass the alleged "payments to or on behalf of or for the benefit of Jacob Zuma by Schabir Shaik and/or the Nkobi Group

of companies and/or the Thomson/Thales Group of companies" ("LM14" to McCarthy's affidavit dated 22 October 2002).

(e) I respectfully submit that the only inference to be drawn is that, on McCarthy's own version, the NPA had in fact commenced these investigations by, at the earliest, mid-2001, and "LM14" is no more than a sham designed to ostensibly legitimise investigations and searches already conducted.

55.

AD PARA 26

(a) I ask that the contents of this paragraph, and the annexures referred to therein, being annexures "LM5" to "LM10" (inclusive) be struck out on the basis set out above.

(b) I mention that there is a striking feature of this case which gives me cause for considerable concern.

(c) It is evident from McCarthy's affidavit, (paragraph 56), that the State was determined, for reasons unclear, to play the alleged handwritten fax very close to its chest. I respectfully submit that the alleged reasons for furnishing me with typed copies of the alleged fax, but not a copy of

the handwritten version, are at best unconvincing, and at worst mystifying.

(d) McCarthy's version is that the original handwritten document was handed to the DSO by Delique in about June or July 2001 (McCarthy paragraph 22).

(e) Downer signed affidavits supporting applications for search warrants and a warrant of arrest on 24 August 2001 and 02 October 2001 respectively ("LM5" and "LM6"). Moreover, Ferreira deposed to an affidavit on 8 September 2001 ("LM9") in an application for mutual legal assistance from the Mauritian authorities. The content and tenor of all three of the affidavits suggest unequivocally that the alleged fax was not in the possession of the DSO. I refer to the following :

(i) "LM5", paragraphs 43 to 45, paragraphs 46 to 47, paragraph 49 (preamble) and paragraph 49(b);

(ii) "LM6" is to the same effect, albeit that the paragraphs are unnumbered – see typed pages 10 to 12;

(iii) "LM9" (specifically Ferreira's affidavit) is more curious still – there is again no suggestion that the alleged handwritten

document is in the possession of the NPA (on 8 September 2001) and it is stated that the contents of the alleged letter had been narrated to the NPA by a witness. In this regard, however, the contents of paragraph 62(g) of Ferreira's affidavit, "LM7" are particularly disturbing. The contents follow so closely the wording of the alleged fax that it is not possible to come to any other conclusion than that the wording was drawn from the fax itself.

(f) In all the circumstances, it is a matter of concern to me that it appears, from the affidavits, "LM5", "LM6" and "LM9", that, for some unexplained reason, the fact that the handwritten document was actually in the possession of the NPA was deliberately concealed from the judicial officers concerned. It is correct that there appears in the State's papers, immediately after "LM5" (Downer's affidavit dated 24 August 2001) a copy of a typed version of the alleged encrypted fax which bears the handwritten words "annexure L" and "annexure 3". However, it appears from Downer's affidavit itself that annexures to that affidavit ("LM5") were marked "WJD". Also, for the reasons set out above, the contents and tenor of the affidavit are inconsistent with the notion that the "reported letter" was annexed to the affidavit. Moreover, the annexure of the alleged fax to the affidavit would be inconsistent with the alleged efforts to ensure that the identity of the alleged bribee was kept

confidential, because the alleged fax makes specific reference to a person named as "JZ".

(g) It is also true that McCarthy makes the allegation in his affidavit (paragraph 56) that the alleged encrypted fax was an annexure to Downer's affidavit dated 24 August 2001, and that he appears to do so on the basis of the contents of my then attorney's letter, annexure "LM24". However, for the reasons set out above, this is not consistent with that affidavit itself, and I do not know how the contents of "LM24" came about.

(h) In the circumstances, there appears to be grave reason to believe that although the handwritten document came into possession of the NPA during June or July 2001, and although the NPA was in possession of a typed English translation thereof dated July 2001 (I refer to "LM2" and the certification at the foot thereof), these documents were nevertheless not disclosed to the judicial officers to which the affidavits were presented, and were referred to in a narrative form which did not correspond with the true fact that the NPA had the documents in their possession. I invite Downer and Ferreira to clarify this aspect of the matter on affidavit, because the matter is clearly a serious one which must be properly dealt with. If the alleged handwritten document, or a typed translation thereof, was indeed annexed to the affidavits in

question, or shown to the judicial officers concerned, it remains perplexing why the affidavits were drawn and signed in the form in which they appear. That eventuality would also contradict the State's contention that the greatest care was taken to ensure that the identity of the so-called "Mr X" did not become a matter of public record (**McCarthy, para.25**).

56.

AD PARAGRAPH 26.4 AND 28

The taking of the documents by Mr. Downer and Ms. Nell and their removal to South Africa is in submission clearly illegal. I shall ask the State to provide the authority for this and seek the copies of the documents. The deponent is extremely vague as to who provided Downer with the documents - this can only be deliberate.

57.

AD PARAGRAPH 27

The contents of this paragraph are not relevant to my application.

58.

AD PARAGRAPH 28

I ask that the contents of this paragraph be struck out, for the reasons set out above.

59.

AD PARAGRAPH 29

The eventual agreement and order speaks for itself - none of the documents are to be copied or supplied to the South African prosecution unless ordered in future in a hearing involving all the parties. It is perfectly clear that the Mauritian authority held the view that there was no basis for the handover of the documents or copies and this is clearly correct. These documents were not legally obtained : that is the obvious inference of the difference between the Mauritian recordal which does not show such obtainment and the actual events. My information is further that Mr. McCarthy has been in Mauritius during the past year - perhaps he can confirm this and disclose the main reason for his visit.

The contents of this paragraph are otherwise not relevant to my application.

60.

Legal argument will be addressed on these issues.

61.

There is absolutely no explanation as to why the issue of the Mauritian documentation and the legality of their removal from Mauritius was not attended to 3 years ago.

62.

The deponent carefully avoids disclosing the means whereby he obtained access to my bank accounts.

63.

AD PARAGRAPH 30

If the contents of this paragraph are intended to suggest that there was no inordinate delay in the investigation, I deny them. As I have stated above, it is evident that, on the State's own version, they had been investigating all of my

affairs since about mid-2001. More than 5 years have elapsed. No explanation or factual substantiation is put up for the delay.

64.

AD PARAGRAPH 31

I ask that this paragraph be struck out, for the reasons set out above.

65.

AD PARAGRAPH 32

(a) I have already dealt with "LM14".

(b) It is a matter of concern that investigators allegedly decided to recommend that the terms of reference of the investigation be expanded, when they had already intensively investigated for more than a year the very matters which they suggested the investigation should be extended to encompass. In my respectful submission, this is not a proper or permissible way in which to conduct investigations.

(c) I respectfully submit that, given the contents of paragraphs 33 and 34 of McCarthy's affidavit, it is in fact more likely that the NPA realised, after

Shaik had allegedly referred in September 2002 to an investigation against me, that the NPA should cover itself in this regard and formally extend the investigation in a transparent manoeuvre to legitimise what had already gone before.

66.

AD PARAGRAPHS 33 and 34

(a) I have no detailed recollection of the matters referred to in paragraph 33.

(b) I deny that Maduna told me during September 2002 or at any other time "what Shaik had done" (whatever that might mean). I respectfully submit that it would be remarkable were the Minister of Justice to tell me that Shaik had named me as a subject of investigation in an affidavit. Indeed, it is Maduna's version that he did not know whether I was under investigation. This is what he is alleged to have told the Business Day, as reported on 18 February 2003. I refer to paragraph 2.4.5 of the Public Protector's report, annexure "L" to my founding affidavit. He has never refuted this newspaper report.

(c) Moreover, the allegation that Maduna told me about the investigation in 2002 is contradicted by the NDPP's letter to my attorneys dated 17

December 2002, in response to my direct query as to whether I was being investigated. In its letter dated 17 December 2002, the NDPP stated that it is "not in the nature of our business (sic) to disclose prematurely the substance and subjects of investigation other than through legal process". I respectfully submit that this is a perplexing response, given the allegation that Maduna had told me of the investigation, apparently at the NDPP's request, shortly after September 2002.

(d) Maduna made mention of an investigation involving me in a conversation in context entirely removed from that claimed. He certainly did not do so because he was asked by Ngcuka to do so. Maduna does not deal with this at all in his affidavit. I believe that the context and company in which it was said to me rendered it off the record. Contrary to the State's self-serving selective interpretation of the notion "off the record" I respect that notion. I was never told officially and my attorneys subsequently sought official confirmation for the record.

67.

AD PARAGRAPH 35

It hardly needs stating that it came as a distressing surprise to me, as the Deputy President of South Africa, to have to read such a revelation in a newspaper.

68.

AD PARAGRAPH 36

The Mauritian reaction clearly demonstrates that the documents were improperly obtained.

I admit this paragraph.

69.

AD PARAGRAPHS 37 and 38

The contents of annexures "LM16" and "LM17" speak for themselves. I have already referred to the fact that the contents of annexure "LM17" are astonishing, given the allegation that the NDPP had allegedly asked Maduna to inform me of the fact of the investigation.

70.

AD PARAGRAPHS 39 and 40

The contents of these paragraphs are not relevant to my application, save that it is noteworthy that 3½ years have elapsed since the application for legal assistance was granted, and the NPA appears to have done nothing about the matter.

71.

AD APRAGRAPH 41

The contents of "LM19" speak for themselves. I have already denied that I had ever previously been informed by the National Prosecuting Authority or the Minister of Justice that I was under investigation. I respectfully submit that my version is backed by the documents to which I have referred above. I confronted Ngcuka at one stage with investigating me - he responded simply by stating that his actions had been mandated or authorised. That was in itself disturbing.

72.

AD PARAGRAPHS 42, 43 AND 44

I shall deal individually below with these paragraphs. In general, I say in response that my present defence has no knowledge of these averments nor do I have any such personal knowledge. This issue seems to be raised in detail simply to create personal embarrassment and is of no relevance to the present issue.

73.

AD PARAGRAPH 42

(a) I am concerned that allegations of this nature find their way into the State's affidavits. I respectfully submit that it is obvious, in the nature of things, that informal communications between my legal representatives and the National Director of Public Prosecutions took place without prejudice and off the record. I have no knowledge of what transpired between Ngcuka and Naidu. I respectfully point out that Naidu is now lead Counsel for Accused 2 and 3. I am also unable to discern the relevance of the allegations to my application.

(b) I ask that this paragraph be struck out, for the reasons set out above.

74.

AD PARAGRAPH 43

"LM20" speaks for itself. I respectfully point out that "LM20" goes a lot further than McCarthy and Ngcuka are prepared to go on affidavit. "LM20", dated 30 May 2003, and signed by Ngcuka, records that Maduna and Ngcuka had personally informed me about the nature and purpose of the investigation. This version, insofar as it pertains to Ngcuka, is not repeated on affidavit. I deny it.

75.

AD PARAGRAPHS 44 to 51 (inclusive)

The contents of the letters and documents, "LM20" to "LM28" speak for themselves.

76.

The letter of my attorney "LM21" clearly does not say what is attributed to it.

77.

AD PARAGRAPH 49

It is very difficult to ascribe a rational, honest motive to the refusal to give me a copy of the handwritten fax. It was the crux of the case against me and the existence thereof was stated by NPA officials.

78.

There is, however, a great deal about the content and timing of the fax which defies rationality.

79.

AD PARAGRAPHS 52 AND 53

(a) It is equally difficult to find a rational reason for the reticence about Ngcuka's reasons. The obvious inference is that none of the so-called "new evidence" in June 2005 meets the difficulties identified by Ngcuka in August 2003. This obviously would throw a very different light on the motivation for the decision in June 2005 to charge me.

(b) The contents of paragraph 52 are hearsay and irrelevant. I accordingly ask that they be struck out. I respectfully submit that the decision plainly lay with Ngcuka and McCarthy, and their decision was not to prosecute.

(c) Insofar as paragraph 53 is concerned, I respectfully point out that the prosecution is very willing in paragraph 52 to tell this Court about the

reasons why the investigation team thought that I should be prosecuted, but is remarkably loath to take this Court into its confidence as to why Ngcuka and McCarthy disagreed.

(d) I further respectfully point out that there is plainly a dispute between Ngcuka and McCarthy, on the one hand, and Maduna, on the other. In the concluding sentence of paragraph 53 McCarthy states that Ngcuka "reported on the investigation to Maduna". Ngcuka confirms this (Ngcuka paragraph 4). This was plainly before the press conference on 23 August 2003. It is difficult to conceive of Ngcuka reporting on the investigation to Maduna, but not telling him that Ngcuka had decided to overrule the recommendations of the investigators. Maduna denies that Ngcuka discussed his decision with Maduna (**Maduna, para.18**). Someone is not telling the truth.

80.

AD PARAGRAPH 54

(a) I have already dealt with Ngcuka's infamous press conference on 23 August 2003.

(b) The contents of Ngcuka's media statement, "LM4", speak for themselves.

(c) I respectfully point out that Ngcuka's knowledge that "the investigation concerning the arms deal had not been closed" is starkly at odds with the tenor and contents of the press release, "LM4", which makes it plain that the investigation against me had been completed. Indeed, the reason for its non-continuation is expressly stated in paragraph 33 of "LM4". In the circumstances, it is perplexing that the investigation continues.

81.

AD PARAGRAPH 55

I am unable to discern the relevance of the contents of this paragraph to my application. I respectfully point out that the "draft" charge sheet in Shaik's case is a detailed document which refers to the alleged benefits supporting the "generally corrupt relationship" (sic) as well as the alleged R500 000,00 bribe. More than 3 years have elapsed. During that time a "final" indictment was served on Shaik, a full criminal trial was run against Shaik for a period of several months, with evidence of overwhelming volume and detail (I refer to the judgment of Squires J), the decision not to prosecute me apparently reversed, and an arrangement made with the Judge President of this Division that my criminal trial would start on 31 July 2006 and run for a period of not less than four months. Yet the State still does not have its "final" indictment, nor its much anticipated forensic audit report,

and flatly refuses to respond to a request for further particulars to the existing "provisional" indictment. I say that the delay is inordinate and inexplicable.

82.

AD PARAGRAPH 56

(a) The justification for not providing the handwritten document in incomprehensible. Shaik's request for it at that time could never be resisted. Surely if the handwritten fax was genuine, the responsible parties would know whence it was likely to come and how would seeing it (as opposed to knowing about it), lead to Delique?

(b) I have already dealt with the issue of whether or not the "handwritten and typed French version of the encrypted fax" was indeed annexed to Downer's affidavit of 24 August 2001.

(c) I respectfully point out that the purported explanation advanced for the State's reluctance to provide me with a copy of the alleged handwritten version of the document runs contrary to any notion of common sense or logic. It is simply not an explanation at all.

(d) I respectfully point out that it was common knowledge that the NPA had in its possession what it regarded as the "handwritten" version of the document before it was allegedly typed and faxed in an encrypted form. It is clear from McCarthy's affidavit that, as far as the NPA was concerned, the person who had provided them with the alleged handwritten document was not the person who had written the document. In the circumstances, it is baffling how the State came to the conclusion that production of the handwritten document might somehow compromise its case or lead to the identification of Delique. No facts are advanced in support of this contention. I say that the contention is feeble and contrived.

(e) I respectfully submit that the perplexing manner in which the alleged handwritten document, and the typed English translation thereof, were dealt with in the affidavits of Downer and Ferreira during August, September and October 2001, and the complete lack of credibility surrounding the State's explanation why it was reluctant to produce those documents to me, lead to the irresistible inference that there is something about the alleged handwritten document, and the alleged fax itself, which the State is prepared to go to enormous lengths to conceal.

(f) I have dealt in my founding affidavit with my application to the Pretoria High Court for access to the handwritten version of the alleged fax. The matter was opposed on the basis of urgency, in keeping with the State's obfuscations concerning the alleged handwritten document.

83.

AD PARAGRAPH 58

(a) I do not understand on what basis the relevance of the complaint to the public protector and the verdict is denied - it explains why I state that the investigation into my affairs was improperly executed.

(b) The findings of the Public Protector, annexure "L" to my founding affidavit, speak for themselves.

(c) I note that McCarthy dodges dealing with the Public Protector's report on the skimpy ground that it is "both lengthy and not relevant to the present matter (constituting as (it does) proceedings of an institution established by Chapter 9 of the Constitution)". I respectfully submit that it is plain from the contents of the Public Protector's report, and the fact that it is relied upon by me in my application, that it is directly and materially relevant to these proceedings. I respectfully submit that the

only inference to be drawn is that the State does not wish to deal with the Public Protector's report because the State cannot deal therewith.

(d) I require the response of the NPA and Maduna to the Public Protector's report.

84.

AD PARAGRAPH 59

(a) It took 4 months from the charge in the Magistrate's Court till Shaik's indictment in the High Court.

(b) I note that more than 2 years have passed since the "final version of the indictment" in Shaik was delivered. There is and can be no explanation for the delay. It is certainly no answer to say that the State was "busy" with Shaik's trial. The State cannot subjugate my constitutional rights in this way.

85.

AD PARAGRAPHS 60 to 80 (inclusive)

(a) I ask that the contents of these paragraphs and the annexures referred to therein, being annexures "LM31" to "LM44" (inclusive) be struck out as against me, for the reasons set out above.

(b) In addition, I respectfully point out that the paragraphs and annexures concerned purport to relate only to the application which I am informed has been brought by Accused 2 and Accused 3. They can have no possible relevance to my application.

(c) Yet the clear intention emerging from paragraphs 60 to 80 of McCarthy's affidavit is that the State seeks to draw adverse inferences from the conduct of Accused 2 and 3. Those adverse inferences relate to matters which are directly and materially relevant to the charges against me in the "provisional" indictment.

(d) As I have stated above, I have difficulty believing that the State has not done this intentionally. Whether or not it has been done intentionally, I respectfully submit that this is grossly improper conduct in proceedings of this nature. It constitutes an apparent endeavour to introduce

irrelevant, hearsay and, on any basis, inadmissible evidence against me into proceedings which are being heard before the trial Judge, with a view to either drawing me in reply or trying to taint my defence in advance. I shall not be drawn in reply, and I shall not have my defence tainted in advance. I say that my rights to a fair trial have been irretrievably infringed. I ask for a permanent stay of the prosecution.

(e) In the circumstances I limit my comments on paragraphs 60 to 80 to those made below insofar as these may impact on the future course of the litigation.

86.

AD PARA 60

One can only infer that the high powered trips to Paris and the meetings with Maduna were in pursuance of evidence against me.

87.

There are profoundly disturbing aspects of the entire dealings between the French controlled companies involved and the prosecution. Some of these will be addressed in argument.

88.

It is not clear why the first Thetard affidavit was necessary - after all, the State had the evidence of Delique and a handwriting expert on that - these were called in the Shaik trial. Why not an affidavit "I authored the fax and its contents are true"?

89.

AD PARAGRAPH 63-69

Nothing in these paragraphs dispels the very real sense of disquiet about these matters.

90.

AD PARAGRAPH 70-80

The rationality of what occurred given the reluctance to withdraw the current charges against me, is difficult to perceive.

91.

The Respondent has accused me and the defence of gratuitously casting slurs and making scurrilous averments. The Respondent has throughout the process of the investigation into my affairs claimed the moral high ground and adopted a purer than the driven snow stance. That is its right. The defence likewise has every right to place facts which advance its case and harms the prosecution's case before the court. That was what was done, the inferences the defence drew from these were also put up expressly so that the prosecution could deal with it.

92.

There were no personal attacks or issues raised which did not relate to the case - that was not because of a dearth of such material. One of the fair trial rights the defence contends has been infringed is the clean hands, fair prosecution aspect on a basis of the totality of complaints. The suggestion that this was gratuitous relies on such a total lack of perception that it is difficult to ascribe to it anything but deliberate obtuseness.

93.

I am however considerably concerned about the level of the exchanges between the other accused and the prosecution. I have been advised that off the record discussions involving legal representatives are indeed sub *rosa* and that this quality is an important part of practical functioning of the legal process. Each accuse the other of this - whoever has done this, had acted reprehensibly.

94.

It is with the greatest respect simply pathetic to testify to the court concerning such an occasion that a senior counsel told the prosecution A, B and C but that his confidences will be respected and his *ipsissima verba* will not be repeated and confirmed. This is exactly what paragraph 67 of the deponent's affidavit states : only a person devoid of basic reasoning ability will not realise that what is coyly protested as confidential, has in that very process been deliberately revealed. The call for co-operation in paragraph 12 is, with respect, sound but very difficult to implement if that is the State's modus operandi.

95.

To the best of my knowledge my defence team has not been obstructive in respect of the case - that will remain our approach but that is not a renunciation of any of my procedural and other rights. These will be jealously protected.

96.

The call in paragraph 12 is thus even more difficult to answer given the very sorry and convoluted saga of incomprehensible deals between the State and the other accused. My defence team and I have never sought any deals with the prosecution and we have always tried to be civilised and courteous in dealing with the litigation.

97.

The above and other factors have, however, certain implications for the intended trial should it go ahead in the current format.

98.

I point out that I was charged in June 2005. I was charged alone. The decision whether to charge the other accused was apparently not even considered at that stage. The other accused were charged in about November 2005. The delay could not have been to consider the case against them.

99.

It seems perfectly clear that the pressing of charges against the French companies was done simply to advance the case against me - it was not a prosecution aimed at primarily a conviction against the French corporate bodies.

100.

The reason for this is also obvious - there is a welter of especially documentary evidence which is very likely admissible against the other accused which is not admissible against me (or at the very least its admissibility is highly debateable). The alleged encrypted fax is a shining example. In the eyes of the public and the press the issue of admissibility carries little weight - these allegations will inevitably be used to taint me. Even seasoned legal practitioners are not immune to the insidious and subliminal effect of constant exposure to such material. I point out that the present matter is a good example and an undoubted forerunner of what I complain about.

101.

AD PARAGRAPHS 81 and 82

(a) I am unable to discern the relevance of these allegations to my application for a permanent stay.

(b) I respectfully point out that it was the State's choice to prosecute Shaik and, in effect, try me in my absence. I have pointed above to the sinister motive which undoubtedly underlies this stratagem.

(c) I respectfully point out that, on the State's own version, the quantity and quality of the resources devoted by the State to the "mirror image" charges against Shaik, destroys the State's contention that it has not had sufficient time to comply with the arrangement with the Judge President of this Division in October 2005 that the trial would commence on 31 July 2006.

102.

AD PARAGRAPH 83

I have been advised, and I say what follows with the greatest deference, that the Honourable Court's judgment (save as far as a qualified precedent on points of

law) has as a matter of law no force and effect and is no more than an inadmissible opinion in this case. It cannot even at a common sense basis be otherwise, the honourable Judge decided the matter on the facts presented to him, their admissibility therein and the credibility of the witnesses on those performances.

103.

AD PARAGRAPHS 84 to 87

(a) I respectfully point out that the judgment on the merits in Shaik's case was delivered (I believe on the third day of that judgment) on 2 June 2005. The judgment was broadcast on national free to air television. I believe it is fair to say that the broadcasting of the judgment gripped the country's attention and dominated the media for the duration of the period of three days. The speculation and debate concerning my position as Deputy President reached fever pitch.

(b) At the height of these events, and for a period of 4 days between 6 and 9 June 2005, the NDPP states that he stayed in the same hotel in Chile with the President of the country but that he did not discuss with the President the question of whether or not I would be charged. I respectfully submit that Pikoli's version is untenable and falls to be rejected on the papers.

(c) To make matters worse, Pikoli will have it that the President proceeded, upon his return to South Africa, to convene a joint sitting of the Houses of Parliament on 14 June 2005 for the purpose of dismissing me as Deputy President, without so much as having discussed with the National Director of Public Prosecutions whether or not I would be charged. I respectfully point out that the President would hardly have done so if there existed the possibility that, following my dismissal, the NDPP would announce that it had not changed its decision not to prosecute me. I find the assertion of no discussions rather improbable.

104.

AD PARAGRAPH 85

Whilst it is better left to argument, how were I to have my day in court if Mr. Pikoli decides not to charge me? The incongruity is obvious.

105.

AD PARAGRAPH 87

I contend the decision was a forgone conclusion. Any other decision would have raised enormous question marks against my dismissal. "We still can't prove his guilt

and he is not going to be charged but he is dismissed because of remarks as to his guilt made in proceedings from which we deliberately omitted him".

106.

AD PARAGRAPH 88

(a) The point needs to be made again - the State clearly was of the view that they would establish at the trial what they in fact established against Shaik. That is the clear corollary of the decision to charge him and implicit in "LM4".

(b) I am advised that the contents of this paragraph consist of inferences or conclusions which are unjustified and unjustifiable.

(c) Insofar as there is a reference to "new documents" introduced by Shaik, or events described by Shaik previously unknown to the State, there is not the slightest detail of such new "documents" or "events". If the State will not disclose what they are, I cannot be expected to deal therewith. The reference to new "documents" or "events" cannot be a reference to the alleged evidence by Shaik that payments had continued or were continuing, because Shaik is alleged to have refused to disclose any

details in those regards, and his allegations could therefore never have justified or even informed a ***bona fide*** decision to prosecute.

(d) The remaining matters in this paragraph are all matters for argument, and they will be dealt with in argument. In the circumstances, I shall comment but briefly thereon below.

107.

AD PARAGRAPH 88.1

What is said herein makes absolutely no sense at all. These are not my documents and hearsay remains hearsay.

108.

AD PARAGRAPH 88.2

What this has to do with me is incomprehensible. Shaik is not on the list of State Witnesses.

109.

AD PARAGRAPH 88.3

On 23 August 2003 the State considered this to be, at the very least, the highly probable outcome. If that was not sufficient to include me then - why is it now?

110.

AD PARAGRAPH 88.4

The admissibility and nature of these documents are dubious and undefined. It is a generalisation of no evidential value.

111.

AD PARAGRAPH 88.5

This was all expected. Shaik is still not on the list of witnesses and he was hardly found to be credible.

112.

AD PARAGRAPH 88.6-88.8

This was exactly why he was charged.

113.

AD PARAGRAPH 88.9-88.12

Surely that is exactly what the State expected and based its decision to prosecute on?

114.

It is obvious from the above that there was no new admissible evidence against me and the State had the exact verdict on the exact facts that they foresaw on 23 August 2003. On the contrary the State's position now is worse than the position it would have been in if Shaik and I were co-accused.

115.

A considerable portion of the chronology is of little relevance and to comment on these equally contributes little to the matter.

116.

AD PARAGRAPHS 89 and 90

I fail to discern the relevance of these allegations to my application.

117.

AD PARAGRAPH 91

I note the allegations in this paragraph. It is plain that the State and its forensic auditors already had all the materials necessary for a forensic investigation and report in their possession. They had already prepared such a report in Shaik. By all accounts, it was a very detailed and voluminous report which was dealt with in detail in evidence before the Court. All the groundwork having been laid, it is inexplicable that, despite undertakings by the State, no such report has yet been produced in my case.

118.

AD PARAGRAPH 92

I fail to discern the relevance of these allegations to my application.

119.

AD PARAGRAPH 93

I point out there was no 15 October 2002 decision. Advocate Mngwengwe's appointment so as to be able to make the decision is for obvious reasons not put up.

120.

AD PARAGRAPH 94

(a) Irrelevant, hearsay and, on any basis, inadmissible material continues to find its way insidiously into McCarthy's affidavit. I respectfully request that the allegation in paragraph 94 that "there was also evidence that Mahomed, the other attorney whose offices were searched, had

amongst other things liaised with the Thomson-CSF Group on Zuma's behalf" be struck out.

(b) I respectfully submit that it would be appropriate were this Honourable Court to its mark its displeasure at the appearance of allegations such as these, which can only be designed to prejudice me, and which the State must know to be impermissible in applications of this nature.

(c) I respectfully point out that, insofar as the searches and seizures pertained to me, the warrants were set aside, and return of the items seized was ordered under the judgment of Hurt J in February 2006.

121.

AD PARAGRAPHS 95 to 108 (inclusive)

Insofar as the facts alleged in these paragraphs correspond with the annexures to McCarthy's affidavit, I do not dispute such contents. I respectfully point out that at all times my defence team made it clear to the State that, if the State wished to amend the indictment, it would need to follow the proper process of the law to do so, and that my rights to object thereto were reserved.

122.

AD PARAGRAPH 99

The letter and what it sought to achieve were clear.

123.

AD PARAGRAPH 103

It was not agreed that a provisional indictment would be served.

124.

AD PARAGRAPH 104

The date of the decision to indict Accused 2 and 3 is not disclosed nor whether "new" evidence gave rise to this or why this was decided upon.

125.

AD PARAGRAPH 106

The Defence has stated their version of the agreement and persists in it. Steynberg's letter materially confirms that.

126.

AD PARAGRAPH 109

(a) In short, the first request was defective.

(b) I respectfully point out that there is no explanation for the delay of nearly 3 years between the Mauritian Supreme Court order of 27 March 2003 and the launching of the application for the issuing of a letter of request on 9 December 2005.

127.

I respectfully submit that the contents of this paragraph are indicative of the cavalier and arrogant conduct of the State in this criminal trial.

128.

AD PARAGRAPHS 111 and 112

I have no knowledge of the allegations in these paragraphs. They are irrelevant to my application.

129.

AD PARAGRAPH 113

(a) As I have stated above, there is no explanation for the about turn by the State between 7 April 2006, repeated in correspondence on 26 June 2006 (JDP8) and again in the application for a postponement on 19 July 2006, and the new stance in paragraph 152 of McCarthy's affidavit. This is an important aspect of the matter, and an explanation is required. I respectfully submit that, in the absence of such an explanation, the only inference to be drawn is that grounds 1 and 3 for the postponement were not ***bona fide*** advanced. Ground 4 has now also been relegated.

(b) There is another aspect to this paragraph which requires comment. It is not clear what Steynberg refers to when he talks about "electronic copies". I am advised and respectfully submit that I, as an accused, am entitled to copies of the documents in the State's possession. Copies means hard copies provided by the State. The word "copies" does not mean a piece of equipment which, were I to purchase the appropriate computer software and hardware to access and retrieve it, I could print for myself hard copies, to the extent that such hard copies might be retrievable or accessible. I respectfully submit that I am entitled to a properly indexed and itemised set of hard copies of the documents in the State's possession, provided at the State's expense, and until such time as I am provided with such an indexed set of hard copies of the documents in the State's possession, my position is that the State has entirely flouted its duty to provide me with copies of any documents in its possession at all.

130.

AD PARAGRAPHS 114 and 115

(a) The judgment of Levinsohn J, JPD7, speaks for itself. Save as may be consistent with the contents of the judgment, I do not concede the contents of these paragraphs.

(b) I respectfully point out, as stated above, that there is no explanation by the State as to why it has not proceeded on the basis of the information available to it at the time at which it decided to charge me in June 2005. Further documents and further information could have been added to the indictment, if warranted, by proper application of the normal process of the law. To the extent necessary, the long anticipated forensic audit report could have been supplemented. Instead, the State took the conscious decision to proceed on the never never. In doing so, the State infringed my rights as an accused person and the State must bear the consequences.

131.

AD PARAGRAPH 116

I respectfully submit that the contents of this paragraph are significant. There is no explanation as to why KPMG was only instructed on 23 May 2006 to "prepare and finalise the forensic report". Nor is there any explanation for the patent contradiction between paragraphs 116 and 125 of McCarthy's affidavit.

132.

AD PARAGRAPHS 117 and 118

The contents of these paragraphs have nothing to do with me. They are irrelevant to my application. McCarthy also persists in attempting to draw adverse inferences against Accused 2 and 3 on the basis of evidence which is irrelevant, hearsay and, on any basis, inadmissible against me in this application. I ask that the contents of this paragraph be struck out on the basis set out above.

133.

AD PARAGRAPH 119

I have already dealt with the contents of Steynberg's letter dated 26 June 2006, JPD8. I respectfully submit that the hollowness of the undertaking that the State would "endeavour to provide the final forensic report and an amended indictment by 31 July 2006" is demonstrated by paragraphs 125 and 126. There is a continuous theme running through the State's conduct. Timetables proposed in June and July 2006 are honoured only in the breach. Fresh, more convenient timetables are decreed in August 2006. The proposed timetables serve only the convenience of the State. They leave the accused, the Court (and undertakings given to the Court in October 2005) and the public interest completely out of

account. Not only are these timetables breached, they are pronounced as if they emanate from legislative authority. On that basis, members of the prosecution team arranged overseas trips before the proposed timetables had even been placed before the Court, still less sanctioned by the Court. I say that the State's conduct is an outrageous violation of my rights and blatant arrogance on the part of the State.

134.

AD PARAGRAPH 120

I have no knowledge of the allegations in this paragraph. I am unable to discern their relevance to my application.

135.

AD PARAGRAPH 121

The reasons why the request was made at that time have been set out. Moreover, the deponent omits to mention that Mr. Justice Levinsohn suggested that such a request from me would be a wise step.

136.

The State again assumes, incorrectly, that I am bound by judgments given against others. I respectfully point out that I had no other recourse than to ask for further particulars to the existing indictment, given the fact that the trial was due to commence on 31 July 2006. I cannot wait indefinitely for the State to comply with empty and repeatedly breached undertakings to provide the "final" indictment. As a result, I proceed on the basis that the existing indictment is the final indictment. I am advised that I am entitled to do so.

137.

AD PARAGRAPH 122

The application for a postponement was made on affidavit at my insistence. The State agreed thereto.

138.

AD PARAGRAPH 123

The contents of this paragraph are correct.

139.

AD THE PROPOSED TIMETABLE

AD PARAGRAPH 125

(a) It is not possible to consider the impact of the KPMG report without sight thereof. However, this can be addressed from the Bar. In the circumstances, I am not in a position to address the proposed time table at this stage.

(b) I have already made my attitude to these paragraphs clear. I have dealt with the arrogance and emptiness of repeated undertakings made by the State. I say that I have been irretrievably prejudiced by the delays in the matter. In the event that I am not granted a permanent stay, or that the matter is not struck off the roll, I reserve all my rights to object to any amendment to the existing indictment, whenever application therefor may be made.

(c) As I have stated clearly above, the State has provided no materials or documents to me or my legal representatives in a proper or accessible or even comprehensible format. It has dumped a computer hard-drive on my attorneys in July 2006 and left me to get on with it.

140.

AD PARAGRAPH 128

(a) What was in particular complained about was that for the proposed postponement to serve its purpose would have taken some two or three years and even that was dependent on litigants and litigation over which I would not have control.

(b) My contentions are set out in my founding affidavit. I dealt above with the fact that they are largely unanswered by the State. The matter will be further addressed in argument.

141.

AD PARAGRAPH 129

(a) This will be addressed in argument but at issue is that the prejudice I am currently suffering is quite unnecessary - there was no need to charge me in June 2005.

(b) I have already dealt with the allegations in this paragraph. I deny the allegations.

142.

AD PARAGRAPH 130

It is not necessary to repeat what I have already said.

143.

AD PARAGRAPH 131

(a) The State has provided the defence with a hard drive containing some 4 million pages of documentation. The sums are easy to do.

(b) The words "for this reason" in the last sentence of this paragraph are not correct. The reasons advanced by the State in its postponement application included, ostensibly, grounds 1 and 3 referred to above. They were also premised on a different timetable which has now been overtaken by a later version more convenient to the State. It was always a matter of conjecture as to when the Shaik judgment would be handed down (nor may it be the last word on it).

(c) I respectfully point out that it is simply arrogant for the State to assume that it is sufficient for me to have "five months" to study the forensic report (the volume, contents and details of which are not indicated), or "three and a half months" to study the "amended indictment", when the documents have, in effect, taken several years to prepare.

144.

AD PARAGRAPHS 132-133

(a) I take issue with the argument put forward. With the greatest respect, if I had been charged and acquitted I would not now be the sacked Deputy President. The suggestion that the effect of a failed prosecution would not have been present to the minds of political conspirators, is untenable.

(b) It is not necessary to trawl through the allegations in my founding affidavit. I deny the allegations in this paragraph, for reasons with which I have already dealt.

145.

The prosecution team were both investigators and prosecutors - it is hardly surprising that their views as to the strength of the case against me would differ from those who either have a more objective view of the matter or a definite political agenda.

146.

I persist in the assertion that it is not proper to have announced the decision not to prosecute me in terms which allowed and prompted media comments that I did the foul deed but covered my tracks too carefully for prosecution.

147.

AD PARAGRAPH 133.1

It is clutching at straws to suggest that the conspiracy about which I complained is "aimed at finding and exploiting the fax". The conspiracy of which I complain is to seize on every available opportunity to investigate every aspect of my affairs, permanently stain my reputation and remove me as a political role player.

148.

AD PARAGRAPH 133.2

The contents of this paragraph are baseless, to say the least. It is McCarthy's own version that the investigation against me commenced, at the latest, in mid-2001. The "obvious next step" referred to is a step which had long since been taken.

149.

AD PARAGRAPH 133.3

(a) McCarthy is repeating himself. I have already dealt with the allegations in this paragraph.

(b) I repeat that Ngcuka, with Maduna at his side, publicly discredited me on 23 August 2003. They could not have done so without a motive. They are unable to explain that motive. I submit that the inference is clear. It was a deliberate stratagem to discredit and isolate me politically, while the State waged open warfare against me through the medium of Shaik's trial, which I was forced to watch silently from the sidelines. When the time was ripe, I was dismissed and charged.

150.

AD PARAGRAPH 133.4

I deny the allegations in this paragraph. I have already dealt with the allegations.

151.

AD PARAGRAPH 133.5

(a) It is especially in respect of the decision to charge me in June 2005 that there is no adequate answer at all to the simple challenge put to the State - indicate what changed between August 2003 and June 2005 which impacted on the case against me in the form of admissible evidence.

(b) I have already dealt with the allegations in this paragraph. I deny the allegations.

152.

AD PARAGRAPH 133.6

(a) The answer does not meet the complaint at all. There was absolutely no need at all to extend the investigation - the motive was to provide a basis for a general fishing expedition involving serious intrusions of rights of privacy and trial preparation. The declarations sought would, to exist, be confessions of corruption.

(b) The reason for the extension of the investigation on 8 August 2005 is glibly and blandly stated in this paragraph. It unfortunately overlooks the fact that the "evidence" gathered by the investigation team, if it was ever gathered, was plainly gathered by 23 August 2003. Hence the contents of paragraph 32(h) of Ngcuka's press release, "LM4". The alleged reason for the extension in August 2005 also overlooks the fact that the Public Protector had already investigated the matter pursuant to Gibson's complaint. I refer to paragraphs 8.3 to 8.5 of the Public Protector's report, annexure "L". The alleged "reason" for the August 2005 "extension" also overlooks an investigation by the Parliamentary Joint Committee on Ethics and Members' interests pursuant to the referral under paragraph 32(g) of "LM4", Ngcuka's press release dated

23 August 2003. The Joint Committee's report was tabled in Parliament on 19 November 2003. The Committee found that there was no breach of the code of conduct. I refer to paragraphs 8.1, 9.1 and 9.2 of the Public Protector's report, annexure "L". I say again that the alleged "extension" of the investigation in August 2005, to the extent that it was extended by a person who was competent or authorised to do so (which I do not concede and indeed have persistently challenged), was a sham.

153.

The State knew about all this back in 2002 and 2003.

154.

AD PARAGRAPH 134

I deny the allegations in this paragraph.

155.

AD PARAGRAPHS 135 to 147 (inclusive)

These paragraphs relate to Accused 2 and 3. Insofar as they contain allegations which deal with the merits of the charges, if there are any, against me, or seek to draw adverse inferences against me, I ask that they be struck out. In the circumstances, I shall only comment briefly on pertinent aspects below.

156.

AD PARAGRAPH 135-143

These relate to a dispute between the other accused and the State. It is simply made clear that the purpose and scope of the agreement makes little sense and these issues may be addressed in argument.

157.

AD PARAGRAPH 144

This is not an adequate explanation - it took some 5 months to decide on terms?

158.

AD PARAGRAPH 146

The position in respect of myself is this:

(a) The prosecution illegally seized a number of documents relating to me;

(b) That illegality has been established.

159.

If the prosecution is contending that I am to blame for the delay occasioned by their illegal conduct, they are somewhat mistaken as to the validity of that contention.

160.

The complaint of delay was first raised before the other accused were charged.

161.

There was no need to charge the other accused in this trial; it does not serve any legitimate purpose. It was bound to delay my trial.

162.

AD PARAGRAPHS 148 to 277 (inclusive)

(a) In these paragraphs, the State traverses the contents of my founding affidavit.

(b) I am advised that it would serve no useful purpose for me to traverse each allegation in McCarthy's affidavit. It would only serve further to burden already overburdened papers in this matter.

(c) I am advised and respectfully submit that the vast majority of the allegations under these paragraphs are either repetitive, or matters of law, or seek to draw inferences from facts, some of which are common cause and some of which are disputed. Insofar as inferences and matters of law are concerned, they will be best dealt with in argument. Insofar as factual allegations are concerned I record that I deny each and every allegation in McCarthy's affidavit, save for allegations

admitting or that are not expressly inconsistent with the terms of my founding affidavit. I briefly comment on some of the paragraphs to place the matter in context.

163.

AD PARAGRAPH 150

There is no consensus regarding a postponement. The State is assuming that they are entitled to and will get an adjournment. That much appears from the statements in court on 31 July 2006 emanating from the State as to the arrangements for overseas visits made by their representatives.

164.

AD PARAGRAPH 151

The State assumes it has a right to deliver a revised indictment - it does not have such right either ex *lege* or by way of agreement with the defence. It is fully entitled to apply to amend the indictment, whether that is successful and to what extent, depends on the court's judgment.

165.

AD PARAGRAPH 152

(a) The State somewhat misconceives the effect of their notices of appeal.

(b) What the Defence objects to and what has to be resolved in advance, is any uncertainty as to what documents they must deal with in the trial and particularly in preparation for the trial. This will be addressed in argument.

166.

AD PARAGRAPH 153

The State has provided the Defence with a hard drive containing 4 million documents. What it must do, and this will be argued, is:

(a) It must provide the Defence with the documents it intends using at the trial – it is impossible to otherwise assess the 4 million documents.

(b) It must provide at least one set of hard copies of the documents they have provided.

(c) It must respond fully to all requests for further particulars.

167.

AD PARAGRAPH 154

If the State is not going to wait until the final conclusion of each application, till when is it going to wait?

168.

It is clear in respect of the Mauritian documents seized there and the dispute about these that:

(a) Copies were not made and given to the South African officials in terms of the request.

(b) The documents were seized in terms of an *ex parte* order – no officer of any court would have assumed that these documents could be copied and removed from the jurisdiction of the Mauritian Court without the persons affected having any right or opportunity to put their case. Any such protestation is simply not believable.

(c) The deponent specifically avoids indicating who made the copies and gave these to his employees and who consented to this on behalf of the Mauritian authorities.

(d) It is clear from the subsequent responses of the Mauritian authorities that they were unaware of the removal of the documents and regarded the order obtained not as authority for such removal.

(e) It appears that very little was done by the Prosecution to oppose the orders sought to negate the original search and seizure order certainly in respect of the communication of the material seized to the NPA.

169.

It was hardly surprising that Thint, in view of the order now prevailing in Mauritius, would oppose the production of any documents in a South African Court. The Mauritian witness the State had flown out refused to testify when he became aware of the order obtained in response to the earlier search and seizure one.

170.

The issue is squarely one of due process investigation and the illegal obtainment of the documentation and the illegal removal thereof. These documents were, in submission, illegally obtained. It is not a question of proof as to the identity of the documents, it is one of evidence illegally obtained which brings the South African system in great disrepute if utilised here. It is, with respect, submitted that the illegality was deliberately perpetrated by the State.

171.

The State knew since 2004 that great difficulties beset the production and proof of the documents.

172.

The point is not one of mutual assistance. Combrinck J clearly pointed out that an application in Mauritius would be necessary. It is now 5 months later. There has been no application or even a semblance of an application in Mauritius. I have now become embroiled in the dispute - the State itself alleges its case has been advanced greatly by the documents it has removed The exclusion of these documents do not take away this prejudice to me.

173.

Issue is respectfully taken with the submission that any finding in the Shaik trial establishes the admissibility of the documents in these proceedings. The documents were improperly removed from Mauritius.

174.

AD PARAGRAPH 155

The suggestion that the Defence must simply grin and bear the gross infringement of pre-trial rights is indicative of the arrogance with which this prosecution has been conducted.

175.

AD PARAGRAPH 157

The "new matter" had thus clearly not been investigated prior to charging me.

176.

AD PARAGRAPH 158

The point the Defence makes is that the Prosecution by simply deliberately refusing to comply with its pre-trial obligations to sufficiently inform the Defence of the case it had to meet, simply made sure that the trial could never proceed as a fair trial.

177.

The Defence has not been given documents – the State is obliged to provide these at its cost.

178.

The State is obliged to identify the documents it is going to rely on and use at the trial – it has not done so.

179.

It is not beyond the control of the State to provide hard copies of the documents – the Court is not going to be asked to use a hard drive on the Bench.

180.

None of the material referred to in paragraph 158.6.1 to 158.6.4 has been provided in the form of documents – it is assumed that these are somewhere on the hard drive.

181.

What is suggested is that the Defence must make an informal guess as to what is going to be raised as part of the State's case.

182.

Documents make little sense especially where an amorphous mass is offered without the actual charges and their details being established.

183.

The Counsel holding a watching brief on my behalf was instructed by the State Attorney for that purpose – not to defend me. He is not a member of the Defence team.

184.

I challenge the State to put up the June 2005 charge – I consent to it being handed to the Court at the hearing. The Prosecution assured Judge Levinsohn that the indictment would be radically altered. That appears from his judgment and it can be confirmed by my attorney who was in Court at the time.

185.

AD PARAGRAPH 160

The State has indicated that 93 000 documents (not pages) were seized in the 2005 armed search and seizure raids. It is simply improbable that between end-May 2006 and end-June 2006 all this would have been incorporated by KPMG into a report. The report was initially for end-March 2006.

186.

AD PARAGRAPH 161

The Prosecution clearly considers that different rules apply to it than to other litigants even in the same litigation.

187.

AD PARAGRAPH 162

The Prosecution assumes that it could have just substituted a new indictment. The Defence never shared that approach hence the comparison is odious. If the Defence was facing mirror charges to Shaik, it could well have been ready in the 4 month period.

188.

The State has so far handed the Defence a hard drive containing 4 million pages of material. How long is the usual time to prepare?

189.

The argument advanced simply illustrated that no side can have so much time as it sees fit.

190.

AD PARAGRAPH 165-166

The State did not have to charge me when it did. Nor can it when it afterwards seized 93 000 documents and delays the trial to use these, which the Defence had

not seen, go to trial on the basis that all these can be introduced during the trial and expect the Defence to be ready to deal with this.

191.

AD PARAGRAPH 167

This is pure argument.

192.

AD PARAGRAPH 168

These averments have no rational basis and relate to highly improbable postulations.

193.

AD PARAGRAPH 177

The infringement of my fair trial rights is the basis of the application.

194.

I again point out that the only persons ever prosecuted are the present Accused and Shaik (and companies controlled by him). It is extremely ironic if this investigation was aimed at the Arms Deal, how many years and how many millions have been spent on entirely unrelated corruption involving just Shaik and myself.

195.

AD PARAGRAPH 185

The answer wholly begs the question – what had to be protected from exposure? Hardly the winning of the bid on the merits.

196.

AD PARAGRAPH 187

Perhaps the furnishing of particulars would have corrected the misconceptions about what is alleged. I deny such misconceptions.

197.

AD PARAGRAPH 193

The State opposed the relief on the basis that it was not urgent and succeeded.

198.

AD PARAGRAPH 197

Whether the President had prior knowledge is a question best answered by himself. There was no new evidence and no new evidence considered in the decision to prosecute me.

199.

AD PARAGRAPH 200

I restate what I have said: the promise of a speedy trial was made.

200.

AD PARAGRAPH 201

(a) The issue of the warrants have been decided already.

(b) If the material has been obtained in terms of a warrant that has been set aside, it has been illegally obtained.

(c) The fact is that the State simply ignored all claims of privilege and continues to peruse all material.

201.

AD PARAGRAPH 202

These assertions are wholly incorrect.

202.

AD PARAGRAPH 203

The value of a comparison will be demonstrated in argument.

203.

AD PARAGRAPH 205

The State clearly never made an effort to establish who drafted the letter – who was its true author. Even the most cursory reading of the judgment of Squires J

demonstrates the untenable nature of the contention that the identity of the creator of the letter is wholly irrelevant for conviction purposes. It is exactly for these reasons that the Prosecution's efforts were not in accordance with fair trial dictates. I note that no proper effort was made herein as well.

204.

AD PARAGRAPH 207

The State sought an adjournment for the achieving of certain purposes. These would require some 2 years plus to achieve. Either these were a smoke screen for the true reasons for the adjournment or that was what was sought in effect.

205.

AD PARAGRAPH 210

As with the same allegations of irrelevance elsewhere, this is taken issue with.

206.

AD PARAGRAPH 218

I understand Yengeni was prosecuted for fraudulent non-disclosure of a discount.

207.

AD PARAGRAPH 224

The various dealings between Accused 2 and various NPA and Justice officials are a cause of great concern to me.

208.

AD PARAGRAPH 226

Five months to consider the issue engenders little faith in the expeditious running of this trial.

209.

AD PARAGRAPH 228

The Defence is unaware of the significant legal issues to be decided by the Supreme Court of Appeal in the Shaik appeal – the law appears fairly clear; it is the facts and inferences which are in issue.

210.

These responses contribute no real factual material – they consist mainly of denials, legal argument and general platitudes of self-proclaimed virtue and propriety.

211.

AD PARAGRAPH 231

As is the warrant application, proof of Advocate Mngwengwe's appointment has not been forthcoming. The relevant passages from that will be indicated and the excerpt of the Heads of Argument is annexed, marked "JZ1". The inference is clear.

212.

AD PARAGRAPH 232

It was a stratagem, purely and simply, made worse by the fact that the earlier investigations and actions of the NPA were not drawn to the Court's attention in the *ex parte* warrant application.

213.

AD PARAGRAPH 233

The only point of dispute is not whether delay from September 2005 till some distant date in 2007 suffices for a judicial response other than granting an adjournment.

214.

AD PARAGRAPH 234

One of the reasons for the trial date being fixed at 31 July 2006 was to give the parties sufficient opportunity to deal with interlocutory applications. This was all dependent on the State advising the Accused of the case they have to meet and prepare for in good time. An amendment was not central to the trial date. The legal representatives of Accused 1 were quietly confident that they would win the application to set aside the warrants. The State was well aware at this time that their armed search and seizure raids were going to be attacked and must have appreciated the risk of losing the same.

215.

AD PARAGRAPH 235

I reiterate:

(a) The President of the Country had announced that I am to have my day in Court.

(b) I was not going to flee and not stand trial. Indeed, every indication was that I would vigorously fight charges brought. He agreed to this.

(c) The highest official in the NPA was specifically told that, given the long history of the matter, I would insist on a speedy trial.

(d) My lawyers had, since 2002, complained about lack of expedition in investigating my alleged criminal activities.

(e) The NPA knew precisely that my dismissal as Deputy President would have hung in the air if I did not get my day in Court irrespective whether the matter was ripe for charging me.

The inferences are clear and irresistible.

216.

AD PARAGRAPH 241

The "evidence" is complete hearsay.

217.

AD PARAGRAPH 242

It is, with respect, somewhat incongruous for the Prosecution to claim the wide powers under section 28 and 29 of the Act up to appeal stage (as they undoubtedly did in the warrant application) and whilst they can readily ask the Court to order the witness to adduce the documents (which happens regularly) and then to profess inability to obtain the information.

218.

AD PARAGRAPH 243

The suggestion that the Prosecution was intent on investigating any defence in order to assist me, is, to say the least, somewhat macabre given the armed raids at dawn. Such a desire before instituting ill-timed and at that stage unnecessary charges are brought, can be accepted. That was not the case here, especially where, in the warrant request, Du Plooy tried to demonstrate that my version in the 35 questions was a lie. That factual aspect must be drawn to the Court's attention, the rest can be dealt with in argument. I annex the extract from Du Plooy's affidavit and mark it "JZ2" (page 26 – 27).

219.

AD PARAGRAPH 246

The statement that Shaik's evidence at his trial, because it was under oath, is not hearsay herein, is simply astonishing.

220.

I accept the statement in paragraph 246.3; it is technically correct. I was requested to deal with the questions and it was made clear that I must deal with these.

221.

AD PARAGRAPH 248

The reference to these documents is a specifically complicating factor in arriving at any settlement of the warrant issues. Some of these were shielded from both the NPA and the Defence by other arms of Government – we are thus dealing with unknown matters.

222.

AD PARAGRAPH 249

The reference to the payee and the need to question him is not understood – I am the payee on the State's version.

223.

AD PARAGRAPH 250

I am unaware of these subpoenas. I have been informed that the NPA previously and surreptitiously obtained such documents and information from bankers who had insight into my affairs. These were asked not to reveal these contacts. I ask for copies of the subpoenas.

224.

AD PARAGRAPH 251

The point made is simply that no details of a single witness being interviewed after the charges, no details of when KPMG's services were mandated, no document as to the instructions to them – absolutely nothing concrete has been put forward save that they have read the documentation seized.

225.

AD PARAGRAPH 257

This has been dealt with. The extension of 15 August 2005 by Advocate Mngwengwe is fatally flawed – he simply did not have the authority to do so; if he had, details of his appointment would have been provided to resolve this dispute unless delay was intended.

226.

AD PARAGRAPH 264

This answer graphically illustrates the problem of the Defence and how utterly meaningless the gesture of handing over the hard drive with millions of documents on it. The Defence insists on hard copies.

227.

AD PARAGRAPH 266

It is not clear why the auditors could not be instructed prior to 23 May 2006 to complete the report given the State's stance (whether correct or not) that they are in possession of the documents and legally so given their notice of appeal.

228.

AD PARAGRAPH 269

The State had at least 6 months between September 2005 and April 2006 to complete the report. No explanation of this failure is given.

229.

AD PARAGRAPH 274

It is noted that, as with the others, this has now paled in the face of opposition.

230.

AD PARAGRAPHS 278 to 400 (inclusive)

These paragraphs are directed at the application launched by Accused 2 and 3. As I have stated above, that application is a separate application which has nothing to do with me. Answers to that application have no place in answering papers in my application. Insofar as there may be allegations, or inferences sought to be drawn, in the above paragraphs, which are adverse to me, or

impact upon matters relevant to the charges against me, I ask that they be struck out.

231.

I am advised that it remains for me to deal with two matters :

(a) the State's proposed timetable;

(b) my request for State funding for my defence.

232.

THE STATE'S TIMETABLE

I respectfully submit that it would be grossly unfair to attempt to bind me to a timetable in circumstances in which I have never seen the "amendments" for which the State apparently intends to apply to the existing indictment, nor the forensic audit report. I have no knowledge of the nature or extent of the amendments which the State proposes to apply to the indictment. Likewise, I have no knowledge of the extent or nature of the forensic audit report. There is every indication that that report is going to be extremely voluminous and complicated. The State's own version is that the facts are highly complex. The facts are said to be "infinitely more extensive and nuanced that any superficial reference to one or

other fact here or there might indicate" (**McCarthy, para.182.3**). In the circumstances, I am left with no alternative but to reserve all my rights should an application for an amendment to the existing indictment be made, or should the long promised forensic audit report eventually be made available to me. These factors inform and demonstrate my application for a permanent stay. My rights to a speedy trial have been irretrievably infringed. The repeated delays, breached timetables and frequently revised timetables give me no cause for confidence in the State's proposals. In the circumstances, I respectfully submit that the only appropriate relief is that my application for a permanent stay be granted, alternatively that the matter be struck off the roll.

233.

APPLICATION FOR STATE FUNDING

I annex hereto marked :

(a) "JZ3", a copy of the State attorney's letter to my attorneys dated 28 July 2006;

(b) "JZ4", a copy of my attorney's letter to the State attorney's dated 3 August 2006;

(c) "JZ5", a copy of the State attorney's letter to my attorneys dated 10 August 2006.

(d) "JZ6", a copy of my attorney's response.

234.

I respectfully submit that it is apparent from the aforegoing correspondence that the State's cynical attitude towards this prosecution is echoed in its responses to my requests for legal assistance. Those responses are pure prevarication and obfuscation. They evince a determination not to deal in any meaningful way with my request for legal assistance.

THE AFFIDAVIT OF MR. PIKOLI

235.

I respond to his affidavit only in so far as it relates to me and only to the extent that it is still necessary given the matters already addressed.

236.

AD PARAGRAPH 5

I maintain the propositions advanced. Conspiracies are by their nature designed to offer as little evidence as possible of their existence. There are even at present certain investigations which may throw very significant light on the conspiracy in issue - obviously I cannot raise these considerations until the facts have been confirmed.

237.

The suggestion that I have instigated a concerted publicity campaign is false.

238.

AD PARAGRAPH 6

The reticence to reveal admissible evidence is surprising – I have been advised that I am entitled to be apprised of the case against me in advance – either the "evidence" alluded to does not exist or my fair trial rights are being abused through some planned trial ambush.

239.

AD PARAGRAPH 8-9

The request for a briefing on the prospects of the successful prosecution is odd – after all, the State foresaw a conviction in the prosecution of Shaik. Nothing that was contemplated in August 2003 had changed – it had come to pass.

240.

AD PARAGRAPH 10-11

It is perfectly unclear what the new evidence was. Not a shred which strengthens the State's case has been demonstrated.

241.

AD PARAGRAPH 12

I deny that these were the only considerations present to the mind of the deponent.

242.

AD PARAGRAPH 13

These considerations simply amount firstly to an admission that I have not been treated the same "as any other accused" – a claim which resonates through the Prosecution's affidavits.

243.

I am not sure what Pikoli is referring to when he refers to repeated calls by me to have my day in Court. He gives no details of this and I have certainly never said this to him. That phrase was used by the President in his speech and was clearly regarded as a call to arms by the deponent.

244.

What I have reacted to in the past was Ngcuka's pronouncement of a *prima facie* case against me. I did not appreciate his wholly unnecessary pronouncements and state that he either has a case in which case he should have prosecuted me, or he should have refrained from such statements.

245.

It is certainly ironic that any meaningful day in Court can only be afforded me by the State sometime next year about 2 years after Pikoli's kind decision to terminate my uncertainty.

246.

AD PARAGRAPH 15

I did not discuss my political career with Pikoli. The discussion was what I have already set out. Pikoli did indicate to me that the trial will be a speedy one.

247.

AD PARAGRAPH 18

One simply has to have regard to the matters Pikoli mentions in paragraph 13, the fact that he was appointed by the President and the timing of the events to realise that his version that the impact of the Shaik verdict in relation to me was never discussed with the President is highly improbable. I do not accept that version.

248.

AD PARAGRAPH 19-20

It is particularly odd if the purpose was the securing of admissible evidence, that the search warrants would contain the catch-all phrase which I have referred to. The Supreme Court of Appeal had in ***Powel*** ruled this impermissible and clearly this

would impact on admissibility – was damaging material going public preferable to ensuring admissibility?

249.

I am entitled to due process – the suggestion that I should grin and bear whatever illegality the State seeks to visit on me is not worthy of a reply.

250.

AD PARAGRAPH 28

The deponents refer to the Hefer commission . It clearly found Ngcuka's version that information was not leaked from the NPA's offices less than satisfactory (the report is annexed to the State's papers). Pikoli seems to have made no efforts in this regard. It also does not seem improper to him that a thoroughly discredited overbroad power of search is included in warrants his office seeks. Delay in prosecuting me subsequent to me being charged also cuts no ice.

251.

AD PARAGRAPH 29

I have no direct evidence that Pikoli is part of a political conspiracy. Nor does he have to be to act improperly.

252.

AD PARAGRAPH 33-36

I take issue herewith and respond as follows:

(a) It is odd that Pikoli is so intent on trying to create a conflict situation between the President and I.

(b) Pikoli does not at all attempt to explain the President's statement that I am to have my day in Court on the accusations of criminal conduct. How was that to happen if Pikoli did not charge me?

(c) Pikoli paints the President as a most unfair person who dismissed me without even knowing if I ever will have an opportunity to face the charges which led to my dismissal.

(d) Pikoli ignores the other possibility – that it is not the President who lied when he contemplated a day in Court for me as an apparent certainty.

(e) The President would not have announced the decision to prosecute me; that is to emanate from the NPA

253.

AD PARAGRAPH 37

The deponent may well be drawing an inference between a formal and informal decision.

254.

AD PARAGRAPH 38

However Pikoli words it, I maintain that I specifically raised the issue of the matter hanging over me for many years and he did promise a speedy trial.

255.

AD PARAGRAPH 40-41

It is only necessary to refer to the warrant application and the ensuing judgment to appreciate the fallacy of these statements. The material had not only been kept, but it has been perused by the NPA despite claims of privilege (these were indeed contested on the basis that they had read it and there was nothing privileged there). The NPA officials and their associates simply acted badly.

256.

I note also that there is no explanation of the paragraph in the warrant which seems designed to get details of my defence.

257.

AD PARAGRAPH 48

Obviously a subsequent prosecution would be open to such a challenge. At least the Prosecution would then be in a position to inform me of the nature of the charges and proceed without delay.

258.

AD PARAGRAPH 54

I must point out that the Shaik trial was then not the best example of the implementation of the "prosecution policy" now raised. No answer is proffered as

to why this was so. Obviously if that was done, not even the Prosecution would have risked searching my homes for notes on what my views of the witnesses, evidence etc. were, as was done here.

259.

AD PARAGRAPH 56

I take issue with this denial. It will be addressed in argument.

260.

AD MR. MADUNA'S AFFIDAVIT

AD PARAGRAPH 7

It is not correct that I alleged a political conspiracy to preclude me from the Presidency - I claimed it was aimed at excluding me from playing a meaningful role in the ANC structures and the political field. Ngcuka's affidavit contains a similar paragraph to 7. I reiterate my response.

261.

AD PARAGRAPH 8

Only the present Accused and Shaik and companies controlled by him have been charged.

262.

AD PARAGRAPH 9

I point out that the Hefer Commission did not share the same view of Ngcuka's activities. I dispute that every effort was made to shield me from negative publicity.

263.

AD PARAGRAPH 10

I simply wish to point out that the State fought tooth and nail and successfully to exclude relevant documentation from the Hefer Commission. The allegations of conspiracy made herein, have been based on the totality of events up to now. Previous suspicions may not have sufficed.

264.

AD PARAGRAPH 11

I had never supported the formation of the Hefer Commission. The internal ANC accusations should have been dealt with by the party structures. The relevant information I had was not acquired by me in my personal capacity - if the ANC instructed me to place the information before the Commission, I would have done so. The allegations made herein are not aimed at evoking public sympathy, they are aimed at the protection of fair trial rights which the deponent seems to take lightly.

265.

AD PARAGRAPH 12

The content of the article was formulated by the journalist who did not extend me the agreed courtesy of giving my comments on the final draft. I am not responsible for these allegations.

266.

What I had specifically mentioned to the journalist was that Maduna as Minister played an active role in the investigation. He was inter alia at the 23 August 2003 news conference. In short, he openly became involved in operational issues and activities of the NPA. Once he interfered in the manner he did, very clear political overtones were injected. Mr. Maduna was not needed at the press conference nor did he have to make "sad day" remarks. He actively chose to do so in a matter that the NDPP was to decide on without fear or favour or outside influence.

267.

AD PARAGRAPH 13

The NEC decided that there was no conspiracy - it did not engage in an investigation to bring out findings - there was a discussion and then a decision. I would indeed frequently recuse myself when issues regarding criminal charges against me would come up. It was neither the time nor the place to raise factual disputes. It is a most inappropriate averment by the deponent.

268.

AD PARAGRAPH 18

I do not understand if the deponent had no idea what Ngcuka was going to say and how he was going to say it, how he would involve him in the process. I do not accept he knew nothing of the aforesaid - that is highly improbable.

269.

AD PARAGRAPH 19

The press report uses the word "could".

270.

AD PARAGRAPH 20

The deponent knew that he would be asked to comment and he knew how his statement would be reported. What he did was unnecessary and it would clearly be published so as to reflect negatively on me.

271.

AD PARAGRAPH 21

The question is why the response was not made to the investigation.

272.

AD PARAGRAPH 23

The protestations of how the deponent would have reacted defies credence:

(a) The letter did not contain an unlawful instruction; the deponent would not refuse a lawful instruction from the President.

(b) It does happen from time to time that the Cabinet and other top structures take decisions with which not all the participants are in agreement. Once the decision is taken, all the participants are expected to give effect to it and that is what they do. There is no "appropriation" involved.

(c) I do not quite understand why I would be entitled to change a letter instructed by the President - it was couched not in my style or language.

(d) It is in particular not clear why the deponent deals with the letter. He as an attorney has very little, if anything, to do with the issue.

The point made relates to the indictment, unless the deponent had anything to do with that, the reason for his meddling escapes me. It points to very questionable motives.

(e) I annex hereto a copy of the letter in issue dated 19 January 2001 and mark it "JZ7".

(f) Mr. Maduna of course also knows the background to this letter drafted by the President's office; the disclaimer of any knowledge by him is somewhat odd given his letter to the President dated 15 January 2001. I mark it "JZ8". The message and the inferences to be drawn are obvious.

273.

AD PARAGRAPH 24 ET AL

This relates to the other accused - it does however illustrate a very participation in the prosecution process and personal interaction with suspects. This will be addressed in argument. It is still not clear to me why the charges in question were withdrawn.

274.

AD NGCUKA's AFFIDAVIT

I do not propose to repeat what I have already stated above. In the circumstances, I shall deal briefly with such aspects of Ngcuka's affidavit as require comment.

275.

AD PARAGRAPH 5

Ngcuka evidently misunderstands, and in any event mis-states, my complaints, which have already been dealt with and will further be dealt with in argument.

276.

AD PARAGRAPH 6

The contents of this paragraph amount to unsubstantiated conjecture. I respectfully point out that Ngcuka is not a member of the National Executive Committee of the ANC ("NEC"). I am a member of the NEC. I am unaware of any investigation by the NEC. I am aware that the issue was discussed at NEC level,

but no more. I have certainly never been asked to state my version to the NEC. I have dealt herewith elsewhere as well.

277.

AD PARAGRAPH 7

I deny the allegations in this paragraph. I point out that the allegations are entirely unsubstantiated. The accusations relating to spin doctors etc are just not cricket.

278.

AD PARAGRAPH 8

I deny the allegations in this paragraph, for the reasons stated above.

279.

AD PARAGRAPH 10

I deny the allegations in this paragraph. I have already dealt with the investigation and the alleged extensions thereof.

280.

AD PARAGRAPH 11

I deny the allegations in this paragraph. I respectfully point out that Ngcuka stops short of alleging (but prefers to leave it between the lines) that I was in any way responsible for his public vilification, or allegations that he was an "apartheid spy", or a "traitor", or for his being subjected to what he called a "malicious whisper campaign". I respectfully point that, insofar as the "malicious whisper campaign" is concerned, Ngcuka was more than ready to counteract that campaign by his own "malicious whisper campaign" launched at his own "off the record" briefing session of carefully selected newspaper editors in 2003. I have already dealt with the overtones of righteous indignation in the State's answering affidavits. I submit that they are misplaced, for the reasons set out above.

281.

AD PARAGRAPH 12

(a) I deny the allegations in this paragraph.

(b) I respectfully point out that, although he does not dispute his extraordinary "off the record" media briefing, Ngcuka goes to extreme lengths to discredit whatever is said about that media briefing without, in the process, divulging that anything that he says occurred there. I respectfully submit that, if Ngcuka perceived that I was one of the

persons responsible for the various accusations against him, the probabilities are overwhelming that his counter-information campaign to his carefully selected target audience would no doubt have contained allegations about me and the two year investigation that the NPA had then been conducting against me.

282.

AD PARAGRAPHS 13 and 14

I have already dealt with the investigation and what fuelled it.

283.

AD PARAGRAPH 15

I deny the allegations in this paragraph. I can do no more than refer to the facts established in evidence at my rape trial.

284.

AD PARAGRAPH 16

(a) I note that I have been brought to Court on a "draft" indictment. I do not know why this is so, and it is not explained by the State.

(b) I deny that my activities are or were "corrupt" or that Ngcuka has any basis for saying so.

(c) I have made the point elsewhere in this affidavit that the wide-ranging investigations which have been carried out against me since mid-2001 cannot legitimately be brought home under the auspices of an ostensible investigation into the "arms deal".

285.

AD PARAGRAPH 17

(a) If Ngcuka, whom I understand resigned as National Director of Public Prosecutions in early 2005 to take up more lucrative opportunities available to him in the private sector, understood what the "real issues" in the trial were, it is all the more mystifying that the State was unable to deliver the "final indictment" as promised by March 2006, or to date.

(b) It is also remarkable that Ngcuka, who has long since left the National Prosecuting Authority makes adverse comment against me. The inference is inescapable that he has an axe to grind.

286.

AD PARAGRAPHS 18 and 19

(a) There is a remarkable identity between McCarthy and Ngcuka. McCarthy also quoted selectively from the JIT report.

(b) I respectfully point out that the conclusion of the JIT report to which I have referred above (I do not have the report, and I am merely quoting the relevant portion thereof from the Public Protector's report, annexure "L") squarely contradicts what Ngcuka has to say in paragraph 18, for the reasons I have set out above. It follows that the fact that I was "implicated of corruption" is founded on a false premise, because the conclusion of the JIT was plainly that no irregularities or improprieties could be ascribed to the members of the Ministers' Committee or Cabinet. I was never a member of national government on any other basis or level.

(c) Allegations of this nature in Ngcuka's affidavit, which are plainly contradictory to the conclusions of the JIT on a matter squarely within the compass of the NPA, serve only to deepen the reasons to believe that the ensuing investigations against me were actuated by ulterior motives.

287.

AD PARAGRAPH 20

(a) It is not clear what Ngcuka refers to when he says that his meeting with editors was "a matter of public record".

(b) Ngcuka's allegation that the meeting was a "matter of public record" is rendered all the more extraordinary by his careful failure to disclose anything that occurred at the meeting. Instead, his affidavit is devoted to an attempt to disprove what I have to say about the meeting, rather than his version of what was actually said.

288.

AD PARAGRAPH 21

(a) I have dealt above with the alternatives open to Ngcuka at that stage, which must have been obvious to him.

(b) In the circumstances, it is remarkable that Ngcuka purported to convene a meeting of a selected target audience, clearly perceived by him to be receptive, for the purpose of telling newspaper editors what they should and what they should not publish. On the face of it, this is an extraordinary and unprecedented event, coming, as it does,

from a person in the position of the National Director of Public Prosecutions.

(c) I respectfully point out that Ngcuka speaks in unjustifiably vague terms – "I considered it necessary to meet with relevant role-players". The considerations taken into account which rendered it "necessary" are unexplained. The criteria which rendered the particular newspaper editors "relevant" are similarly unexplained. Quite what role the newspapereditors had to play, is also unexplained. What is clear is that the purpose was to "scotch the rumours". The whole matter smacks of a surreptitious disinformation campaign launched by the then NDPP, using the media as his weapon.

(d) I deny the insidious attempt by Ngcuka to suggest between the lines, but not expressly, that I had anything to do with the accusations that he was allegedly attempting to "scotch".

289.

AD PARAGRAPH 22

(a) I have pointed out above Ngcuka's failure to allege what in fact was said at the meeting.

(b) I further note that Ngcuka's two "senior colleagues" in the NPA have not put up affidavits to confirm what Ngcuka says, despite the conduct of the NPA of which I have complained in these affidavits.

(c) I respectfully submit that one would have thought that, if the meeting was not the "sort of secretive, shadowy meeting" referred to, but Ngcuka's "matter of public record", there would have been no difficulty in being candid with the Court about what transpired at the meeting. Instead, the carefully considered way in which Ngcuka has dealt with the meeting, and what he has failed to say about what transpired at the meeting, support the conclusion that the off the record briefing was something very different to a matter of public record. It is remarkable that none of the newspapers the next week or so carried any articles setting out what the National Director had stated. I respectfully submit that conduct of this nature on the part of the National Director of Public Prosecutions is extraordinary, to say the least.

290.

AD PARAGRAPHS 23 and 24

(a) Ngcuka's attack on Mona was hardly unexpected. I refer to what I have stated in my founding affidavit in this regard.

(b) I respectfully point out that I relied, as I was entitled to do, upon an affidavit by Mona setting out what happened at the meeting. I had no reason to disbelieve what he said in that regard, and I respectfully point out that, while flatly denied by Ngcuka, what actually transpired at the meeting remains a secret.

291.

AD PARAGRAPH 25

I would be repeating myself were I to make the observation again that I could only go on what was reported in the media, and such statements as were available to me, concerning the events at the meeting. It is all the more surprising that Ngcuka and his two "senior colleagues" from the NPA choose not to divulge what Ngcuka actually had to say at the meeting.

292.

AD PARAGRAPHS 26 and 27

The conclusions sought to be drawn in these paragraphs are matters for argument.

293.

AD PARAGRAPH 28

I respectfully point out that these matters are not evident from the Public Protector's report. One would have thought that if the NPA had a credible explanation for the serious misconduct referred to in the Public Protector's report, and referred by him for further investigation, those explanations would be put up. Instead, the NPA elects not to put up any explanations at all.

294.

AD PARAGRAPH 29

I request a copy of the "audit working papers" in which the reference to the alleged bribe appears.

295.

AD PARAGRAPH 30

(a) Ngcuka misunderstands my complaint.

(b) I submit that the content and tenor of the media release of 23 August 2003 is plain. I have dealt with the issue above.

296.

AD PARAGRAPH 31

I have dealt above with the exhaustive and largely irrelevant factual background provided by McCarthy. I deny that the NPA took "every precaution" to keep my name out of the media. What they did was to furtively fish around in my affairs under the pretext of an investigation into the "arms deal".

297.

AD PARAGRAPH 32

The "explanation" raised more questions than it did answers. This result could not but have been obvious to Ngcuka at the time at which he made his press release. As I have pointed out above, it would have been the simplest of matters for the NPA to announce that they had decided not to prosecute me. In the circumstances, it would not have been necessary to trawl through the entire history of the investigation, with selected excerpts from the "evidence" gathered, and then announce the conclusion in paragraph 31 of the press release that "the investigating team recommended that we institute a criminal prosecution against Deputy President Zuma". The implications must have been clear and obvious to

everyone, including Ngcuka himself. Matters were only worsened by Ngcuka's statement (the "prima facie case" remark) in paragraph 32 of his press release, without disclosing any grounds on which he disagreed with the recommendations of his dedicated team of investigators who had worked on the case for more than two years, and then in the same breath announcing that a decision had been made to charge Shaik for, ***inter alia***, "various counts of corruption" as well as Thomson "on contraventions" (sic), and a reference of the "evidence" the NPA had against the French to the French authorities for them "to take appropriate action". I respectfully submit that it is frivolous for Ngcuka to say on affidavit that the press release amounts to any explanation at all for his decision. Instead, it is conduct consistent with that of a man determined not to take me to Court, but to give me to the world, as I have stated in my founding affidavit.

298.

AD PARAGRAPH 33

(a) It is not clear to my why Ngcuka would contact Counsel. In fact, Counsel did not inform me of the impending announcement. Instead, the President telephoned me to inform me.

(b) I respectfully point out that, at a practical level, there was nothing that I could do to object to the National Prosecuting Authority holding a press

conference to announce a decision not to prosecute me. I could hardly foresee what they were going to say during the course of that announcement.

299.

AD PARAGRAPH 34

(a) I deny that the harm was "only transitory in nature".

(b) I respectfully point out that Ngcuka., as was the case in the press release itself, has been less than candid in failing to state, despite what he regards as an eloquently spelled out ***prima facie*** case of corruption against me in Shaik's indictment, what factors he took into account in coming to his decision not to follow the recommendation of the investigators to prosecute me.

300.

AD PARAGRAPH 35

(a) I deny the bald statement that the harm was "unavoidable".

(b) I have already dealt with the Shaik judgment that the State relies on so heavily.

301.

AD PARAGRAPH 36

The content of the Public Protector's report speaks for itself. It is a matter for argument.

302.

AD PARAGRAPH 37

(a) The contents of this paragraph are, with respect, ridiculous. The State's own publicly stated case is that the alleged handwritten document was the genesis of the investigations against me (Ngcuka press release).

(b) The implications of the State's attitude have been dealt with above. That attitude is shrouded in mystery, and the implications of the attitude are a matter of concern, to say the least, for the reasons I have set out above.

303.

AD PARAGRAPH 38

(a) I have already dealt with the State's alleged "reasons" for not releasing a copy of the handwritten fax.

(b) I do not know what Ngcuka refers to when he speaks of "the original handwritten copy of the fax" (sic). I have already pointed out that it is incomprehensible to release a typed English translation thereof, but not the handwritten document itself which is said to be the origin of the investigation. I have also pointed out that, given that, according to the State's alleged knowledge, the person who allegedly provided them with the document was not the person who had written the document, it is nonsensical to conclude that the production of the document itself would lead to the identification of the person who provided it. The State's case is shrouded in mystery.

304.

AD PARAGRAPH 39

I do not know when the document was made available to Shaik, or whether the document was made available to my legal representatives as soon as it had been provided to Shaik.

305.

AD PARAGRAPH 40

The contents of this paragraph are disingenuous. Ngcuka must have known full well what the press would do with his press release, and the conclusions they would draw therefrom.

306.

AD PARAGRAPH 41

(a) I require a copy of the "comprehensive response".

307.

AD PARAGRAPH 43

The issue raised is one of law.

308.

AD PARAGRAPHS 44 to 71 (inclusive)

(a) The allegations in these paragraphs relate to the application by Accused 2 and 3. That application has nothing to do with me, and I respectfully submit that the answers to that application are not admissible as against me in my application, for the reasons set out above.

(b) I note that Ngcuka seizes on the opportunity, particularly in paragraph 67, to seek to draw adverse inferences against the conduct of Accused 2 and 3, in respect of matters directly and materially relevant to charges against me. I submit that Ngcuka's conduct in this regard is inappropriate, for the reasons to which I have already referred. In the circumstances, I ask that paragraphs 44 to 71 be struck out.

309.

Should this Honourable Court not be persuaded to grant the relief of a permanent stay, my representatives will move for lesser relief in terms of section 342A which would have the effect of confining the parameters of the trial and ensuring its expeditious completion.

310.

Such relief would, *inter alia*, relate to:

(a) A first trial date.

(b) An order that the Prosecution must proceed on the present indictment.

(c) An order that the further particulars must be provided by a certain date (and any request for further or better particulars likewise be regulated).

(d) An order that the State must identify and deliver the documents it intends using at the trial and that it may not use additional documentation without the leave of the Court.

(e) An order that the KPMG report must be delivered by a specific date.

(f) An order that the State ceases investigations or an order that if the State wishes to consult with witnesses other than those on its witness

list, it firstly be established from the Defence whether these are Defence witnesses.

311.

In this regard, a separation of trials from Accused 2 and 3 will be sought with my trial to proceed first. This application will be made from the bar but some of the facts set out in these affidavits will be relied upon. These aspects will be addressed in the Heads of Argument to be filed to give fair warning. This will greatly simplify the disputes between the parties and the acceptance of a realistic timetable.

WHEREFORE I humbly request that it may please the above Honourable Court to dismiss the State's application for a postponement, an order that there be a permanent stay of the prosecution against me, alternatively that the matter be struck off the roll, alternatively that the court should it grant any postponement, would:

(a) Limit the prosecution to the current indictment.

(b) Limit the prosecution to the use of documentation not in dispute in the warrant applications and in respect of the Mauritian seizures.

(c) Impose a strict timetable for the provisions of the documents in the format and listed as set out hereinbefore the provision of further particulars and the KPMG report.

(d) Fix the trial with an instruction of no further adjournments on behalf of the State.

(e) Prohibit any further investigation of the matter.

(f) A separation of my trial.

(g) Other conditions which the court deems meet.

_____

DEPONENT

I HEREBY CERTIFY that the Deponent has acknowledged that he/she knows and understands the contents of this Affidavit, which was signed and sworn to before me at

on this day of

after the provisions of the regulation contained in Government Notice No. 1258 published in the Government Gazette No.R.3619 dated 21st July 1972 had been duly complied with.

_____

COMMISSIONER OF OATHS