IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

GP Case No: 062027/2022

CCT: _____

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA	Applicant/Appellant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS, KWA-ZULU NATAL	Second Respondent
NATIONAL PROSECUTION AUTHORITY	Third Respondent
THE REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG LOCAL DIVISION	Fourth Respondent

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NOTICE OF APPLICATION FOR LEAVE TO APPEAL IN TERMS OF RULE 19

PLEASE TAKE NOTICE that the abovementioned applicant/appellant intends to apply for leave to appeal against the whole of the judgment and order of the Gauteng Local Division, Johannesburg (Per Sutherland DJP, Molahlehi and Senyatsi JJ) delivered on 16 January 2022. The applicant seeks an order

1. Granting leave to appeal directly to this Court;

2. Reversing the decision of the court *a quo* and replacing it with the following:

"*The application is dismissed with costs.*"

3. Granting such further, alternative, just and equitable remedy as the court deems fit;

4. Costs in the event of opposition.

PLEASE TAKE NOTICE FURTHER that the affidavit of **WALTER NIEDINGER** will be used in support thereof and it is annexed hereto.

PLEASE TAKE NOTICE FURTHER that the applicant has not applied, nor does he intend to apply for leave or special leave to appeal to another Court.

PLEASE TAKE NOTICE FURTHER that the applicant has appointed **WN ATTORNEYS INCORPORATED, 477 FALDA STREET, CNR WINDSOR ROAD AND FALDA STREETS, GARSFONTEIN, EXTENSION 5, PRETORIA** as the address at which he will accept notice and service of all process in these proceedings.

PLEASE TAKE NOTICE FURTHER that if you intend opposing this application you are required (a) to notify the applicant's attorney in writing within 10 days after the lodgment of this application of your intention to oppose the application and to file your answering affidavit, if any; and further that you are required to appoint in such notification an address at which you will accept notice and service of all documents in these proceedings.

If no such notice of intention to oppose is given, the applicant will request the Registrar to place the matter before the Chief Justice to be dealt with in accordance with Rule 11(4) of the Rules of the Honourable Court.

Dated at **PRETORIA** on this **06th** day of **FEBRUARY 2023.**

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TO: THE REGISTRAR
CONSTITUTIONAL COURT OF SOUTH AFRICA
BRAAMFONTEIN

AND

TO: **STATE ATTORNEY, JOHANNESBURG**
FIRST RESPONDENT'S ATTORNEYS
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AND

TO: **THE STATE ATTORNEY**
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APPLICANT'S FOUNDING AFFIDAVIT

I, the undersigned

WALTER NIEDINGER

do hereby make oath and say that:

1. I am an adult male admitted attorney in terms of the laws of the Republic of South Africa and am the attorney of record acting on behalf of the

Private Prosecutor in the underlying criminal proceedings in the form of a private prosecution which commenced on 15 December 2022 by the service upon the Accused person cited and described as such in the said summons, Mr Cyril Matamela Ramaphosa ("Mr Ramaphosa").

2. The facts contained in this affidavit are, unless the contrary appears from the context or is so stated, within my own knowledge and are true and correct. The facts of which I do not have personal knowledge are to the best of my knowledge and belief both true and correct.

3. I am duly authorised by the applicant/appellant to depose to this affidavit on his behalf.

4. The first respondent is the incorrectly cited President of the Republic of South Africa, whose *locus standi* to bring the interdict appealed against is more fully questioned below. The remainder of the parties are as cited in the court *a quo*.

A: NATURE OF THE APPLICATION

5. This application represents easily one of the saddest chapters in the history of injustice in South Africa. It deals with some of the most fundamental issues which flow into the DNA of South Africa, past, present and future. These include the right to human dignity, access to justice and other rights to victims of crime, on the one hand and the rights to fair trial, personal freedom and "*reputation*" on the part of criminally accused persons. Our justice system generally has long been (wrongly)

accused of favouring (alleged) criminals over and above the victims of crime. That issue also comes into sharp focus in this matter.

6. But perhaps most importantly, this matter also brings into focus, in numerous and shocking examples which are too many to mention here and which will be dealt with during legal argument, the chaos which will rule at the sacrosanct principle of judicial precedent or stare decisis is neglected, misapplied or allowed to be manipulated by litigants or any other person or organ of state. That principle is an incident of the rule of law and one of its most essential component, legal certainty. Without legal certainty chaos and the law of the jungle, premised on the subjective interests of the particular litigant in focus, would rule and not the law.

7. This is then an application for leave to appeal, hopefully on an expeditious basis but without asserting "*urgency*" in the conventional sense, against the ostensibly "*interim*" interdict granted by their Lordships Honourable Sutherland DJP, Molahlehi J and Senyatsi J in the Gauteng Division of the High Court, Johannesburg, in the application brought by the President of the Republic of South Africa (the First Respondent herein) essentially to prevent the physical presence of the Accused at the scheduled appearance which was set down for 19 January 2023 and on subsequence appearance dates until the final determination of Part B (i.e. including all appeals). In respect of 19 January 2023 the order was final and that date has come and gone.

However, it is in respect of the future dates of appearance, starting on 26 May 2023, that this application is of crucial importance.

8. For that reason, this application is being brought alongside a request which will be made to the Chief Justice or the appropriate presiding judicial official, to expedite the hearing of the matter in such a way that the decision of the Court will be available before the next appearance date of 26 May 2023 which was deliberately set far out by me so as to allow for a relatively comfortable period of time to this Honourable Court, without unnecessarily truncating the time of the respondents to file their opposing papers.

9. In this regard the proposed date of hearing, which is obviously subject to the Directors of the Court, has been nominated in such a way as to grant the respondents the full periods allowed in the Rules, while only appealing to the Court to accelerate the date of hearing to at least one month before the next sitting of the ongoing criminal proceedings. In that proposed arrangement, I beg all the indulgence of the Court. It is certainly in the interests of justice that the issue raised in be resolved as soon as humanly possible.

10. It will be demonstrated that practically all the main grounds of appeal raised below represent exceptional and special circumstances which warrant the intervention of the apex court.

11. I further beg leave that this Honourable Court, in the interests of justice, hears the Rule 19 application for leave to appeal simultaneously with the

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merits of the appeal itself as is customarily done in this Court. I stress that these are mere proposals for the indulgence of the Chief Justice in whose sole discretion the issuing of directions is otherwise placed by the applicable Rules. A separate letter begging for such indulgence will be written to the Chief Justice, via the Registrar, and duly copied to all the parties.

12. I am advised that in order to obtain the relief sought in the Notice of Application to which this affidavit is attached and having set out the salient background facts (which I do in section B below), the applicant also bears a duty to satisfy this Court in respect of:-

12.1. its jurisdiction to entertain the matter (see section C below);

12.2. direct appeal and valid reasons for by-passing the Supreme Court of Appeal or "*the SCA*" (section D below);

12.3. appealability of interim orders (section E below); and

12.4. prospects of success (section F below)

12.5. the grounds of appeal (section G); and

12.6. the interests of justice to grant leave (section H below).

13. I am further advised that I am required to furnish this Honourable Court with a copy of the judgment of the court *a quo* against which the appeal is sought. I duly do so by means of Annexure "**CCA1**" hereto.

JMA

14. I therefore deal with these topics starting with a brief outline of the complex and long history of this application.

B: SALIENT FACTUAL BACKGROUND

15. It will be appropriate during legal argument to start the history of this matter at its proper beginning, which is the well-known Zondo Commission of Inquiry into so-called State Capture.

16. It was at the said Commission that the applicant refused to make an appearance based on his genuine belief, which was subsequently ruled to be incorrect and which ruling he has to accept, that he could not be forced to do so when he had instituted parallel proceedings for the judicial review of the decision of Chair of the Commission not to recuse himself in the face of the applicant's allegations of a prior relationship as well as meetings and discussions between the two of them which had taken place in hotels in Durban in the past.

17. The applicant was subsequently sentenced to 15 months imprisonment, as a result of that stance, which was the subsequent subject of a series of three interrelated decisions of this Honourable Court in respect of granting an urgent application compelling him to appear before the Commission in spite of such pending review proceedings, upon failure to do so convicting him of contempt of court and sentencing him to 15 months *in absentia* and finally dismissing his application to rescind the conviction and sentence.

JM

18. He commenced his imprisonment on 7 July 2022 at the Estcourt Correctional Centre in the province of Kwa-Zulu Natal.

19. Due to his advanced age and pre-existing co-morbidities, he soon took seriously ill and was thereafter transferred to a heart clinic in Pretoria where he was admitted until his release on medical parole in October 2022.

20. All the time while he was undergoing physical incarceration, an unrelated trial in which he is an accused person before the Pietermaritzburg High Court, previously and until recently presided over by His Lordship Mr Justice Koen, was proceeding. The next set down date was 10 August 2022.

21. Due to the applicant's ill-health, it became necessary to postpone the scheduled sitting of 10 August 2022 in his physical absence. Due to the peremptory provisions of section 158 of the Criminal Procedure Act[1] ("CPA"), read together with section 159 thereof, as well as the criminal offences imposed in sections 54 and 55 of the CPA, coupled with the refusal of the National Prosecuting Authority ("NPA") prosecutors to acceded to an agreed postponement, my attorney of record in those criminal proceedings emailed or filed an application at 21h07 on 9 August 2021 and the NPA delivered its affidavit at approximately 08h00 on 10 August 2021, having emailed an unsigned version thereof at 11h46 on 9 August 2021. For the record whatever happened on 9 August

[1] No 51 of 977.

2021, it was most certainly not the filing by the NPA of any affidavit if the correct interpretation of the underlined words is to be observed.

22. It transpired that at approximately 16h45 on 9 August 2022 and before any actual filing of any affidavits in court one of the NPA co-prosecutors Mr Breitenbach SC had called a journalist with the News24 network, and disclosed to her the full contents of an unsigned and certainly not yet filed "*affidavit*" to which was annexed a copy of a letter from my lead treating doctor, General Mdutywa, which was marked "*Medical Confidential*" at the very top and which also stated at paragraph 6 thereof:

> "***We further appeal that you treat this information with the confidentiality it deserves***."

23. Putting aside the ethics of disclosing such clearly confidential medical information and irrespective of such confidentiality, the conduct of the prosecutors who participated in the disclosure of the said information (which included both Mr Breitenbach SC and Mr Billy Downer SC) *prima facie* constituted a breach of section 41(6) of the National Prosecuting Act No. 32 of 1998, which provides that:

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

JA

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

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

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

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

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

24. Section 41(7) demonstrates the extreme seriousness with which our law views this crime in that it is punishable by a maximum sentence of 15 years imprisonment. It is no trivial matter.

25. When this matter was then sharply raised at the next appearance in late September 2021, Judge Koen refused to entertain it principally because it was admittedly on raised for the first time in argument simply because it occurred well after the close of pleadings in early July 2021 (which was around the date of the applicant's incarceration). In his judgment in the section 106(1)(h) made several pronouncements which are of immense significance to this application for leave to appeal for different reasons. I

apologise for quoting them in detail but the significance thereof will be more fully dealt with during legal argument.

26. Firstly, Koen J ruled that the issue of a prosecutor's title to prosecute must be assessed at the end of the criminal trial after all the evidence has been led and that it was premature to decide it even after the stage of tendering a plea but before leading evidence. This sentiment (with which I disagree) permeates the entire judgment.

27. In coming to that conclusion Koen J also expressed the view that in interpreting the meaning of the expression "*title to prosecute*" it makes no difference whether the court is dealing with a private prosecution or a public prosecution. To the extent that a private prosecutor clearly and surrogately exercises the public powers of the NPA, *albeit* temporarily, I tend to partly agree with this sentiment.

28. Thirdly Koen J made a definite statement against the use of preliminary litigation . This is so even though I had clearly refrained from the incorrect practice of bringing my challenge in separate civil and motion proceedings. I had advisedly waited until the pleading stage or the commencement of the trial (as opposed to the commencement of the criminal proceedings upon service of the summons) before articulating my challenge. That notwithstanding Koen J saw it fit to lament the dangers of preliminary litigation more particularly when it rears its ugly head in the context of parallel civil proceedings.

29. Last but not least and perhaps must significantly, Koen J had the following to say about the applicant's allegations of criminal conduct on the part of the prosecutors and/or the involved journalist in the form of breaches of section 41(6) of the NPA Act (at paragraph 240 of the judgment):

> "***If it is believed that the provisions of section 41(6) outlaws such conduct, then a formal charge in that regard can be pursued, where the proper application of section 41(6) can be fully ventilated and its proper interpretation determined***".

30. As it actually happened and before the delivery of Koen J's judgment on 26 October 2021, the applicant had also independently indeed laid criminal charges at the Pietermaritzburg High Court. I annex hereto his police complaint affidavit marked "**CCA2**". This had turned out to be an extremely important document in the present proceedings before the criminal court, the civil High Court review proceedings and the present application. It is significant to note that this complaint and the criminal charges were produced and laid even before the applicant knew the outcome of my section 106(1)(h) plea or application. The charges had nothing to do with that outcome. The said charges would have been pursued even if the section 106(1)(h) application had been successful.

31. The document, which speaks for itself, cries out for proper interpretation.

JH

C: JURISDICTION: CONSTITUTIONAL ISSUES RAISED

32. The issues raised in this application are clearly constitutional issues which are matters connected therewith. The parties are *ad idem* on this.

33. At the core of this application is a constitutional right of an aggrieved person, who is denied his right to access the courts by being stripped off his right to prosecute.[2]

34. It is also in the interests of justice that the application be heard, as it concerns important constitutional questions regarding the interpretation and application of the CPA in as far as section 106(1)(h) is concerned, this includes the application of the Constitution, specifically section 35 thereof. All these questions engage the jurisdiction of this Honourable Court.

35. It is thus apparent that substantial constitutional matters are implicated in this matter as well as the Part B main application pending which the interim relief has been sought.

D: DIRECT ACCESS AND VALID REASONS FOR BYPASSING THE SCA

36. As a point of departure, section 167(6)(b) of the Constitution, read with rule 19(2) of the Constitutional Court rules allows a litigant to appeal directly to the Constitutional Court if it is in the interests of justice to do so.

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[2] Nundalal v Director of Public Prosecutions KZN and Others (AR 723/2014) [2015] ZAKZPHC 25 at para [54].

37. The interests of justice relate to the High Court having opened the flood gates of the civil courts in instances where an Accused person seeks avoid appearance in the criminal court.

38. This in itself, tramples on the administration of justice as this matter cannot wait to be exhausted in all the forums while the feared and predictable chaos created by the judgment of the Full Court persists. In other words, every litigant who wishes to challenge, for example the title to prosecute will avoid criminal proceedings on the basis that their right to freedom will be infringed, be it in private of public prosecution.

39. In fact, Koen J dealing with the same principle in a matter where I was on the other side of the fence, in **S v Zuma and Another**[3] held as follows:

> ***"The same principle applies to public prosecutors employed by the State. Section 106(1)(h) draws no distinction between public and other prosecutors (private and statutory). Hence, as a matter of consistent statutory interpretation, viz-a viz public prosecutors, a lack of independence and impartiality would also not amount to a lack of title. The lack of 'title to prosecute', provided for unqualified in s 106(1)(h), cannot, at the level of interpretation, mean a lack of independence and impartiality in respect of one type of prosecutor, that is public prosecutors, but not others, that is private prosecutors."***

[3] 2022 (1) SACR 575 (KZP) at para [49].

JA

40. Accordingly, "*there is no doubt that the right of private prosecution is a matter appertaining generally speaking to the administration of justice*".[4]

41. At this juncture, I pause to mention that this proposition was confirmed by this Court when it dismissed my leave to appeal against that judgment for lack of prospects of success. Should this position change, it is only this Court that can change that status, having indirectly endorsed Koen J's judgment.

42. There is consensus that the issues dealt with herein are urgent and that they relate to weighty matters which deserve speedy resolution. So much so that Deputy Judge President Sutherland took the very unusual step of allocating the matter to a Full Court of Judges, with him Presiding, *mero motu* and without any of the parties having so requested as is usually the norm. This decision was announced 48 hours before the hearing.

43. It is on these basis that this matter is one which deserves to be allowed to bypass the Supreme Court Appeal ("SCA").

44. Based on the above, it is my respectful contention that the prospects of success on appeal are good and that it is in the interests of justice that leave to appeal be granted. This matter raises important issues in respect of the jurisdiction of civil courts over criminal matters, the vital role and application of separation of powers and the Outa test applicability.

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[4] Groenewoud and Colyn v Innesdale Municipality 1915 TPD 413 at page 415.

45. The matter is destined to end up in this Court and in any event it deserves its attention.

E: THE APPEALABILITY OF INTERIM ORDERS

46. Under this heading, I contend, for argument's sake that interim orders are appealable. The operative standard is this regard is '*the interests of justice*'. In consideration thereof the court must have regard to and weigh carefully all germane circumstances, that:

46.1. "***whether an interim order has a final effect, or disposes of a substantial portion of the relief sought in the pending review, is a relevant and important consideration, yet it is not the only or always decisive consideration***";

46.2. "***that it is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable***";

46.3. "***that if appealability would best serve the interests of justice, then the appeal should be proceeded with no matter what the pre-Constitution common law impediments might suggest. This is especially so in a case where an interim order should***

not have been granted in the first place, by reason of failure to meet the requirements."[5]

47. Further reference is made to **United Democratic Movement and another v Lebashe Investment Group (Pty) Ltd and others**[6], that while the general rule is that interim interdicts are not usually appealable, the established questions to be posed when faced with such an appeal are whether it '*is in the interest of justice*', whether '*special circumstances*' exist for a court of appeal to determine whether the interim order has an element of finality which would prejudice the applicant, or whether the interim order has the potential to prejudice a party by preventing it from exercising its rights protected by the Constitution.

48. The Constitutional Court in **City of Tshwane Metropolitan Municipality v Afriforum and Another**[7] where the Constitutional Court emphasised that:

"if appealability or the grant of leave to appeal would best serve the interest of justice, then the appeal should be proceeded with no matter what the pre-Constitution common law impediments may suggest".

49. In confirming the proposition, each case should be looked at in isolation where interim orders are challenged, the Supreme Court of Appeal in

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[5] United Democratic Movement and National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC). City of Tshwane Metropolitan Municipality v Afriforum and Another [2016] ZACC 19; 2016 (9) BCRL 1133 (CC); 2016 (6) SA 279 (CC).

[6] [2021] 2 All SA 90 (SCA) para 4.

[7] para 41.

JM

RTS Industries and Others v Technical Systems (Pty) Ltd and Another[8] held the following in that regard:

> ***"Whether or not an interim order is appealable is fact-specific. This was affirmed in South African Informal Traders Forum v City of Johannesburg, where the Constitutional Court held that when determining whether it is in the best interests of justice to appeal an interim order, the court must have regard to and weigh carefully all relevant circumstances. The factors that are relevant or decisive in a particular instance, will vary from case to case."***

50. Accordingly, I contend that the interests of justice necessitate the hearing of this application. That it involves the private prosecution of the sitting President by his predecessor, the involvement of preliminary litigation and the proliferation of sometimes contradictory authorities all add up to the special and exceptional circumstances and the need to determine the issues arising and bring some finality in the interests of justice.

51. The harm to the constitutional rights of the applicant is irreparable and the actual effect of the order is final in that the prosecution will *ipso facto* be brought to a halt until all Part B appeals have been exhausted.

52. The apparent dichotomy between the legal standing of the President *vis-a-vis* the named accused person cries out for adjudication by this Court.

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[8] (Case No. 145/2021) [2022] ZASCA 64 (5 May 2022) at para 24

F: PROSPECTS OF SUCCESS

53. It is in the interests of justice to grant leave to appeal. The test for the leave to appeal to be granted in matters of this nature, is that of the interests of justice, having regard to the prospects of success and/or compelling reasons.

54. To deal with this issue, we proceed by considering the grounds of appeal so as to demonstrate that the prospects of success are overwhelming since the relevant authorities all point to significant or gross errors and misdirections on the part of the Full Court *a quo*. We do so in turn.

55. The vast majority of the underlying conclusions and utterances made by the Full Court are completely unsustainable both in law and in logic. They cannot withstand the scrutiny of this Honourable Court.

G1: GROUNDS OF APPEAL

56. Upon a proper and holistic evaluation of this matter it will be clear that the first respondent has negligible prospects of success in respect of both Part B and the criminal trial itself. There is more than sufficient *prima facie* evidence to sustain the charges of being an accessory after the fact in the commission of the principal offence.

57. The learned Judges erred in stating that *"there is no substantive distinction between a criminal court and a civil court"* and more

JA

alarmingly that the distinction between the two courts "*is merely an organisational convenience*".

58. The criminal courts are specifically created for criminal matters whilst civil courts are created to adjudicate over civil matters. There is a difference between the two and one court cannot and should not trample on the powers of the other. The reason why Judges wear differently coloured robes in each court carries deep meaning and is not just an organisational convenience. In certain countries, such as England, the criminal courts are even geographically located in separate premises known as The Old Bailey.

59. The mere fact that the civil courts and the criminal courts are governed by two separate and different statutes is sufficient indicative of the vast differences between the two. It is incorrect to ascribe these fundamental difference to mere administrative convenience. The difference is not in the league of that between civil motion court and trial court or opposed motions and unopposed motions.

60. The SCA judgment in **Moyo** is authority that civil courts should not generally be used to determine disputes which are germane in the context of criminal proceedings. It is worth quoting a rhetorical question posed by Justice Wallis JA who penned the majority judgment, paragraph [157], which paragraph reads as follows:

> ***"Why are issues germane only in the context of criminal proceedings being canvassed and determined in civil***

proceedings and not in the constitutionally compliant forum, and in accordance with the constitutionally compliant statute, provided for the adjudication of criminal cases?"

61. The SCA judgment in **Moyo** went further in deprecating the usage of civil courts to resolve disputes well suited for criminal courts as follows:

> *"[167]* ***As a general rule departures from the procedures laid down in the CPA and the effective removal of criminal proceedings to the civil courts should not be countenanced***. (my emphasis)
>
> ....
>
> *[170]* ***All of this conveys to me that the wisdom of Langa ACJ remains pertinent. There are echoes of that in Madlanga J's words in Savoi. The question in every case is one of the interests of justice. In my view the interests of justice in both of these cases demanded that the high court decline to hear them before the resolution of the criminal trials. Like my colleague I deprecate the fact that the trial judge failed to address the point. However, like him, given that the proceedings have reached this stage, I consider it in the interests of justice to deal with the appeal."*** (my emphasis)

JH

62. Any decision premised on the basis that there is no distinction between civil and criminal courts, especially in the context of preliminary litigation is misplaced. Preliminary litigation is frowned upon even if it is carried out in the same criminal court context. A fortiori, it is not to be countenanced in relation to the criminal court and the civil courts.

63. Be that as it may, those cases are, in any event, distinct from this matter insofar as they do not establish the principle in question herein. They are not authority that the title to prosecute can be challenged outside the constitutionally compliant platform through provisions of section 106(1)(h) of the CPA. This formulation also makes it clear that the question of recognising or failing to recognise this crucial distinction is a crucial function. The difference between the fair trial rights enshrined in section 34 to those enshrined in section 35 of the Constitution is, *inter alia*, in recognition of the two systems. Section 34 deals with the rights of the Private Prosecutor to access justice and not to have to resort to self-help even when the NPA has declined to prosecute. Section 35 deals with the fair trial rights of the accused person.

64. With respect, the Court was incorrect in negating the Public Prosecutor's section 34 rights as the court in the well-known judgment of **Nundalal v Director of Public Prosecutions KZN**,[9] which the very same court relies upon, held that:

[9] AR723/2014) [2015] ZAKZPHC 25 (8 May 2015).

> "***... person whose feelings and good name are injured has the right to prosecute privately if he actually suffers an injury***" **and that "*a decision to deny a private prosecutor the right to prosecute should be taken cautiously not least because it implicates the right to access to the court under s 34 of the Constitution*."** (my emphasis)

65. All that is needed from the private prosecutor is to show that he or she has a substantial and peculiar interest and that he "*individually*" suffered some injury as a consequence of the commission of the offence. With respect, the applicant clearly falls under this category.

66. In this connection and regarding the merits, the Full Court completely neglected to take into account the private prosecutor's right and solely focussed on the alleged freedom of movement of the accused, which would have been limited only for 15 to 30 minutes in a situation where that is justified. It is a fundamental mistake to over-exaggerate the rights of accused persons over and above of the victims such as the applicant. At worst a balance must be struck. The Full Court failed to do so even in the context of the balance of convenience requirement.

The distinction between the private and public prosecution

67. The Honourable Justices erred in deciding that where the prosecutor declines to prosecute, it must not be understood to be a delegation of statutory authority to the prosecutor. Further, that "*a private prosecution is properly so called - private not public*". To the extent that this

pronouncement seeks to equate a private prosecution to civil proceedings between two entities, it is incorrect.

68. The right to institute a prosecution is the right vested on the State and is exercised on behalf of the State by the NPA.[10] In turn, section 7 of the CPA confers the very same right to a private prosecutor. This right that is conferred on the private prosecutor is not absolute, it is significantly qualified by, *inter alia*, sections 7, 12 and 13 of the CPA.

69. The right to prosecute is vested in the State. According to section 12 of the CPA **Private prosecution shall be proceeded with in the same manner as if it were prosecution in the instance of the State.**[11]

70. Further:

> ***"Where the prosecution is instituted under section 7 (1) and the accused pleads guilty to the charge, the prosecution shall*** *be* ***continued at the instance of the State."*** [12] (my emphasis)

71. Based on the foregoing, it is clear that the High Court failed to take into consideration the relevant provisions of the CPA which give guidance to conducting private prosecution and clearly regards them not as purely private matters.

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[10] S v de Freitas 1997 (1) SACR 180 (C) at page 183E - F.
[11] section 12(1).
[12] section 12(2).

72. Accordingly, with respect, this major error and gross misdirection by the Honourable Judges is what led to the finding that the OUTA test does not apply to this matter. I deal further with this issue in the succeeding paragraphs because it is also a stand-alone ground of appeal, albeit related to the present one. It is indeed so that some if not all of the grounds of appeal overlap to a significant extent.

The Unlawful and False Media Statement of the NPA

73. The learned Judges erred in giving credence to the biased, unlawful and patently false media statement of the NPA. In deposing to the affidavit, the NPA failed to deal with the circumstances under which the two certificates were granted and their validity. What is more is that the NPA fails to repeat or justify under oath the demonstrably false media statement which was issued to the public. This is so even though it knew that the media statement is one of the core drivers of these proceedings.

74. All what the NPA expresses in its founding affidavit is that it will only be involved in part B and not part A. In the applicant's defence, the Full Court deals with what the NPA refuses to deal with, even though this statement relates directly to them.

75. The stance taken by the NPA is strangely not dealing with direct accusations of bias ought properly to have attracted the assumption that the accusations must stand until disputed.

JH

***Locus standi* preliminary objection**

76. The utterly unsatisfactory manner in which the Full Court dealt with this aspect leaves a lot to be desired and constitute a gross misdirection.

77. The learned Judges erred in ignoring the issue of the applicant's *locus standi* to deal with this matter. The first respondent stated that the person charged and arraigned is Mr Cyril Ramaphosa, in person and not The President of the Republic of South Africa.

78. *Locus standi* is concerned "***the sufficiency and directness of a litigant's interest in proceedings which warrants his or her title to prosecute the claim asserted***"[13] and should have been one of the first things to establish by the applicant. The reality is that the Accused person has been cited, rightly or wrongly, as Mr Ramaphosa and not the President.

79. This Court in the CR17/BOSASA[14] litigation accepted or established the distinction between Mr Ramaphosa as a private individual and the President of South Africa. This distinction cannot now be discarded when it operates against the President but invoked when it works in his favour.

80. The bottom line is that the President does not meet even the liberal test set out in Giant Concerts in respect of own-interest standing. On the

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[13] Groenewald Lubbe Incorporated v Fick (A 278/13) [2013] ZAGPPHC 479 (3 December 2013).
[14] Public Protector v President of the Republic of South Africa 2021 (6) SA 37 (CC) at paragraphs [103] to [109]

JKP

other hand there is no reliance placed on public interest standing in terms of section 38(d) of the Constitution.

Overbroad Interim Relief

81. The learned Judges erred in granting the applicant relief in respect of 6 June 2022 *nolle prosequi* certificate which the applicant had specifically not sought and without any amendment or raising the issue for argument.

82. The applicant in his notice of motion sought a relief foreshadowed as follows:

> "***1. The application is heard as one of urgency and the ordinary forms and service provided for in the Uniform Rules of Court are dispensed with in line with Rule 6(12).***
>
> ***2. Pending the final determination of Part B of this application:***
>
> ***2.1. the respondents are interdicted from taking any further steps to give effect to the nolle prosequi certificate of 21 November 2022 ("the certificate") and/or the summonses issued by the Registrar on 15 and 21 December 2022 ("the summons"), or to pursue the private prosecution under case number: 059772/2022 ("the private prosecution"), against the applicant in any way;***

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2.2. the applicant is excused from appearing before this Court on 19 January 2023 or on any other date pursuant to the certificate and/or the summons.

3. The costs of this application are to be paid by the first respondent, alternatively his legal representatives, and any other respondent that opposes the application, on an attorney and own-client scale, such costs to include the costs of two counsel.

4. Further and/or alternative relief."

83. This issue is inextricably linked to the Rule 7 objection raised in respect of the authority of the State Attorney to represent the applicant. This issue like the *locus standi* point, was unduly brushed aside by the Full Court.

84. Save to mention that during argument, counsel for the first respondent, the applicant in the High Court stated that prayer 2.1 relates to the applicant only, the first respondent in the High Court. From the reading of the notice of motion, it is clear from the literal and clear reading thereof that the relief sought is one which interdicts and restrains all the respondents. No amendment was formally or even informally moved. This has implications on other related issues such as the applicability of the OUTA test.

JA

85. It is trite in our law that an applicant in application proceedings must make out his or her case in the founding papers and should not be allowed to make out a case elsewhere, even in his reply. An applicant must stand and fall by his or her founding affidavit. The founding affidavit must contain sufficient facts upon which a court may find in the applicant's favour.[15]

86. Accordingly, the intervention by the court was inappropriate, and effectively resulted in a new case being put up on behalf of the applicant at the instance of the court itself.

87. The Supreme Court of Appeal in the matter of **National Commissioner of Police and Another v Gun Owners of South Africa**[16] where the Appeal Court dealt with the amendment of the relief claimed at the instance of a Court *a quo* as follows:

> "***Counsel for the appellants submitted that this intervention by Prinsloo J was inappropriate, and effectively resulted in a new case for GOSA, put up at the instance of court itself. In my view, the submission has merit for two related reasons. The first is that there is a real risk that judicial intervention of the kind in question, may render the court susceptible to an accusation of bias. It is a fundamental tenet of the administration of justice, now subsumed under the***

[15] Director of Hospital Services v Misty 1979 (1) SA 626 (AD) at 635H-636D. See also, Swissborough Diamond Mines v Government of the Republic of South Africa and others 1999 (2) SA 279 (T) at 317E-G.

[16] (561//2019) [2020] ZASCA 88; [2020] (23 July 2020) at para 25. See also, para 26.

Constitution[17] that all those who appear before our courts are treated fairly and that Judges act – and are seen to act – fairly and impartially throughout the proceedings".

88. The second reason by the SCA in the **National Commissioner** judgment at paragraph 26 was put as follows:

> "***The second reason is that in our adversarial system of litigation, a court is required to determine a dispute as set out in the affidavits (or oral evidence) of the parties to the litigation. It is a core principle of this system that the Judge remains neutral and aloof from the fray. This Court has, on more than one occasion, emphasised that the adjudication of a case is confined to the issues before a court.***
>
> ***'[I]t is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for "it is impermissible for a party to rely on a constitutional complaint that was not pleaded". There are cases where the parties may expand those issues by the way in which they***

[17] Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before court or, where appropriate, another independent and impartial tribunal or forum.

conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone."

89. It is also instructive that the first respondent sought relief to interdict the commencement of the criminal proceedings which indicates that his position was that the proceedings had not yet commenced despite the service of the summons. A few months beforehand the same party was seeking to convince this same Court that proceedings against the Public Protector had indeed commenced even before her being notified of the date of the hearing, the appointment of Evidence Leaders or the finalisation of Terms of Reference. It should not be easy for the same organ of state to assert such contradictory positions of the law to the same forum depending on where they stand in particular proceedings. This kind of conduct is calculated to bring the administration of justice and the judiciary into disrepute. It should be discouraged by, *inter alia*, punitive costs.

90. Accordingly, the relief afforded to the applicant by the High Court amounts to relief which is revealing of unsustainable contradictions and deception.

G2: FURTHER GROUND BASED ON THE MERITS: THE ERRONEOUS EVALUATION OF THE REQUIREMENTS OF INTERIM INTERDICTS

Alternative Remedy

91. The learned Judges erred in holding that the first respondent does not have any alternative remedy. On the contrary, there are a plethora of remedies available to the accused.

92. This reliance by the Full Bench is misplaced. The cases in **Nedcor** and **Nundalal** hold a contrary view in that they state that a challenge of the title to prosecute is usually raised through a special plea in terms of section 106 (1) (h). This section therefore clearly presents an alternative, if not preferable, remedy.

93. The first respondent could also have brought urgent review proceedings without seeking interim relief, as he has done in respect of the well-known challenge to the Phalaphala Independent Panel report in this same court.

Balance of convenience / OUTA test applicability: Does OUTA apply or not?

94. The learned judges erred in failing to conduct a proper balance of convenience test by specifically excluding the considerations espoused in OUTA.

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95. The distinction between private and public prosecutions is overstated and does not accord with the legislative text and case law that have interpreted the legislative text.

96. As stated above, just like the NPA, the private prosecutor prosecutes on behalf of the State provided that the requirements in section 7 of the CPA are met. Once this hurdle is passed, the private prosecutor prosecutes the matter as if it is being prosecuted by the State. Specifically, the private prosecutor does not have untrammelled powers in respect of the prosecution. The NPA reserved its right to take over the prosecution at any time. This is a clear indication that the prosecution, despite it being prosecuted privately, still proceedings belonging to the State.

97. Once the above proposition is accepted; it follows that that OUTA considerations on balance of convenience are applicable. Unfortunately, the Full Court failed to appreciate this.

98. The Full Court would have reached a different conclusion had it applied the OUTA test having regard to the separation of powers principle, properly applied.

99. Besides the failure to take the OUTA test into consideration, the full bench erred in finding that the private prosecutor suffers no harm as compared to the overstated 30 minutes right to freedom harm to be suffered by the accused. What this finding does is to elevate the 30 minutes right to freedom harm over harm to the administration of justice, which harm also implicates section 34 of the Constitution.

100. Extending the above differentiation between the private and public prosecution, the learned Judges erred in finding that in this matter, the OUTA test on interim interdicts does not apply. The fundamental error made by the Judges in this regard is to seek to isolate/detach the issue of public and private prosecutions as not related.

101. This Court, in the judgment of **Du Plessis v De Klerk**[18], remarked, with respect correctly, that:-

> ***"Whether a private prosecutor is exercising a governmental power is a point which need not now be decided. It may be argued that the private prosecutor is not vindicating a private right, but is invoking the power of the state to punish crime. Sections 12 and 13 of the Criminal Procedure Act 51 of 1977 reflect the state's continuing interest in a private prosecution."*** (my emphasis)

102. Section 12(1) of the CPA provides that:-

> ***"A private prosecution shall, subject to the provisions of this Act, be proceeded with in the same manner as if it were a prosecution at the instance of the State ..."***

103. Section 13 of the CPA provides that:-

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[18] 1996 BCLR 658 (CC) at footnote 87.

> "***An attorney-general or local public prosecutor acting on the instructions of the attorney-general, may in respect of any private prosecution apply by motion to the court before which the private prosecution is pending to stop all further proceedings in the case in order that a prosecution of the offence in question may be instituted or, as the case may be, continued at the instance of the State, and the court shall make such an order.***"

104. To equate the criminal proceedings described in these sections to private or civil proceedings is a serious misconception and gross misdirection. Section 13 of the CPA is also consistent with the sentiment that the proceedings should be contained to the court before which the private prosecution is pending, that is, the criminal court.

105. In **S v De Freitas**[19] (*supra*), the Court emphasised the fact that the exercising of the right to prosecute is a right vested in the State and is essentially delegated to a private prosecutor by the State:

> ***"[T]he right to institute a prosecution which is the right which lapses, is a right which vests in the State ... and is a right which is exercised on behalf of the State by the Attorney-General [DPP]. Where the Attorney-General [DPP] declines to prosecute and issues a certificate nolle prosequi and where certain other requirements are present an interested***

[19] At page 184

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> ***member of the public is entitled to bring a private prosecution. <u>The primary right, however, to prosecute is that of the State and at best the citizens with an interest have a spes which will only be realised in the event of the Attorney-General [DPP] declining to prosecute</u>.*** " (my emphasis)

106. It is not clear from the Full Court judgment in which way is the OUTA test not applicable to this specific matter more especially when the thrust of these authorities is taken into account.

107. Accordingly, it is submitted, that based on the above authorities and any purposive interpretation of, *inter alia*, sections 12 and 13 of the CPA, the prosecution of criminal proceedings by a private prosecution is nothing but the (indirect) exercise of State powers conferred on him or her by the relevant legislation. As such, OUTA finds application in this matter in practically the same way as it would if what was being interdicted was a public prosecution.

108. The same conclusion may be reached by approaching the question slightly differently: In terms of sections 54 and 55 of the CPA, the failure of an accused person to attend criminal proceedings constitutes a criminal offence. If the law insists that certain stringent and onerous new hurdles must be placed against an applicant who seeks to restrict the exercise of statutory or constitutional powers in the civil or "*horizontal*" setting then how much more when the interdict sought authorise the commission of a criminal offence, as in the present matter. Not only must

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the OUTA test logically apply but there may be room to argue for a stronger or "*double*" OUTA test.

109. The Learned Judges most certainly committed a gross misdirection in the finding that the matter could ever possibly be a candidate to be determined by the sheer application of the Setlogelo test. The court then went on to adjudicate the matter on that patently erroneous basis and the incorrect test.

110. Thirdly and finally and even if it could somehow be accepted that the OUTA test did not apply to the relief sought against the private prosecutor, which is still denied, there can be no doubt that the test applies to the interim interdict(s) directed at the Director of Public Prosecutions and the Registrar of the Court. To the extent that the relief was indivisibly sought against all those respondents, it would be disingenuous and an unacceptable splitting of hairs to argue for the inapplicability of the OUTA test to this particular matter.

111. Since the first respondent did not even plead OUTA, it would have been obvious that he could not have possibly met its requirements. The only way in which that glaring omission could have been remedied was by holding that OUTA does not apply. It clearly does.

G3: <u>OTHER MISCELLANEOUS GROUNDS OF APPEAL</u>

112. The Full Court made yet another startling and incorrect statement to the effect that holding state officials criminally liable for failing or omitting to

perform their duties, dubbing that idea "both novel and radical with extremely wide-ranging implications for the entire state apparatus. This is plainly not so. If it was the work of the entire so-called Zondo Commission or the Marikana Commission would go to waste because no state official could be prosecuted for their commissions or omissions for fear of collapsing the state apparatus. The simple principle is of course that state official's criminal liability for omissions is governed by the presence of a legal duty to act and the legal convictions of the community as was tritely established in **Ewels**.[20]

113. The Full Court also mysteriously granted relief relating to the *nolle prosequi* certificate of 6 June 2022 while no relief in that regard was sought by the first respondent. This seemingly innocuous error had the most far-reaching implications in that it allowed the first respondent to escape the obligation to appear in court on the basis of the earlier certificate irrespective of the status of the second clarificatory certificate.

114. The Full Court went as far as suggesting that an accessory after the fact could escape liability on the basis that the principal offence was committed on an earlier date. However this sequence forms part of the definitional requirements for accessory liability.

H: THE INTERESTS OF JUSTICE

115. Even purely based on some of the most startling pronouncements made by the Learned Judges, such as those dealing with private prosecutions,

[20] Minister van Polisie v Ewels 1975 (3) SA 590 (A)

civil versus criminal courts, liability of officials, it is in the interest of justice, considering the fact that there are compelling reasons that exists in this matter.

116. The matter raises an important question of law and/or a discrete issue of public importance that will have an effect on future disputes. Specifically, this Court would have to clarify and provide certainty as to whether or not an accused person can just approach the civil court whimsically with the aim of interdicting incomplete and/or pending criminal proceedings. It matters not whether the proceedings are at the insistence of the NPA or a Private Prosecutor. The prosecution essentially belongs to the State, despite the revocable "*delegation*" thereof to the prosecutor.

117. The Full Court has created the totally incorrect impression that a private prosecution is purely a private matter despite the fact that the NPA preserves its power to take the case at any point or when the accused has been found guilty.

118. The Full Court's judgment has created a new legal regime that conflicts with the *Moyo* jurisprudence that says a civil court should generally not countenance entertaining matters which should ordinarily be determined by a trial court. The interest of justice would be offended if the Full Court's finding that there is not difference between a civil and criminal court is not judicially scrutinised by this Court.

119. Furthermore, the conflict created by the various Full Court judgment, referred to in this affidavit and the suspect reliance by the Full Court on

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dated precedence should finally be resolved in order to create certainty with regard to the competency of a civil court in a private prosecution to deal with the merits of the case. In other words, can a civil court in a private prosecution pronounce on the merits that should ordinarily be resolved in a criminal trial court?

120. The conflict created by the above judgments i.e Full Court's judgment and other decisions such as **Van Deventer**[21], **Nundalal** (supra) and **Nedcor**[22] judgments can be summarised as follows:

120.1. The cases in **Nundalal** and **Nedcor** held, in no uncertain terms, that an accused person who, in a private prosecution, wishes to challenge the title of the prosecutor should invoke the provisions of section 106 (1) (h) of the CPA, which in the words of the **Moyo** case is the Constitutional compliant provision which should be raised in the criminal trial court.

120.2. In the **Nedcor** case, which was decided after the **Van Deventer**'s case, the court was faced with the same prayers as was sought by the first respondent as applicant in the High Court, as follows:

"Prayer 1 -The first respondent lacks the requisite locus standi to prosecute;

[21] Van Deventer v Reichenberg 1996 (1) SACR 119 (C)
[22] Nedcor Bank v Gcilitshana 2004 (1) SA 232 (SECLD)

Prayer 2 - The summons commencing the proceedings is invalid for want of compliance with section 10 of Act the CPA;

Prayer 3 -There is no prospect of success on the first respondent's own version of events, of any court convicting him;

Prayer 4 - The institution of the private prosecution is actuated by mala fides on the part of the first respondent, and/or his representatives;

Prayer 5 - The prosecution was initiated with an ulterior motive to oppress and harass the applicants rather than to secure criminal justice."

120.3. In its wisdom, the court in **Nedcor** refused to entertain prayers 1 to 3 in the following terms:

"The points taken in subparas 4.1, 4.2 and 4.3 relate to the merits of the prosecution. It must be clearly stated, however, at the outset that this Court does not have the power to usurp the functions of the magistrate. For example, the challenge to the prosecutor's title should properly be raised in the magistrate's court by way of plea in terms of s 106(1)(h) of the Criminal Procedure Act 51 of 1977." (my emphasis)

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120.4. On the contrary, the Full Court's judgment and ***Van* Deventer** held a different view. The view supported by these cases is that an accused person can raise the title to prosecute challenge in a civil court and completely avoid section 106 (1)(h) of the CPA vehicle. This is an absolute conundrum in our law which requires some definitive pronouncement by this Honourable Court.

121. It should also be noted that the Full Court erred in overemphasising that the **Van Deventer** case was decided to post the adoption of the Constitution. This is very important in deciding whether the powers excised by a private prosecutor are purely private powers, having regard to section 179 of the Constitution, read with section 7 of the CPA. Of course, one also has to consider the dicta in various decisions including, Koen J's judgment, amongst others, where it is was strongly suggested that the private prosecutor exercises public power in a private prosecution. The bigger point is that all these cases confirm that section 106(1)(h) of the CPA represents at worst an adequate alternative remedy and at worst the preferred method of raising a special plea or preliminary objection in a criminal case.

122. Most importantly we now have a unique situation in our hands where the High Courts in three Divisions have expressed themselves differently on the key questions of preliminary litigation, brought either in the civil or criminal courts, the relationship between private and public prosecutions, the role of the private prosecutors rights in terms of section 34, the capacity of the President acting officially or personally and many other

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contradictions which compromise both stare decisis and the rule of law. Such decisions include the present decision, **S v Zuma** (supra) in the KZN Division, **Mokhesi v S**[23] in the Free State; **Nundalal** (KZN) and the **CR17 / BOSASA** referred to above[24] **President of the Republic of South Africa v Public Protector**[25] in this Honourable Court.

123. The Full Court's unqualified reliance on the 1950 old Transvaal case of **Solomon**[26], which has been repeatedly overruled in respect of the relevant of ulterior motives in the modern era, also constitutes a gross misdirection which must be addressed in the interests of justice.

124. Even if **Solomon**'s case was indeed still good law, which is doubtful to prefer it over and above the contrary view as expressed by the SCA is totally wrong and it undermines the principle of *stare decisis*.

125. Purely as an illustration of the likelihood of the floodgates of similarly frivolous claims for exemption from appearance in the criminal courts, I attach hereto marked "**CCA3**" and "**CCA4**" respectively, correspondence from the attorneys of Ms Maughan who is accused 2 in the related Pietermaritzburg High Court criminal matter and the response from Ntanga Nkuhlu Incorporated. In the exchange it will be noticed that the accused person in that case wasted no time in seeking to rely, opportunistically, on the precedent unfortunately created in the present matter.

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[23] 2022 (2) SACR 326 (FB)

[24]

[25] Public Protector v President of the RSA (supra)

[26] Solomon v Magistrate, Pretoria and Another 1950 (3) SA 603 (T)

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126. The overall situation presented by this matter cries out for the definitive voice of this Honourable Court on these highly contentious issues and hopefully well before the next date of appearance on 26 May 2023 and also before such interim interdicts become the norm in the hands of well-resourced criminally accused persons, as correctly observed and warned by Wallis JA in **Moyo**.

WHEREFORE I pray for an order in terms of the Notice of Application to which this affidavit is attached.

DEPONENT

I HEREBY CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was **SIGNED AND SWORN TO** before me at Pretoria on this the 6th day of **FEBRUARY 2023**, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

SOUTH AFRICAN POLICE SERVICE
GARSFONTEIN
2023 -02- 06
COMMUNITY SERVICE CENTRE
SUID-AFRIKAANSE POLISIEDIENS

"CCA1"

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

CASE NUMBER: 062027-2022

DATE OF HEARING: 12 January 2022

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: (YES)	
(2) OF INTEREST TO OTHER JUDGES: (YES)	
2023/1/16.	
DATE	SIGNATURE

In the matter between:

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**Applicant**
and	
JACOB GEDLEYIHLEKISA ZUMA	**First Respondent**
THE DIRECTOR OF PUBLIC PROSECUTION, KWAZULU NATAL	**Second Respondent**
NATIONAL PROSECUTING AUTHORITY	**Third Respondent**
THE REGISTRAR OF THE HIGH COURT; SOUTH AFRICA, GAUTENG LOCAL DIVISION, JOHANNESBURG	**Fourth Respondent**

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Delivery: This judgment has been delivered orally on 16 January 2023 in court and was thereafter uploaded to court online, and further communicated to the parties by email.

JUDGMENT

Summary: Urgent application – Part A and B. Part A concerns an interim interdict, pending the outcome of the hearing in Part B. Application to interdict the respondents from proceeding with a private prosecution set down to commence on less than a week from the hearing of the urgent application. Applicant accused of either being guilty as an accessory after the fact to a crime allegedly committed by the Public Prosecutor and a journalist in publicising the medical record of the respondent in contravention of section 41(6) of the Criminal Procedure Act or defeating the ends of justice. Respondent complaining that in publicising his medical record his dignity, privacy and bodily integrity and security were compromised.

Part A focused on whether the applicant has established urgency, *prima facie* right, absence of alternative appropriate effective relief, and balance of convenience in favour of the applicant.

Jurisdiction – the respondent contended that it is inappropriate for a civil court to entertain an issue that is already before a criminal court. The court rejected the proposition and found that there is clear authority that a party charged by a private prosecutor may approach and seek a relief to protect his or her rights in the civil court.

Private prosecution- The principles governing private persecution and the requirements for a *nolle prosecui* certificate as contemplated in section 17 (2) of the CPA considered.

Interim interdict-The requirements of an interim interdict considered and applied.

Urgency- The matter regarded as urgent and thus the relief sought in the notice of motion granted.

The Court (Sutherland DJP, Molahlehi J and Senyatsi J)

[1] This is an urgent application for an interim interdict pending a decision in a hearing on the main controversy. That main controversy, stripped of the details, is about whether the first respondent, Mr Zuma, the ex-president of the Republic, has title to

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bring a criminal prosecution against the applicant, Mr Ramaphosa who is the incumbent President of the Republic. (The other respondents are the Director of Public Prosecutions, Kwazulu-Natal and the National Prosecuting Authority who are referred by such names. Mr Zuma shall be referred to as the respondent) The interim interdict is sought to suspend any further steps being taken to continue with the private prosecution, including the requirement that the applicant is compelled to appear before a criminal court on 19 January 2023, less than a week away.

[2] The charge alleged by the respondent against the applicant is that he is either guilty as an accessory after the fact to a crime committed by Adv Downer SC and a journalist, Ms Maughan, or of obstructing the course of justice by facilitating them evading justice. Adv Downer and Ms Maughan are alleged to have contravened section 41(6) of the National Prosecuting Authority Act 32 of 1998 (NPA Act) by publishing confidential information about the respondent's medical history. They have been charged accordingly, at the instance of the respondent, qua private prosecutor, but that trial has not yet begun. The respondent had made a demand, dated 18 August 2021, that the applicant cause an urgent enquiry to be instituted into alleged prosecutorial misconduct by Adv Downer in which conduct he had allegedly connived with Ms Maugham to publish confidential information. The applicant's conduct, which allegedly constitutes the *actus reus* of the crimes he supposedly committed, is that from 21 August 2021 the applicant by omission or commission enabled the principal perpetrators to evade liability for the crime of contravening section 41(6) of the NPA Act which, in turn, injured the dignity, privacy, bodily integrity and security of the respondent.

[3] This court is not, at this time, called upon to pronounce on the merits or demerits of the contending views on that question. The relief sought is in accordance with the practice of this court divided into parts A and B. The Main case is addressed in the relief sought in Part B. It is part A which is before us at this time in which the pertinent issues are, straightforwardly, whether a case is made out to interdict the further proceedings in the envisaged private prosecution pending a decision on that question in an orderly hearing in part B, to be set down in due course. Nothing which is stated in this judgment is intended to prejudge the outcome of the hearing in the main controversy.

[4] The five elements of the relief sought are plain: urgency, a prima facie right, albeit open to some doubt, harm, the absence of alternative appropriate effective relief and the balance of convenience favouring the applicant. The law on these elements is trite and require no elaboration.

[5] In addition, the jurisdiction of this court to consider the relief at all is questioned. The debate on that point ventilated two rival propositions. The respondent contends that the court has no jurisdiction because it is inappropriate that a civil court addresses an issue which is before the criminal court. The argument was advanced that if the applicant wishes to challenge the title of the respondent to bring a private prosecution, he should raise that point in the criminal trial court on 19 January 2023. Section 106 (h) of the Criminal Procedure Act 51 of 1977, (CPA) specifically mentions that a plea of no title by a private prosecutor can be pleaded. It is contended that this explicit remedy in the CPA, is part and parcel of the scheme of the division between the civil

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process and the criminal process and a clear distinction should be maintained between them. Moreover, we were reminded that the courts have a well-established aversion to litigious challenges to the process of court ostensibly to paralyse the progress of a given case in what has come to known under the rubric of the Stalingrad defence. Further, we were directed to the remarks of Wallis JA in the *Moyo and Sonti case (Moyo v Minister of Justice and Constitutional Development & Others; Sonti v Minister of Justice and Constitutional Development & Others 2018 (8) BCLR 972 (SCA) at para [157];* we emphasize the critical text:

> 'In section 35 the Constitution guarantees a range of rights to arrested, detained and accused persons. Section 35(3) guarantees to all accused persons the right to a fair trial. That is secured in practice by the provisions of the Criminal Procedure Act 51 of 1977 (the "CPA"). The appellants do not seek to impugn the provisions of the CPA in any way, yet they are seeking to assert their fair trial rights before a civil court. That should give pause for thought. Why are issues germane only in the context of criminal proceedings being canvassed and determined in civil proceedings and not in the constitutionally compliant forum, and in accordance with the constitutionally compliant statute, provided for the adjudication of criminal cases?'

[6] On the other hand, there is clear authority for contrary proposition that a party who is charged by a private prosecutor may indeed approach a civil court for relief as is sought in this case. *Solomon v Magistrate, Pretoria 1950 (3) SA 603 (T) at 607* is the first of several decisions cited to us which indicate that to be so. After having considered the contention, the court in *Solomon* addressed the proposition at pp 606 – 608. We emphasise the critical passages:

> "[counsel] maintained that under these provisions the grounds upon which this application was based were left to the determination of the Court in which the prosecution was laid, and fell to be decided in that Court after the hearing of evidence. The provisions referred to were intended to be exhaustive and they excluded the jurisdiction of this Court to intervene. I was unable to agree to this view, and accordingly overruled the preliminary objection, for these reasons -

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I can find in the sections relied upon no evidence that the provisions relating to the costs of unfounded and vexatious prosecutions or the title of the prosecutor to bring the proceedings, were intended by the Legislature to be exhaustive and to exclude any right to invoke the assistance of the Supreme Court, as the applicant now does. Mr. *Retief* maintained (I think in support of his contention that the provisions referred to were exhaustive) that under secs. 17 and 18 of the Act the private party who had obtained the *Attorney-General's* certificate was given an absolute right to prosecute, of which he could not be deprived by the Court. No doubt the sections referred to do bestow a right to prosecute, subject to the necessary conditions, but I cannot take the view that that fact excludes the jurisdiction of the Court to interfere on proper cause. If Mr. *Retief's* contention were correct, this Court would have no power to intervene even though it were shown in the clearest possible manner that the party who had instituted the private prosecution had no interest whatever in the outcome of the trial and had embarked upon it for some ulterior motive, such for example as to prevent a business competitor from leaving the country on his lawful business, or to delay him in so doing. In such a case, if the prosecution were launched in a superior Court, I do not consider that it could be held that the remedies provided in the sections of the Act to which Mr. *Retief* referred were exhausted. The taking out of the summons would clearly be an abuse of the process of the Court, in that it had been undertaken not with the object of having justice done to a wrongdoer, but in order to enable the prosecutor to harrass the accused or fraudulently to defeat his rights (see *King v Henderson* (1898, A.C. 720); cf. *Berman v Brimacombe* (1925 TPD 548)). The process of the Court, provided for a particular purpose, would be used not for that purpose, but for the achievement of a totally different object, namely for the oppression of an adversary. The Court has an inherent power to prevent abuse of its process by frivolous or vexatious proceedings (*Western Assurance Co v Caldwell's Trustee* (1918 AD 262); *Corderoy v Union Government* (1918 AD 512 at p. 517); *Hudson v Hudson and Another* (1927 AD 259 at p. 267)), and though this power is usually asserted in connection with civil proceedings it exists, in my view, equally where the process abused is that provided for in the conduct of a private prosecution. In such a case as I have postulated, therefore, this Court would in my opinion by virtue of its inherent power be entitled to set aside a criminal summons issued by its own officials or to interdict further proceedings upon it. It is also by virtue of its inherent power that the Court interferes to restrain illegalities in inferior courts either by way of interdict or *mandamus* or by declaratory order, as it has on occasion done (see, e.g., *Rex v Boon* (1912 TPD 1136); *Schlosberg* v *Attorney-General* (1936, W.L.D. 59); *cf. Joseph Baynes, Ltd v Minister of Justice* (1926 TPD 390), *per* STRATFORD, J., at p. 398; *Rascher v Minister of Justice* (1930 TPD 810)). I have no doubt whatever that in a similar case the Court would have power to stop a private prosecution in an inferior court.

Mr. *Retief* referred me to *Rex v Diab* (1924 TPD 337 at p. 341), in which MASON, J.P., said that the right and duty of prosecution was absolutely under the control and management of the *Attorney-General* and, so long as he complied with the provisions of the law with reference to prosecutions and trials the Court was not entitled to interfere. He argued that similarly a private prosecution was absolutely under the control and management of the private prosecutor and that the Court could not intervene. The case of the private prosecutor is, however, different from that of the *Attorney-General*, in that the title of the former to prosecute is conditional upon his possession of such an interest as is described in the Act, and the Court is therefore entitled to inquire into the question whether he has such an interest or not."

[7] Since then the proposition has been affirmed in the Constitutional era in *Van Deventer v Reichenberg 1996 (1) SACR 119(C), Nedcor Bank Ltd v Geiltshana 2004 (1) SA 232*

JM

(SECLD) and in *Nundalal v DPP, KZN [2015] ZAKZPHC 25 (8 May 2015).* It therefore plain that, upon such authority, section 106(h) of the CPA cannot be construed to be the exclusive route by which a person aggrieved by a private prosecution can challenge the title of the private prosecutor. Moreover, the proposition advanced about avoiding cross contamination between the civil courts and civil process and the criminal courts and criminal process is overstated. In truth there is no substantive distinction between a criminal court and a civil court – there is only one court and the streaming of criminal cases and of civil cases to different judges is merely an organisational convenience. There are no distinct jurisdictional competences. Ancillary thereto it follows that the process of such a court is also seamless. No question can arise of a trespass into the work of another court with a distinct jurisdiction. It is these respects that the present case does not evoke the suspicion posed by Wallis JA in the *Moyo and Sonti Case.*

[8] Accordingly, to sum up, the notion that the only route of relief a party can invoke to contest the title of a private prosecutor is to raise the question of title as a plea as mentioned in section 106 (h) of the CPA is misconceived. In any event the very appearance of the applicant before the criminal court is what is sought to be prevented by the relief sought in this urgent application, premised on the contention that to appear in the criminal court per se, would be to submit to an unlawful intrusion on the rights to freedom of the applicant, if the private prosecution is unlawful for want of proper authority.

[9] Herein lies also the key factor that demonstrates the urgency relied upon in this matter. The trial date is 19 January 2023, less than a week away. There were other

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grounds of urgency relied upon initially, but one alone is sufficient. It is axiomatic that if the aim is to avoid having to appear, even if merely for a formal postponement, the matter before this court is urgent. To reiterate, the nub of the applicant's case is that to submit to the summons is a violation of his rights to freedom because it is an unlawful summons issued by a person without title to prosecute privately.

[10] It is alleged that the urgency is self-created but the premise for that contention is specious to say the least. The papers detail the progress of the parties' exchanges from the moment the summons was served. First there was an exchange about a defective summons. The respondent denies the defect but chose, in any effect, on 21 December 2022 to file a further Summons attaching the *nolle prosecui* he relies upon, this act being described by him as 'supplementary'. This matter was enrolled for hearing on 10 January 2023 - 20 calendar days thereafter. There are no grounds for criticism evidenced at all.

[11] The critical question for decision is whether there is an apparent right, even if only prima facie, that is threatened. Again there is a plethora of contentions in this regard. However, again, shorn of the details and nuances in these over-lengthy papers, the prima facie right which is shown is straightforward.

[12] In our legal system the only agent that can lawfully bring a criminal prosecution is the state. The NPA is the organ of state that manages prosecutions. There is an exception to that exclusivity. In a specific instance when the state declines to prosecute a party against whom an aggrieved person has lodged a complaint with the police, a

certificate may be obtained from the NPA to open the door to a private prosecution by a person who can show that they were harmed by the commission of the alleged crime alleged in the police complaint. That certificate is usually known by its Latin sobriquet, a *Nolle Prosecui*. The process is closely regulated by section 7 of the CPA. The relevant portion reads thus; we emphasise the critical provisions:

> "Private prosecution on certificate *nolle prosequi*
>
> (1) In any case in which a Director of Public Prosecutions declines to prosecute for an alleged offence-
> (a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence;
> .....
> may....institute and conduct a prosecution in respect of such offence....
>
> (2) *(a)* No private prosecutor under this section shall obtain the process of any court for summoning any person to answer any charge unless such private prosecutor produces to the officer authorized by law to issue such process a certificate signed by the attorney-general that he has seen the statements or affidavits on which the charge is based and that he declines to prosecute at the instance of the State.
> *(b)* The attorney-general shall, in any case in which he declines to prosecute, at the request of the person intending to prosecute, grant the certificate referred to in paragraph *(a)*.
> *(c)* A certificate issued under this subsection shall lapse unless proceedings in respect of the offence in question are instituted by the issue of the process referred to in paragraph *(a)* within three months of the date of the certificate.
> *(d)* ....."

[13] Accordingly, the authority to conduct a private prosecution is one granted to a private person within the four corners of the *nolle prosecui*. No person is required to subordinate themselves to a private prosecution except where the state has issued a valid *nolle prosecui* which relates to a crime allegedly committed by that person. A person who, in the absence of a *nolle prosecui* relevant to a given person, issues a summons to bring that person before a criminal court, violates that person's rights to personal freedom. There may be several other respects in which such a person's other

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rights may be further violated, but key to any expression of any relevant right being violated by an unlawful private prosecution is that of personal freedom, which is a right guaranteed by our constitution and implicated in sections 9, 10 and 12 of the constitution. These sections guarantee equality, dignity and freedom and security of the person. Further, part of the argument advanced by the applicant also invokes the right to just administrative action as dealt with in section 33 of the Constitution, as shall be alluded to hereafter.

[14] In this case the title of the respondent to bring a private prosecution against the applicant is challenged on a number of grounds. The critical proposition is that the *nolle prosecui* upon which the respondent relies is either inapplicable to the applicant, or, is unlawful if it can be properly construed to indeed be applicable to the applicant. Some of the legal issues raised are novel. We list the issues which a court in due course shall have to decide.

14.1 Does the text of the *nolle prosecui*, properly interpreted, relate to the applicant?

14.2 Is the text too vague to be a valid certificate? It is contended that a *nolle prosecui* should name the persons who the NPA decided not to prosecute in order to be valid. On the papers two *nolle prosecui* were issued. The first named Adv Downer. Upon demand to the NPA by the respondent who wished to also charge Ms Maughan, a revised document was issued omitting his name and stating "any person." Whether a revision in this form is proper must be decided.

JM

14.3 It is claimed that because the charge levelled, as an accessory after the fact or of obstructing the course of justice is a crime that could be committed only after the principal crime had occurred and the *nolle prosecui* refers only to the *date* of the principal crime, ergo, the *nolle prosecui* could not have contemplated the applicant.

14.4 The author of the *nolle prosecui*, the NPA, has denied, for what that is worth, that it related to the applicant. Whether what the author states is relevant or admissible is itself contested. The NPA are yet to answer fully and it has indicated it shall do in relation to Part B of the relief sought.

14.5 The question of whether the *nolle prosecui* can be interpreted to include the applicant depends in part on whether the police complaint mentions the applicant, as contemplated in section 7(2) of the CPA. It is common cause that the applicant is referred in to the formal complaint but the significance of that reference is disputed. The respondent contends that the mere mention of his name is enough. The applicant's case is that the mention of his name is not in relation to a *complaint articulated against him*, but rather mere narrative which alludes to the fact that the applicant was conducting an enquiry into the publication of the confidential information. It is contended that if that is the correct import of the reference, the applicant is not included as a potential accused in the police complaint

14.6 It is contended that is not apparent that the state ever applied its mind to the crimes of which the applicant is now alleged to have committed, and thus, having

UM

regard to section 7(2) of the CPA the *nolle prosecui* could not be understood to refer to him. As already stated, the NPA have yet to file an affidavit.

14.7 The applicant contends that the issue of such a *nolle prosecui*, being administrative action, required that he be afforded the benefit of *audi alterem partem* as contemplated in the Promotion of Administrative Justice Act 3 of 2000 (PAJA) in order for it to validly apply to him. It is common cause that the applicant was not afforded a chance to be heard before the issue of this *nolle prosecui.* There is authority in *Nandalal,* referred to earlier, for the proposition that the issue or refusal of *a nolle prosecui* is indeed administrative action. Whether *audi alterem partem* is indeed a requirement for the issue of a *nolle prosecui* is a novel legal issue which has yet to be decided.

14.8 Is the *actus reus* alleged, i.e. neglecting to respond effectively after having been asked in his capacity as President of the Republic to cause an enquiry to be launched into the conduct of the NPA and of the Media for publicising confidential information actually a crime? If not, it is argued that no *nolle prosecui* could be validly issued in respect thereof. Implicated herein is the question of whether, in our law, state officials who are neglectful of duties are liable to criminal sanctions. The respondent contends that they are. This is a proposition that is both novel and radical with extremely wide-ranging implications for the entire state apparatus.

[15] Were one or more of these grounds challenging the validity or applicability of the *nolle prosecui* to be established at the forthcoming hearing, the result would be to

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invalidate the summons served on the applicant. What is sought by the applicant is a chance to do that. None of these claims are implausible on their own terms, even if they are ultimately found to be incorrect or inadequate to invalidate the private prosecution.

[16] Therefore, in our view a prima face case of a right to personal freedom being violated has been shown.

[17] Is there any material harm? It was argued that the harm of appearing in a criminal court on 19 January was not material. This contention misses the point. The harm lies not in the temporary inconvenience of physically attending a hearing, if only for a formal postponement. The critical harm concerns a fundamental constitutionally guaranteed right to personal freedom. That value, which is foundational to our constitutional order may never be treated lightly. Our history instructs us that it is a matter of pride that South Africans value and assert our freedom above all other considerations in the face of whatever adversity we chance upon to meet. Our law must guard that right and its exercise unreservedly.

[18] Among the contentions advanced as to why the threshold for an interdict had not been cleared was that the decision in the *OUTA* case. *(National Treasury & others v Opposition to Tolling alliance & Others 2012 (6) SA 223 (CC))* applied to a decision by a private prosecutor. The *OUTA* case held that where it is sought to interdict a statutory authority from performing a function within its remit a higher threshold existed than when seeking such relief against a private litigant. This approach

safeguards organs of state from being paralysed by litigation which might damage the broader public interest. Thus, only in an exceptional case should an interdict be granted against an organ of state. The contention advanced to us was that a private prosecutor exercises statutory authority and must be treated alike. This is not correct. The respondent's contention is untenable. The legislative scheme in terms of which the statutory authority in which the power to conduct the prosecution of persons is vested, and in a given case, declines to prosecute must not be understood to be a delegation of statutory authority to the private prosecutor. A private prosecution is properly so called – private not public. The *OUTA case* cannot be applicable.

[19] Is there a viable alternative to this interim interdict? Plainly there is not. This we take to be axiomatic, as it would require the applicant to appear before a criminal court and by so doing implicitly submit to a process which he claims is unlawful. Were the applicant to succeed later to have the private prosecution declared invalid, the harm of the submission to unlawful action cannot be undone.

[20] As to the balance of convenience, the respondent suffers no harm if there is a delay in the private prosecution in order to debate the controversies alluded to in this judgment. As mentioned earlier, the trial of the alleged principal offenders has yet to begin. Their conviction is a necessary condition for criminal liability by the applicant.

[21] The costs were hotly debated. However, it is unnecessary in this urgent hearing to address the costs which shall be reserved for a decision at the hearing of the main case.

[22] An order therefore issues as follows:

(1) The application is urgent and the ordinary forms and service provided for in the Uniform Rules of Court are dispensed with.

(2) Pending the final determination of Part B, the first respondent is interdicted from taking any further steps to give effect to the *nolle prosequi* certificates of 21 November 2022 and 6 June 2022 ("the certificates") and/or the summonses issued by the Registrar on 15 and 21 December 2022 ("the summons"), or to pursue the private prosecution under case number: 059772/2022 against the applicant in any way.

(3) The costs occasioned by this urgent application shall be reserved for decision at the hearing of Part B of this case.

(4) The parties' representatives are directed to immediately approach the office of the Deputy Judge President, Johannesburg, to arrange a case management meeting to set an agreed date for the hearing of part B.

for **The Court**

(Sutherland DJP et Molahlehi and Senyatsi JJ)

Heard: **12 January 2023**

Judgment: **16 January 2023**

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Appearances:

For the Applicant:

Adv N Maenetje SC,

with him, Adv N Muvangua and Adv P Sokhela

Instructed by State Attorney, Johannesburg.

For the 1st Respondent:

Adv D Mpofu SC,

with him, Adv S Moela, Adv Mavhungu, S Mamoepa and Adv K Pama-Sihunu

Instructed by WN Attorneys Inc

For 2nd and 3rd respondents

Adv T Mathibedi SC,

with him, Adv T De Klerk

Instructed by the State Attorney, Pretoria.

CAS 309/10/21
PMP

"CCA2"

AT THE PIETERMARITZBURG POLICE STATION

In the matter between

JACOB GEDLEYIHLEKISA ZUMA Complainant

and

WILLIAM DOWNER SC Accused No 1

SWORN STATEMENT IN SUPPORT OF CRIMINAL COMPLAINT

I, the undersigned

JACOB GEDLEYIHLEKISA ZUMA

do hereby make oath and state that

1. I am a major male person, the former president of the Republic of South Africa, residing at KwaNxamalala residence, Nkandla, KwaZulu-Natal.

2. The facts deposed to in this affidavit are, save where it is stated or where the context indicates the contrary, within my personal knowledge and to my belief true and correct.

JGZ.

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3. I am an accused person in the matter of the State v Zuma and Another which is enrolled in the Pietermaritzburg High Court under case number CCD 30/2018. In the course of my case being argued before the High Court, it became clear to me that there is evidence that criminal conduct has taken place in an attempt to manipulate my investigation and prosecution for unlawful purposes.

3.1. In a detailed affidavit deposed to on behalf of the NPA, by Mr Hofmeyr, the Deputy National Director of Prosecuting Authority, there is evidence that in the course of the investigation and of my prosecution under case number CCD 30/2018 information was given or crudely put, leaked to people who had nothing to do with the case or the investigation in contravention of the law. I attach a copy of the affidavit of Hofmeyr which details the evidence of criminality involved in the investigation and prosecution of my case as annexure "A".

3.2. It is clear that there has been criminal interference in the investigation by persons not authorised to conduct such investigations which include criminal involvement of foreign spies and illegal surveillance.

3.3. Former prosecutors, currently serving prosecutors, former investigators and current investigators are reported on oath by Mr Hofmeyr to have engaged in various conducts which when carefully considered amount to contravention of the National Prosecuting Authority Act, 32 of 1998 ("the NPA Act").

4. I am advised that:

4.1. section 41 (6) of the NPA Act provides that:

> ***"notwithstanding any other law, no person shall without the permission of the National Director or a person authorised in writing by the National Director disclose to any other person:***
>
> ***a. any information which came to his or her knowledge in the performance of his or her functions in terms of this Act or any other law;***
>
> ***b. the contents of any book or document or any other item in the possession of the prosecuting authority; or***
>
> ***c. the record of any evidence given at an investigation as contemplated in section 28."***

4.2. section 41(7) of the NPA Act provides that:

> ***"Any person who contravenes subsection (6) shall be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 15 years or to both such fine and such imprisonment."***

5. I first became aware of these contraventions of the National Prosecuting Authority Act after various reports were prepared and produced by at-least two independent investigations. The first being an investigation of the Joint Standing Committee on Intelligence on the so-called Browse Mole and the report of an investigation by a Judicial Commission of Inquiry headed by Justice Khampepe. Copies of both

documents, which are bulky, will be provided to the investigating team if so required.

6. This criminal interference in my case has not been investigated or reported by any law enforcement agency. Consistent with the pattern of leaks and criminal interference in the recent past, I learnt during the court proceedings in Pietermaritzburg that the Advocate Downer SC breached the aforementioned provision when he unlawfully handed a medical report involving me in an affidavit leaked to a journalist, Karyn Maughan. I attach a copy of the affidavit as "B". Advocate Downer authorised the leaking of sensitive and private information obtained in the course and scope of his employment in breach of the aforementioned provision of the NPA Act. I understand that giving or leaking information that is obtained in the course and scope of work is a criminal offence under the NPA Act punishable by a severe sentence.

7. I therefore report and seek that a criminal case be opened and investigated by the police and law enforcement officers in relation to the conduct of Advocate WJ Downer SC, a Senior Deputy Director of Public Prosecutions in the NPA. I wish to extend my complaint of criminal wrongdoing to cover all other persons as reflected in the documents attached above who are either prosecutors and or investigators who have violated the provisions of the NPA Act and the Constitution.

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8. The conduct that I demand be investigated by the South African Police Service (SAPS) relates to the contravention of section 41 of the National Prosecuting Authority Act primarily but extend to other criminal activities, particularly those reflected in the affidavit of Mr Hofmeyr involving criminal interference in my prosecution by foreign spies with the assistance of local investigators and prosecutors. I believe that the interference of foreign spies contravene the law governing our intelligence services and would in that regard refer to the report of JSCI referred to above for further guidance.

9. I have no doubt that beyond the criminal conduct involving the leaking of confidential information to persons outside the NPA, the scope of criminal conduct is far wider and in the course of a diligent investigation, the SAPS will discover clear evidence showing the violations of section 41 by the prosecutors, investigators and other persons who are directly or indirectly involved in my case. The specific details of the criminal offences which, at this stage, I wish to report for criminal investigation and prosecution are:

Count 1

10. On or about 04 to 13 June 2008 Advocate WJ Downer SC unlawfully and in breach of section 41 of the NPA Act disclosed information concerning an investigation by the National Prosecuting Authority involving Mr Jacob Gedleyihlekisa Zuma to another person, namely Mr Sam Sole, a journalist who was at all material times employed by the Mail & Guardian.

JGZ

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Count 2

11. On or about 09 and 10 August 2021 Advocate WJ Downer SC authorised and sanctioned the disclosure by Advocate A Breitenbach SC of a confidential medical report person, to one News24 journalist Ms Karyn Maughan. The report had been initially disclosed in an affidavit signed by Advocate Downer himself on behalf of the National Prosecuting Authority in relation to a then pending application for the postponement of the criminal trial of Mr Jacob Gedleyihlekisa Zuma. The information came to the knowledge and into the possession of the prosecuting authority and members of its prosecuting team in the performance of their functions in terms of the NPA Act. The leaking of this medical report and information was done without the written permission of the National Director of Public Prosecution and therefore constituted a criminal violation of section 41 of the NPA Act.

Preliminary analysis

12. The admitted conduct of Advocate WJ Downer SC and his accomplices clearly contravened the provisions of section 41(6), read with 41(7) of the National Prosecuting Authority Act.

13. The criminal conduct set out in the affidavit of Hofmeyr also reports a number of criminal activities that were committed in violation of the law, for example possibly the Intelligence Act and ultimately the Constitution.

JGZ.

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14. As can be observed from the annexures, the most prominent feature of this case is that the complaints are based on conduct which has already been admitted by the suspects under oath. The relevant investigations and decision whether or not to prosecute should therefore take a relatively shorter period of time than usual, more particularly given the national importance of the matter and the seriousness of the offences.

15. In aggravation of the criminal conduct referred to above, it also appears from the papers that the prosecuting team also authorised their doctor, a Professor Sarkin, to send his life partner to handle sensitive medical information without the necessary authorisation.

16. I am fully cognisant of the fact that the criminal conduct which I am reporting herein also forms part of totally separate and distinct ongoing proceedings in which I have raised a plea in the High Court sitting in Pietermaritzburg, in terms of section 106(1)(h) of the Criminal Procedure Act. This criminal complaint is a completely separate cause of action which must be pursued to bring the suspects to book and to cause them to account for their own criminal conduct, irrespective of the outcome of the said plea proceedings. This sentiment was also correctly expressed by the presiding Judge in the aforementioned ongoing criminal trial in which I am the accused person. At that point, my legal representatives merely sought, at my instruction, to place my intentions to lay the present criminal charges on the record, which was duly done.

17. The alleged conduct also forms part of separate investigations which are conducted by the President of the Republic of South Africa, Mr Cyril Ramaphosa, the Minister of Justice, Mr Ronald Lamola, and/or the Legal Practice Council. The relevant complaint letter written to President Ramaphosa and his response form part of the full papers in an application which I had brought to supplement my lea in my criminal trial. The full application is attached hereto marked "C".

18. The purpose of bringing the information contained in this affidavit to the attention of the police is to initiate a process which must necessarily lead to the prosecution of the suspects, failing which a certificate to the contrary must be duly issued by the National Director of Public Prosecutions, who is incidentally the person ultimately responsible for the deployment of the suspects.

19. I am prepared to give further clarificatory statements under oath in support of the above should that be deemed necessary. The criminal violations set out in the attached documents should serve as a useful basis of determining the scope of criminal investigation that the SAPS may conduct in this complaint and the inclusion of further suspects and/or accomplices.

21/10/2021.

JACOB GEDLEYIHLEKISA ZUMA

I HEREBY CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at PIETERMARITZBURG on this the 21 day of OCTOBER 2021, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

SOUTH AFRICAN POLICE
CORPORATE COMMUNICATIONS
2021 -10- 21
MIDLANDS
KWAZULU-NATAL

HANS SHAIL

COMMISSIONER OF OATHS

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"CCA3"

Your Ref.: M Ntanga/Z0021/21
Our Ref.: N24/JZ/216/WDK/CDP/TK

19 January 2023

Ntanga Nkuhlu Inc
Honeydew
Per email: mongezi@ntanga.co.za

Dear Sir/Madam

MAUGHAN v ZUMA CASE NO 12770/22P
ZUMA v MAUGHAN CASE NO CC52/2022P

1. We note that Ms Maughan is due to appear on 2 February 2023 in the private prosecution instituted against her by your client, Mr Zuma.

2. You will recall that 2 February was agreed upon as a holding date, at a time when Ms Maughan's application to set aside the summons initiating the private prosecution against her ("the abuse application") was enrolled for hearing on 8 and 9 December 2022.

3. The abuse application was subsequently re-enrolled for hearing on 20 and 22 March 2023 following a directive issued by the Acting Judge President of the Division. It follows that the private prosecution matter would likewise have to be remanded to a later date, pending the outcome of the abuse application.

4. We understand that the appearance on 2 February would be no more than a postponement. If you disagree, we request that you advise us urgently. There is, accordingly, no justification for compelling Ms Maughan to appear in court on that day. The High Court recently confirmed[1] that requiring a person to appear in court in a private prosecution which is claimed to be unlawful, may infringe on that person's constitutionally guaranteed right to personal freedom. These are precisely the circumstances our client finds herself in. It would therefore be prudent to avoid unnecessarily infringing on Ms Maughan personal freedom pending the outcome of her abuse application.

[1] *President of the Republic of South Africa v Jacob Gedleyihlekisa Zuma & Others*, (062027/22) [2023] ZAGPJHC (16 January 2023) par 17 and further.

JM

5. For these reasons, we propose that your client removes the private prosecution matter from the court roll on 2 February by way of notice to the Registrar and Ms Maughan, on the understanding that the matter may be re-enrolled once the abuse application has been determined. Alternatively, we propose that Ms Maughan be released from appearing on 2 February 2022 and instead be represented by her legal representative on that day, for purposes of a suitable postponement.

6. We look forward to your response hereto as soon as possible, by no later than **Monday 23 January 2023**.

Yours faithfully

Willem de Klerk
WILLEM DE KLERK ATTORNEYS

JM

"CCA4"

NN

Ntanga Ntumbi Inc. Attorneys

Your ref:
Our ref:M.Ntanga/M0159/22

January 24, 2023

Willem de Klerk Attorneys
Westcliff
Johannesburg

Per Email: charl@wdklaw.co.za

RE: KARYN MAUGHAN v JACOB GEDLEYIHLEKISA ZUMA, PIETERMARITZBURG HIGH COURT CASE NO: CC 52/2022 P

We refer to your letter dated 19 January 2023 to which, having now had an opportunity to consult with our client, we are instructed to respond as follows:-

1. For the sake of clarity, Ms Maughan is not compelled by our client to appear in court on 2 February 2023 but by the law, specifically the applicable provisions of the Criminal Procedure Act ("the CPA"). To mention a few the provisions of section 55(1) and 158(1) of the CPA compel her to appear, failing which she will be committing a further and separate criminal offence than that for which she has been criminally charged and indicted. The provisions of these sections are peremptory and cannot be waived.

2. Our client is therefore not inclined or prepared to "*agree*" that she must not appear as specifically warned by the court. Neither is he legally empowered or competent to enter into such an illegal "*agreement*" to commit a crime.

3. Should your client wish to make an application for a postponement *sine die* as

per your proposal, she is free to do so in terms of section 168 of the CPA. Such an application will most likely be opposed.

4. Our client is however amenable to the postponement of the matter to a specific date which falls after the 22 March hearing date of the review application so as to enable the criminal court to be kept abreast of developments, in the usual way.

5. The judgment which you purport to rely on and which was recently handed down in the Gauteng Division has no application to the current situation where the Court, per Judge Chili, specifically warned your client "*to appear at 9h30 on 2 February 2022 failing which a warrant for your arrest will be issued*".

6. The Gauteng decision is also distinguishable on many other grounds and it is of a different division. In any event it is an interim decision which is subject to reversal by the court which granted it. Moreover it can only be asserted in court and not in a letter such as yours. There is no difference Ms Maughan and the thousands of accused persons across the country, who may be similarly aggrieved by their prosecutions and may have even taken steps to challenge such prosecutions but who are required to appear in the criminal courts from time to time in terms of the provisions of the law referred to above. This is commonplace.

7. The judgment you referred to represents the very first time in recorded history that a court of law has ordered that an accused person be exempted from physically attending his or her first appearance in court simply because of the alleged "*harm*" and "*inconvenience*" associated with a postponement hearing. For, *inter alia*, that reason, leave to appeal will be shortly sought against it as it sets a very dangerous precedent any may encourage unimaginable lawlessness. Your letter only serves to confirm this fear.

JM

8. For these or other related reasons the proposals contained in paragraph 5 of your letter under reply are, for the avoidance of any doubt, hereby rejected.

9. A similar request or proposal was informally received from the legal representatives of Accused 1. For the sake of convenience this letter is copied to them as it applies in equal measure to their client.

Yours truly,

Mongezi Ntanga

CC: **State Attorney**
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