IN THE HIGH COURT OF SOUTH AFRICA **Reportable**

NATAL PROVINCIAL DIVISION

Case No : 8652\08

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA **APPLICANT**

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

JUDGMENT

NICHOLSON J

Introduction

1. **The applicant is Jacob Gedleyihlekisa Zuma. The applicant sets out in some detail his career including his participation in the liberation struggle for political rights for all in South Africa. He is 66 years of age and served time on Robben Island for a political offence. Thereafter the applicant went into exile to fight for the political rights of the oppressed in this country. Since the advent**

of democracy he has occupied a number of senior posts in the African National Congress (ANC) and is currently the president.

2. **Apart from his party political career the applicant has at all material times to this application held high political office. He was a member of the KwaZulu-Natal legislature and the Member of the Executive Council (MEC) for Economic Affairs and Tourism for that province from April 1994 to June 1999.**

3. **The applicant became a member of the National Assembly of Parliament in June 1999. He was appointed the Deputy President of the Republic of South Africa on 19 June 1999 and became leader of government business in Parliament. The remainder of his career will appear from the facts enumerated in the judgment hereinafter.**

4. **The Respondent is the National Director of Public Prosecutions ('the NDPP').**

5. **The Society for the Protection of our Constitution, a voluntary association, applied to join these proceedings as an *amicus curiae*.**

6. **The applicant was represented at the hearing by Mr K J Kemp SC, assisted by Mr MDCSmithers and Miss AA Gabriel, the NDPP by Mr W Trengove SC, assisted by Mr W Downer SC, Mr George Baloyi, Mr A Breitenbach, Ms Kameshni Pillay and Mr A Steynberg, while the Society was represented by Mr Z Omar. I am immeasurably grateful to counsel for their efforts which have made my very difficult task a lot easier by their thorough heads of argument and other materials.**

Background

7. **On 23 August 2003 the then NDPP Mr Bulelani Ngcuka held a press conference at which he announced that his office had decided to prosecute one Mr Schabir Shaik and a number of corporate entities in which he had substantial interests, but not the applicant who at that time was the deputy President of the Republic of South Africa.**

8. **This prosecution was pursued and Mr Shaik was in due course convicted and sentenced to an effective term of fifteen years imprisonment. The corporate entities were also sentenced appropriately. The Supreme Court of Appeal and Constitutional Court have confirmed the convictions and sentence. It was**

common cause during that case ('the Shaik trial') that between October 1995 and September 2002, Shaik personally, and some of the corporate appellants, made numerous payments totalling a substantial amount of money to or on behalf of the applicant.

9. **Discovery of the payments ultimately led to the prosecution of Shaik and the corporate entities. They were charged with three main counts and in each instance with a number of lesser alternate charges. The main charge on count 1 was that of contravening section 1(1)(a)(i) and (ii) of the Corruption Act 94 of 1992 (the CA).**

10. **The State alleged that during the relevant period Shaik and one or other of the corporate entities made 238 separate payments of money either directly to or for the benefit of the applicant. The State alleged that the object of the payments was to influence the applicant to use his name and political influence for the benefit of Shaik's business enterprises or as an ongoing reward for having done so.**

11. **The main charge on count 3 was one in terms of s 1(1)(a)(i) of the CA. During September 1999, Ms Patricia de Lille, a member of Parliament, made allegations concerning corrupt practices during**

what has become known as the arms deal. This related to the purchase of armaments by the Government of the Republic of South Africa from a number of overseas and local contractors. As a result of her complaints a number of State institutions, including the Auditor-General, the National Prosecuting Authority and the Public Protector, became involved.

12. **Thomson-CSF (Thomson), a French company with which Shaik had participated as part of a consortium (the German Frigate Consortium), had acquired a significant stake in the arms deal, in particular, the provision of an armaments suite for corvettes for the South African Navy purchased by the Government. The State alleged that Mr Shaik's participation, through a local company called African Defence Systems (ADS), in which Thomson acquired a majority stake, was as a result of the applicant's influence.**

13. **It alleged further, that during September 1999 and at Durban, Shaik, acting for himself and his companies, met Alain Thétard, a Thomson executive, and that a suggestion was made that in return for payment by Thomson to the applicant of R500 000 per year, until dividends from ADS became payable to Shaik, the applicant would shield Thomson from the anticipated enquiry and**

thereafter support and promote Thomson's business interests in South Africa.

14. The State alleged that the suggestion was then approved by Thomson's head office in Paris and that a seal was set on this arrangement at a meeting in Durban during March 2000 involving Thétard, Shaik and the applicant. This led to a document described in the evidence as 'the encrypted fax' being sent by Thétard from Pretoria to Thomson's head office.

15. A few days after Mr Shaik was convicted and sentenced (see *S v Shaik & Others* 2007 (1) SACR 142 (D)), on 20 June 2005, the successor of Mr Ngcuka, the new NDPP Mr Vusi Pikoli, announced that his office had decided to prosecute the applicant. This was followed up by the service on the applicant of a provisional indictment in November of the same year. The indictment was a mirror image of counts 1 and 3 of the charges of which Mr Shaik had been convicted.

16. The matter came before Msimang J on 31 July 2006. The State applied for a postponement to complete its investigations and finalize the indictment. The application was opposed. Msimang J, in his judgment of 20 September 2006 refused the

postponement and called on the State to proceed with the trial. When the State indicated that it was not ready to proceed to trial, he struck the matter from the roll.

17. **On 27 December 2007 the National Prosecuting Authority ("NPA") decided once again to prosecute the applicant. That decision was followed up with the service of an indictment on the applicant on 28 December 2008. The applicant is currently charged together with Thint Holding (Southern Africa)(Pty) Ltd (the second accused) and Thint (Pty) Ltd (the third accused), with 18 counts, including charges of racketeering, corruption, money laundering and fraud.**

The present application

18. **Prior to the matter being called in court on 4 August 2008 the applicant brought an application in which he seeks an order in the following terms:**

> **'1.**
>
> **That it is declared that the decision taken by the National Prosecuting Authority during or about June 2005 to prosecute the applicant is invalid and is set aside.**
>
> **2.**

That it is declared that the decision taken by the National Prosecuting Authority during or about December 2007 to prosecute the applicant, which decision was implemented by the service on the applicant on 28 December 2007 of an Indictment, a copy of which is annexed to the applicant's founding affidavit as annexure "A" thereto ("the Indictment"), is invalid and is set aside.

3.

That it is declared that the Indictment is invalid and is set aside.

4.

That the respondent is ordered to pay the costs of this application on the scale as between attorney and client, such costs to include the costs consequent upon the employment of three Counsel.

5.

That the applicant is granted such further, other and/or alternative relief as to the above Honourable Court may seem meet.'

19. At the outset I must emphasise that these proceedings have nothing to do with the guilt or otherwise of the applicant on the charges brought against him. They deal with the disputed question of a procedural step that the State was required to comply with prior to instituting proceedings against the applicant. If there are defects, at best for the applicant, the present indictment may be set aside. Once the defects are cured, subject of course to any other applications that are brought, the State is at liberty to proceed with any charges they deem meet.

The application of the amicus curiae

20. The Society for the Protection of our Constitution applied to join these proceedings as an amicus curiae. It is necessary to deal with its application on the basis that its participation, evidence and submissions may have an impact on how the application should be approached. The Society gave notice in its application that it would seek an order, in terms of s 168 of the CPA, that the criminal prosecution against the applicant be stayed until he completed his anticipated term of office as President of the Republic of South Africa, *alternatively* that it be quashed in its entirety.

21. I am not aware of any case in our law, whether civil or criminal, in which an amicus curiae applied for relief in its own name. The observation must also be made that the relief that the Society seeks is drastic and considerably more far-reaching than that sought by the applicant himself.

The request by the amicus for a commission of enquiry into the violation of the applicant's constitutional rights.

22. The *amicus* in his heads of argument asks for an order in the following terms:

> **'20 a) An order that an investigation be conducted forthwith to identify all individuals who participated in the violation of the constitutional rights of President Zuma. These people must be charged with the crime of defeating the ends of justice…'**

23. The amicus is effectively asking for the appointment of a commission of enquiry into the violation of the applicant's constitutional rights. The courts have laid down when such commissions should be appointed.

24. In these papers frequent mention is made of the alleged irregularities in the arms deal. The applicant says in his founding affidavit at paragraph 26 that 'questions relating to alleged irregularities in the arms deal were raised from September 1999. These were raised in the press and parliament.'

25. There are also widespread calls for a commission to be appointed to investigate the Arms Deal. This court has no power to appoint any commission of enquiry. The President is responsible for appointing commissions of inquiry in terms of Section 84 (2) (f) of the Constitution. In terms of Section 1 (1) (a) of the Commissions

Act No. 8 of 1947, if the President has established a commission of inquiry he may make the provisions of the Act applicable provided the investigation objectively relates to a matter of 'public concern'.

26. **It was held in *President of RSA and others v SARFU and others* 2000 (1) SA 1 (CC) that the term 'public concern' must be a concern of members of the public which is widely shared (paragraph 175).**

27. **In *Bell v Van Rensburg NO* 1971 (3) SA 694 C the court referred at page 710 et seq to the Salmon Report in England with approval which held that the inquisitorial methods of commissions should never be used for a matter of purely local or minor public interest but should always be restricted to matters of material public interest with regard to which there exists a nation wide crisis of confidence. In such cases the court concluded that no other method of investigation would be adequate.**

28. **The court in the Bell case also approved statements to the effect that commissions should be appointed to maintain the unsullied integrity of our public life, without which a successful democracy is not possible. It held that it is essential that on the infrequent**

occasions when crises in public confidence take place, the evil, if it exists, should be exposed so that it can be eradicated lock, stock and barrel. On the other hand if it does not exist the general public can be satisfied that there is no substance in the general rumours and suspicions that gave rise to such crises. The court concluded that the public places its confidence in such a commission to conduct the most assiduous investigation and to call evidence in order to expose the truth. It is only in this manner that public confidence can be restored.

29. Mr du Plooy the deponent to the answering affidavit of respondent has indicated that all his investigations were as a result of what Ms Patricia de Lille said in Parliament. He says

> **'The investigations had their origins in broad-ranging allegations of impropriety relating to the arms deal. Those allegations were made, *inter alia*, in September 1999 by an opposition member of Parliament Ms Patricia de Lille.'**

30. It would be naïve to suggest that the allegations concerning corruption relating to the arms deal have ceased or diminished in intensity. They purport to involve very senior figures in government from the President downwards. The Constitutional Court – the highest judicial custodians of the fountain of all our

power and authority – the constitution – has said the following of and concerning corruption and maladministration.

> **'[4] Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State.'**
>
> **Per Chaskalson P (as he then was, later Chief Justice) in *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC).**

31. **In *S v Ebrahim* 1991 (2) SA 553 (AD) the court cited with approval the American case of *Olmstead v United States* 277 US 438, where Justice Brandeis said the following:**

> **'Decency, security and liberty alike demand that Government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the Government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.'**

32. The applicant is accused of writing a letter dated 19 January 2001 to Gavin Woods MP the chairperson of the Parliamentary Standing Committee on Public Accounts with the intention of blocking the Heath Unit from investigating the Arms Deal. The applicant points out that the President's office drafted the letter. There is no denial filed by the President. The court can hardly be unaware of the other dark mutterings emanating from the applicant that if he goes down others will follow him. Like a blinded Samson he threatens to make sure the temple collapses with him. The impression created is that the applicant has knowledge he will disclose if he is faced with conviction and sentence.

33. Only a commission of enquiry can properly rid our land of this cancer that is devouring the body politic and the reputation for integrity built up so assiduously after the fall of Apartheid. If the allegations made by Ms de Lille and a group of courageous journalists are true then there is no better reason for a commission to probe this corruption.

34. If their allegations are not true then the political leaders of our society should not be permitted to be defamed and slandered in this shameless and despicable way. If they are innocent they

should not be required to resort to the ordinary courts to defend their good names and reputations. The public purse should fund a commission of enquiry so that they can govern in peace and tranquility and not under an ever present cloud of suspicion and scandal.

35. There is unimpeachable authority for this. The amicus seeks an order for a commission to vindicate the reputation of the applicant. This has been done on at least one previous occasion by the president. On 19 September 2003, scarcely one month after Mr Ngcuka held his press conference to announce his intention to prosecute Mr Shaik and not the applicant, a commission of enquiry was instituted by the President under Gov Gaz No 25481 Regulation Gazette No 7771, to

> **'Inquire into, make findings, report on and make recommendations concerning the following: Whether at any stage prior to 1994, the National Director of Public Prosecutions, Mr BT Ngcuka, was –**
>
> **(a) registered with the security branch or any other service of any other security service of any pre-1994 government as an agent under the code name RS 452 or under any other code name; and**
>
> **(b) Acting as an agent for the Security Police and/or National**

Intelligence Service of any pre-1994 government.'

36. That commission was appointed to investigate the scandalous allegations made of the NDPP at that time. It seems to me so much more important to appoint a commission to thoroughly investigate whether there is truth in the allegations of widespread corruption and, if there is not, to clear the name of President Mbeki and those others unjustly accused.

37. To return to the request of the Amicus for this court to appoint a commission of enquiry into the scandalous allegations made of the applicant. From the above it is abundantly clear that the court cannot perform such a function. To make such an order would be what is known in the law as a *brutum fulmen* – a useless thunderbolt. It is only the president who is empowered by the constitution to appoint commissions. That relief sought by the amicus must therefore be refused.

38. The other relief sought by the amicus, seeking orders staying or dismissing the charges against the applicant permanently or until his term of office as President of South Africa ceases, is similarly misconceived and must be dismissed.

39. **There are other reasons why the application of the amicus cannot succeed. In *Certain Amicus Curiae Applications, In re: Minister of Health and Others v Treatment Action Campaign and Others* (CCT8/02)(5 July 2002) the Constitutional Court said the following:**

> **'The role of an amicus is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court. Ordinarily it is inappropriate for an amicus to try to introduce new contentions based on fresh evidence.'**

40. **The NDPP, on behalf of the State, objected to the admission of the Society as an amicus, while the applicant, through his counsel, while not expressly supporting the application, did not object thereto. In his affidavit in support of the amicus application, Mr William Mahlangu, the chairperson of the Society attacks the method of securing attendance at court of the applicant which is not a live issue in the application at all. The deponent also makes similar allegations of a political conspiracy against the applicant which add nothing to what the applicant has said himself. I accordingly find that the admission of the Society will not be of any assistance to this Court in its deliberations.**

The applications to strike out

41. The respondent has applied to strike out 15 items, some including multiple paragraphs, of the applicant's founding affidavit. The first item relates to the biographical material of the applicant and his part in the struggle for democratic rights in South Africa. The remaining paragraphs complained of can be broadly described as being offensive because they insinuate that there is political meddling in the prosecution process. This is a serious allegation and must be examined with the most anxious deliberation, as it strikes to the heart of our democracy. The independence of the NPA and the prohibition on executive interference will be examined in detail later in the judgment. The role of the courts to monitor and halt any such executive action was unequivocally asserted by the Constitutional Court in *In Re Certification of the Constitution of the RSA* 1996(4) SA 744 at para [146] where the Court held that

> **'[section] 179(4) [of the Constitution] provides that the national legislation must ensure that the prosecuting authority exercises its functions, without fear, favour of prejudice. There is accordingly a constitutional guarantee of independence, and any legislation or *executive* action inconsistent therewith would be subject to constitutional control by the Courts.' (Emphasis added.)**

42. There is therefore an emphatic constitutional imperative to outlaw any executive action which seeks to interfere with the independence of the prosecuting authority. The applicant in turn applies to strike out seven paragraphs and one annexure in the respondent's answering affidavits. The material that causes offence relates to allegations of improper conduct by applicant and his legal representatives and the inclusion of other proceedings about such conduct and the award of costs in such other proceedings.

43. These are substantive applications and are accompanied by affidavits setting out the reasons for striking out the relevant paragraphs. Both applications include prayers for punitive costs on the attorney and client scale. At no stage did either party abandon these applications and the court is therefore compelled to deal with them. It is of course trite that in order to rule on what is irrelevant, or scandalous and vexatious the court has to look at the merits and what is relevant to the live issues therein. See *Elher (Pty) Ltd v Silver* 1947 (4) SA 173 (W) at 176-7. I accordingly propose to look at the merits before determining the strike out applications.

Was applicant entitled to make representations in terms of the relevant law?

44. The crisp issue for determination is whether the applicant was entitled to make representations to the NDPP before the decision was taken to prosecute him.

45. Section 179(5)(d) of the Constitution of the Republic of South Africa, Act no 108 of 1996 provides as follows:

> **'[The National Director Public Prosecutions] may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director Public Prosecutions, from the following:**
>
> > **(i) The accused person.**
> >
> > **(ii) The complainant.**
> >
> > **(iii) Any other person or party whom the National Director considers to be relevant.'**

46. The NDPP contends that these provisions do not apply to the decision to prosecute the appellant in this matter. It is common cause that the applicant was not afforded an opportunity to make representations.

47. The obligation to hear representations forms part of the *audi alteram partem* principle. What is required is that a person who may be adversely affected by a decision be given an opportunity to make representations with a view to procuring a favourable result. The affected person should usually be informed of the gist or the substance of the case, which he is to answer. The affected person has no general right to receive every piece of information relevant to the decision. See *Chairman, Board on Tariffs and Trade v Brenco Inc and Others* 2001(4) SA 511 (SCA) paras 13, 14, 29, 30 and 42. *Radio Pretoria v Chairman, Independent Communications Authority of South Africa* 2003(5) SA 451 (T) para 24.6.

48. In order to give effect to the right to procedurally fair administrative action, the respondent had to give the applicant adequate notice of the nature and purpose of the proposed administrative action. The proposed administrative action was the exercise of the discretion to change his decision not to prosecute to one prosecuting the applicant.

49. The duty to give a reasonable opportunity to make representations had to be in the context of the reasons not to prosecute the applicant which had changed thereafter.

50. In the case of *Nisec (Pty) Ltd v Western Cape Provincial Tender Board and Others* 1998 3 SA 228 (C) at 234-5 Davis J held that

> **'In summary, it appears that a right to a hearing does include the provision of such information which would render the hearing meaningful in that the aggrieved party is given an opportunity to know all the ramifications of the case against him and thereby is provided with the opportunity to meet such a case.'**

51. The ramifications of the case against the applicant would surely include the basis upon which the respondent had since changed his thinking about the decision to prosecute. As Colman J said in *Heatherdale Farms (Pty) Ltd and Others v Deputy Minister of Agriculture and Another* 1980 (3) SA 476 (T) at 486D--F:

> **`It is clear on the authorities that a person who is entitled to the benefit of the *audi alteram partem* rule need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral hearing, or allowed representation by an attorney or counsel; he need not be given an opportunity to cross-examine; and he is not entitled to discovery of documents. But on the other hand (and for this no authority is needed) a mere pretence at giving the person concerned a hearing would clearly not be compliance with the rule. . . . What would follow . . . is, firstly, that the person concerned must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representation; secondly he must be put in possession of such information as will render his right to make representations a real, and not an illusory one.'**

52. The right to make representations would only be real and not illusory if the applicant knew what criteria were applied in not prosecuting him and how those had changed. I will return to the competing contentions of the parties in this matter but it suffices to say that the applicant submits the two decisions were as a result of a political campaign against him and the respondent maintains it was as a result of new evidence that had been discovered.

53. The applicant claims that the decision to prosecute him constitutes a 'review' of an earlier decision not to prosecute, hence he is entitled to make representations to the NDPP in terms of section 179(5)*(d)* of the Constitution, and the virtually identically worded section 22(2)*(c)* of the National Prosecuting Authority Act 32 of 1998 ('the NPA Act').The applicant has to have regard to the provisions of the national legislation, even though he refers to the constitution. It has been held that where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard. See *South African National Defence Union v Minister of Defence and others* 2007 (5) SA 400 (CC) at paragraph 51. The applicant does not challenge the

constitutionality of the relevant provision in the NPA Act. Where the two are in virtually identical terms it does not seem to me to be a problem to refer to the wording in the constitution. The fact that such wording is contained in that document could hardly diminish its status. It must always be borne in mind that section 2 provides that the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

The nature of the proceedings

54. There was some debate as to the nature of these proceedings. Mr Kemp suggested that they were in the nature of or akin to section 106(1)(h) of the Criminal Procedure Act, no 51 of 1977, which is to the effect that when an accused pleads to a charge he may plead that the prosecutor has no title to prosecute. Sub-section (3) provides that an accused shall give reasonable notice to the prosecution of such a plea though such may be waived by the prosecutor or the Court may on good cause shown dispense with such notice or adjourn the trial to enable such notice to be given.

55. It is manifest that such a plea is available if the prosecutor has not been properly appointed and in that case the proceedings are

a nullity. I have a number of difficulties with the submission that this application is akin to or even in terms of section 106. Firstly the section commences with the words 'When an accused pleads to a charge'. It is manifest that the applicant has not had the charges in the indictment put to him let alone pleaded to them. In addition I understand that it was the intention of the applicant to seek further particulars to the charge before it was put to him.

56. The second problem relates to the ambit of this particular plea. It has been held that the sub-section refers specifically to a plea addressing whether the prosecutor has title to prosecute. The plea therefore relates to the right or authority of the prosecutor to appear as a prosecutor in the case. See *Ndluli v Wilken NO and others* 1991(1) SA 297 (AD) at 306 C – D. I do not, therefore, believe that section 106 avails the applicant at this stage.

57. Are the proceedings therefore civil in nature? Mr Trengove argued that the Court is precluded from considering this application because it does not constitute administrative action in terms of the Promotion of Administrative Justice Act No 3 of 2000 (PAJA). Section 6(1) provides that any person may institute proceedings in a Court or tribunal for the judicial review of an administrative action. 'Administrative action' is defined in section

1(ff) to mean any decision taken by an organ of State which adversely affects the rights of any person and which has a direct, external legal effect, but does not include a decision to institute or continue a prosecution.

58. It is clear that a decision not to prosecute an accused is subject to review by the Court though not one to institute a prosecution. Put differently, the Court's jurisdiction to review a decision to prosecute is excluded. Although clearly not identical this exclusion has much in common with what are termed ouster clauses.

59. In *Rex v Padsha* 1923 AD 281 the Appellate Division had reason to consider a section of the Immigration Regulation Act 22 of 1913 which provided that any person or class of persons deemed by the Minister on economic grounds *inter alia* shall be a prohibited immigrant. Acting under these powers the Minister issued a notice in which he deemed every Asiatic person to be unsuited on economic grounds to come and live in this country. Surprisingly the majority of judges in that Court upheld the validity of the notice. The majority decision saw nothing wrong with stigmatising the whole population of Asia as unsuitable on economic grounds from entering South Africa. Broadly stated,

every Asiatic, the majority held, would threaten the job security of the population of this country.

60. **Even traders, teachers, lawyers and priests were not welcome. Clearly the South African experience of one particularly troublesome immigrant had immense influence on the Court's decision. The Court said and I quote**

> **'Moreover, a person of that class, exercising influence over his fellow Asiatics may become a disturbing factor in the industrial processes of the country, as actually happened in the now historic case of Gandhi.'**

61. **Fortunately Innes CJ, in the minority, saw things differently. The relevant law conferred upon Immigration Boards' exclusive jurisdiction in deciding immigration matters and ousted the jurisdiction of the Courts. Chief Justice Innes then said**

> **'It is competent for Parliament to oust the jurisdiction of Courts of law if it considers such a course advisable in the public interest. But where it takes away the right of an aggrieved person to apply to the only authority which can investigate and, where necessary, redress his grievance, it ought surely to do so in the clearest language. Courts of law should not be astute to construe doubtful words in a sense which will prevent them from doing what *prima facie* is their duty, namely, from investigating cases of alleged injustice or illegality.'**

62. The Courts have followed the words of Innes CJ in a large number of decisions which have adroitly side-stepped ouster clauses in a plethora of statutes.

63. PAJA excludes the Court's right to review a decision to prosecute. Does this ouster provision preclude this Court investigating a defective procedure which preceded the making of the decision? Assuming the right of an accused to make representations, would this oust the right of the Courts to review a failure by the NDPP to afford such a right? It should be borne in mind that a review is essentially a court procedure aimed at inadequacies in the process and not the merits of the decision.

64. The decision taken to prosecute the applicant would be one in terms of section 179(5)(d) of the Constitution which is one taken, after consulting with DPPs and taking representations from the accused *inter alia*. On this hypothesis the decision by Mr Pikoli and his successor Mr Mpshe was not such a decision taken after consulting such persons and it falls outside the provision precluding the Court's review powers. Put differently, the jurisdictional facts that should have preceded the making of the decision, were consultations with the DPPs and the right of the accused *inter alia* to make representations. Once these

jurisdictional facts were absent the decision ceased to be one in terms of section 179(5)(d) and became justiciable under PAJA.

65. There is ample authority for this proposition, including *Minister of Law and Order v Hurley and another* 1986(3) 568 AD at 584 *et seq*. In that case the Court referred with approval to *Rex v Padsha (supra)*. Hurley's case involved an ouster clause relating to arrest and detention of persons in terms of section 29(1) of the Internal Security Act 74 of 1982, which could only take place if a policeman with the rank of lieutenant-colonel or higher had reason to believe the person had committed certain offences. The Court held that the ouster clause did not avail the police if a policeman, for example, of a lower rank performed the arrest. It did not avail the policeman also if he did not have reason to believe in the sense of informing the Court of the reasons. (See page 584 F – I).

66. *In casu*, therefore, if a decision needed the accused to make representations such was not a decision in terms of section 179(5)(d) if no representations were entertained. I believe the Court's jurisdiction remains unimpaired. It is not therefore necessary to consider the fascinating arguments as to whether PAJA constitutes an exclusive codification of the rights of review.

I am of the judgment that this application is in the nature of a civil review and I have therefore excluded my assessors from such decision.

The proper approach to interpretation

67. **The courts have held that the proper approach to the interpretation of a statute is to seek the intention of the legislature. The rules of interpretation are set out in *S v Toms: S v Bruce* 1990 (2) SA 802 (AD) at 807H-808A where the court stated as follows:**

> **'The primary rule in the construction of statutory provisions is to ascertain the intention of the Legislature. One does so by attributing to the words of a statute their ordinary, literal, grammatical meaning. Where the language of a statute, so viewed, is clear and unambiguous effect must be given thereto, unless to do so… would lead to absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the Court is justified in taking into account… The words used in an Act must therefore be viewed in the broader context of such Act as a whole… When the language of a statute is not clear and unambiguous one may resort to other canons of construction in order to determine the Legislature's intention. (Case references omitted.)**

68. **Both counsel Mr Kemp and Mr Trengove submitted that there was no ambiguity and that sensible meaning could be given to the**

words in the sub-section in question. It may be as well at the outset to define the limits of the competing arguments over the interpretation of the sub-section. It is clear that what occurred was a decision by the NDPP either by himself or in all probability in conjunction with the head of the Directorate of Special Operations, a Deputy National Director, Mr McCarthy. Secondly, the process they went through in deciding to prosecute the applicant was clearly a review in its ordinary sense of a reconsideration, alteration or substitution of a previous decision not to prosecute.

69. Although the right or duty to review a decision to prosecute or not to prosecute is clearly discretionary once the NDPP and Mr McCarthy decided to embark on that exercise there must be some circumstances in which, when they did so, they were obliged to consult the relevant Director of Public Prosecutions (DPPs) and take representations within a period specified by the National Director Public Prosecutions, from the accused person, the complainant and any other person or party whom the NDPP considers to be relevant. In other words there is no merit in an argument that there are no circumstances in which he or they are not obliged to consult *inter alia* the accused.

70. As it common cause that this obligation to take representations relates only to the NDPP it does not apply to a prosecutor in the Magistrates' Court or the High Court, when confronted with a possible review of a decision to prosecute or not to. The words 'after consulting the relevant DPPs' seemed to be the cause of the most controversy in argument. Mr Trengove submitted that the duty of a NDPP to take representations of an accused were limited to only those occasions when he was overruling a decision of a DPP and not when he was overruling his own decision or the decision of his predecessor.

71. In other words the contention of the applicant, so the argument for respondent went, meant that the sub-section should be read without the words in question. In that event the sub-section would read that '[The National Director Public Prosecutions] may review a decision to prosecute or not to prosecute after taking representations within a period specified by the National Director Public Prosecutions, from the following: the accused person, the complainant and any other person or party whom the National Director considers to be relevant.'

72. Had the sub-section read in that fashion there would have been no doubt that the applicant had to have a chance to make

representations once the NDPP embarked on a review. Mr Kemp submitted that the sub-section does not state that '[The National Director Public Prosecutions] may review a decision to prosecute or not to prosecute *of a Director of Public Prosecutions*, after consulting etc…' It is also clear that the words in italics are not present and their inclusion would have also put the matter beyond any doubt. The real importance in the sub-section seems to be to allow representations, by an accused, where a decision not to prosecute has been reversed, and to a complainant, where a prior decision to prosecute has been altered to one not to prosecute.

73. Assuming that there must be occasions when representations had to be heard from an accused, those made by the NDPP would be in more serious matters than those made by the DPPs and their subordinates. Looked at from the perspective of the NDPP, the right to simply reverse his own previous decision not to prosecute, might be seen to arise from his elevated status. From the perspective of the accused, the fact that a decision required the attention of the NDPP would necessarily be of great moment to him (the accused) and would obviously require such an accused to be afforded the opportunity to make representations. That he cannot make representations in such a case, on the

respondent's version, would also, for obvious reasons, be an absurdity.

74. **Another absurdity would be that an unscrupulous DPP intent on having a previous decision changed could either change it himself or ask someone below the rank of NDPP i.e. a Deputy National Director to review the decision. In each case the accused would be out in the cold in the sense of not being able to make representations.**

75. **I am of the view that all these considerations incline me to hold that there does seem to be some ambiguity in the sub-section and the words are not capable of unequivocal interpretation. Looked at from the accused's perspective there is also a glaring absurdity that the review of a decision not to prosecute him of a lower subordinate of the NDPP, i.e. the DPP, in arguably a less serious matter would entitle him to make representations, while a more serious matter involving the decision of the NDPP alone would leave him out in the cold.**

76. **Given that there are these and other glaring absurdities and that the negation of the right of an accused to make representations may lead to a result contrary to the intention of the Legislature, it**

is necessary to look at the context in which the words appear in the Act as a whole. As appears from the authority cited earlier when the language of a statute is not clear and unambiguous one may also resort to other canons of construction in order to determine the Legislature's intention.

77. To ascertain the intention of the legislature we have to look at the mischief the new provisions were designed to remedy. In order to properly understand the provisions of the section it is necessary to look at the history of the Act and its predecessors.

78. From time immemorial the executive has cherished the notion of usurping the independent function of the prosecuting authority and directing criminal prosecutions at its political opponents. That it was so under the Apartheid Government is manifest and the catalogue of prosecutions, from the Treason Trial in the early sixties, to the plethora of prosecutions thereafter under the Terrorism Act of 1967, bear witness to that stratagem. Many activists, fighting against the apartheid system, languished for many years behind bars, as a result of prosecutions at the instance of the executive.

79. The political control of prosecutions was effected by a series of statutes, the last, during the Apartheid era, being section 3 of the CPA. Section 3 of the CPA provided the authority to prosecute prior to 1992 and gave the Minister of Justice complete control over the provincial attorneys-general. Section 3(5) provided as follows:

> **'An attorney-general shall exercise his authority and perform his functions under this Act or under any other law subject to the control and directions of the Minister who may reverse any decision arrived at by an attorney-general and may himself in general or in any specific matter exercise any part of such authority and perform any of such functions.'**

80. The daunting prospect of the Minister of Justice, in the new South Africa, giving directions for prosecutions against the architects and executioners of the Apartheid policy, galvanized the mostly white legislature to pass the Attorney-General Act, no 92 of 1992, (the AG Act) in its death throes. The AG Act took away all political control over prosecutions, repealed section 3 of the CPA and provided in section 5(1) that every attorney-general had the authority to prosecute in any court within his jurisdiction. Section 108(1) of the Interim Constitution repeated the notion of an absence of political interference, when it vested attorneys-general with the power to institute prosecutions on behalf of the State.

81. Section 179 of the Final Constitution introduced the notion of National Director of Public Prosecutions (the NDPP) with powers of control over the old provincial attorneys-general, who now became Directors of Public Prosecutions.

82. A perusal of the remaining sub-sections of section 179 assists in interpreting the statute. Section 179(5) provides the NDPP with the responsibility to determine, with the concurrence of Cabinet members, responsible for the administration of justice and after consulting DPPs, prosecution policy which *must* be adhered to in all prosecutions. In addition he bears the responsibility to issue policy directives, which *must* be observed in all prosecutions. The corollary of this is the power of the NDPP to intervene in the prosecution process when prosecution policy directives are not complied with.

83. Section 179 provides for the creation of the Prosecuting authority. In terms of sub-section (1) it calls into being a single national prosecuting authority consisting of the NDPP, who is the head of the prosecuting authority, and is appointed by the President, and Directors of Public Prosecutions ('DPPs') and prosecutors as determined by an Act of Parliament.

84. Sub-section (2) of section 179 provides that the prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

85. Sub-section (3) provides that national legislation must ensure that the DPPs are appropriately qualified; and are responsible for prosecutions in specific jurisdictions, subject to subsection (5). Sub-section (4) continues by providing that national legislation *must* ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. I interpolate here to mention that this is but one of many clear indications that the NDPP and the prosecuting authority are independent and must be free of all political interference. Further reference will be made to this but it is instructive to note that the Constitutional Court has asserted this independence in no uncertain terms. Mention has been made of the Certification case in which the Constitutional Court held there is accordingly a constitutional guarantee of independence, and any legislation or *executive* action inconsistent therewith would be subject to constitutional control by the Courts.

86. In *Carmichele v Minister of Safety and Security and Another* 2002 (1) SACR 79 (CC) the court held

> **'Prosecutors have always owed a duty to carry out their public functions independently and in the interests of the public.'**

87. Sub-section (5) provides that the NDPP must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the DPPs prosecution policy and must issue policy directives which must be observed in the prosecution process. The NDPP may intervene in the prosecution process when policy directives are not complied with and may review a decision to prosecute or not to prosecute as I have indicated above.

88. Sub-section (6) provides that the Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority. That this does not imply any right to interfere with a decision to prosecute is clear from what follows.

89. In their submissions to the Enquiry into the NDPP (the Pikoli Enquiry) by the South African Institute for Advanced Constitutional, Public, Human Rights and International law by Hannah Woolaver and Michael Bishop published in Advocate August 2008 at page 31 the authors state :

> **‘Therefore, the Minister's powers of oversight are confined to those included in the Act. As already discussed, these include the requirement that the Minister approve prosecution policy, and various duties on the NDPP to provide information and submit reports to the Minister. The Act gives no power to the Minister regarding the exercise of prosecutorial discretion in individual cases. As such, individual decisions regarding whether or not to prosecute in a particular case are not within the purview of the Minister's ‘final responsibility'. These rest in the exclusive discretion of the prosecuting authority, and ultimately the National Director.’**

90. I agree with this summary of the position. Pursuant to the imperative to produce national legislation parliament has passed the NPA Act, which provides in terms of section 22 for the NDPP as the head of the prosecuting authority, to have authority over the exercising of all the powers, and the performance of all the duties and functions conferred by the Constitution or that Act law. Of particular interest in the present enquiry is sub-section (4) which provides that in addition to any other powers, duties and functions conferred on the NDPP he may conduct any investigation he may deem necessary in respect of a prosecution and may direct the submission of and receive reports from a DPP in respect of a case, a matter, a prosecution or a prosecution process or directions.

91. Section 32 provides a further indication of the desire of Parliament to prevent interference, political and otherwise from the decisions to prosecute. It provides for the impartiality of, and oath or affirmation by members of prosecuting authority. Sub-section (1)(a) provides that a member of the prosecuting authority shall serve impartially and carry out his duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law. Sub-section (1)(b) provides a very strong imperative against interference with a member of the prosecuting authority. It provides that no organ of state and no member of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority in the exercise of its duties and functions.

92. To enforce the seriousness of this prohibition on any interference by any person from the President downwards section 41 provides that contravention of that sub-section is a serious offence and any person contravening it shall be liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.

93. That there should be no political influence was trenchantly stated in *S v Yengeni* 2006 (1) SACR 405 (T) at paragraph [51] where Bertelsmann and Preller JJ observed

> **'The Constitution guarantees the professional independence of the [NDPP] and every professional member of his staff, with the obvious aim of ensuring their freedom from any interference in their functions by the powerful, the well-connected, the rich and the peddlers of political influence.'**

94. What the learned judges were saying in that case was that the independence of the prosecuting authority is vital to the independence of the whole legal process. If one political faction or sectional interest gains a monopoly over its workings the judiciary will cease to be independent and will become part of a political process of persecution of one particular targeted political enemy.

95. How then does this impact on the power of the NDPP to review a decision to prosecute or not to prosecute? He sits at the apex of the prosecuting authority, insulated from political interference and is the final decision maker in the prosecuting process. Should an accused challenge a decision to prosecute, the NDPP is the final port of call in the administrative process of making representations. Having been largely instrumental in creating

prosecuting policy and after giving prosecuting directives he is obliged to ensure they are carried out.

96. The hierarchy of prosecuting authority requires that decisions to prosecute are made by various levels in descending order from the NDPP and down through the ranks of DPPs to the lowest prosecutor. The NDPP is empowered alone to authorize prosecutions in certain instances including the Prevention of Organised Crime Act, no 121 of 1998, sections of the Films and Publications Act 65 of 1996, and The Implementation of the Rome Statute of the International Criminal Court Act, no 27 of 2002. The fact that authorization is required from the NDPP tends to suggest that he is not involved in the actual prosecution itself and authorizes the DSO to prosecute. Apart from that the lower levels of prosecutors below DPPs exercise a delegated authority to bring prosecutions in the courts.

97. Acting on this delegated authority prosecutors decide to prosecute or not depending on criteria established in the policy directives emanating from the prosecution policy. The prosecution policy talks of exercising its function 'without fear, favour or prejudice' and that the process must be 'fair, transparent, consistent and predictable'. It purports to promote

'greater consistency in prosecutorial practices nationally'. It requires

> **'members of the Prosecuting Authority to act impartially and in good faith. They should not allow their judgment to be influenced by factors such as their personal views regarding the nature of the offence or the race, ethnic or national origin, sex, religious beliefs, status, political views or sexual orientation of the victim, witnesses or the offender.'**

98. The policy states further that

> **'The decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused and their families. A wrong decision may also undermine the community's confidence in the prosecution system… Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, a prosecution should normally follow, unless public interest demands otherwise.'**

99. The prosecution policy deals with the question of public interest and mentions factors that should be taken into account including

> **'the seriousness of the offence,… the manner in which it was committed, the motivation for the act and the relationship between the accused and the victim. The nature of the offence, its prevalence and recurrence, and its effect on public order and morale.'**

100. The policy also makes mention of 'the need for individual and general deterrence, and the necessity of maintaining public confidence in the criminal justice system.'

101. Mention is also made of the circumstances of the offender including, 'previous convictions, criminal history, background, culpability and personal circumstances as well as other mitigating and aggravating factors.'

102. The policy speaks about restarting a prosecution and says the following

> **'People should be able to rely on and accept decisions made by members of the Prosecuting Authority. Normally, when a suspect or an accused is informed that there will not be a prosecution or that charges have been withdrawn, that should be the end of the matter. There may, however, be special reasons why a prosecutor will review a particular case and restart the prosecution. These include… an indication that the initial decision was clearly wrong and should not be allowed to stand; an instance where a case has not been proceeded with in order to allow the police to gather and collate more evidence, in which case the prosecutor should normally have informed the accused that the prosecution might well start again… a situation where a prosecution has not been proceeded with due to the lack of evidence, but where sufficient incriminating evidence has since come to light…'**

103. Regard should also be had to the Code of Conduct of the National Prosecuting Authority which was framed by the NDPP in terms of section 22(6)(a) of the NPA Act and which is binding on all members of the Prosecuting Authority. It provides that

> **‘prosecutors should be individuals of integrity whose conduct should be honest and sincere who should respect, protect and uphold justice, human dignity and fundamental rights as entrenched in the Constitution… strive to be and be seen to be consistent, independent and impartial…’**

The NDPP as a reviewing authority

104. It is important to note that there is a constitutional imperative to carry out the prosecution policy and directives as the constitution uses the peremptory ‘must’ in stipulating those duties of the prosecution authority. The constitution and the NPA Act, read with the prosecution policy and directives posit a model of criminal justice with a National Director at the apex who is independent, fair, consistent and absolutely free of political influence. In fact to try to influence him is a criminal offence. Everywhere in the constitution, the NPA Act, the prosecution policy and directives and the Code of conduct are references to independence of prosecutors and their duty to act without fear or favour.

105. As the head of the prosecuting authority the NDPP must insure that all prosecutors follow the Constitution, the Act, and the other instruments. His powers to review or reconsider a decision to prosecute or not to prosecute a person must be made

in the light of these principles. His constitutional imperative to review decisions to prosecute or not to prosecute is a unique role ascribed to him and allows him to exercise this discretion.

106. The concept of a review or reconsideration assumes a role somewhat elevated to and distant from the person whose decision is being reviewed. It also assumes an unbiased, open and honest reappraisal of the decision to prosecute. It is not to be lightly entertained and is a constitutional imperative directed at affording an accused the right to the reconsideration of a prosecution based on an acknowledgement of the embarrassment, dislocation, disruption and trauma that the mere bringing of a prosecution can entail. The effect of the arguments raised by the respondent is that the applicant is not entitled to enjoy this privilege, which is extended to others who by no stretch of the imagination can be regarded as necessarily more worthy.

107. In this regard I do not consider this application as a satellite or ancillary proceeding and I would distinguish it from the cases, both South African and foreign, cited by Mr Trengove, illustrating the very understandable reluctance of courts to consider matters which should more properly be ventilated in the trial proper. See

***R v DPP, ex parte Kebeline and Others* [2000] 2 AC 326 (HL), *Sharma v Brown-Antoine and Others* [2007] 1 WLR 780 (PC). In none of those cases was there a provision which is the equivalent of section 179(5)(d).**

108. The NDPP is the only member of the prosecuting authority who has such a constitutional and statutory obligation to review and any findings I make are restricted to this very narrow issue.

109. When the NDPP reviews a decision he will exercise this very important obligation in the light of the prosecution policy and directives and other considerations. On various occasions prosecutors have declined to prosecute because of the old or young age of the offender, the triviality of the offence, and the personal tragic consequences to the offender of his offence, where his crime touches those near and dear to him.

110. The NPA Act contemplates a number of prosecution scenarios which need to be considered in turn. The first scenario envisages that the NDPP or any Deputy NDPP, designated by him, has the power to institute and conduct a prosecution in any court in the Republic *in person* in terms of section 22(9) of the NPA Act. In other words the NDPP can handle the whole case himself and

appear personally in court and conduct the prosecution. Nowhere in the papers does it appear that this is such a case.

111. The second scenario posits a prosecution by the DPPs, the old attorneys-general in their area of jurisdiction, in terms of section 24 of the NPA Act. Counsel were in agreement that the words 'after consultation with the relevant DPP' in the Constitution would mean that a review of one of their decisions by the NDPP would definitely require him to take representations from the accused, the present applicant. At the time of the writing of section 179(5)(d) there was no DSO and the occasions when the NDPP prosecuted in person would have been rare, if they ever occurred at all. Even today the manifold duties envisaged by the Constitution and the NPA Act would preclude him ever appearing in person.

112. It follows, therefore, that at the time of the promulgation of relevant sub-section of the Constitution and, indeed the NPA Act, all prosecutions would have been conducted by the DPPs in their geographic regions or their duly authorized prosecutors in the High and Magistrates Courts. This is abundantly clear and is supported by the affidavit of Mr Hofmeyr for the respondent, where he explains that the agreement reached at the

Constitutional Committee of 4 April 1996 that drafted the legislation was to that effect. The agreement read in part

> **'Mr Schutte reported that political parties had reached the following agreements regarding the Attorney-General:**
>
> **i There would be one prosecutorial authority: consisting of the national attorney-general and other attorneys-general;**
>
> **ii The attorneys-general would in principle be responsible for prosecutions, with the national attorney-general being responsible for laying down policy guidelines and ordering in specific cases a prosecution where the guidelines have not been met, or where an attorney-general has not met the guidelines and has refused to prosecute…'**

113. So at the time of its enactment the sub-section in question would have availed every accused provided the NDPP decided to review a decision to prosecute as they would have all emanated from the DPPs. Excluded would have been the rare occasions he appeared in person.

114. Since the establishment of the DSO, what was the effect of that on the right of an accused to make representations, when the NDPP decided to review a decision to prosecute? The DSO has the power to prosecute and institute criminal proceedings in terms of section 7 of the NPA Act and it seems clear that the prosecution of Mr Shaik and the applicant was carried out by

them. The present indictment against the applicant is signed by Aubrey Thanda Mngwengwe and he describes himself as an Investigating Director of the DSO.

115. Section 7(3) of the NPA Act provides that the head of the Directorate of Special Operations shall be a Deputy National Director assigned by the National Director. In terms of section 13(1)(aA) the president, after consultation with the Minister and National Director, may appoint one or more Directors of Public Prosecutions to the DSO. These would be properly qualified advocates, as the legislation prescribes, and similar to the A-Gs of the old days. The effect of this would be that there would be DPPs, who were head of the prosecution authority, in the provinces i.e. the old A-Gs, and the DPPs in the DSO.

116. The investigation into the applicant was 'carried out by the DSO' as Mr Ngcuka said at his press conference. The decision was made by the NDPP and Mr McCarthy, who was a Deputy National Director of Prosecutions and head of the DSO. This is not denied by the respondent in his answering affidavits. In fact the respondent puts up an affidavit by McCarthy in which he says 'Ngcuka and I did not accept the investigation team's recommendation…'

117. The NDPP and McCarthy overruled the decision of the investigation team, which was headed in all probability by a DPP. Senior Special Investigator du Plooy says in the answering affidavit he was 'duly designated by the Investigating Director to conduct the investigation…' Such would be an Investigating DPP. If the NDPP was to properly exercise his review powers with regard to DPPs it necessarily implies that he did not make the decision as such to prosecute as this would nullify his independence with regard to the review. Although he clearly did make the decisions in conjunction with McCarthy and probably a DPP that fact alone should, in my judgment, not have disentitled an accused to make representations.

118. The DSO as a juristic entity had not come into being and naturally there is no mention of it in 179(5)(d). Should the Constitution be read so as to include the DSO (which does have DPPs) when it mentions consultation with the relevant DPPs?

Section 39 of the Constitution

119. Section 39 of the Constitution deals with the interpretation of legislation including the Bill of Rights. It provides as follows:

‘39(1) When interpreting the Bill of Rights, a court, tribunal or forum—

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) …’

120. If it is clear that when interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society that is based on human dignity, equality and freedom. The provision of the right to make representations to an accused would pay appropriate tribute to his right to human dignity, given the opprobrium that is normally attendant upon a criminal trial. It would be grossly unequal to allow representations to an accused on the happenstance that his case emanated from a decision by a DPP and not the Deputy National Director, who was head of the DSO. It might well have gone through the hands of a DPP (the advocate with legal knowledge) in the DSO. I have mentioned that the head of the investigation team was probably a DPP and

therefore the decision to prosecute involved consultation with him. We know from the press articles annexed that Mr Mpshe was consulting with his investigation team (headed by a DPP) before instituting a prosecution in the second half of 2007. I therefore conclude that he should have consulted with the applicant as well.

121. As I have mentioned sub-section (2) provides that when interpreting any legislation, which must include the Constitution itself, otherwise it would be self contradictory, every court must promote the spirit, purport and objects of the Bill of Rights. These rights include the very values that I have mentioned of human dignity, equality and freedom. The proper exercise of the NDPP's review may in a proper case result in an accused's freedom in the sense that if he decides to decline to prosecute, the accused does not stand in jeopardy of conviction and incarceration.

122. A consideration of the jurisprudence of the Constitutional Court, with regard to interpreting legislation, would seem to fortify me in this view. In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors* 2001 (1) SA 545 (CC) the Court held at paras [21]-[24] that:

> **'All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights… The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution…**
>
> **Accordingly, judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section…'**

Reading in and reading out

123. It must be recalled that section 179(5)(d) speaks of the right the NDPP has to review decisions and then there is a comma followed by a number of sub-clauses. The sub-clauses conclude with the right of the NDPP to consult with any other person or party whom the NDPP considers to be relevant. Clearly the widest possible powers are given to the NDPP when he embarks on his review. It would seem to me to do no injustice to language to include the head of the DSO who is a Deputy NDPP.

124. As I have indicated when section 179 of the Constitution was fashioned all prosecutions flowed through the DPPs (except the rare occasions – if ever - when the NDPP personally prosecuted) and therefore every time the NDPP reviewed a decision he would have had to hear representations from the accused. With the advent of the DSO in 2000 no amendment was made to the NPA Act or the Constitution to include prosecutions that have their genesis there. In dealing with the present state of the NPA Act it is necessary to embark on the process of interpretation known as reading in.

125. The South African courts first accepted the notion of reading in as an acceptable constitutional remedy in *National Coalition of for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC). In that case the court set out the following considerations *inter alia* for embarking on the process of reading in. I am paraphrasing paragraphs [73] – [76] of the judgment. The court held that the resulting provision once the words have been read in, must be consistent with the constitution. The resulting provision must interfere as little as possible with the laws adopted by the legislature and the court must be able to, in reading in the words, define with sufficient

precision how the statute ought to be extended to comply with the constitution. I believe that to read into the legislation in question (the NPA Act) in such a manner as to extend the group that presently appears to be limited to DPPs, to include the NDPP himself and Deputy NDPPs, would be eminently consistent with the constitution and would define with sufficient precision the group involved.

126. All these circumstances incline me to the view that a proper interpretation of the sub-section in question means that the NDPP ought to have taken representations from the applicant before deciding to prosecute him. The failure to do so means that what he did was not a decision in terms of section 179(5)(d) and it was not therefore prohibited from scrutiny and review by the court in terms of PAJA.

The NDPP offer to hear representations

127. The denial of the right to make representation was attacked on another basis and although made in a slightly different context I am inclined to determine that point as well on the basis of the decision of the Constitutional Court in the case of *S v Jordan and others (Sex Workers Education and Advocacy Task Force and others as Amici Curiae)* 2002(6) SA 642 (CC) at para 21.

128. Mr Kemp on behalf of the applicant has argued that the NDPP, in the person of Mr Ngcuka, extended an invitation to the applicant, *alternatively* the world at large, to make representations on the matter of the prosecution in the matter of Mr Shaik, his entities and the applicant. Mention has been made of the Press statement made on 23 August 2003 and such contains the following paragraph:

> **'25. We have never asked for nor sought mediation. We do not need mediation and we do not mediate in matters of this nature. *However, we have no objection to people making representations to us, be it in respect of prosecutions or investigations. In terms of section 22(4)(c) of the Act, we are duty bound to consider representations.*' (Emphasis added).**

129. What value does the court place on the NDPP's statement that he had no objection to people making representations to him, be it in respect of prosecutions or investigations? The statement was prefaced with the mention of mediation and it could only have referred to a possible mediation with the applicant and his legal representatives. The NDPP undertook to consider representations. The simple corollary of this was that he had no objection to their receipt. But he went further and said that in terms of section 22(4)(c) of the NPA Act, he was duty bound to consider the representations. Again that seemed to be a promise and pledge to consider the representations.

130. Section 22(4)(c) provides that in addition to any other powers, duties and functions conferred or imposed on or assigned to the National Director by section 179 or any other provision of the Constitution, this Act or any other law, the National Director, as the head of the prosecuting authority, may consider such recommendations, suggestions and requests concerning the prosecuting authority as he or she may receive from any source.

131. The NDPP said he was duty bound to accept such representations as were tendered in terms of that section. The simple meaning was that it was a solemn undertaking to consider them when they came from any source. As far as I understand the position that offer was never retracted or withdrawn by Mr Ngcuka or any of his successors.

132. The applicant's attorneys wrote a letter to the NDPP dated 11 October 2007 requesting an opportunity to make prior representations in respect of any decision to charge him. The letter is annexed and reads in part as follows:

> **'The recent developments in the NPA inter alia;**
>
> 1. **The suspension of the National Director of Public Prosecutions;**

2. The meeting of the Directorate of Special Operations of 25 June 2007;
3. The appointment of an acting National Director of Public Prosecutions

has not gone unnoticed.

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

Through the proceedings and the documentation filed of record between Mr Zuma and the NDPP it is abundantly clear that certain allegations have been made about the manner in which both the investigation and the prosecution have occurred.

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

133. The suspension mentioned in the letter refers to the suspension of Mr Pikoli by the President and the appointment of an acting National Director, Mr Mpshe. The allegations that were made clearly related to the charge from the applicant that his case was being politically driven. The response by Mr Mpshe given the next day was very laconic and reads as follows:

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

134. It could be argued that this is not a refusal to hear his representations but it was hardly a positive response. If the applicant's matter was not subject to a review then there would be no need for the NDPP to hear representations. The only implication is that it was a refusal to consider any representations. It is not clear that the applicant was following up on the offer, made by Mr Ngcuka, at the press conference I have mentioned. Even if he was unaware of such offer it does not seem to matter, as long as the offer remained open.

135. Mention is made in the letter of the review of certain cases and this is clarified as follows by the applicant, who states that during 2007 the NPA reviewed various cases, including that of Commissioner J Selebi. Certain newspaper reports are annexed. Following Mr Pikoli's suspension Mr Mpshe was appointed acting NDPP and he applied to have certain warrants directed at Mr Selebi set aside.

136. Applicant says 'My case was one of those reported to be under review. It would be odd and constitute unequal and discriminatory treatment if my case was not reviewed and no representations were called for.'

137. The newspaper article in question states

> **'The NDPP will decide soon whether to proceed with charging two of the country's most powerful figures ANC presidential frontrunner Jacob Zuma and police commissioner Jackie Selebi. The NPA said yesterday that Mokotedi Mpshe was 'deliberating' the way forward in both cases… NPA spokesman Tlali Tlali said Mpshe had met the team investigating Zuma and was presented with a 'final briefing' on the continuing probe into allegations of corruption. This could herald the beginning of the end of a seven-year investigation into Zuma who has emerged as the runaway candidate for the presidency of the ANC… Tlali said prosecutions boss Mpshe would carefully consider all the information presented to him by the investigating team before making a decision…**
>
> **Mpshe is also applying his mind to the matter involving Selebi. Tlali said the panel appointed to review the charges against Selebi had also submitted a report to Mpshe yesterday. '**

138. Mr Mpshe, as I have indicated, denies that the case of the applicant was under review. Be that as it may, the question which remains was whether he was obliged to give the applicant the chance to make representations, arising out of the promise of the predecessor, at the press conference or out of the request made by the applicant's lawyers.

139. It is difficult to evaluate the real significance of the offer made by Mr Ngcuka and the letter requesting the chance to make representations, sent four years later, without considering the

events that took place in between. The applicant suggests the delay was all part of the political machinations of the NDPP, who denies it most vehemently. The applicant also suggests that the refusal to hear his representations was as a result of the political meddling, which had bedeviled his prosecution from the outset. The respondent wishes to strike these allegations from the record. In other words, the applicant's contentions are that the independence of the NDPP was compromised and that this affected not only the initial decision, but also the later ones. For this reason it was all the more important for him to make representations, concerning his prosecution.

140. It is also necessary to look at these happenings to understand why certain key events took place. The first relates to the reasons for the decision not to prosecute the applicant in the first place. Secondly it must be borne in mind that in the mean time Mr Pikoli was suspended and Mr Mpshe was now saddled with the responsibility of deciding whether to hear representations promised by his second to last predecessor.

Legitimate expectation

141. The court has to consider whether the statement made by the NDPP at the press conference gave the applicant the legitimate expectation of making representations before the decision was reversed. In *President of the Republic of South Africa v SARFU* 2000 (1) SA 1 (CC) at page 94 paragraph [212] the full court dealt with the doctrine of legitimate expectation and approved the judgment in *Administrator, Transvaal and others v Traub and others* 1989 (4) SA 731 (AD). In the last-mentioned case the court dealt with legitimate expectation at 755 et seq and said the following *inter alia* (I omit the footnotes and case references):

> **'[L]egitimate expectations… are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis…[E]ven where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the Courts will protect his expectation by judicial review as a matter of public law.... Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue....**
>
> **The particular manifestation of the duty to act fairly which is presently involved is that part of the recent evolution of our administrative law which may enable an aggrieved party to evoke judicial review if he can show that he had "a reasonable expectation" of some occurrence or action preceding the decision complained of and that that "reasonable expectation" was not in the event fulfilled.'**
>
> **As the cases show, the principle is closely connected with "a right to be heard". Such an expectation may take**

> **many forms. One may be an expectation of prior consultation. Another may be an expectation of being allowed time to make representations....'**

142. Did a legitimate, or reasonable, expectation arise in this matter either from an express promise, given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue?

143. It might be argued that this was a vague and general invitation to the public at large to make representations on any matter. The words 'any source' are of the widest import and are not confined in any respect. They must include the applicant, if given their widest interpretation. If given a narrow interpretation they would seem to be directed at the applicant and his lawyers. Mention was made to mediation in the same paragraph which could only have referred to the applicant. Secondly, the paragraph that precedes this one says the following:

> **'24. We did not leak the questions put to the Deputy President to anyone else. Only two people in the entire organizations had the questions, the National Director and one of his deputies. The questions were given to the lawyers of the Deputy President. They would know best.'**

144. The offer to allow representations could not apply to Mr Shaik and his corporate entities, as a decision had been already made

to prosecute them. As a consequence of this the applicant is the obvious person to whom they are addressed.

145. Was this a serious offer by the NDPP or an off- the- cuff expression of goodwill to a man that had been within a hair's breadth of being prosecuted himself? I get the impression that the applicant was not entirely off the hook so to speak and that investigations into him would continue once the NDPP had assessed how the prosecution against Mr Shaik proceeded. Portions of affidavits by Mr McCarthy the head of the DSO are put up to indicate that during or after the press conference Mr Ngcuka gave no promise that the applicant would never be prosecuted – in fact he said he might well be.

146. When he made the offer to hear representations Mr Ngcuka explained how exhaustive the two year investigation was and said the following:

> **'27. Evidence was obtained through searches and seizures that were conducted in Durban, France and Mauritius. Documentation was obtained from various entities, including 118 bank accounts relating to numerous entities and individuals. A vast number of witnesses from across the business and private spectrum were interviewed, consulted and questioned over the period.'**

147. Mr Ngcuka informed the press that all these endeavours persuaded the investigation team to recommend a prosecution against the applicant. He then stated:

> **'32. After careful consideration in which we looked at the evidence and the facts dispassionately, we have concluded that, whilst there is 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.'**

148. The normal test for the institution of a prosecution is set out in *Du Toit et al* in *Commentary on the Criminal Procedure Act* at page 1-4M as follows:

> **'A prosecutor has a duty to prosecute if there is a *prima facie* case and if there is no compelling reason for a refusal to prosecute. In this context '*prima facie* case' would mean the following: The allegations, as supported by statements and real and documentary evidence available to the prosecution, are of such a nature that if proved in a court of law by the prosecution on the basis of admissible evidence, the court should convict. Sometimes it is asked: Are there reasonable prospects of success? The prosecution, it has been held, does not have to ascertain whether there is a defence, but whether there is a reasonable and probable cause for prosecution – see generally *Beckenstrater v Rottcher and Theunissen* 1955(1) SA 129 (AD) at 137 and *S v Lubaxa* 2001 (2) SACR 703 (SCA).'**

149. In other words Mr Ngcuka was saying that he had what would normally be sufficient to prosecute the applicant and yet he

declined to so. This decision was most strange for other important reasons connected to the nature of the offences. Bribery, as a common law offence, or in its statutory form, under the Corruption laws, is a bilateral offence. It cannot be committed by a person alone. In the papers reference is made to an affidavit in prior proceedings by Mr Ngcuka in which he says

> **‘At the time when I prepared my announcement, I was in possession of a draft indictment against, inter alios, Schabir Shaik. In this indictment, reference was of necessity made to his relationship with [Mr Zuma] and the bribe agreement with Thetard. This indictment spelled out, far more eloquently than my statement, what was clearly a prima facie case of corruption against [Mr Zuma].’**

150. Given that a decision was made to prosecute Mr Shaik and his corporate entities, the decision not to prosecute the applicant, when there was a *prima facie* case and bribery is a bilateral crime, was bizarre to say the least. It was a total negation of the Constitutional imperatives imposed on the NDPP to prosecute without fear and favour, independently and in consistent, honest and fair fashion. I have already made reference to the Constitution, the NPA Act and the prosecution policy, directives and code of conduct in this regard.

151. The question of public policy could never have come into question, nor was it given as a reason. As the prosecution policy points out, the circumstances of the offender can be taken into account, but if the person implicated occupied the second to most senior position in government, as Deputy President, that was hardly a reason to decline to prosecute. I have already mentioned the powerful words of the Constitutional Court concerning corruption and how it can destroy a country. Squires J in *S v Shaik and others* 2007(1) SACR 12 said at page 239:

> **'I do not think I am overstating anything when I say that this phenomenon can truly be likened to a cancer, eating away remorselessly at the fabric of corporate probity and extending its baleful effect into all aspects of administrative functions, whether State official or private-sector manager. If it is not checked, it becomes systemic and the after-effects of systemic corruption can quite readily extend to the corrosion of any confidence in the integrity of anyone who has a duty to discharge, especially a duty to discharge to the public, leading eventually, and unavoidably, to a disaffected populace.'**

152. See also *S v Shaik and others* 2007(1) SACR 247 and 319 (SCA) where bribery was called an ugly offence and insidious because it is difficult to detect and more difficult to eradicate.

153. The more senior the status of a person in the government hierarchy the more seriously the courts regard his corruption. In *S v Van der Westhuizen* 1974(4) SA 60 (C) at 63 G-H the court said

that 'the nature of the office held by a person who takes a bribe can have a bearing on the sentence. If he holds a high office, this fact may be regarded as an aggravating circumstance.'

154. The legitimate quest for the bigger fish in the world of crime was eloquently expressed in *Mohunram v National Director of Public Prosecutions and Another* 2007(4) SA 222 (CC) at para [155] where Sachs J in the Constitutional Court said, in the context of the forfeiture of assets, involved in organised crime, that

> **'If the (Asset Forfeiture Unit) is to accomplish the important functions attributed to it, it should not unduly disperse the resources it has at its command. Its manifest function as defined by statute is to serve as a strongly empowered law enforcement agency going after powerful crooks and their multitude of covert or overt subalterns. The danger exists that if the AFU spreads its net too widely so as to catch the small fry, it will make it easier for the big fish and their surrounding shoal of predators to elude the law. This would frustrate rather than further the objectives of the [Prevention of Organised Crime Act]."**

155. If there was a prima facie case of serious corruption against the Deputy President there were, in my view, no reasons of public policy why he should not have been prosecuted simultaneously with Shaik. Its failure to do so brought justice into disrepute. The NDPP should either have charged the applicant or made no

mention of a *prima facie* case of corruption. The applicant is effectively complaining that he was found guilty (at the Shaik trial) in absentia: Shaik was convicted but the applicant was dismissed as Deputy President. He puts up the speech by the President in which he says:

> **'As Honourable Members would know, the judgment contains detailed matters of fact and inference against which penalties have been meted out. At the same time, proceedings pertaining to a possible appeal to higher courts are still pending. However, the judgment contains some categorical outcomes.**
>
> **These are that the court has made findings against the accused and at the same time pronounced on how these matters relate to our Deputy president, the Hon Jacob Zuma, raising questions of conduct that would be inconsistent with expectations that attend those who hold public office.'**

156. The applicant complains of the legality of such a procedure. He says the following

> **'Shortly before the 20th (on or about Sunday, 6 June 2005), I was requested by the President of the RSA, through others, to resign in the light of the Shaik judgment. The request at that time was hard to justify on any legal basis.'**

157. In the ordinary course of events, if one was relying on a judgment of a court, one could not say that the findings of fact

and law were correct, until a final court of appeal had decided them. Secondly, a judgment in a criminal case against one party is not evidence against persons, who were not parties to the proceedings. In other words the fact of the conviction of Mr Shaik and his corporate entities was not evidence against the applicant. In *R v Lee* 1952 2 SA 67 (T) the court held as follows:

> **'Now a judgment *in personam*, whether given in civil or in criminal proceedings, though it is evidence of the fact that the judgment was given, is not evidence, against persons who are not parties to the proceedings, of the truth or correctness of the judgment… Judgments *inter partes*, or, as they are sometimes called, judgments *in personam*, are not… admissible for or against strangers in proof of the facts adjudicated. They are not admissible against them because it is an obvious principle of justice that no man ought to be bound by proceedings to which he was a stranger, and over the conduct of which he could therefore have exercised no control…'**

158. At common law, had the applicant been an ordinary employee and not Deputy President or a cabinet minister, it would have been illegal for the President to have taken into account the judgment of Mr Shaik in dismissing the applicant. According to section 90(2) of the Constitution, however, the president appoints the deputy president and Cabinet ministers, assigns their powers and functions, and may dismiss them. Even though the President's decision was unfair and unjust, given the fact that the applicant was not given a chance to defend himself in a court of

law, it was not an illegal act given his power to hire and fire his Deputy or cabinet ministers, at his will.

159. Immediately after his dismissal the applicant was charged, as I have indicated, with mirror images of the charges against Mr Shaik, more especially those in counts 1 and 3. The applicant complains that this was all part of a political strategy, because of the rivalry between himself and the President for the position of President of the ANC, to be decided at Polokwane in December 2007. He maintains that this strategy involved stigmatizing him as being *prima facie* corrupt and charging Mr Shaik, without ever letting him defend himself, and then dismissing him. This was one of the allegations that the respondent sought to strike out. It is also a matter of common knowledge that the applicant was replaced by Mrs Phumzile Mlambo-Ngcuka as Deputy President.

160. These allegations are a modern echo of what the French Cardinal Richelieu, Chief Minister of Louis XIII, once said in the seventeenth century when he observed that in matters of state the weakest are always wrong. Others have inclined to the same view. The great Greek historian Thucydides in the fifth century BC wrote that the question of justice only enters where the pressure of necessity is equal. He was cynical enough to aver that the powerful exact what

they can, and the weak grant what they must. Fortunately with the advent of the rule of law matters are now quite different. The courts are there to make sure that power and wealth are not deciding factors in the courts.

161. The Canadian Supreme Court has described the judicial function as 'absolutely unique' with the consequence that 'The judge is in "a place apart" in our society and must conform to the demands of this exceptional status'. See *Therrien (Re)*, 2001 SCC 35 (CanLII) ([2001] 2 S.C.R. 3 • (2001), 200 D.L.R. (4th) 1) at para 108 -112. When the public forfeited their right to resort to arms they placed the resolution of their disputes in the hands of judges and agreed to abide by their decisions. There came into being a secular priesthood that should remain apart from the taint of politics.

162. In the decision of Lord Atkin in *Liversidge v Anderson* [1942] AC 206 the duties of judges were emphasized. Given the genesis of the applicant's charges there is some irony in his mention of the 'clash of arms' in the passage in question, but it must be borne in mind that the judgment was given during the worst days of World War 2. Lord Atkin said:

> **'In this country, amid the clash of arms, the laws are not silent. They may be changed but they speak the same language in war as in peace. It has always been one of**

> **the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.'**

163. In order to understand the background of the decision; firstly, not to charge the applicant and, thereafter, to charge him, it is necessary to understand the background and reasoning process. It is also necessary to try and explore the reasons for these decisions to evaluate his right to make representations. I have indicated that the cases show that he must be given the gist of the reasons for the change of mind, otherwise his right to make representations will be illusory. Finally, of course, it is necessary to decide whether the allegations of political meddling are scandalous, vexatious and irrelevant as alleged in the strike out applications.

164. I have mentioned that the independence of the NPA and the prohibition on executive interference has been asserted by the Constitutional Court in the Certification case. It will be recalled that the court held that any *executive* action inconsistent with prosecutorial independence would be subject to constitutional control by the Courts. This court must carry out that function, not only in the interests of the present applicant, but also on behalf of

all the people of South Africa, who have a very legitimate interest in this fundamental principle.

165. In the Certification case the Constitutional Court referred to the decision of *Ex parte Attorney-General, Namibia : In re The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1995(8) BCLR 1070 (Nms). In the last mentioned case Leon AJA quotes with approval the remarks of Ayoola J at a key note address when opening the First Conference of Commonwealth Directors of Public Prosecutions as follows at pages 1085 - 6 :

> **'The manner in which such discretion (to prosecute or not) is exercised and the process of prosecutorial decision-making are central to the criminal justice system. If prosecutorial decisions are to lead to public confidence in the system and are to be consistent with human rights norms they must also not only be just but also be seen to be so. The mechanism for arriving at such decisions must itself be seen to be such as can be conducive to fairness.'**

166. Leon AJA went on to quote the following passage with approval at page 1086 :

> **'Experience in many parts of Africa has shown that arbitrary and oppressive use of prosecutorial powers have often been potent weapons of fostering political ends to the detriment and ultimate destruction of democracy. On the other hand, experience, such as that**

> **of Gambia, has also shown that where there is no abuse of prosecutorial powers public confidence in the criminal justice system is maintained.'**

167. Whether the NDPP was influenced by the executive is not easy for the applicant to prove as that sort of knowledge would obviously lie with the NDPP. He would not, obviously, be privy to the oral or written instructions that the executive may have given to the prosecuting authority. The NDPP denies it most emphatically and says at all times the decision, not to prosecute the applicant, and, thereafter to prosecute him were his alone. In fact he stigmatizes the allegations of political interference as scandalous, vexatious and irrelevant.

168. When a party has peculiar knowledge of a fact he is not for that reason saddled with the burden of proving that fact: peculiar knowledge affects the quantum of evidence expected from the party but does not affect the incidence of the burden of proof. If such party fails to adduce evidence, in other words to transmit his or her knowledge to the court, the inference which is the least favourable to the party's cause may be drawn from the proven facts.

> **See *Abrath v The North Eastern Railway Co* (1883) 11 QB 440; *Union Government v Sykes* 1913 AD 156; *Molteno Bros v SA Railways* 1936 AD 321 333; *Naude v Tvl Boot & Shoe***

Manufacturing Co 1938 AD 379 392; *Durban City Council v SA Board Mills Ltd* 1961 3 SA 397 (A) 405A; *Gericke v Sack* 1978 1 SA 821 (A) 827E. The same rule applies in criminal cases: *R v Cohen* 1933 TPD 128; *Rex v Hoffman* 1941 OPD 65; *S v Theron* 1968 4 SA 61 (T) 63; *S v Langeveldt* 1969 1 SA 577 (T) 581H; *S v Witbooi* 1971 4 SA 138 (NC) 140–141. See also *Galante v Dickinson* 1950 2 SA 460 (A) 465; *Botes v Van Deventer* 1966 3 SA 182 (A) 1888; *Henry v SANTAM Insurance Co Ltd* 1971 1 SA 468 (C) 472–473.

169. The effect of all this is that the Courts take cognizance of the handicap under which a litigant may labour where facts are within the exclusive knowledge of his opponent and they have in consequence held, as was pointed out by Innes JA in *Union Government v Sykes* 1913 AD 156 at page 173, that 'less evidence will suffice to establish a *prima facie* case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required.'

170. The titanic political struggle between the applicant and the President is no concern of the court unless it impacts on issues to be decided in this application. The rivalry of the applicant and the President is hardly open to question and the polarization of the country into opposing camps before and after Polokwane is well known. The President of this country is restricted to two terms of office by operation of the constitution and his campaign to seek the leadership of the ANC was hotly contested by the applicant.

171. In LAWSA Second Edition Vol 5(3) title Constitutional Law at paragraph 221 the learned author Professor George Devenish describes the functions and role of the President as follows.

> **'The Constitution creates an executive presidency, and not merely a titular one as prevailed under the 1961 Republican Constitution…The president is elected by Parliament from among its members, but must vacate his or her seat on assuming office, thereby establishing an extra-parliamentary presidency. This allows the incumbent to be free to a certain extent from the turbulent and unpredictable nature of South African party politics, as is manifested in the robust party political activity in the National Assembly, although the president remains the leader of the victorious governing political party. Such a president is then able to fulfil a unifying, reconciling and, if necessary, mediating role in the profoundly cleavaged society that South Africa is, with its potential for conflict and violence.'**

172. Had the President won the election as party leader at Polokwane he could still not have been elected President of the country, without a constitutional amendment. The learned professor refers to the practice that the president of the majority party is the president of the country. The corollary of this is that if the president of the party was not president of the country that unifying and reconciling role in our profoundly cleavaged society would not take place.

173. At its lowest then the decision to stand as party leader was controversial and not in accordance with the Westminster system we espouse in this country. The applicant claims his woes are attributable to his decision to accept nomination of others and stand for the position of head of the party, as a rival to the incumbent president. Clearly the stakes were high and the competition fierce.

174. We know that the decision not to prosecute him was for reasons totally antithetical to the constitutional duties of the NDPP to make consistent, fair and honest decisions without fear or favour and we are conscious of the irrationality of charging the briber and not the recipient of bribes, but does this alone show political conspiracy? One has to examine the decision not to prosecute the applicant to ascertain whether it was made from fear or favour and whether it was consistent.

175. At first blush a decision not to prosecute the Deputy President of the country appears to be as a favour to the second to highest ranking politician in the country. The applicant denies this and puts quite a different slant on the objective. He says it was all part of a political agenda that had as its objective the favouring of President Mbeki in his quest for a further term of office as ANC

President. Those are allegations that the respondent seeks to strike out of the record. Is there any evidence of this? Mr Ngcuka says that he and Minister Maduna 'informed the Deputy President about this investigation shortly after it started.' That hardly constitutes proof of any interference.

176. It is important to establish how extensive the political interference, influence or pressure has to be to be recognized by the courts. In *Sharma's* case, mentioned above, the Privy Council of the House of Lords in England considered an appeal from the West Indies. The appellant was the Chief Justice of Trinidad and Tobago and he was charged with attempting to pervert the course of justice by trying to influence the decision of the Chief Magistrate in a trial involving Mr Basdeo Panday, the Leader of the Opposition and a former Prime Minister. Mr Panday was charged with corruption and the Chief Justice had three meetings with the Chief Magistrate during which he tried to influence the decision in favour of Mr Panday.

177. The prosecution authorities investigated the removal of the Chief Justice, in terms of their constitution and the matter was placed in the hands of the Deputy Director of Public Prosecutions. She brought a prosecution against the chief justice

for perverting the course of justice during his three meetings with the Chief Magistrate, when he spent time trying to secure a result in favour Mr Panday. The Chief Justice brought an application to review the decision to prosecute him and sought an order staying all action consequential on that decision to prosecute. In other words he was asking the court to declare the indictment invalid. Had the Chief Justice been successful with his application, the indictment would have been set aside and no further charges could be brought until the prosecuting authority had been purged of the malign political influence.

178. The Chief Justice in that matter alleged that there was improper, politically-motivated interference in the prosecution process against him i.e. the Chief Justice, by the Prime Minister and the Attorney-General and the others, including the Deputy Director who brought the prosecution.

179. The Privy Council gave two separate judgments the main judgment being by Lord Bingham of Cornhill and Lord Walker of Gestingthorpe, who said the following at page 786 et seq:

> **'The rule of law requires that, subject to any immunity and exemption provided by law, the criminal law of the land should apply to all alike. A person is not to be singled out for adverse treatment because he or she**

> **holds a high and dignified office of state, but nor can the holding of such an office excuse conduct, which would lead to the prosecution of one not holding such an office. The maintenance of public confidence in the administration of justice requires that it be, and be seen to be, even-handed.**
>
> **It is the duty of police officers and prosecutors engaged in the investigation of alleged offences and the initiation of prosecutions to exercise an independent, objective, professional judgment on the facts of each case. It not infrequently happens that there is strong political and public feeling that a particular suspect or class of suspect should be prosecuted and convicted… This is inevitable, and not in itself harmful so long as those professionally charged with the investigation of offences and the institution of prosecution do not allow their awareness of political and public opinion to sway their professional judgment. It is a grave violation of their professional and legal duty to allow their judgment to be swayed by extraneous considerations such as political pressure.'**

180. I would say that in South Africa it goes far beyond being a 'grave violation of their professional and legal duty [for prosecutors] to allow their judgment to be swayed by extraneous considerations such as political pressure' as it is a very serious criminal offence for which the legislature has put a maximum sentence of 10 years imprisonment for any breach.

181. The other Lords of the Privy Council did not differ on this point and Baroness Hale of Richmond, Lord Carwell and Lord Mance approved a previous decision of the Court of Appeal. That decision was to the effect that the court has power to interfere

with a prosecution, because the judiciary accepts responsibility for the rule of law. As such it embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. (At page 794 G-H). These very same principles are, of course, core values of our own constitution. The learned Lords then said at page 795 A-B:

> **'In our opinion, the same responsibility extends to the oversight of executive action in the form of a police or other prosecutorial decision to prosecute. The power to stay for abuse of process can and should be understood widely enough to embrace an application challenging a decision to prosecute on the ground that it was arrived at under political pressure or influence or was motivated politically rather than by an objective review of proper prosecutorial considerations (such as, in England, those set out in the Code for Crown Prosecutors issued under the Prosecution of Offences Act, 1985.)'**

182. An examination of the above passage posits that the test is therefore a proscription of decisions to prosecute that are arrived at under political pressure, or influence, or those that were motivated politically, rather than by an objective review of proper prosecutorial considerations. The South African equivalents are of course the prosecution policy, the code and directives I have already mentioned above. They posit a prosecution model which is totally independent of political influence and which prosecutes fairly, consistently and without fear or favour to anyone. I have

already indicated why the failure to prosecute the applicant was an egregious breach of those principles.

183. The learned Lord Bingham of Cornhill and Lord Walker of Gestingthorpe then stated that under the Judicial Review Act 2000, judicial review lies against a public prosecutor, for instance, if he acts on instructions from an unauthorized person. The Lords then continue

> **'It is well established that a decision to prosecute is ordinarily susceptible to judicial review, and surrender of what should be an independent prosecutorial discretion to political instruction (or the Board would add, persuasion or pressure) is a recognized ground of review…'**

184. After indicating the clear principles involved the case was decided on the facts. In that matter the prosecutor had no meetings with any politicians or even any contact. The Privy Council then decided at page 793 that

> **'there was no reasonable basis for concluding that the Deputy DPP's decision or advice was influenced by political pressure. She had been expressly instructed to make her own independent decision. She swore that she did so, having no contact with the Prime Minister on any subject nor with the Attorney General on this subject.'**

185. The Privy Council then dismissed the appeal of the Chief Justice for a lack of any evidence of interference of any sort and

effectively denied his bid to stay all actions consequent on the decision to prosecute.

186. Our South African law is no different. In *S v Yengeni op cit* the appellant – a former member of Parliament – had been convicted of corruption arising out of an aspect of the arms deal, relating to his purchase of a motor vehicle. The appellant had discussed his potential sentence with a former Minister of Justice and Constitutional development, Mr Maduna and the then NDPP, Mr Ngcuka. This discussion took place at a meeting at the Minister's home during January 2003. It was also common cause that the three of them agreed that 'should the appellant plead guilty to a "watered-down" charge, the State would not seek a custodial sentence. Bertelsmann and Preller JJ said the following at paragraph [57]

> **'It was indubitably ill-advised for the former National Director of Public Prosecutions [Mr Ngcuka] to be seen to participate in a discussion with the Minister [Mr Maduna] and the appellant. The independence of the office that he held, and the fearless and unfettered exercise of the extensive powers that this office confers, are incompatible with any hint or suggestion that he might have lent an ear to politicians who might wish to advance the best interests of a crony rather than the search for the truth and the proper functioning of the criminal and penal process.'**

187. In this matter apart from Minister Maduna informing the applicant about this investigation shortly after it started, was there any other suggestion that there was political interference? Is there a suggestion that what Bertelsmann and Preller JJ warned against had taken place? Was there a breach of the independence of the office that he held, and interference with the fearless and unfettered exercise of the extensive powers that this office confers as the judges said? Is there a hint or suggestion that the NDPP might have lent an ear to politicians as the learned judges admonished? Was there political pressure, influence or persuasion of any sort as the Privy Council suggested in Sharma's case?

188. In the press statement Mr Ngcuka states that he conducted the investigation 'without any *undue* influence from the executive or any arm of our government.' He should have said it was conducted without any influence whatsoever. I might interpolate to say that the prosecution policy and code of conduct emphasise very clearly that statements should not be made to the media before a prosecution is instituted. At the press conference, which was broadcast on national television, Mr Ngcuka then thanks a number of his staff and then says the following of and concerning

Dr Maduna, who was present, at the press conference, sitting next to him:

> **'More importantly, I want to extend my greatest appreciation to Dr Panuell (sic) Maduna, the Minister of Justice, for his unstinging support. Minister, you've once more demonstrated political leadership.'**

189. Given that there should not be a hint or suggestion that the NDPP might have lent an ear to politicians he is here expressing his greatest appreciation to a politician for his 'unstinging' (sic) support. Perhaps he meant 'unstinting'. Even if he meant the Minister was not stingy in his support – in other words very generous in the time and energy he spent on the matter, it is a startling statement, given the total independence the NDPP is supposed to exercise.

190. The comment that the Minister's generous support demonstrated once more his political leadership leaves much to be desired. How does a decision to prosecute Mr Shaik and not the applicant provide a further demonstration of political leadership? Is the reason that he said this that the decision not to prosecute the applicant needed political evaluation and Mr Ngcuka learned from the advice of his leader? That seems to be the most plausible inference. The presence of the Minister at the

press conference is otherwise inexplicable and seems to indicate a total lack of appreciation of the independence of the NPA.

191. I must conclude that the Minister gave generous amounts of his time and energy to the NDPP and political leadership in the long period leading up to the press conference. Laconic as these comments may be they certainly are not consonant with 'the fearless and unfettered independent exercise of extensive powers' referred to by the learned judges in the Yengeni matter. The comments certainly strengthen the inference that the decision not to prosecute the applicant was politically driven.

192. There is another disturbing feature in the decision to withdraw charges against Thint in the Shaik matter. Mr Du Plooy, the deponent to the opposing papers, filed on behalf of the NDPP, explains how the charges against Thint were withdrawn. He explains that Thint was accused no 11 in the Shaik trial and that some months prior to the trial date Thint approached Minister Maduna and indicated it wished to meet with him and Mr Ngcuka. These matters are not in dispute and curiously are volunteered by the respondent himself. It is not clear whether a physical meeting took place but that is the most plausible inference. Following on the approach to Mr Maduna some discussion must have taken

place as two trips were made to Paris by Mr Ngcuka and Mr McCarthy but, apparently, to no avail. The political meddling, that the judges in Yengeni's matter had been so critical of, was being repeated. At paragraph 35 of Du Plooy's answering affidavit the following appears:

> **'35.1 In the latter half of 2003, *an intermediary ostensibly acting for the Thint group contacted Minister Maduna and indicated that the group wished to meet with him and Mr Ngcuka. Pursuant to this approach*, Mr Ngcuka traveled to Paris on two occasions in the second half of 2003 (Mr McCarthy accompanied Mr Ngcuka on one of these occasions). Nothing came of those discussions.**
>
> **35.2 In early 2004, Mr Maduna was contacted by the legal representatives of Thint. *Pursuant to this approach, a meeting was held at Mr Maduna's house in April 2004 at which the Thint delegation indicated their willingness to co-operate with the prosecution. It was agreed that they would contact Mr Ngcuka's office to discuss the terms of their co-operation.***
>
> **35.3 On 19 April 2004 a meeting was held between Thint's representatives on the one hand, and Mr Ngcuka and Mr McCarthy on the other. They concluded an agreement. Mr Ngcuka confirmed the agreement in a letter to Thint's counsel later that day. The agreement was that, if Mr Thetard made an affidavit verily to the effect that he was the author of the encrypted fax, the NPA would, amongst other things, retract warrants for Mr Thetard's arrest and withdraw the prosecution against Thint.**
>
> **35.4 On 20 April 2004 Mr Thetard made an affidavit confirming that he was the author of the encrypted fax. On 4 May 2004 Mr Ngcuka confirmed that he would withdraw the charges against Thint on the date of the next appearance in the Shaik matter. Notwithstanding the fact that shortly afterwards Mr Thetard made a further, unsolicited affidavit evidently aimed at**

> **undermining his first affidavit, the NPA decided to keep its side of the bargain and the charges were withdrawn against Thint on 11 October 2004.' (Emphasis added.)**

193. What is clear from the respondent's own papers is that the Minister had a meeting with Mr Ngcuka, the NDPP and representatives of an accused in the case. It is clear from the above that once the group spoke to the Minister he contacted Ngcuka who went to Paris on two occasions. What is clear is the Minister must have made his input into the offer and its consequences for the prosecution against Shaik. This fax was of course crucial in the future case against the applicant. The fax must have been the subject of discussions in Paris.

194. We know that in early 2004, Mr Maduna was contacted by the legal representatives of Thint and a meeting was held at his house. The Thint delegation indicated their willingness to co-operate with the prosecution. An agreement was reached at this meeting at which the minister was present. The terms were that Thint would cooperate and Mr Thetard would make an affidavit to the effect that he was the author of the encrypted fax. In return for this cooperation the NPA would withdraw the charges.

195. Clearly the Minister and Mr Ngcuka were using the oldest device in the ancient art of prosecution - to continue the angling

metaphor of Sachs J in the Constitutional Court - using a sprat to catch a mackerel. So long as Thint (the sprat) agreed to agree that it wrote the fax then the prosecution could then catch Shaik (the mackerel). The applicant maintains that the ultimate objective of the strategy was to prosecute Shaik and, when he was convicted, fire the applicant. I have explained why he regarded that as unjust given that the NDPP had never had the courage to charge him and give him a chance to defend himself. So the applicant maintains that he was the big fish - if one were to continue this dubious metaphor - as the deputy president of the country and rival of the President in the race for the presidency of the ANC. These contentions fall into the series of allegations the respondent wishes to strike out of applicant's affidavit.

196. Put at its very lowest Mr Maduna seems to have played a not insignificant part in the planning of the strategy in question, whatever its end objective might be. Given the constitutional imperative for the NDPP to be totally independent, and decide without fear or favour it was a most regrettable occurrence, in the light of the fact that it also constituted a serious criminal offence.

197. Is there any evidence that political interference has continued? Annexed to the Respondent's answering affidavit in this matter is

a supporting affidavit by Mr Pikoli, put up in the adjournment and permanent stay applications before Msimang J, in which he says the following:

> **'30. It is denied that the prosecution has not approached the Presidency about the matter [the arms deal enquiry]. The NPA and the prosecution team have in fact been engaging with the Director- General in the Presidency in this regard since February 2006.'**

198. This paragraph is in response to paragraphs 29 and 30 of the applicant's founding affidavit, in the proceedings before Msimang J, in which he sets out what role the President played in the arms deal acquisition process. The applicant does not suggest that the President was guilty of any corruption but suggests that the President is in possession of sufficient knowledge to clear the applicant.

199. Other documents filed include admissions by the NPA, through its spokesman Makhosini Nkosi, made on 9 July 2006 that the President has never been the subject of investigation, as that was never warranted, as there was no evidence of impropriety by him. The meetings with the Director-General in the Presidency could not, therefore, have been about the President's involvement. Nor is there any suggestion that any crimes in connection with the arms deal were committed in the office of the

President. The ongoing meetings could only relate to the complicity of the present applicant. These consultations with the office of the Presidency on the implied ongoing basis from February 2006 are also cause for concern given the constitutional imperative of independence.

200. There is one further matter to be considered, which the applicant alleges provide proof that there was a political influence, pressure or persuasion to prosecute him during December 2007 when Mr Mpshe was at the helm of the NPA. The applicant says that 'It is also pointed out that the NPA during 2007 reviewed various cases including that of Commissioner J Selebi. I annex hereto newspaper reports reflecting this.'

201. In an article by Mr Sam Sole, dated 5 October 2007 in the *Mail and Guardian,* annexed to the papers, mention is made of certain warrants of search and arrest issued against Mr Selebi. The warrants had not been executed and Mr Pikoli contacted the President who instructed the Minister of Justice to write to Mr Pikoli. The article says the following:

> **'She did so, apparently demanding access to the Selebi docket and seeking to circumscribe Pikoli's prerogative to make a decision. Pikoli replied, asserting that prerogative and warning the Minister over her attempt to**

> **interfere. That prompted Mbeki to suspend Pikoli on September 23. On September 28, the acting national director of Public Prosecutions, Mokotedi Mpshe, applied successfully to have the arrest warrant cancelled. He later revealed that the Selebi case is the only one that is being 'reviewed' by him. The inescapable conclusion is that this is as a result of Mbeki's intervention… we can only conclude that the difference between the two cases is that the decision on Zuma was politically palatable to Mbeki whereas the decision on Selebi was not.'**

202. The respondent states in reply that the paragraph is disputed. He goes on to say

> **'It is incorrect that Mpshe reviewed "various cases including that of Commissioner J Selebi". In fact he reviewed only Selebi's case, at the request of the Minister of Justice. Once again, the applicant bases his assertions on unsubstantiated and inaccurate press reports.'**

203. The only other response by the respondent is to be found earlier in the answering affidavit, at paragraph 89.

> **'89. Between the hearing on 27 to 29 August 2007 of the appeals in the SCA concerning the August 2005 searches and seizures and the handing down of the SCA's judgments on those appeals on 8 November 2007, the President suspended Mr Pikoli as NDPP, stating that there had been an irretrievable breakdown in the working relationship between Mr Pikoli and the Minister of Justice and Constitutional Development, Ms Brigitte Mabandla. The President appointed Mr Mpshe as the acting NDPP.'**

204. An affidavit is put up by Mr Pikoli but nowhere does he deal with the allegations in the article by Mr Sole. The applicant knew little or nothing of these goings on and put up the best evidence he could find. Mr Pikoli was the NDPP and must have known the answers to these allegations. By law he is supposed to admit or deny or confess and avoid these allegations or face the prospect of the court accepting the allegations as correct. See *Moosa v Knox* 1949 3 SA 327 N at 331.

205. From the above it is clear that there is no attempt by Mr Pikoli to deal with the allegation of the blatant interference by the Minister and the fact that Mr Pikoli asserted his rights of independence. There is no refutation that the Selebi warrants were cancelled by Mr Mpshe after political interference and that Pikoli was suspended because he refused to do so. There is an admission that Mpshe reviewed only Selebi's case, at the request of the Minister of Justice. The other admission relates to the fact that the President suspended Mr Pikoli as NDPP, stating that there had been an irretrievable breakdown in the working relationship between Mr Pikoli and the Minister.

206. At the level of the most plausible inference, in the absence of any other competing one, it must be inferred that there was again

political interference at the very time Mr Mpshe was contemplating charging the applicant. Mr Pikoli does not deal with the allegation that the issuing of the warrants against Selebi was not palatable to the President but the decision to prosecute the applicant was.

207. The NDPP states unequivocally that the NDPP Mr Pikoli was suspended by the President because of a breakdown in his relationship with the Minister of Justice. There should be no relationship with the Minister of Justice – certainly insofar as his decisions to prosecute or not to prosecute anybody from the Commissioner of Police downwards. All that is clear from the Constitution, the NPA Act and the various prosecution policies, directives and codes of conduct. The suspension of the National Director was a most ominous move that struck at the core of a crucial State institution. Of importance to the applicant was the fact that Pikoli's replacement, Mr Mpshe, who had to decide his fate, must have realized that to disobey the executive would in all probability ensure his own professional demise.

208. The trial of the applicant was not proceeded with before Msimang J and struck off the roll on 20 September 2006. The judge in that matter made serious comments about the manner in

which the NDPP was dealing with the matter. I have dealt with the bilateral nature of corruption and the inexplicable decision not to prosecute the applicant in August 2003. It is very difficult to understand why the State did not proceed against the applicant on the evidence they had, given that it had resulted in a fifteen year sentence for Shaik.

209. The applicant states in his founding affidavit that after all these proceedings he and those who wished him to occupy a leadership role in the ANC 'were concerned about the criminal charges being re-launched at all and moreover being launched at a critical time in the political process'. He goes further and suggests that this was a stratagem to cloak him in the guise of an accused at the critical moments in the political process and so hamper his election as ANC President. There does seem to be merit in that contention. I am therefore not inclined to strike out these allegations.

210. The timing of the indictment by Mr Mpshe on 28 December 2007, after the President suffered a political defeat at Polokwane was most unfortunate. This factor, together with the suspension of Mr Pikoli, who was supposed to be independent and immune from executive interference, persuade me that the most plausible

inference is that the baleful political influence was continuing. If the NDPP is to be totally independent and perform his functions without fear and favour he should not be liable to suspension by the executive at any given moment.

211. In the decision of the Privy Council of the House of Lords in England in *Grant v DPP* [1982] AC 190 at 201 Lord Diplock said of the Jamaican Constitution

> **'The office of the Director of Public Prosecutions was a public office newly-created by section 94 of the Constitution. His security of tenure and independence from political influence is assured. In the exercise of his functions, which include instituting and undertaking criminal prosecutions, he is not subject to the direction or control of any other person.'**

212. I might interpolate to say that it seems to me that the only way to ensure the independence of the NDPP is to make his appointment and dismissal on the same conditions as that of a judge. If his security of tenure and independence is not assured and he can he suspended by the executive, the whole legal process is in serious jeopardy.

213. What Mr Maduna and his successor Miss Mabandla did is also the responsibility of the President and his whole cabinet. The most renowned definition of collective responsibility of the

Cabinet appears in LAWSA Second Edition, volume 5(3), title Constitutional Law, paragraph 227 where Lord Salisbury is quoted as saying:

> **‘For all that passes in Cabinet every member of it who does not resign is absolutely and irretrievably responsible and has no right afterwards to say that he agreed in one case to a compromise, while in another he was persuaded by his colleagues . . . It is only on the principle that absolute responsibility is undertaken by every member of the Cabinet, who after a decision is arrived at, remains a member of it, that the joint responsibility of Ministers to Parliament can be upheld and one of the most essential principles of parliamentary responsibility established.’**

214. In terms of the Constitution of the Republic of SA 108 of 1996 s 92(2) Cabinet ministers are also accountable, collectively and individually, to Parliament for the exercise of their powers and performance of their functions. Is it possible that the Mr Maduna was on a frolic of his own or acting on instructions? It seems very improbable that in so important a matter as one involving the Deputy President (his political superior) a mere minister would get involved without the President knowing and agreeing.

215. The allegations of corruption affected not only the government but the party and the whole country. Given the keen competition between the applicant and the president for the leadership is it conceivable that the president did not know? The President is

after all the only person who can dismiss the Deputy President in terms of the Constitution. In terms of sub-sections 96(3)(4) and (5), added by annexure B to Schedule 6 of the Constitution, Ministers are accountable individually to the president and to the National Assembly for the administration of their portfolios. In terms of the Constitution all members of the Cabinet are correspondingly accountable collectively for the performance of the functions of national government and its policies. Furthermore, ministers must administer their portfolios in accordance with the policy determined by the Cabinet. However, should it happen that a minister fails to administer the portfolio in accordance with the policy of the Cabinet, the president may require the minister concerned to bring the administration of the portfolio into conformity with that policy.

216. It seems to me that in terms of the law, more especially emanating from the Constitution, there is responsibility attributable to the President and his cabinet for what Mr Maduna did. This would, of necessity, also apply to what Ms Mabandla did. I am therefore not convinced that the applicant was incorrect in averring political meddling in his prosecution. I will deal with the consequences of this on the striking out applications later in the judgment.

217. If there was political interference in the earlier decision not to prosecute the applicant and in all probability the later one to prosecute him what does one make of the offer of the NDPP that the applicant can make representations at any time about the investigation or prosecution? It seems to me that if he was afforded the chance to make representations at any time for any reason, it would be the duty of NDPP as he expressed it to consider these.

218. The applicant expresses this as follows, after explaining that there was no new evidence, at the time Mr Pikoli decided to prosecute him. At paragraph 73 he says

> **'73. It is in this context that the NDPP's failure to comply with the provisions of section 179(5) must be considered. Where such extraneous factors as the politics of the day and a change in decision without any new evidence are present, there is indeed an obligation to be extra vigilant in ensuring compliance with Section 179(5) to the fullest extent. And if there is new evidence, surely one seeks an explanation from the person to be charged in these circumstances.'**

219. Given the political entanglements and machinations in the whole matter of the applicant's prosecution, there does seem to be merit in this submission. This would apply more especially if

the political thinking changed and consideration was to be given to charging him.

220. There is a distressing pattern in the behaviour which I have set out above indicative of political interference, pressure or influence. It commences with the 'political leadership' given by Minister Maduna to Mr Ngcuka, when he declined to prosecute the applicant, to his communications and meetings with Thint representatives and the other matters to which I have alluded. Given the rules of evidence the court is forced to accept the inference which is the least favourable to the party's cause who had peculiar knowledge of the true facts. It is certainly more egregious than the 'hint or suggestion' of political interference referred to in the Yengeni matter. It is a matter of grave concern that this process has taken place in the new South Africa given the ravages it caused under the Apartheid order.

221. In the Yengeni matter the judges went on to emphasise the importance of the independence of the prosecuting authority when they stated at paragraph [52]

> **'The independence of the Judiciary is directly related to, and depends upon, the independence of the legal professions of the [NDPP]. Undermining this freedom from outside influence would lead to the entire legal**

> **process, including the functioning of the Judiciary, being held hostage to those interests that might be threatened by a fearless, committed and independent search for the truth.'**

222. There is a contradiction between Mr Mpshe and Mr Tlali as to whether the applicant's case was under review. After Msimang J struck the matter off the roll the NDPP had to make up his mind whether to charge the applicant afresh. Whichever version is accepted – in other words, irrespective of whether there was to be a review of the applicant's case - that was a decision the NDPP had to make. When he made it he told the applicant that he would not hear any of his representations.

223. What weight can be given to his promise to listen to all representations at the press conference held by Mr Ngcuka? It is also clear that the respondent always acknowledged the applicant's right to make representations. At paragraphs 154.2 and 164 respondent says

> **'154.2 The applicant has in any event had ample opportunity to make representations on the decision to prosecute him since it was taken. He could have made these representations to Pikoli who took the decision to prosecute him. He could moreover more recently have made the representations to the NPA either before or after the current decision to reinstitute charges. He required no invitation to make such representations…'**

> **'164… Any accused person, and indeed any suspect, is free to make representations to the NPA regarding a pending or anticipated prosecution. The applicant, represented as he is by senior and experienced counsel, must be well aware of this.'**

224. In the light of these statements it is most strange and disturbing that Mr Mpshe shut the door on the applicant making any such representations. In my view the promise at the press conference was binding on the NDPP on two scores. Firstly, because it was an invitation to the applicant to make representations and he acquired a legitimate expectation to make them pursuant to the promise. Secondly, the NDPP told the applicant and the world at large that he was duty bound to consider any such representations in terms of section 22(4)(c). It is reinforced by the subsequent attitude.

225. The NDPP is a very important appointment. If his word is worth nothing then our National Prosecuting Authority is in peril. In *Wronsky and another v Attorney-General* 1971 (3) SA 292 (SWA) the applicants had applied for an order directing the respondent in terms of section 14 of Ordinance 34 of 1963 (S.W.A.) to decide immediately whether or not he refuses to prosecute certain persons; and in the event of his refusal to immediately furnish a certificate *nolle prosequi*. The respondent had stated that he had

not yet decided as he wished to study further statements before he decided. It was not alleged that he had acted *mala fide*.

226. It was held, that the application should be refused. Hoexter J (as he then was) held that where *mala fides* was neither alleged nor proved the court had no reason to doubt the allegations of the attorney-general that he was not in any position to make a decision. The court held at pages 294-5 that it was obliged to take into account what it termed 'the elevated position of the attorney-general'.

227. The court approved a dictum by Acting Judge President Watermeyer to the effect that the attorney-general 'is the highest official in charge of prosecutions and the Court is bound to place great reliance and great trust in what he says.' See *Heller v Attorney-General* 1932 CPD 102 at page 104.

228. It seems clear that the applicant was entitled to place great reliance and trust in what Mr Ngcuka said in inviting representations at the press conference.

229. Because of the political meddling I am of the view that the respondent did not maintain his independence and was not in a

proper position to carry out his duties to honour the promise to hear representations or to respond properly to the request to receive representations. I am not saying the political meddling is a sufficient ground on its own to secure the relief at all. That was not an issue as such in this application. What I mean is that it was legitimate of the applicant to place it before the court to evaluate his right to make representations.

230. I am of the view that the applicant had a legitimate expectation that his representations be heard by Mr Pikoli in the first instance and Mr Mpshe especially after the promise at the press conference and the letter requesting an opportunity to make such representations.

231. For this additional reason I believe the NDPP ought to have heard the applicant's representations.

232. It is interesting that in the *Sharma* judgment to which I have referred extensively earlier on the Deputy DPP did invite representations from the Chief Justice in that case.

> **'On 2 June she supplied the Chief Justice with a summary of the allegations being investigated and told his legal representative that she would consider any representations he might think it necessary to make.**

> **Such representations were submitted to her in writing on 23 June.'**

233. I might add in conclusion on this point that I wonder at the wisdom of the respondent in not hearing the applicant's representations, when he asked to make them. That would certainly have allowed the matter to proceed more speedily. There are many complaints and recriminations about procrastination in this matter. The constitutional court has spoken about the undesirability of points taken to delay matters. The courts have over the years said much the same.

234. In *Le Grand (t/a Jeannes) v Carmelu (Pvt) Ltd (t/a Lynwood Fashions)* 1980 (1) SA 240 (ZRA) MacDonald CJ at 242D - G said the following

> **'The civil courts in common with the criminal courts exist to do justice and not to provide some practitioners with a forum in which, relying upon technical and wholly academic points, to attempt to prevent a court adjudicating upon the real issues.'**

235. The respondent complains that the applicant keeps preventing the matter from proceeding to trial. It must always be borne in mind that the State decided not to prosecute the applicant in the Shaik matter five years ago on 23 August 2003, in the peculiar circumstances I have mentioned. That was after an exhaustive

two year investigation, interviewing hundreds of witnesses in several countries and at great cost no doubt to the taxpayer. More than two years ago the State asked for an adjournment for the criminal trial against the applicant, which was correctly refused by Msimang J. So all the blame for delays is not to be attributed to the applicant.

236. It was said with commendable clarity and forthrightness in *R v Hepworth* 1928 AD 265 at 277 that:

> **'A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.'**

237. The court has gained the impression that all the machinations to which I have alluded form part of some great political contest or game. For years the applicant is under threat of prosecution for serious corruption and yet never brought to trial. There is a ring of the works of Kafka about this. In addition I have mentioned the applicant’s threats of disclosure should he go down.

The applications to strike out

238. As I have mentioned the respondent and applicant have both brought applications to strike out allegedly offensive material in the affidavits of their opponents. The material in applicant's founding papers, apart from excessive biographical material, which is really of no great moment, relates to his allegations of political meddling in his investigation and prosecution. The material concerning his tax charges flows from this allegation and must be considered with it. As appears from the above findings I am satisfied that political meddling cannot be excluded and I am of the judgment that it existed to a sufficiently egregious degree that it justified inclusion in the papers.

239. Put differently, if the applicant was not prosecuted for what appears to be some ulterior political motive, when he became entitled to make representations, he needed to know what had changed in the political thinking or circumstances that justified the new decision to prosecute him. The applicant needed to know why he was not prosecuted in a bilateral offence to understand why he was now being prosecuted.

240. I am of the view that the respondent's application to strike out must be dismissed with costs.

241. The applicant's striking out motion is aimed at allegations that his attacks on the political meddling in the prosecution were made without foundation and were scandalous and vexatious. As I have found they were relevant to establish the background and the basis for the first decision not to prosecute, the applicant was not prohibited from raising them. The respondent was not then entitled to attack the applicant and his legal team and their *bona fides* in including them. The applicant's striking out application must be granted with costs.

The delay

242. It seems clear to me that the applicant cannot attack the Pikoli decision to prosecute him as that indictment became a nullity once Msimang J struck the matter off the roll. This was the view of the Constitutional Court in the letter of request appeal under case no CCT 90/07 where it said

> **[41] …'[O]nce a case is struck from the roll, the case terminates and is no longer pending. There is no guarantee that the criminal proceedings will be reinstated. Removal of a matter from the roll is therefore abortive of the currency of the trial proceedings. Should the trial ever be enrolled, it would start anew.'**

243. The decision by Mr Mpshe to prosecute the applicant was therefore the reversal of the decision of Mr Ngcuka not to prosecute him. As PAJA is applicable the applicant was obliged to bring the application for review within six months and he has done so. Even if it is not applicable he was required to bring his application within a reasonable time. It seems to me that he has fulfilled that requirement. See *Wolgroeiers Afslaers (Edms) Beperk v Munisipaliteit van Kaapstad* 1978(1) SA 13 (AD).

244. The question remains whether all the charges should be declared to be invalid. At some levels the respondent has thrown the book at the applicant, so to speak, by including charges relating to tax evasion etc. These related to payments he had allegedly received from Mr Shaik or his companies and which should have been included in his tax return as gifts (bribes). Some of the payments would also date after the initial decision not to charge him. At some levels they are all interrelated and it does not seem to make practical sense to attempt some sort of severance exercise. In any event the offer to hear his representations probably covered any charges to be brought against him should the respondent decide to charge him.

The question of costs

245. As I have found these to be civil proceedings costs must follow the event. I am not inclined to grant attorney and client costs in any of the applications before me. In the main application I am of view that the costs of three counsel are justified. In the other applications relating to the striking out and admission of the Amicus Curiae I believe one counsel of junior status would have been sufficient.

246. I must repeat that this application has nothing to do with the guilt or otherwise of the applicant. It deals only with a procedural point relating to his right to make representations before the respondent makes a decision on whether to charge him again. Once these matters are cured the State is at liberty to proceed again against the applicant, subject to any further proceedings he may bring.

247. I therefore grant the following orders:

a. It is declared that the decision taken by the National Prosecuting Authority during or about 28 December 2007 to prosecute the applicant, a copy of which is annexed to the applicant's founding affidavit as annexure "A" thereto is invalid and is set aside.

b. The respondent is ordered to pay the applicant's costs of suit including those consequent upon the employment of three counsel.

c. On the respondent's application to strike out certain paragraphs of applicant's founding affidavit I make the following order:

'The application is dismissed with costs.'

d. On the applicant's application to strike out certain paragraphs of the respondent's answering affidavit I make the following order:

'The application is granted with costs.'

e. On the application of the Amicus Curiae, I make the following order:

'aa. The application to join as an *Amicus Curiae* is refused.

bb. The applicant in the *Amicus Curiae* application is ordered to pay the respondent's costs, incurred in opposing that application.'