THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 288/11
Reportable

DEMOCRATIC ALLIANCE	1st Appellant
RICHARD MICHAEL MOBERLEY YOUNG	2nd Appellant
CCII SYSTEMS (PTY) LTD	3rd Appellant

and

THE ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	1st Respondent
THE HEAD OF THE DIRECTORATE OF SPECIAL OPERATIONS	2nd Respondent
JACOB GEDLEYIHLEKISA ZUMA	3rd Respondent

Neutral citation: *Democratic Alliance v The Acting National Director of Public Prosecutions* (288/11) [2012] ZASCA 15 (20 March 2012)

Bench MPATI P, NAVSA, BOSIELO and TSHIQI JJA, and PLASKET AJA

Heard: 15 FEBRUARY 2012

Delivered: 20 MARCH 2012

Corrected:

Summary: Decision by the office of the National Director of Public Prosecutions to discontinue prosecution subject to constitutional review – the Democratic Alliance, a registered political party, has locus standi to bring application to review – record of decision is compellable.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Ranchod J sitting as court of first instance).

1 In respect of all three issues between the first appellant and the first and third respondents, the appeal is upheld with costs and the first and third respondents are ordered jointly and severally to pay the first appellant's costs, including the costs attendant on the employment of two counsel.

2 In respect of all the issues between the second and third appellants and the first and third respondents the appeal is dismissed and the second and third appellants are ordered to pay the first and third respondents' costs jointly and severally, including the costs attendant on the employment of two counsel.

3 The order of the court below in respect of the application to intervene remains unaltered, but the remainder is substituted as follows:

'1 The issues raised for separate adjudication by the respondents are determined as follows:

1.1 The respondents' objection to the standing of the first applicant in the review application is dismissed with costs including the costs attendant on the employment of two counsel.

1.2 The first respondent's decision of 6 April 2009 to discontinue the prosecution of the third respondent is held to be subject to review.

1.3 In the Rule 6(11) application the first respondent is directed to produce and lodge with the Registrar of this Court the record of the decision. Such record shall exclude the written representations made on behalf of the third respondent and any consequent memorandum or report prepared in response thereto or oral representations if the production thereof would breach any confidentiality attaching to the representations (the reduced record). The reduced record shall consist of the documents and materials relevant to the review, including the documents before the

first respondent when making the decision and any documents informing such decision.

1.4 The first and third respondents are ordered to pay the applicant's costs jointly and severally including the costs attendant on the employment of two counsel.'

4 The substituted order set out in para 1.3 above is to be complied with within 14 days of date of this judgment.

JUDGMENT

NAVSA JA (MPATI P, BOSIELO and TSHIQI JJA, and PLASKET AJA concurring):

Background

[1] This appeal does not concern the merits of a decision taken on 6 April 2009, by the first respondent, Mr Mokotedi Mpshe, the then Acting National Director of Public Prosecutions, to discontinue a prosecution against the third respondent, Mr Jacob Zuma, who is presently the President of the Republic of South Africa, on corruption charges.[1] Instead, it is about the correctness of decisions in relation to two interlocutory matters and points *in limine*, raised in the manner described in successive paragraphs. In *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 2 this Court described litigation between the National Director of Public Prosecutions (NDPP) and Mr Zuma as having had a 'long and troubled history'. Harms DP recorded that the law reports are replete with judgments in that regard. A brief summary of that history as well as a description of Mr Mpshe's initial decision, in 2007, to indict Mr Zuma and, of how Mr Zuma became President of South Africa is set out in paras 3 to 7 of that judgment. I do not intend to repeat it here. I now turn to describe how the present appeal arose.

[2] In April 2009 the Democratic Alliance (DA), a registered political party and the official opposition in our national parliament, approached the North Gauteng High Court, by way of

1 In essence, Mr Zuma is said to have been accused of providing political patronage and protection in exchange for financial reward.

an application, for an order reviewing, correcting and setting aside the decision to discontinue the prosecution, and declaring the decision to be inconsistent with the Constitution of the Republic of South Africa. Thereafter, the DA required the first and second respondents to deliver to the registrar of the high court, in terms of Rule 53(1) of the Uniform Rules of Court, the record on which the impugned decision was based, which included representations made by Mr Zuma as to why the prosecution should be discontinued.

[3] The prosecuting authorities refused to deliver the record, on the basis that it contained the said representations, which had been made on a confidential and without prejudice basis. They pointed out that Mr Zuma had declined to waive the conditions under which he had submitted his representations. Furthermore, the office of the NDPP informed the DA that it intended to contest the DA's locus standi in the review application and that it would assert that a decision by the national prosecuting authority to discontinue a prosecution was not reviewable. The DA was informed that these issues would be raised *in limine*.

[4] This led to two interlocutory applications in the high court. In the first, brought in terms of Uniform Rule 6(11),[2] the DA sought an order directing the first respondent to dispatch the record of proceedings on which the decision to discontinue the prosecution was based, excluding the representations by Mr Zuma. In addition the DA also sought an order directing that the prosecution authorities specify, by written notice, the documents or material excluded from the record.

[5] In the second application, the second and third appellants, Mr Richard Young and CCII Systems (Pty) Ltd (CCII), respectively, brought an application for leave to intervene as second and third applicants in the review application. CCII had been an unsuccessful bidder in the arms procurement process. Mr Young is the sole and managing director of CCII. In his affidavit, in the application to intervene, he recorded that the DA's locus standi

2 Rule 6(11) provides:
'Notwithstanding the aforegoing subrules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a judge.'

had been challenged by the first and third respondents and stated the following:

'[I]n order to obviate any possible difficulties in this regard, CCII Systems and I seek to intervene as Second and Third Applicants. As will become apparent from what follows below, there can be no serious dispute about our standing.'

[6] Mr Young's complaint was that CCII had lost out on its bid in the arms procurement process 'in highly questionable circumstances'. He claimed that CCII had been 'deselected' in the category of acquisition of naval vessels. CCII is a supplier of specialised software and computer systems for defence applications and its systems are intended to be a central component of the combat capability of naval vessels. In his affidavit in the application to intervene Mr Young points out that CCII was ousted as a bidder in favour of a company associated with one that the national prosecuting authority had contemplated as a co-accused in the corruption case against Mr Zuma. It appears from Mr Young's affidavit that he had complained about CCII's deselection to the Special Investigation Unit, headed by the then Judge Heath. He also complained to the office of the Auditor-General and apparently to the Public Protector. According to Mr Young a multi-agency investigation of the arms procurement process was established. That resulted in a report to Parliament, which, inter alia, upheld his complaints concerning the conflict of interest on the part of Mr Chippy Shaik, who was integral to the arms procurement process. A careful reading of Mr Young's affidavit reveals that there is no direct accusation involving corruption on the part of Mr Zuma in relation to the 'deselection' of CCII in the arms procurement process.

[7] In resisting these two interlocutory applications the first and third respondents filed answering affidavits in which they contested the DA's and the second and third appellants' locus standi in the review application. Predictably, issues that impinge on the merits of the review application were raised on behalf of the respondents.

[8] The North Gauteng High Court (Ranchod J) rejected the submission on behalf of the DA that the points *in limine* should be heard after all the affidavits had been filed in the review application and should be decided at the commencement of that hearing. The high court conflated the points *in limine*, which ought rightly to have been heard at the

commencement of the hearing of the review application, with the issues to be decided in the interlocutory applications.

[9] Ranchod J accepted the submission, on behalf of the first respondent, that a political party such as the DA did not have a direct and substantial interest in the decision to discontinue the prosecution. Ranchod J reasoned as follows:

'It would be wrong on legal principle to contend that all members of the public in South Africa have a direct and personal interest sufficient to clothe them with standing to seek the review and setting aside of the NDPP's decision. I do not think every member of the public can demonstrate, on the facts of this case, that the decision to discontinue the prosecution of President Zuma has a direct effect on any of their rights – even in the extended sense in which the Constitutional Court construed direct and personal interest in [*Kruger v President of the Republic of South Africa & others* 2009 (1) SA 417 (CC) par 22 and 23].'

[10] Much time and effort was wasted in the high court and before us, on debate about whether a decision to discontinue a prosecution constititued administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The DA contended that such a decision constituted administrative action in terms of PAJA. The relevant part of the definition of administrative action in s 1 reads as follows:

'"**administrative action**" means any decision taken, or any failure to take a decision, by –

(*a*) an organ of state, when –

i) exercising a power in terms of the Constitution or a provincial constitution; or

ii) exercising a public power or performing a public function in terms of any legislation; or

(*b*) …

which adversely affects the rights of any person and which has a direct, external legal effect but does not include –

(*aa*) …

(*bb*) …

(*cc*) …

(*dd*) …

(*ee*) …

(*ff*) a decision to institute or continue a prosecution.' (emphasis added.)

[11] Considering whether the DA had standing under PAJA, Ranchod J said the following:

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

The learned judge concluded that the DA had not met this requirement.

[12] The DA, in asserting its right to bring the review application, also relied on s 38 of the Constitution which provides

'**Enforcement of rights** – Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are–

(*a*) anyone acting in their own interest;

(*b*) anyone acting on behalf of another person who cannot act in their own name;

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

(*d*) anyone acting in the pubic interest; and

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

[13] Turning to the standing of the DA under these provisions of the Constitution, Ranchod J stated the following:

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

The high court rejected the DA's reliance on the equality provision in s 9 of the Constitution,[3] to the effect that if a powerful and influential figure such as Mr Zuma is shown to have avoided prosecution by reason of such power and influence, it undermined the right to equality of all citizens and that consequently, it had standing in terms of s 38 on this account, to pursue the application for review. In dealing with that submission Ranchod J said the following:

'The main application is not concerned with the enforcement of rights but the review of administrative action on the grounds set out in section 6 of PAJA, or on the grounds of legality in

3 Section 9(1) of the Constitution provides;
'(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.'

terms of section 1(*c*) of the Constitution.'

[14] Ranchod J also rejected the submission that the right to just administrative action, as contemplated in s 33 of the Constitution, was infringed. This was based on the judge's view that a person bringing a review application must show that he or she is directly affected by the impugned decision. Ranchod J took the view that the statement by the DA, that the review brought into question whether the decision to discontinue the prosecution was in compliance with the rule of law, was insufficient to clothe it with standing.

[15] In the last part of the dictum referred to at the end of the para 13 above, Ranchod J had regard to section 1(*c*) of the Constitution, because of the DA's alternative ground of review, namely, the supremacy of the Constitution and the rule of law. Section 1(*c*) of the Constitution reads as follows:

'1. **Republic of South Africa** – The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(*a*) …

(*b*) …

(*c*) Supremacy of the constitution and the rule of law.'

[16] Turning to the DA's contention that the decision to prosecute was liable to be set aside on the basis of a contravention of the basic tenets of the rule of law, in that the national prosecuting authority was obliged to follow legal prescripts and to act strictly in accordance with the law and to treat all criminal suspects equally, the high court said the following:

'For purposes of standing, the enforcement of section 1(*c*) of the Constitution is to be treated in the same way as challenges to the constitutional validity of legislation brought on the basis that, as an abstract and objective proposition, the legislation in question is inconsistent with the Constitution – as opposed to challenges based on infringements or threatened infringements of rights in the Bill of Rights. A person bringing such a constitutional challenge has to show that he or she is directly affected by the unconstitutional legislation. This was confirmed by Ackermann J and Chaskalson P in *Ferreira v Levin and Others* [1996 (1) SA 984 (CC)]. They both concluded that an applicant in such circumstances has to prove that he or she is directly affected by the unconstitutional

legislation.'

[17] Based on all the reasoning set out above the high court concluded that the DA had not provided any sustainable basis for its contention that it had standing to bring the review application.

[18] In dealing with the application by Mr Young and CCII to intervene, Ranchod J had regard to Uniform Rule 12, which provides:

'Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant. The court may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the action as to it may seem meet.'

[19] Ranchod J considered submissions on behalf of Mr Young and CCII that each had a sufficient interest in the decision to discontinue the prosecution, in addition to the overwhelming public interest in the outcome of the review application. The learned judge reasoned that, as was the case with the DA, Mr Young and CCII must show that they have a direct and substantial legal interest in the outcome of the review application in order to succeed with their application to intervene. Ranchod J concluded that the entity whose interests might potentially have been affected in relation to the arms procurement process was CCII and that Mr Young's assertion that he was the original complainant had to be rejected. Having regard to the factual assertions referred to in para 6 above and the prosecution of a certain Mr Schabir Shaik, the court below said the following:

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

[20] Referring to the fact that CCII had reached a settlement with government agencies in relation to its complaint concerning its arms procurement bid, the high court concluded that the result was that CCII had no interest that could be affected by the decision to discontinue the prosecution.

[21] Consequently, Ranchod J dismissed the application to compel production of the reduced record of the decision to continue the prosecution as well as the application by Mr Young and CCII to enter the fray as intervening parties. The DA and the parties seeking to intervene were ordered to pay the costs of the litigation including the costs consequent upon the employment of two counsel. It is against those orders and the conclusions referred to above that the DA and the other two appellants appeal with leave of the court below.

Conclusions

[22] The issues that arise for determination in this appeal are: the reviewability of the decision to discontinue Mr Zuma's prosecution; whether the first respondent is required to furnish the record of his decision; the standing of the DA to challenge the decision; and whether Mr Young and CCII have standing as a prerequisite of their application to intervene.

Reviewability

[23] The reviewability of a decision to discontinue a prosecution lies at the heart of this appeal. It will be recalled that in correspondence the NDPP's office indicated that reviewability of the decision in question and the question of standing were issues that it intended to raise at the outset. Furthermore, instead of having those issues raised and argued in respect of the main application – the review application – the court below enabled the first and third respondents to fuse them with the issues raised in the interlocutory applications.

[24] In order to adjudicate the reviewability question it is necessary at the outset to reproduce part of the first respondent's answering affidavit to the DA's application to compel production of the record. The relevant parts read as follows:

'50. Prosecutorial decisions are not reviewable for rationality under PAJA or the Constitution.

51. It is correct that under the Constitution rationality is a minimum threshold requirement for all exercises of public power. Prosecutorial decisions involve the exercise of public power.

52. ….

53. …

54. In the case of prosecutorial decisions, the legislature has excluded prosecutorial decisions (including decisions not to prosecute) from the ambit of PAJA. This means that such decisions cannot be reviewed on the ground of rationality under PAJA.

55. It is not permissible or desirable in the circumstances to go behind the exclusion in PAJA and to rely on rationality under the Constitution without challenging the constitutionality of the exclusion from the ambit of PAJA of prosecutorial decisions. PAJA covers the ground and the legislature has decided to exclude prosecutorial decisions from its ambit, including decisions not to continue criminal prosecutions as submitted above. For the reasons that a PAJA review is unavailable, a rationality review under the Constitution is also unavailable. This will be addressed further in legal argument.

56. There are other reasons why it would be inappropriate to subject prosecutorial decisions to judicial review on the ground of rationality. Rationality review requires an assessment of the presence or absence of a rational connection between the decision and the reasons given for it, as well as a rational connection between the decision and the material properly placed before the decision maker. To conduct the assessment a judicial officer must see and consider the material that was placed before the decision maker. In cases of decisions to discontinue prosecution after the accused makes representations, such material would include representations made on a confidential and without prejudice basis. But such information is privileged and cannot be disclosed to a Court and third parties. A rationality review cannot be properly conducted in such circumstances. This is a justifiable limitation under section 36 of the Constitution on the right to have the exercise of public power reviewed for rationality. It serves an important governmental purpose. It facilitates full and frank discussions and disclosures between the accused person and the prosecutor in the interests of the proper administration of justice.'

[25] In para 59 of his answering affidavit, Mr Mpshe stated that a decision to prosecute or discontinue a prosecution could only ever be challenged in court on very narrow grounds, such as bad faith.

[26] It appears that in the court below the first respondent did not persist in the contention that a decision to discontinue a prosecution was not reviewable on the basis of a failure to

comply with the fundamental tenets of the rule of law. As indicated above Ranchod J dismissed that challenge on the basis that neither the DA nor Mr Young nor CCII had standing, because they had failed to show that they were directly affected by the decision.

[27] Whilst there appears to be some justification for the contention that the decision to discontinue a prosecution is of the same genus as a decision to institute or continue a prosecution, which is excluded from the definition of administrative action in terms of s 1(*ff*) of PAJA, it is not necessary to finally decide that question. Before us it was conceded on behalf of the first and third respondents that a decision to discontinue a prosecution was subject to a rule of law review. That concession in my view was rightly made. As recently as 1 December 2011, in *Democratic Alliance v President of the Republic of South Africa & others* 2012 (1) SA 417 (SCA) this Court noted that the office of the NDPP was integral to the rule of law and to our success as a democracy.[4] In that case this Court stated emphatically that the exercise of public power, even if it does not constitute administrative action, must comply with the Constitution. The Constitutional Court has repeatedly emphasised this point.

[28] In *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) (2005 (6) BCLR 529) the Constitutional Court, with reference to its earlier decision in *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) (1998 (12) BCLR 1458), stated the following (para 49):

'The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive "are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law". In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.'

[29] A most instructive case concerning constitutional control over the exercise of public

4 Para 114.

power is the decision of the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa & another: In Re Ex Parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241). It is necessary to quote rather extensively from that judgment (paras 37-45):

'The exercise of public power was regulated by the Courts through the judicial review of legislative and executive action. This was done by applying constitutional principles of the common law, including the supremacy of Parliament and the rule of law. The latter had a substantive as well as a procedural content that gave rise to what Courts referred to as fundamental rights, but because of the countervailing constitutional principle of the supremacy of Parliament, the fundamental rights could be, and frequently were, eroded or excluded by legislation.

Judicial review served the purpose of enabling Courts, whilst recognising the supremacy of Parliament, to place constraints upon the exercise of public power. It was a power asserted by the English courts as part of their common-law jurisdiction. Our Courts did the same and the development of administrative law in South Africa was much influenced by the developments in England. As a result our Courts have frequently sought guidance from English law on this subject.

According to *De Smith, Woolf and Jowell*:

"[T]he standards applied by the courts in judicial review must ultimately be justified by constitutional principles, which govern the proper exercise of public power in any democracy. This is so irrespective of whether the principles are set out in a formal, written document. The sovereignty or supremacy of Parliament is one such principle, which accords primacy to laws enacted by the elected Legislature. The rule of law is another such principle of the greatest importance. It acts as a constraint upon the exercise of all power. The scope of the rule of law is broad. It has managed to justify – albeit not always explicitly – a great deal of the specific content of judicial review, such as the requirements that laws as enacted by Parliament be faithfully executed by officials; that orders of court should be obeyed; that individuals wishing to enforce the law should have reasonable access to the courts; that no person should be condemned unheard and that power should not be arbitrarily exercised. In addition, the rule of law embraces some internal qualities of all public law: that it should be certain, that is ascertainable in advance so as to be predictable and not retrospective in its operation; and that it be applied equally, without unjustifiable differentiation.

Other constitutional principles are perhaps less clearly identified but nevertheless involve features inherent in a democratic State. These include the requirements of political participation, equality of treatment and freedom of expression.

A constitutional principle achieves practical effect as a constraint upon the exercise of all public

power. Where the principle is violated it is enforced by the courts which define and articulate its precise content."

To the same effect, *Boulle, Harris and Hoexter* state that:

"The basic justification for judicial review of administrative action originates in the Constitution. In the constitutional State there are, by definition, legal limits to power, and the courts are bestowed with judicial authority, which incorporates the competence to determine the legality of various activities, including those of public authorities."

This method of controlling public power was not affected by the Constitutions of 1961 and 1983. The 1961 Constitution provided in specific terms that Parliament was supreme and that no court had jurisdiction to enquire into or pronounce upon the validity of an Act of Parliament, other than one relating to the entrenched language rights. The 1983 Constitution also entrenched the supremacy of Parliament, though it made provision for courts to have jurisdiction in respect of questions relating to the specific requirements of the Constitution. This, however, has been fundamentally changed by our new constitutional order. We now have a detailed written Constitution. It expressly rejects the doctrine of the supremacy of Parliament, but incorporates other common-law constitutional principles and gives them greater substance than they previously had. The rule of law is specifically declared to be one of the foundational values of the constitutional order, fundament rights are identified and entrenched, and provision is made for the control of public power, including judicial review of all legislation and conduct inconsistent with the Constitution.

Powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution. Thus, in the *President of the Republic of South African and Another v Hugo* the power of the President to pardon or reprieve offenders had to be dealt with under s 82(1) of the interim Constitution, and not under the prerogative of the common law. In *Fedsure*, the question of legality had to be dealt with under the Constitution and not under the common-law principle of *ultra vires*. In *Sarfu 3* the President's power to appoint a commission and the exercise of that power had to be dealt with under s 84(2) of the 1996 Constitution and the doctrine of legality, and not under the common-law principle of prerogative and administrative law.

In the *Container Logistics* case it was said:

"No doubt administrative action which is not in accordance with the behests of the empowering legislation is unlawful and therefore unconstitutional, and action which does not meet the requirements of natural justice is procedurally unfair and therefore equally unconstitutional. But, although it is difficult to conceive of a case where the question of *legality* cannot ultimately be

reduced to a question of *constitutionality*, it does not follow that the common-law grounds for review have ceased to exist. What is lawful and procedurally fair within the purview of s 24 is for the Courts to decide and I have little doubt that, to the extent that there is no inconsistency with the Constitution, the common-law grounds for review were intended to remain intact."

…

Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution, which defines the role of the courts, their powers in relation to other arms of government and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution (and that need not be decided in this case), the Constitution is the supreme law and the common law, insofar as it has any application, must be developed consistently with it and subject to constitutional control.'

[30] Importantly, the Constitutional Court in *Pharmaceutical Manufacturers* held that the grounds of review articulated in the well-known case of *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642 at 651-652 are 'consistent with the foundational principle of the rule of law enshrined in our Constitution' (para 83) and that the rule of law also requires rationality as a prerequisite for the validity of the exercise of all public power (paras 85-86).

[31] Section 1(*c*) of the Constitution proclaims the supremacy of the Constitution and the concomitant supremacy of the rule of law. In fulfilling the constitutional duty of testing the exercise of public power against the Constitution, courts are protecting the very essence of a constitutional democracy.[5] Put simply, it means that each of the arms of government and every citizen, institution or other recognised legal entity, are all bound by and equal before the law. Put differently, it means that none of us is above the law. It is a concept that we, as a nation, must cherish, nurture and protect. We must be intent on ensuring that it is ingrained in the national psyche. It is our best guarantee against tyranny, now and in the future.

5 See *DA v President of RSA* 2012 (1) SA 417 (SCA) para 122.

[32] The office of the NDPP exercises public power and is subject to the constraints set out in the authorities referred to above. Having made the concession that the decision to discontinue the prosecution was subject to a rule of law review, it was nevertheless submitted on behalf of the first and third respondents that such a review would be a narrow one, on limited grounds. In light of the primary concession made on behalf of the respondents, it is for present purposes not necessary to debate the extent to which a decision to discontinue a prosecution is reviewable. That is a question for the high court - the court seized with the application for the review. Counsel for Mr Zuma rightly conceded, subject to a reservation concerning the question of standing on the part of the DA and the intervening parties, that the arguments made on his behalf in respect of the reviewability of the impugned decision were premature. In light of the concession made by the NDPP on the question of reviewability, it is difficult to understand why it persisted in pursuing the appeal on this aspect. It does not reflect well on the NDPP. I will, in due course, deal with the high court's decision to conflate the preliminary points with the issues raised in the application to compel production of the record and the application to intervene.

Production of the Record

[33] There was debate before us about what the value would be to the reviewing court of a reduced record, namely, a record without Mr Zuma's representations. Concern was also expressed on behalf of Mr Zuma that there might be material in the record of decision, which might adversely affect his rights and to which he might rightly object. That concern was met by an undertaking on behalf of the first respondent that, in the event of this Court altering the decision of the court below so as to order the production of the record of the decision sought to be reviewed, the NDPP's office would inform Mr Zuma of its contents. Questions involving the extent of the record of the decision and its value to the court hearing the review application are speculative and premature. In the event of an order compelling production of the record, the office of the NDPP will be obliged to make available whatever was before Mr Mpshe when he made the decision to discontinue the prosecution. It will then fall to the reviewing court to assess its value in answering the questions posed in the review application. If the reduced record provides an incomplete

picture it might well have the effect of the NDPP being at risk of not being able to justify the decision. This might be the result of Mr Zuma's decision not to waive the confidentiality of the representations made by him. On the other hand, a reduced record might redound to the benefit of the NDPP and Mr Zuma.

[34] Furthermore, there was debate about the applicability of Uniform Rule 53, the relevant part of which provides as follows:

'(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected-

(*a*) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(*b*) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to dispatch, within fifteen days after receipt of the notice of motion to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so.'

[35] In its express wording Uniform Rule 53 appears to be confined to dealing with decisions of particular institutions and officials performing certain categorised functions, namely, judicial, quasi-judicial or administrative functions. It is worth noting that Uniform Rule 53 was introduced at a time when judicial review was perhaps the most significant method of controlling the exercise of public power. The then Supreme Court developed a body of principles to control the exercise of public power. In *Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council* 1903 TS 111 at 115, Innes CJ described the common law power of review as follows:

'Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature; it is a right inherent in the Court. . . .'

This statement of the law is still apposite today except that the Constitution, not inherent jurisdiction, is now the basis for review. It has hitherto never been suggested that Uniform Rule 53 applied only in respect of a narrower form of review.

[36] However, much of the body of principles that was developed by our courts, exercising their powers of review, came to be called Administrative Law.[6] In the pre-constitutional era when the now out-dated classification of functions doctrine was applied there were recognised categories of administrative acts such as legislative, judicial, quasi-judicial and purely administrative acts,[7] which categories are largely repeated in Uniform Rule 53. Within the administrative law sphere there were recognised public bodies or institutions and officers that were subject to administrative review. That too is mirrored in Uniform Rule 53. Attorneys-General – the predecessors of the NDPP – were clearly officers for purposes of Uniform Rule 53[8] and their decisions would either have been 'quasi-judicial' or 'administrative'.[9]

[37] In the constitutional era courts are clearly empowered beyond the confines of PAJA to scrutinise the exercise of public power for compliance with constitutional prescripts. That much is clear from the Constitutional Court judgments set out above. It can hardly be argued that, in an era of greater transparency, accountability and access to information, a record of decision related to the exercise of public power that can be reviewed should not be made available, whether in terms of Rule 53 or by courts exercising their inherent power to regulate their own process.[10] Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed. The DA, in its application to compel discovery, has merely asked for an order directing the office of the NDPP to

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6 In this regard see Cora Hoexter *Administrative Law in South Africa* (2 ed) (2012) at pp 13-15 and the dicta from the *Pharmaceutical* case set out in para 28 above.
7 See Joubert (ed) *The Law of South Africa* (1st Reissue) Vol 1 paras 59-73.
8 See Baxter *Administrative Law* (1984) at 333.
9 See Baxter *op cit* at 344-348.
10 Section 173 of the Constitution reads as follows:
'**Inherent power**- The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

despatch within such time as the court may prescribe the record of proceedings relating to the decision to discontinue the prosecution, excluding the written representations made on behalf of Mr Zuma to the office of the NDPP. Subject to the question of standing which is dealt with next I can see no bar to such an order being made.

Locus standi

[38] It is necessary at the outset to say something about our law in relation to the question of standing. During the time of an oppressive regime lawyers had to fight for space in order to challenge and limit human rights abuses. At a time when a Parliament representing the minority of the population was regarded as supreme, and when there was restricted space within which to assert the rights that are now taken for granted, courts were willing to adopt a more liberal approach to standing when there was a threat to rights that even an oppressive government was forced to recognise as fundamental in a civilised society. In *Wood & others v Ondangwa Tribal Authority & another* 1975 (2) SA 294 (A) this Court, in dealing with the interdict *de libero homine exhibendo* (the equivalent of the English writ of habeas corpus) and our law's then more restrictive approach to locus standi, said the following at 310D-H:

'Although the position is that in Roman-Dutch law no private person can proceed by a popular action as such, it is clear that the interdict *de libero homine exhibendo* is part of our law, and it only remains to be considered at whose request a Court will issue the interdict. Basically, the cause of action is *sui generis* because not only was the right to freedom protected by it but "it is set in motion as a matter of duty". In this respect it would appear to be distinguishable from any of the other *actiones populares*. *Voet,* 43.29, says that in the favour shown to freedom the interdict is granted to anyone among the people (*cuivis ex populo*). That indicates, in my view, that he had in mind the *actio popularis*. Nevertheless, I think it follows, from what I have said above, that although the *actiones populares* generally have become obsolete in the sense that a person is not entitled "to protect the rights of the public", or "champion the cause of the people" it does not mean that when the liberty of a person is at stake, the interest of the person who applies for the interdict *de libero homine exhibendo* should be narrowly construed. On the contrary, in my view it should be widely construed because illegal deprivation of liberty is a threat to the very foundation of a society based on law and order.' (emphasis added.)

[39] It is true that in appropriate circumstances a person was allowed to act on behalf of a detained person because the latter could not act for him or herself. However, the liberty of an individual, was already regarded in Roman times as a right of the highest value and it is the importance of that issue that motivated courts to lean towards a more liberal approach to standing.[11]

[40] We have come a long way since our troubled history, referred to in the briefest terms in para 35 above. In *Kruger v President of Republic of South Africa & others* 2009 (1) SA 417 (CC) the Constitutional Court held, in relation to the standing of an attorney to challenge the constitutionality of certain proclamations (para 25):

'As an attorney in a specialist personal injury legal firm who works regularly in this field, Mr Kruger has a direct and professional interest in the validity of the proclamations. A legal practitioner is an officer of the court. Where the practitioner can establish both that a proclamation is of direct and central importance to the field in which he or she operates, and that it is in the interest of the administration of justice that the validity of that proclamation be determined by a court, that practitioner may approach a court to challenge the validity of such a proclamation. In this case Mr Kruger has shown that he is a personal injury attorney and that the validity of the proclamations is of central importance to his field of practice. Moreover, he has established that significant legal uncertainty has arisen because of the contents of the First Proclamation and the publication of the Second Proclamation. The effect of this uncertainty is clearly adverse to the proper administration of justice. A personal injury attorney must be able to understand and engage with the legislative scheme on which he or she and his or her clients rely in order to seek compensation. The uncertainty created by the issue of the two proclamations and their effect on Mr Kruger's ability to manage his clients' affairs are reason enough to grant standing to the applicant.'

[41] In *Kruger* the Constitutional Court left open the question whether the attorney was acting or could act in the public interest.[12]

[42] In *Albutt v Centre for the Study of Violence and Reconciliation & others* 2010 (3) SA 293 (CC), Ngcobo CJ accepted that the non-governmental organisations that had brought the challenge to the granting of amnesty to various prisoners had standing in their own

11 See *Wood v Ondangwa* op cit at 311E-H.
12 See para 27.

interest and in the public interest. The court stated (paras 33-34):

'The concession that the NGOs have standing was properly made. Our Constitution adopts a broad approach to standing, in particular, when it comes to the violation of rights in the Bill of Rights. This is apparent from the standing accorded to persons who act in the public interest. This ground is much broader than the other grounds of standing contained in s 38. The NGOs have standing on at least two grounds.

First, they are litigating in the public interest under s 38(*d*) of the Constitution. The NGOs contend that the exclusion of victims from participation in the special dispensation process violates the Constitution, in particular, the rule of law. They submit that, as civic organisations concerned with victims of political violence, they have an interest in ensuring compliance with the Constitution and the rule of law. Second, they are litigating in the interest of the victims under s 38(*c*). The victims whose interests the NGOs represent were unable to seek relief themselves because they were unaware that applications for pardons affecting them were being considered. The process followed by the President made no provision for the victims to be made aware of the applications for pardons, not to be given the opportunity to make representations.'

[43] As pointed out earlier in this judgment, the DA is a registered political party active in the national parliament. Its federal constitution sets out its political vision, 'of a prosperous, open opportunity society that is uniquely South African: in which every person is free, secure and equal before the law …'. The DA's constitution recognises that:

'South Africa's constitution is the only foundation on which an Open Opportunity Society can be built because it recognises that every person is equal in dignity and worth and guarantees the freedom of each individual.[13]

The rights enshrined in the constitution must be defended and promoted in order to protect the people of South Africa from the concentration and abuse of power.'

[44] It was accepted on behalf of the third respondent that all political parties participating in the National Parliament can be taken to subscribe to constitutional principles. Section 48 of the Constitution provides that before members of the National Assembly begin to perform their functions they must swear or affirm faithfulness to the Republic and obedience to the Constitution. All political parties participating in parliament must necessarily have an interest in ensuring that pubic power is exercised in accordance with

13 Clause 1.2 and also 1.3 of the DA's Constitution.

constitutional and legal prescripts and that the rule of law is upheld. They represent constituents that collectively make up the electorate. They effectively represent the public in parliament. It is in the public interest and of direct concern to political parties participating in parliament that an institution such as the National Prosecuting Authority (NPA), acts in accordance with constitutional and legal prescripts. It can hardly be argued that citizenry in general would be concerned to ensure that there was no favouritism in decisions relating to prosecutions. Few members of political parties or members of the public have the ability, resources or inclination to bring a review application of the kind under discussion.

[45] It is of fundamental importance to our democracy that an institution such as the NPA, which is integral to the rule of law, acts in a manner consistent with constitutional prescripts and within its powers, as set out in the National Prosecuting Authority Act 32 of 1998. Certainly the membership of the DA can rightly be expected to hold the party they support to the foundational values espoused in the DA's constitution and to expect the DA to do whatever is in its power, including litigating, to foster and promote the rule of law. In this regard see *Justice Alliance of South Africa & others v President of the Republic of South Africa & others* 2011 (5) SA 388 (CC) para 17 and the recent decision of the full court in *Bio Energy Afrika Free State (Edms) Bpk v Freedom Front Plus* and *Freedom Front Plus v Moqhaka Local Municipality & others* 2012 (2) SA 88 (FB) paras 15-17. It clearly is in the public interest that the issues raised in the review application be adjudicated and, in my view, on the papers before us, it cannot seriously be contended that the DA is not acting, genuinely and in good faith, in the public interest. See *Freedom Under Law v Acting Chairperson: Judicial Service Commission & others* 2001 (3) SA 549 (SCA) para 21.The question whether, in making the decision to discontinue the prosecution of Mr Zuma, the NPA had acted in accordance with the law or had wrongly and unlawfully succumbed to political power and influence, as alleged by the DA, is a matter for decision in the review application after all the papers have been filed. Presently, it follows that the DA has standing to act in its own interests, as well as in the public interest, and is entitled to pursue that application to its conclusion.

[46] Not so with the parties seeking to intervene. It is difficult to discern with any degree

of precision, or at all, the ambit of their complaint against Mr Zuma. It is even more difficult to establish that a complaint, however vague, was lodged with the NPA itself. We were not pointed to any part of the record from which it appears which of the two parties seeking to intervene had in fact lodged a complaint with the NPA. There is much force in the submission that, having regard to the litigation between CCII, which was a bidding party, and government agencies and the subsequent monetary settlement, the basis of which has not been disclosed, it cannot be said that there is any protectable interest that CCII could advance in the review application. The motivation for entering the fray is in my view clear from what is stated by Mr Young himself, namely, that which, in modern terminology, is referred to as a 'fall-back position' – in the event of the DA being held not to have locus standi. In my view the conclusion of the court below in respect of the standing of the parties seeking to intervene is correct. It follows that the application to intervene must fail.

[47] I turn to deal with the submission on behalf of the first and third respondents that allowing too lenient an approach to standing would have a disastrous impact on prosecution services, in that it would lead to a flood of challenges to prosecutorial decisions, which would, in turn, cause the NPA to virtually grind to a halt. Courts are no strangers to floodgates arguments. First, courts will be astute to ensure that those asserting a right to challenge prosecutorial decisions have in fact provided a legally recognised basis for doing so. Secondly, the floodgates argument is not borne out by experience but, in any event, it is apposite to call to mind what was stated in *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the RSA* 1996 (3) SA 1095 (TkS) at 1106D-G:

'One of the principal objections often raised against the adoption of a more flexible approach to the problem of *locus standi* is that the floodgates will thereby be opened, giving rise to an uncontrollable torrent of litigation. It is well, however, to bear in mind a remark made by Mr Justice Kirby, President of the New South Wales Court of Appeal, in the course of an address at the Tenth Anniversary Conference of the Legal Resources Centre, namely that it may sometimes be necessary to open the floodgates in order to irrigate the arid ground below them. I am not persuaded by the argument that to afford *locus standi* to a body such as first applicant in circumstances such as these would be to open the floodgates to a torrent of frivolous or vexatious litigation against the State by cranks or busybodies. Neither am I persuaded, given the exorbitant costs of Supreme Court litigation, that

should the law be so adapted cranks and busybodies would indeed flood the courts with vexatious or frivolous applications against the State. Should they be tempted to do so, I have no doubt that appropriate order of costs would soon inhibit their litigious ardour.'

Thirdly, as was pointed out by Budlender, 'if the cases are well-founded, there can be no objection to a flood of people trying to achieve justice' ('The Accessibility of Administrative Justice' 1993 *Acta Juridica* 128 at 132).

Hearing the point *in limine* together with the two interlocutory applications

[48] In *Bader & another v Weston & another* 1967 (1) SA 134 (C) Corbett J said the following (at 136E-H):

'It seems to me that, generally speaking, our application procedure requires a respondent, who wishes to oppose an application on the merits, to place his case on the merits before the Court by way of affidavit within the normal time limits and in accordance with the normal procedures prescribed by the Rules of Court. Having done so, it is also open to him to take the preliminary point that (in this case) the petition fails to disclose a cause of action and this will often be a convenient procedure where material disputes of fact have arisen which cannot be resolved without recourse to the hearing of oral evidence. On the other hand, I do not think that normally it is proper for such a respondent not to file opposing affidavits but merely to take the preliminary point. I say "normally" because situations may arise where this procedure is unexceptionable. For example, a respondent, who is suddenly and without much notice confronted with a complex application and who would normally be entitled to a substantial postponement to enable him to frame opposing affidavits, might well be permitted there and then to take such a preliminary point. Generally speaking, however, where a respondent has had adequate time to prepare his affidavits, he should not omit to prepare and file his opposing affidavits and merely take the preliminary objection.'

[49] Generally, courts should be slow to allow parties to engage in piecemeal litigation, with attendant delays. Put differently, courts should be intent on obviating prolonged litigation. This case has shown precisely how undesirable for the administration of justice to-ing and fro-ing between the high court and this Court over a long period of time, without the merits being finally adjudicated, can be. Courts should be circumspect when suggestions are made about the procedure to be followed on the basis that it might shorten rather than lengthen litigation.

Costs

[50] It is necessary to deal with the submission on behalf of the intervening parties in respect of costs. It was submitted that since they had sought to vindicate constitutional rights they were entitled to be treated differently from commercial litigants on the basis of what is set out in the judgment of the Constitutional Court in *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC) and not be ordered as an unsuccessful party to pay the costs of the other litigants. At para 20 of *Biowatch* the following appears:

'Nevertheless, even allowing for the invaluable role played by public-interest groups in our constitutional democracy, courts should not use costs awards to indicate their approval or disapproval of the specific work done by or on behalf of particular parties claiming their constitutional rights. It bears repeating that what matters is not the nature of the parties or the causes they advance but the character of the litigation and their conduct in pursuit of it. This means paying due regard to whether it has been undertaken to assert constitutional rights and whether there has been impropriety in the manner in which the litigation has been undertaken. Thus, a party seeking to protect its rights should not be treated unfavourably as a litigant simply because it is armed with a large litigation war-chest, or asserting commercial, property or privacy rights against poor people or the State. At the same time public-interest groups should not be tempted to lower their ethical or professional standards in pursuit of a cause. As the judicial oath of office affirms, judges must administer justice to all alike, without fear, favour or prejudice.'

[51] Having regard to the description, set out above, of the nature of and manner in which the parties seeking to intervene entered the fray, they are, in my view, not entitled to the protection afforded litigants by *Biowatch*.

[52] The first and third respondents were agreed that in the event that we were inclined to compel the production of the record that it should be in the terms set out in the order that appears hereafter. For all the reasons stated above the following order is made:

1 In respect of all three issues between the first appellant and the first and third respondents, the appeal is upheld with costs and the first and third respondents are ordered jointly and severally to pay the first appellant's costs, including the costs attendant on the employment of two counsel.

2 In respect of all the issues between the second and third appellants and the first and

third respondents the appeal is dismissed and the second and third appellants are ordered to pay the first and third respondents' costs jointly and severally, including the costs attendant on the employment of two counsel.

3 The order of the court below in respect of the application to intervene remains unaltered, but the remainder is substituted as follows:

'1 The issues raised for separate adjudication by the respondents are determined as follows:

1.1 The respondents' objection to the standing of the first applicant in the review application is dismissed with costs including the costs attendant on the employment of two counsel.

1.2 The first respondent's decision of 6 April 2009 to discontinue the prosecution of the third respondent is held to be subject to review.

1.3 In the Rule 6(11) application the first respondent is directed to produce and lodge with the Registrar of this Court the record of the decision. Such record shall exclude the written representations made on behalf of the third respondent and any consequent memorandum or report prepared in response thereto or oral representations if the production thereof would breach any confidentiality attaching to the representations (the reduced record). The reduced record shall consist of the documents and materials relevant to the review, including the documents before the first respondent when making the decision and any documents informing such decision.

1.4 The first and third respondents are ordered to pay the applicant's costs jointly and severally including the costs attendant on the employment of two counsel.'

4 The substituted order set out in para 1.3 above is to be complied with within 14 days of date of this judgment.

M S NAVSA
JUDGE OF APPEAL

APPEARANCES:

For Appellants:	S P Ronsenberg SC H J De Waal Instructed by: Minde Schapiro & Smith Inc c/o Edelstein-Bosman Inc Pretoria Symington & De Kok Bloemfontein
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For 3rd Respondent:	K J Kemp SC T Khuzwayo L K Olsen Instructed by: Hulley & Associates Inc c/o F Vally Attorneys Pretoria Honey & Partners Inc Bloemfontein