THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 573/08

NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS Appellant

and

JACOB GEDLEYIHLEKISA ZUMA Respondent

(THABO MVUYELWA MBEKI and GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA intervening)

Neutral citation: *National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1 (12 Jan 2009)

Coram: HARMS DP, FARLAM, PONNAN, MAYA AND CACHALIA JJA
Heard: 28 NOVEMBER 2008
Delivered: 12 JANUARY 2009
Updated:
Summary: (1) Criminal procedure – setting aside of indictment – s 179 of the Constitution – consultation by National Director of Public Prosecutions when reviewing a prosecutorial decision with accused. (2) Civil procedure – principles of deciding factual issues in motion proceedings restated. (3) Judiciary – the limits of judicial decision-making restated.

ORDER

On appeal from: High Court, Pietermaritzburg (Nicholson J sitting as court of first instance).

A The appeal is upheld with costs including the costs of three counsel.

B Paragraphs 1 to 4 of the order of the court below are set aside and replaced with the following:

‘1 The application is dismissed.

2 The applicant is to pay the respondent’s costs of suit including those consequent upon the employment of three counsel.

3 On the respondent’s application to strike out, the applicant is ordered to pay the costs on the attorney and client scale.

4 The applicant’s application to strike out is dismissed with costs on the attorney and client scale.’

C The application to intervene is dismissed.

JUDGMENT

HARMS DP (FARLAM, PONNAN, MAYA and CACHALIA JJA concurring):

INTRODUCTION

[1] This is an appeal against a judgment of Nicholson J, in which he set aside a decision by the National Director of Public Prosecutions (the NDPP) to indict the respondent, Mr Jacob G Zuma.[1] The appeal by the NDPP is with the leave of the court below. Mr Thabo M Mbeki (until recently the President of the country) and the Government of the RSA sought leave to intervene in the appeal on the ground that they have an interest in the appeal since many findings of the court below impinged on them negatively and they wish to have the record set straight.

[2] The litigation between the NDPP and Mr Zuma has a long and troubled history and the law reports are replete with judgments dealing with the matter.[2] It is accordingly unnecessary to say much by way of introduction and a brief summary will suffice.

[3] Mr Zuma was appointed as Deputy President of the RSA on 19 June 1999. He was, however, dismissed by Mr Mbeki during June 2005. During December 2007, he became the president of the governing political party, the African National Congress (the ANC), at the expense of Mr Mbeki, the incumbent and only other candidate for that position. It is common knowledge that subsequent to the judgment of the court below Mr Mbeki resigned as President of the country and that Mr Zuma is said to be the ANC's candidate for that post after the 2009 general election. Mr

[1] See *Zuma v National Director of Public Prosecutions* (8652/08) [2008] ZAKZHC 71 (12 September 2008) to be found at www.saflii.org.za.
[2] See especially *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2008 (2) SACR 421 (CC); [2008] ZACC 13 and *Thint Holdings (Southern Africa) (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2008 (2) SACR 557 (CC); [2008] ZACC 14.

Zuma regards the indictment as an impediment to his political future and the present case is an attempt by him to seek, on procedural grounds, closure of the criminal proceedings.

[4] On 23 August 2003, Mr Bulelani Ngcuka, the then NDPP, announced his intention to indict a certain Mr Schabir Shaik on two counts of corruption, but stated that he would not indict Mr Zuma, who was said to have been the recipient of alleged corrupt payments from Mr Shaik. I shall revert to the detail of the announcement, to which I shall refer as the Ngcuka decision. Mr Shaik was convicted and sentenced during June 2005,[3] and Mr Zuma, who was implicated in the judgment, was dismissed by Mr Mbeki from the position of Deputy President as a consequence, not (as Mr Mbeki said) because he was guilty but (as Mr Mbeki implied) on the theory that Caesar's wife should be above reproach.[4]

[5] A few days later, on 20 June, the newly appointed NDPP, Mr Vusi Pikoli, announced his decision to indict Mr Zuma. (This decision will be referred to as the Pikoli decision.) The matter came before Msimang J on 31 July 2006 for trial on two corruption counts which mirrored the two Shaik corruption counts. The prosecution applied for a postponement to complete its investigations and finalise the indictment. Msimang J refused the postponement and called on the prosecution to proceed with the trial. When the prosecution indicated that it was not ready to do so, he struck the matter from the roll.

[6] Mr Pikoli had in the interim been suspended by Mr Mbeki on an unrelated matter, and Mr Mokotedi Joseph Mpshe, the acting NDPP, decided on 27 December 2007 once again to indict Mr Zuma (herein called the Mpshe decision). That decision was followed by an indictment of 87 pages with 18 main counts of racketeering, corruption, money laundering, tax evasion and fraud. Much was based on the same subject matter that was dealt with in the Shaik trial but, according to the NDPP, the

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[3] *S v Shaik* 2007 (1) SACR 142 (D) confirmed on appeal: *S v Shaik* 2007 (1) SA 240; [2007] 2 All SA 9 (SCA) and *S v Shaik* 2008 (2) SA 208 (CC).

[4] According to Suetonius, *Vita Divi Juli* 74, Julius Caesar supposedly said when explaining why he was divorcing his wife on the ground of a suspicion of adultery that 'Meos tam suspicione quam crimine iudico carere oportere.' (They [my wife, mother and sister] should be as much free from suspicion of a crime as they are from crime itself.)

facts and circumstances differed materially because the evidence against Mr Zuma had become more compelling and the legal impediments to charging him had been reduced.

[7] In the application, which is the subject of this appeal, Mr Zuma sought an order declaring that both the Pikoli and the Mpshe decisions were invalid and, consequently, they were to be set aside. Nicholson J obliged by setting aside the latter decision (the former having lapsed). This brought the prosecution to an end – at least for the time being.

THE SCOPE OF THE CASE

[8] It would be naïve to pretend that we are oblivious to the fact that Nicholson J's judgment has had far-reaching political consequences and that there may be an attempt to employ this judgment to score political points. It is accordingly necessary to state at the outset what the case is about as opposed to what it is not about. An applicant is required to set out his case in the founding affidavit. This Mr Zuma did. He asserted that his case for the setting aside of the two decisions to prosecute him was premised on two bases, something he confirmed in his replying affidavit.

[9] He relied in the main on s 179(5)(d) of the Constitution,[5] which s 22(2)(c) of the National Prosecuting Authority Act 32 of 1998 (the NPA Act) repeats. It provides in summary that the NDPP may 'review' a decision to prosecute or not to prosecute, after consulting the 'relevant' Director of Public Prosecutions (the DPP) and after taking representations from the accused, the complainant and any other relevant person. His case in this regard was simple: the Pikoli and Mpshe decisions to prosecute amounted in each instance to a review of the Ngcuka decision not to prosecute him; they were made without his having been invited to make representations in fulfilment of a constitutional requirement and they were, consequently, invalid. It matters not that he was able, if he so desired, to make representations – his complaint was that he had to be invited to make them.

[10] The second and alternative ground on which he relied was that he had a legitimate expectation to be invited to make representations before any decision was taken to change the Ngcuka decision. In this regard he relied principally on s 33 of the Constitution, which deals with just administrative action. The expectation,

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[5] Constitution s 179. Prosecuting authority.—(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of—
(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and
(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.
(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.
(3) National legislation must ensure that the Directors of Public Prosecutions—
(a) are appropriately qualified; and
(b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5).
(4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.
(5) The National Director of Public Prosecutions—
(a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;
(b) must issue policy directives which must be observed in the prosecution process;
(c) may intervene in the prosecution process when policy directives are not complied with; and
(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:
(i) The accused person.
(ii) The complainant.
(iii) Any other person or party whom the National Director considers to be relevant.
(6) The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.
(7) All other matters concerning the prosecuting authority must be determined by national legislation.

according to the founding affidavit, arose from the content of Mr Ngcuka's press release when he announced his decision not to prosecute him and from some other non-contentious facts that will be detailed in due course.

[11] From this it is apparent that Mr Zuma's case depended, as far as the first ground is concerned, on an interpretation of the Constitution.[6] In regard to the second it depended in essence on whether s 33 of the Constitution applied and, if so, on the meaning of the Ngcuka press statement. (The ultimate argument was somewhat different but does not affect the general purport of the point now under discussion.) These are all legal issues based on common cause facts.

[12] Mr Zuma made it abundantly clear that he did not wish to impugn the decisions themselves, and that his application was not concerned with the reasons and motives for the decisions: it related only to the procedural requirements for making them. He implied that he might attack the merits of the decisions in separate proceedings. In spite of this explicit statement of intent, Mr Zuma introduced a large number of facts that related to the merits of the decisions. The NDPP contended that they were irrelevant.

[13] It follows from this that, as the trial judge recognised, 'political meddling' was not an issue that had to be determined (para 229 of his judgment). Nevertheless, a substantial part of his judgment dealt with this question; and in the course of this discussion he changed the rules of the game, took his eyes off the ball and red-carded not only players but also spectators. Lest his judgment be considered authoritative it will be necessary to deal with these matters.

[14] However, it must be understood that this aspect of the judgment is not about the guilt or otherwise of Mr Zuma or whether the decision to prosecute him was justified. It is even less about who should be the president of the ANC; whether the decision of the ANC to ask Mr Mbeki to resign was warranted; or who should be the ANC's candidate for President in 2009. More particularly, this aspect of the judgment is not about whether there was political meddling in the decision-making process. It

[6] In the event s 22(2)(c) of the NPA Act played no role in the argument because it merely restates the constitutional provision.

is about whether the findings relating to political meddling were appropriate or could be justified on the papers.

THE JUDICIAL FUNCTION

[15] It is crucial to provide an exposition of the functions of a judicial officer because, for reasons that are impossible to fathom, the court below failed to adhere to some basic tenets, in particular that in exercising the judicial function judges are themselves constrained by the law. The underlying theme of the court's judgment was that the judiciary is independent; that judges are no respecters of persons; and that they stand between the subject and any attempted encroachments on liberties by the executive (para 161-162).[7] This commendable approach was unfortunately subverted by a failure to confine the judgment to the issues before the court; by deciding matters that were not germane or relevant; by creating new factual issues; by making gratuitous findings against persons who were not called upon to defend themselves; by failing to distinguish between allegation, fact and suspicion; and by transgressing the proper boundaries between judicial, executive and legislative functions.

[16] Judges as members of civil society are entitled to hold views about issues of the day and they may express their views provided they do not compromise their judicial office. But they are not entitled to inject their personal views into judgments or express their political preferences. To illustrate the point I intend to refer to some instances where the court below in my view overstepped the limits of its authority.

[17] The 'Society for the Protection of our Constitution' sought to be admitted as *amicus curiae*, asking for an order which the court below charitably interpreted as one for the appointment of a commission of inquiry into the alleged violation of Mr

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[7] Citing Lord Atkin in *Liversidge v Anderson* [1942] AC 206 at 244: 'In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.'

Zuma's constitutional rights. The court found, quite rightly, that it was beyond its competence to make such an order, but it then proceeded to add at length that a commission of inquiry into the so-called arms deal, which gave rise to some of the criminal allegations against Mr Zuma, should be appointed 'to rid our land of this cancer that is devouring the body politic' (para 33). Whether or not one agrees with these sentiments is beside the point. The point is that those personal sentiments concerning a political decision were, in the context of the judgment, unwarranted.

[18] Then there is its criticism concerning two of Mr Mbeki's decisions. The first concerns his dismissal of Mr Zuma as Deputy President in terms of s 91(2) of the Constitution (para 155-158). The second relates to his decision to stand for re-election as president of the ANC with the knowledge that he could not serve another term as President of the country (para 171-173). The propriety and legitimacy of Mr Mbeki's decisions were not issues in the case and he was never called upon to justify them. These matters are also not matters of law – they relate to purely political questions and, once again, whether or not one agrees with the learned judge's sentiments is of no consequence: the findings were gratuitous.[8]

[19] The independence of the judiciary depends on the judiciary's respect for the limits of its powers. Even if, in the words of the learned judge, the judiciary forms a 'secular priesthood' (para 161) this does not mean that it is entitled to pontificate or be judgemental especially about those who have not been called upon to defend themselves – as said, its function is to adjudicate the issues between the parties to the litigation and not extraneous issues.

JUDGING FACTS IN MOTION PROCEEDINGS

[20] I have already mentioned that the issues in this case are primarily legal and based on common cause facts but that is not how the court below approached the case. Instead it applied a novel approach to motion proceedings which, if left undisturbed, may serve as a dangerous precedent.

[8] His comments on the Selebi/Pikoli matter are dealt with later.

[21] Benevolently interpreted it would appear that the court, in the context of a striking out application brought by the NDPP, sought to determine whether the NDPP was influenced by the executive in deciding to prosecute.[9]

[22] The rule of court in question states that a court may strike out allegations from an affidavit that are 'scandalous, vexatious or irrelevant' provided the objecting party will be prejudiced if the allegations are not struck out (Uniform Rule r 6(15)). At this juncture it suffices to deal with the objection to allegations that are said to be irrelevant. The passages in Mr Zuma's affidavit to which the NDPP objected dealt in the main with his allegations concerning a political conspiracy to prosecute him.

[23] The test for irrelevance is whether the allegations do not apply to the matter in hand or do not contribute one way or another to a decision of that matter.[10] Inadmissible evidence is by its very nature irrelevant.[11] Mr Zuma said that he introduced the allegations to show that the decision not to ask for his representations was deliberate and politically motivated. Whether the failure to provide him with a hearing was deliberate or politically motivated has nothing to do with his causes of action. He was, as a matter of law, either entitled to a hearing or he was not. If he was entitled to one, the reason for the failure to afford him one is completely immaterial.

[24] The court below did not decide whether the allegations were relevant or not. Instead it sought to determine whether the allegations were 'offensive because they insinuate that there is political meddling' (para 41). To do that, it looked at the 'merits' (para 43), that is, whether there was merit in the allegations (para 238). The court accordingly analysed the allegations (and some of its own suppositions) to determine what factual 'inference' it could draw (para 191); what 'the most plausible inference' was (para 191, 206); and what 'seemed' to have happened (para 196,

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[9] There is also another possible interpretation of the judgment and that is that the court was of the view that the possibility of political interference created a duty to apply s 179 of the Constitution (para 218-219) but that is unlikely.

[10] *Meintjes v Wallachs Ltd* 1913 TPD 278 at 285-286 quoted with approval in *Beinash v Wixley* 1997 (3) SA 721; [1997] 2 All SA 241 (A).

[11] *Swissborough Diamond Mines (Pty) Ltd v Government of the RSA* 1999 (2) SA 279 (T) 336F-G.

209). It found that it 'was not convinced that [Mr Zuma] was incorrect' (para 216), and that political meddling could not be excluded (para 238).

[25] The court erred in its approach to striking out applications. It is correct that relevance has to be tested with reference to the merits of the case but that does not mean that relevance depends on the factual merit of the impugned allegations.[12] Whether they are true or not is of no moment; their relevance to the merits of the case is what is of consequence. As mentioned, the court did not consider this question.

[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.[13] The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.[14]

[27] The court below imposed an onus on the NDPP to prove a negative. This appears from the finding that it 'was not convinced that [Mr Zuma] was incorrect' in relation to political meddling (para 216). It reasoned that the question whether there had been political meddling fell within the peculiar knowledge of the NDPP and was difficult for Mr Zuma to prove; and so, it held, less evidence would suffice to

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[12] *Elher (Pty) Ltd v Silver* 1947 (4) SA 173 (W) 177-178.
[13] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634-5; *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 55; *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2008 (2) SACR 421 (CC) para 8-10.
[14] *Sewmungal NNO v Regent Cinema* 1977 (1) SA 814 (N); *Trust Bank van Afrika Bpk v Western Bank Bpk NNO* 1978 (4) SA 281 (A).

establish a prima facie case (para 168-169).[15] This rule of evidence, namely that if the facts are peculiarly within the knowledge of a defendant the plaintiff needs less evidence to establish a prima facie case, applies to trials. In motion proceedings the question of onus does not arise and the approach set out in the preceding paragraph governs irrespective of where the legal or evidential onus lies.[16] In applying the 'rule' the court omitted to determine whether the NDPP had failed to adduce evidence on the particular issues; it used the 'rule' in spite of evidence to the contrary; and it did so in instances where no answer was called for because the allegations were either not incorporated into the founding affidavit or were inadmissible. Finally, the court failed to have regard to another principle, namely that the more serious the allegation or its consequences, the stronger must be the evidence before a court will find the allegation established.[17]

INDEPENDENCE OF THE NPA[18]

[28] Although it is generally accepted that any prosecution authority ought to be free from executive or political control, this was and is not necessarily the norm in Anglo-American countries. It depends on the position of the Attorney-General who, in many countries, is a political appointee – often at ministerial level. Nevertheless, an Attorney-General is required by convention to make prosecutorial decisions without regard to political considerations and may not subject his discretionary authority to that of government. He is also not responsible to government to justify the exercise of his discretion because this political office has judicial attributes.[19]

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[15] *Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173-174; *Gericke v Sack* 1978 (1) SA 821 (A) 827D-H.
[16] *Ngqumba v Staatspresident; Damons NO v Staatspresident; Jooste v Staatspresident* 1988 (4) SA 224 (A).
[17] *Gates v Gates* 1939 AD 150 at155; *R(N) v Mental Health Review Tribunal (Northern Region)* [2006] QB 468 para 62.
[18] For useful expositions see JJ Joubert (ed) *Criminal Procedure Handbook* 8 ed 46 et seq; E Du Toit et al *Commentary on the Criminal Procedure Act* (loose leaf ed) ch 1.
[19] Ian G Scott 'The Role of the Attorney General and the Charter of Rights' 29 *Crim L Q* (1986-1987) 187; E C S Wade & A W Bradley *Constitutional and administrative law* 11 ed 402-404; *Ex parte Attorney General, Namibia: In Re the Constitutional Relationship between the Attorney-General and the Prosecutor-General* [1995] 3 LRC 507, 1995 (8) BCLR 1070 (SCNm); *Githunguri v Republic of Kenya* [1986] LRC (Const) 618 (HC); *Proulx v Quebec (Attorney General)* 2001 SCC 66, [2001] 3 SCR 9. For the constitutional crisis about the independence of the Attorney-General in 1924 in the UK see S A de Smith *Constitutional and Administrative Law* 4 ed 380-381.

[29] Locally the pre-Union position was exemplified by Ordinance 1 of 1903 (T), which provided that the right and power of prosecution was 'absolutely under [the Attorney-General's] own management and control' (s 6). At the time the Attorney-General was a cabinet minister.[20] The South Africa Act of 1909 had a similar provision (s 139) but the difference was that since Union Attorneys-General were civil servants.[21] The position changed in 1926 when all powers, authorities and functions relating to the prosecution of crimes and offences were vested in the Minister.[22] However, in terms of a notice published at the time in the Government Gazette the decision to prosecute or not to prosecute remained with the Attorneys-General and the Minister exercised an appeal or review function only.[23] As from 1935, Attorneys-General had to exercise their authority and perform their functions under the Criminal Procedure Act subject to the control and directions of the Minister who could reverse any decision.[24] The convention, apparently, remained as set out in the mentioned government notice.[25]

[30] The independence of the Attorneys-General's decision-making concerning prosecutions was reinstated by the Attorney-General Act 92 of 1992 although the Minister had to co-ordinate their functions and could request them for information or a report on any matter, and they had to submit annual reports to him (s 5). The interim Constitution also recognised that the authority to institute criminal proceedings vested in the Attorneys-General.[26]

[31] Section 179 of the Constitution[27] creates a single national prosecuting authority (the NPA) consisting of a National Director, who is head of the prosecuting authority and a political appointee, and also DPPs and prosecutors. The NPA has the power to institute criminal proceedings on behalf of the State and to carry out

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[20] As to political interference in the Transvaal Republic: *S v Nellmapius* (1886) 2 SAR 121.
[21] So, too, the Criminal Procedure and Evidence Act 31 of 1917 s 7.
[22] Act 39 of 1926. References to 'the Minister' in this judgment refer either to the Minister of Justice or, where applicable, the Minister of Justice and Constitutional Development.
[23] GN 1532/1926. For a discussion: Gardiner & Lansdown *SA Criminal Law and Procedure* (6 ed 1957) vol 1 190-193.
[24] General Law Amendment Act 46 of 1935 s 1. Also the Criminal Procedure Acts 56 of 1955 (s 5) and 51 of 1977 (s 3(5)).
[25] This differs from the historical assumptions made in the judgment (para 78-79): 32 *House of Assembly Debates* cols 156-169 (2 February 1971) referred to in (1977) 1 *SACC* 136 n 6.
[26] Act 200 of 1993 s 108(1).
[27] See in general *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC).

any necessary functions incidental thereto. Although national legislation must ensure that the NPA exercises its functions without fear, favour or prejudice, the Minister must exercise final responsibility over the NPA and the NDPP must determine prosecution policy with the concurrence of the Minister.

[32] Accordingly, the Constitution on the one hand vests the prosecutorial responsibility in the NPA while, on the other, it provides that the Minister must exercise final responsibility over it. These provisions may appear to conflict but, as the Namibian Supreme Court held in relation to comparable provisions in its Constitution, they are not incompatible.[28] It held (I am using terms that conform with our Constitution) that although the Minister may not instruct the NPA to prosecute or to decline to prosecute or to terminate a pending prosecution, the Minister is entitled to be kept informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal or prosecutorial authority.

[33] The NPA Act, the constitutionality of which is not under attack, shows that the court below overstated the position when it held without qualification that 'there should be no relationship [between the NPA and] the Minister of Justice – certainly insofar as his decisions to prosecute or not to prosecute anybody from the Commissioner of Police downwards' (para 207). (To the extent that the statement implies that there could be a relationship from the Commissioner of Police upwards it was probably unintended.)

[34] The Act requires members of the prosecuting authority to serve 'impartially' and exercise, carry out or perform their powers, duties and functions 'in good faith and without fear, favour or prejudice' and subject only to the Constitution and the law (s 32(1)(a)).[29] It further provides that no one may interfere 'improperly' with the NPA in the performance of its duties and functions (s 32(1)(b)). ('Improperly' may be tautologous because interference usually implies some or other impropriety.) It reaffirms that the Minister must exercise final responsibility over the NPA and

[28] *Ex parte Attorney General, Namibia: In Re the Constitutional Relationship between the Attorney-General and the Prosecutor-General* [1995] 3 LRC 507, 1995 (8) BCLR 1070 (SCNm).

[29] *S v Yengeni* 2006 (1) SACR 405 (T).

obliges the NDPP, at the request of the Minister, to furnish the latter with information or a report with regard to any case and to provide the Minister with reasons for any decision taken (s 33(2)). More directly in point is s 22(2)(c), which is the counterpart of s 179(5)(d) of the Constitution and deals with the NDPP's review function, read with s 22(4)(a)(iii). The latter provision states that, in exercising the review power to prosecute or not to prosecute, the NDPP may advise the Minister 'on all matters relating to the administration of justice', which is hardly compatible with the notion that there may be no relationship between them.

[35] The court below began its discussion of the legal issues implying in general terms that a decision to prosecute is an administrative action to which the *audi* principle (with its offspring the doctrine of legitimate expectation) applies (para 47-53). This has never been the law and, as the Constitutional Court held, it is not the law under the Constitution and the Promotion of Administrative Justice Act 3 of 2000 (PAJA).[30] Such a decision is not susceptible to review. There are policy reasons for this[31] that need not be discussed because the constitutionality of the provision of PAJA,[32] which excludes a review of a decision to prosecute,[33] is not under attack.[34]

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[30] *Kaunda v President of the RSA (2)* 2005 (4) SA 235 (CC) para 83-84 and the cases there cited. Compare further *Meyer v Law Society, Transvaal* 1978 (2) SA 209 (T) 214F-215D; *Meyer v Prokureursorde van Transvaal* 1979 (1) SA 849 (T); *Huisamen v Port Elizabeth Municipality* 1998 (1) SA 477; [1997] 2 All SA 458 (E); *Park-Ross v Director: Office for Serious Economic Offences* 1998 (1) SA 108; [1998] 1 All SA 70 (C) para 22-25. As to the meaning of 'administrative action' see *President of the RSA v SA Rugby Football Union* 2000 (1) SA 1 (CC) also reported as *President of the RSA v SARFU* 1999 (10) BCLR 1059 (CC) para 143.

[31] *In re Smalley* [1985] AC 622 at 642-643; *In r*e *Ashton* [1994] 1 AC 9 at 17; *Sharma v. Deputy Director of Public Prosecutions (Trinidad and Tobago)* [2006] UKPC 57 (30 November 2006); *Marshall v Director of Public Prosecutions (Jamaica)* [2007] UKPC 4 (24 January 2007).

[32] Section 1: '"administrative action" . . . does not include . . . a decision to institute or continue a prosecution.'

[33] The review of a decision not to prosecute is not excluded by PAJA and although the Constitutional Court in *Kaunda v President of the RSA (2)* 2005 (4) SA 235 (CC) para 84 left the question open the court below held that it could be reviewed (para 58). As to a decision not to prosecute in the UK: *Corner House Research v The Serious Fraud Office* [2008] UKHL 60 (30 July 2008).

[34] English law now appears to be 'that absent dishonesty or *mala fides* or an exceptional circumstance, the decision of the DPP to consent to the prosecution of the Respondents is not amenable to judicial review': *R v Director of Public Prosecutions, Ex Parte Kebeline* [1999] UKHL 43; [2000] 2 AC 326 (per Lord Steyn).

[36] This does not mean, and it was never argued otherwise, that a failure to comply with a constitutional or statutory requirement to hear a party is not justiciable under the principle of legality irrespective of whether or not PAJA applies.[35]

[37] The court dealt at length with the non-contentious principle that the NPA must not be led by political considerations and that ministerial responsibility over the NPA does not imply a right to interfere with a decision to prosecute (para 88 et seq). This, however, does need some contextualisation. A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent,[36] something not alleged by Mr Zuma and which in any event can only be determined once criminal proceedings have been concluded.[37] The motive behind the prosecution is irrelevant because, as Schreiner JA said in connection with arrests, the best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal.[38] The same applies to prosecutions.[39]

[38] This does not, however, mean that the prosecution may use its powers for 'ulterior purposes'. To do so would breach the principle of legality. The facts in *Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order*[40] illustrate and explain the point. The police had confiscated machines belonging to Highstead for the purpose of charging it with gambling offences. They were intent on confiscating further machines. The object was not to use them as exhibits – they had enough exhibits already – but to put Highstead out of business. In other words, the confiscation had nothing to do with the intended prosecution and the power to confiscate was accordingly used for a purpose not authorised by the statute. This is what 'ulterior purpose' in this context means. That is not the case before us. In the

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[35] Constitution s 2: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.' *President of the RSA v SA Rugby Football Union* 2000 (1) SA 1 (CC) also reported as *President of the RSA v SARFU* 1999 (10) BCLR 1059 (CC) para 148. See for a recent application in a similar context *Naidoo v National Director of Public Prosecutions* 2005 (1) SACR 349 (SCA). It is difficult to comprehend the reference to ouster clauses at para 58-66 of the judgment below.

[36] *Beckenstrater v Rottcher & Theunissen* 1955 (1) SA 129 (A); *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA). For Canada: *Prouxl v Quebec (Attorney General)* 2001 SCC 66, [2001] 3 SCR 9.

[37] *Thompson v Minister of Police* 1971 (1) SA 371 (E) 375A-D.

[38] *Tsose v Minister of Justice* 1951 (3) SA 10 (A) 17.

[39] *Beckenstrater v Rottcher & Theunissen* 1955 (1) SA 129 (A).

[40] 1994 (1) SA 387 (C). The correctness of this judgment does not arise for decision.

absence of evidence that the prosecution of Mr Zuma was not intended to obtain a conviction the reliance on this line of authority is misplaced as was the focus on motive.[41]

[39] Courts have also interfered with decisions to prosecute in circumstances where the prosecuting authorities had given an undertaking not to prosecute or had made a representation to that effect in exchange for a plea or for co-operation.[42] The prosecuting authority has been kept to its bargain. Interesting as the examples may be, they have no bearing on the facts before us.

THE NGCUKA DECISION

[40] I have already mentioned that during August 2003 Mr Ngcuka, in his capacity as NDPP, decided to prosecute Mr Shaik but not to prosecute Mr Zuma. He announced this decision at a press conference in the presence of the then Minister, Dr Penuel Maduna. In the press release Mr Ngcuka made two statements that are of consequence to Mr Zuma's case. The one deals with the legitimate expectation argument, to which I shall revert under another heading. The second statement was this:

'After careful consideration in which we looked at the evidence and the facts dispassionately, we have concluded that, whilst there is a *prima facie* case of corruption against the Deputy President, our prospects of success are not strong enough. That means that we are not sure if we have a winnable case.'

Mr Zuma expressed his dissatisfaction with this statement because, he said, it carried the gratuitous and offensive imputation, which he had to endure, that he was corrupt but had covered his tracks. Apart from this, Mr Zuma, as appears from his founding affidavit, was quite pleased with the announcement. Indeed, in his replying affidavit he made it clear that it was common cause that 'after extensive and

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[41] *Beckenstrater v Rottcher & Theunissen* 140B-F.
[42] *North Western Dense Concrete CC v DPP, Western Cape* 2000 (2) SA 78 (C); *Van Eeden v DPP, Cape of Good Hope* 2005 (2) SACR 22 (C); *R v Croydon Justices, ex parte Dean* [1993] 3 All ER 129 (QBD).

thorough investigations', Mr Ngcuka and his deputy, Mr McCarthy, 'took a carefully considered decision' not to prosecute him.[43]

[41] It is important to stress that Mr Zuma did not allege that this decision was politically motivated; he did not say that it was unjustified; and he did not allege that Dr Maduna had acted improperly by being present at the press conference. In spite of this, Nicholson J saw it as his duty to determine whether the decision was made from fear or favour (para 174) and said (para 175):

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

[42] The statements in the second and third sentences are puzzling. Mr Zuma was never called upon to deal with the supposition that the decision not to prosecute was a favour to him and, accordingly, he never sought to deny it. And although Mr Zuma perceived a political plot behind the Pikoli and Mpshe decisions, he did not say that the Ngcuka decision was part of the plot. The trial judge's later statement that Mr Zuma maintained that there was a strategy to prosecute Mr Shaik and, when he was convicted, to dismiss him as Deputy President, does likewise not appear from the papers (para 196).

[43] Nicholson J also attacked the merits of the Ngcuka decision, finding that it was 'bizarre' and that it brought justice into disrepute (para 150 and 155). The merits of the decision were, once again, not before him and were irrelevant and in reaching this conclusion he in any event took no note of the NDPP's explanation. It is correct that if there is prima facie evidence of a crime in the sense of reasonable prospects of success the NPA should, in the absence of other germane considerations, initiate

[43] The finding of the court below that the Ngcuka decision was a review and not an original decision is, accordingly, not fact based (para 117). Had it been a review it would have been void because Mr Zuma had not been invited to make representations. The effect would then have been that the objections to the later 'review' on which this case is based would have had no merit because one cannot review a void decision.

a prosecution. But the term 'prima facie evidence' has more than one connotation and may mean, as Mr Ngcuka conveyed, that there may be evidence of the commission of a crime which is nonetheless insufficient to satisfy the threshold of a reasonable prospect of success, especially if regard is had to the burden of proof in a criminal case.[44] Although corruption involves two persons, the fact that the one may be guilty does not mean that the other is also guilty because the intention of each party must be decided separately, and evidence that may be admissible against the one may not be admissible against the other.[45] In other words, the fact that Mr Shaik was found guilty does not mean that Mr Zuma is guilty. Having said all of this, I must emphasise that I am not holding that the Ngcuka decision was right, simply because I do not have the material to judge what is in the context of this case a non-issue. Instead, I am simply holding that the court below had erred in this regard.

[44] I have already mentioned that Mr Zuma never accused Dr Maduna of having acted improperly, whether in connection with the Ngcuka decision or otherwise. Nicholson J, again, thought otherwise and without hearing Dr Maduna concluded that he had done so in attending the press conference. From this he deduced that there was a suggestion of political interference and then held that Dr Maduna played a 'not insignificant part' in planning the 'strategy' not to prosecute in order to have Mr Zuma dismissed as Deputy President on the conviction of Mr Shaik, and that this constituted a serious criminal offence (para 196).[46] Dr Maduna's supposed

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[44] See the discussion by Zeffertt, Paizes and Skeen *The SA Law of Evidence* (2003) 121-130. *R v Director of Public Prosecutions, ex parte Manning* [2000] 3 WLR 463 at 474 (Lord Bingham of Cornhill):

'In most cases the decision will turn not on any analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it.'

[45] Compare *Thint Holdings (Southern Africa) (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2008 (2) SACR 557 (CC) para 58.

[46] He also referred to meetings between Dr Maduna and the NDPP around the prosecution of another co-accused, Thint (para 192-195), and the fact that Mr Ngcuka thanked Dr Maduna at the press conference for his political leadership. As to the first, the court was not entitled to base its judgment on something taken from an answering affidavit unless the argument was foreshadowed in the founding affidavit, which it was not: *Administrator, Transvaal v Theletsane* 1991 (2) SA 192 (A). As to

machinations around the Ngcuka decision were then extrapolated to cover Mr Mbeki and the whole cabinet (para 213). (It is a matter of public record that Dr Maduna left cabinet after the 2004 general elections.) Once again, the 'strategy' involving Dr Maduna, Mr Mbeki and all the other members of cabinet as well as the causal connection between the Ngcuka decision and Mr Mbeki and the cabinet as found by the trial judge were not based on any evidence or allegation. They were instead part of the judge's own conspiracy theory and not one advanced by Mr Zuma.[47] Further, the finding, by implication or otherwise, that a non-party may have committed a criminal act where this was not alleged, where it was not in issue and without hearing that party is incomprehensible.

THE PIKOLI DECISION

[45] It will be recalled that the Pikoli decision to indict Mr Zuma came to nought when Msimang J struck the case from the roll. This, according to the Constitutional Court, terminated the proceedings.[48] Having fallen away, the Pikoli decision was of mere academic interest and nothing was left to set aside. The court below realised this and, consequently, refrained from setting it aside (para 242).

[46] The court nevertheless proceeded to make findings about the decision that cannot be justified on the record and, once again, I would fail in my duty if I did not indicate briefly where the court overstepped the mark. It latched onto a paragraph in an annexure to the NDPP's answering affidavit on which Mr Zuma had not relied (para 197-199). It was an answer by Mr Pikoli to an affidavit made by Mr Zuma in the proceedings before Msimang J. The NDPP alleges that the trial judge misunderstood the context of Mr Pikoli's evidence and counsel for Mr Zuma did not dispute this. The court also relied on the contents of a newspaper article that speculated that the decision to prosecute was politically motivated (para 200-205).

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the second, the statement appeared in an annexure and Mr Zuma did not seek to rely on it and, accordingly, the court was not entitled to base its judgment on it because the NDPP was not called upon to deal with it: *Minister of Land Affairs & Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA); [2007] ZASCA 153 para 43.

[47] The fact that cabinet may in law be responsible for the actions of a minister does not establish without evidence that cabinet knew what the minister did (para 213-216).

[48] *Thint Holdings (Southern Africa) (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2008 (2) SACR 557 (CC) para 40-42.

Mr Zuma had attached the article to his founding affidavit to indicate that he believed that his case was being reviewed by the NDPP. He did not rely on the contents of the article which, in any event, were no more than inadmissible speculation by a journalist.

[47] The trial judge, again, failed to comply with basic rules of procedure.[49] Judgment by ambush is not permitted. It is not proper for a court in motion proceedings to base its judgment on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest ─ the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. A party cannot be expected to trawl through annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained.[50] The position is no different from the case where a witness in a trial is not called upon to deal with a fact and the court then draws an adverse conclusion against that witness.[51]

[48] This criticism also applies in relation to the findings of the court below about the unrelated investigation concerning the Commissioner of Police, Mr Jackie Selebi. Its findings that (a) 'there is no refutation that the Selebi warrants were cancelled by Mr Mpshe after political interference and that Pikoli was suspended because he refused to do so' (para 205); that (b) 'Mr Pikoli does not deal with the allegation that the issuing of the warrants against Selebi was not palatable to the President but the decision to prosecute the applicant was' (para 206); and that (c) 'the suspension of [Mr Pikoli] was a most ominous move that struck at the core of a crucial State institution' (para 207) were all likewise based on unconfirmed newspaper speculation on which Mr Zuma did not and could not rely. Here again the court, without having all the facts, commented on matters that were not in issue or canvassed.

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[49] Compare *Minister of Land Affairs & Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA); [2007] ZASCA 153 para 43.
[50] *Swissborough Diamond Mines (Pty) Ltd v Government of the RSA* 1999 (2) SA 279 (T) 324F-G.

[51] *President of the RSA v SA Rugby Football Union* 2000 (1) SA 1 (CC) also reported as *President of the RSA v SARFU* 1999 (10) BCLR 1059 (CC) para 61.

[49] Mr Zuma did not note a cross-appeal in relation to the dismissal of his claim for setting aside the Pikoli decision and, accordingly, the procedural correctness of this decision does not call for consideration.[52] It is, however, necessary to say something about the allegation of political meddling with Mr Pikoli's decision. This is because, although Mr Zuma made a general allegation of 'political motives and stratagems' in the decision to prosecute him, it is only in the case of the Pikoli decision that he tried to identify role players who were allegedly involved.

[50] The sequence of events was the conviction of Mr Shaik, a visit to Chile by Mr Mbeki and Mr Pikoli, Mr Mbeki's dismissal of Mr Zuma, and Mr Pikoli's decision to prosecute him. From this Mr Kemp (for Mr Zuma) sought to infer an implied instruction by Mr Mbeki to Mr Pikoli to prosecute Mr Zuma. That was the high watermark of the 'evidence' on political meddling.

[51] Once again, without deciding that there was or was not political meddling, fairness requires that these facts and accusations should be put in their proper perspective. The judgment of the trial judge in the Shaik matter found, albeit not in those words, that a generally corrupt relationship (to use Mr Kemp's words during argument) existed between Mr Shaik and Mr Zuma. He added, quite appropriately, that his judgment did not hold that Mr Zuma was guilty. I have already mentioned what the basis of Mr Mbeki's reaction was and it is difficult to see how Mr Pikoli could, in the light of the Shaik judgment, have failed to prosecute Mr Zuma. The evidence about the trip to Chile is clear and Mr Zuma knew this in advance: Mr Pikoli did not accompany Mr Mbeki although they were on the same mission. They did not meet and did not discuss the matter. Whether Mr Zuma believes this or not is another matter; courts are duty-bound to deal with proven facts.

THE MPSHE DECISION

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[52] *Goodrich v Botha* 1954 (2) SA 540 (A); *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) 607; *National Union of Metalworkers of SA v Henred Fruehauf Trailers* 1995 (4) SA 456 (A) 475; *Municipal Council of Bulawayo v Bulawayo Waterworks Co Ltd* 1915 AD 611 at 631; *SAR & H v Sceuble* 1976 (3) SA 791 (A).

[52] The legality of the Mpshe decision is the crux of this appeal. Unfortunately, the court below subjected Mr Mpshe to the same treatment that it had inflicted on others. It also used the newspaper report referred to above to make a similarly unfounded finding against Mr Mpshe (para 200-205). Having done this, the court went on to assume that Mr Mpshe complied with the supposed instructions of Mr Mbeki to prosecute Mr Zuma fearing that he, like Mr Pikoli, might be suspended or dismissed should he assert his prosecutorial independence (para 207). All this was gratuitous and not based on any evidence.[53]

[53] The court below set aside the Mpshe decision and the indictment that followed because of his failure to (a) comply with s 179(5) of the Constitution and (b) accord Mr Zuma a hearing in the light of his legitimate expectation that arose, firstly, because of the Ngcuka announcement (para 223-224) and, secondly, in view of a letter written by Mr Zuma's attorney, Mr Hulley, shortly before the decision was made and Mr Mpshe's response to it (para 132-133, 230).[54]

[54] It is necessary to stress that the NDPP never refused to afford Mr Zuma a hearing. Mr Zuma knew from June 2005 that he was the subject of an investigation. He was soon thereafter served with 'interim' indictments. He had been told in the Ngcuka press release that he could make representations under s 22(4)(c) of the NPA Act and that the NDPP was duty-bound to consider them. He did nothing of the sort. Instead, he resisted all attempts by the NPA to further their investigation. This case is accordingly not about the opportunity to be heard – it is about Mr Zuma's alleged right to be invited to make representations and, concomitantly, a right to a statement setting out the criteria that were applied in not prosecuting him and how these had changed. In other words, he requires with the invitation an analysis of the case against him as considered by Mr Ngcuka against the facts in possession of Mr Mpshe.

SECTION 179(5)(d) of the CONSTITUTION

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[53] The court chose to comment on the timing of the Mpshe decision while Mr Zuma expressly refrained from doing so (para 210).

[54] It is not necessary to comment on the finding, again based on newspaper reports, that because Mr Mpshe consulted his investigation team this meant that he should have consulted with Mr Zuma (para 120) because Mr Kemp did not rely on it.

[55] The full text of s 179 appears earlier in a footnote but it is convenient at this juncture to quote the relevant part of sub-sec (5):

'The National Director of Public Prosecutions—

. . .

(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:

(i) The accused person.

(ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant.'

[56] The main issue between the parties is whether the requirement of 'taking representations' from Mr Zuma applies to the facts of this case. The NDPP argues that the provision applies only to reviews of decisions of DPPs and their prosecutors while Mr Zuma contends that it also applies when the NDPP reconsiders one of his own decisions.

[57] Before dealing with the wording of the provision it must be placed in context. Section 179 is to be found in chapter 8 of the Constitution, which deals with 'Courts and Administration of Justice'. This chapter does not purport to deal with rights of accused persons – they are contained in chapter 2, the Bill of Rights, more particularly s 35. I accept that the chapter must be so interpreted that it promotes the spirit, purport and objects of the Bill of Rights and fits seamlessly into the Constitution as a whole.

[58] As mentioned before, s 179 created a new prosecutorial structure where, instead of having a number of Attorneys-General, each with their respective areas of jurisdiction, one now has an NDPP who is a presidential (political) appointee at the apex of a single NPA and below him DPPs and prosecutors who are not.

[59] Against this background sub-sec (3)(b) states that DPPs are to be 'responsible' for prosecutions in their specific jurisdictions, subject to the contentious sub-sec (5). 'Responsible', as Mr Kemp argued, means in this context 'answerable,

accountable; liable to account'.[55] By virtue of the cross-reference to sub-sec (5), this implies that DPPs are answerable to the NDPP. Paragraphs (a)-(c) proceed to deal with three functions of the NDPP in his capacity as head of the NPA and his control over DPPs and the prosecutors for whom they are in turn responsible. They are to determine prosecution policy; to issue policy directives; and to intervene in the prosecution process when policy directives are not complied with.[56]

[60] Sub-section (5)(d) deals with the procedure that the NDPP must follow in reviewing a prosecutorial decision. This requires prior consultation with 'the relevant' DPP and prior representations from the accused, the complainant and any other relevant person.

[61] The dictionary meaning of 'review' includes the review of an own decision but as the court below correctly pointed out 'the concept of a review or reconsideration assumes a role somewhat elevated to and distant from the person whose decision is being reviewed' (para 106).[57] It is also in the ordinary course of events done on the existing record and the facts that were before the person whose decision is being reviewed. Support for this can be found in legislation such as s 302 of the Criminal Procedure Act 51 of 1977, s 24 of the Supreme Court Act 59 of 1959, the various statutes dealing with courts of the same status as the high courts, PAJA and the Uniform Rules of Court r 53. It is accordingly wrong to argue, as did Mr Kemp, that regard must simply be had to the dictionary meaning of 'review'. Dictionary meanings are only a guide to meaning because the meaning of words depends on context.[58]

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[55] *Mweuhanga v Administrator-General of South West Africa* 1990 (2) SA 776 (A) 783E-I.

[56] 'The National Director of Public Prosecutions—

(a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;

(b) must issue policy directives which must be observed in the prosecution process;

(c) may intervene in the prosecution process when policy directives are not complied with; and

(d) . . ..'

[57] Elsewhere the court below had a different view (para 68).

[58] *Seven Eleven Corporation of SA (Pty) Ltd v Cancun Trading No 150 CC* 2005 (5) SA 186; [2005] 2 All SA 256 (SCA) para 24.

[62] In the context of sub-sec (5), the power to review can only be an 'apex' function, in other words, a function of the head of the NPA *qua* head. Paragraph (d) accordingly deals only with the review of a decision by the 'relevant' DPP – it does not include a reconsideration of the NDPP's own decisions. Once this is accepted, the reference to the 'relevant' DPP does not, as submitted by Mr Kemp, refer to the DPP who is affected because the case may fall within his jurisdiction.

[63] Mr Kemp also submitted that para (d) is an empowering provision, meaning that the NDPP's power to review decisions derives solely from its terms. The corollary of his argument is that the consultation and representation requirement applies to decisions of the NDPP or else the NDPP would not be entitled to revisit his own prosecutorial decisions. In the light of the finding in the preceding paragraph that the provision is an 'apex' provision that deals with the control of the NDPP over the DPPs, the premise of the argument falls away.

[64] There is a more compelling reason why the submission cannot be sustained. Section 179(2) is the empowering provision. It empowers the NPA to institute criminal proceedings, and to carry out 'any necessary functions incidental to instituting criminal proceedings'. The power to make prosecutorial decisions and to review them flows from this.[59] If it were necessary specially to empower any member of the NPA to make such decisions and to revisit them, one would have expected the Constitution to have said so. It would be incongruous to require a special provision to empower the head of the NPA to review matters but to assume that other members of the NPA of a lower rank have the power of review by implication. One would have expected that at the lower level there is greater need for these requirements but, significantly, the drafters of the Constitution, conscious of the existing practice, and for good reason, did not think it necessary to include such safeguards.[60]

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[59] It will be recalled that prosecutorial decisions and their internal reconsideration were, except in the limited sense set out earlier, not subject to procedural limitations or judicial overview. Mr Kemp accepts that the review of prosecutorial decisions by prosecutors and DPPs is not subject to any consultation or representation requirement.

[60] Called a 'glaring absurdity' by the court below (para 75) but the absurdity is not addressed by its interpretation.

[65] Mr Kemp further argued that the purpose of the provision was to protect the legitimate reliance an accused and a complainant may place on a duly considered and announced prosecutorial decision, and that it limits arbitrary changes of prosecutorial decisions at the NDPP level. This means that any decision reviewed by the NDPP is subject to the consultation and representation requirements of the sub-section. The reason, he said, is to be found in the fact that the NDPP is a political appointee and, consequently, the object of the consultation and representation requirement is to control the NDPP's political mindset in decision-making.[61]

[66] There are several counters to this argument. First, although the NDPP is a presidential appointee it is fair to assume that the drafters of the Constitution took it for granted that the NDPP would, as would Attorneys-General in common-law countries who are also political appointees, act independently and not take political considerations into account in making prosecutorial decisions. I have dealt earlier with this aspect. Second, if the object was to prevent the NDPP from taking decisions without the input of DPPs in order to prevent him from taking politically motivated decisions, the provision would not have limited the consultation and representation requirement to cases of review, but would have extended it to all his prosecutorial decisions. In order to give the submitted rationale sense, counsel had to introduce a limitation into the text of the Constitution, namely that the decision under review must have been announced. There is nothing to justify such a limitation.

[67] Mr Kemp also relied on the equal protection clause in the Constitution. The argument amounts to this: all accused persons should be treated equally; and the right to be invited to make representations in the case of a review of a prosecutorial decision should accordingly be so interpreted as to accrue to all reviews and not only those of the NDPP's subordinates. The presumption of equal treatment in statutory interpretation has always been with us and now has a special status by virtue of the Bill of Rights.[62] The question is whether it is ousted by other considerations in the circumstances of this section of the Constitution. I am of the view that it is. The underlying purpose of the provision is not to protect the accused

[61] This consideration found favour with the court below (para 77-118).
[62] LM du Plessis in 25(1) Joubert (ed) *Lawsa* (first re-issue) para 322.

or the complainant: it is to define the procedure for the exercise of the power of control of the NDPP. It would be strange to find such an important right, which is not known in comparable jurisdictions or in our common law, in a chapter of the Constitution that deals basically with structures concerned with the administration of justice and not rights. The Bill of Rights deals in great detail with the rights of accused persons, and is silent about the right to be invited to make representations concerning prosecutorial decisions. The main problem though is that s 179 on any interpretation 'discriminates' in the sense that the right to be invited does not extend to most prosecutorial reviews like those by a DPP or a prosecutor. These considerations trump in my view the presumption and Mr Kemp's reliance on the equal protection clause of the Bill of Rights is, accordingly, misplaced.

[68] Both parties pointed to anomalies flowing from the other's interpretation. Mr Trengove (for the NDPP) pointed to these: Why protect an accused when an earlier prosecution decision is reversed but not when the first prosecution decision is taken? Why protect him when the NDPP reverses an earlier prosecution decision but not when the DPP or the prosecutor does so? Who is the relevant DPP with whom the NDPP must consult when the earlier decision was his own? Why must the NDPP consult with the accused if he wishes to withdraw and with the complainant if he wishes to prosecute? Mr Kemp had a shorter list of anomalies. The first can be disposed of immediately. He suggested that to avoid a review by the NDPP, a DPP may dishonestly have a prosecutor make the decision to prosecute.[63] This is not so: the 'relevant' DPP is the one who is 'responsible' for the prosecution under ss (3)(b). The second concerns the case where the NDPP reviews a decision of a DPP after hearing representations but then at the request of one of the affected parties decides to reconsider his decision without hearing anyone. This *reductio ad absurdum* is but another formulation of one of Mr Trengove's anomalies and, as he said, anomalies will remain irrespective of which interpretation is adopted.

[69] The last aspect that needs mentioning in relation to the interpretation of para (d) concerns the use by the court below of the 'reading in reading out' method of interpretation (para 123-126). This method is a constitutional remedy which is used

[63] Relied on by the court below (para 74) while disregarding the difference between the right to make representations and the right to be invited to make them.

to prevent a finding that legislation is unconstitutional.[64] This case is concerned with the interpretation of the Constitution itself and not with its constitutionality and the use of the 'reading in reading out' mechanism by the court was inappropriate.

[70] I therefore conclude that s 179(5)(d) does not apply to a reconsideration by the NDPP of his own earlier decisions but is limited to a review of a decision made by a DPP or some other prosecutor for whom a DPP is responsible.

[71] Mr Kemp sought to argue on the facts that the Ngcuka decision was not one by the NDPP but was taken jointly by the NDPP and the head of the Directorate of Special Operations (the DSO) who, he submitted, was a DPP and, accordingly, that the Ngcuka decision was one by a DPP. The head of the DSO is a post-Constitution creation and is not a DPP but a deputy NDPP in terms of the NPA Act (s 7(3)). Further, the fact that he joined in the decision-making does not mean that the decision is no longer that of the NDPP. If the argument were correct, it would mean that the Mpshe decision was also not one made by the NDPP and would fall beyond the provision and destroy the basis of Mr Kemp's whole argument because it, too, was made jointly with the head of the DSO.[65]

[72] A further aspect of the Ngcuka decision that requires consideration is its scope. The decision was made in a particular context. The context was the two counts of corruption levelled against Mr Shaik, Mr Zuma being the recipient of the alleged bribes. It was not a decision not to prosecute Mr Zuma for any crimes whenever committed. Mr Ngcuka made it clear that if circumstances were to change in the sense that more or better evidence became available the decision not to prosecute would be revisited and reconsidered. This means that the Ngcuka decision was not intended to be final; it depended on the then available evidence; and it was limited to the mirror images of the Shaik corruption counts.

[73] The Mpshe decision, on the evidence of the NDPP, was not a review of the Ngcuka decision. The Ngcuka decision had been overtaken by events. There was

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[64] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 73-76.

[65] The findings of the court below at para 117 are not based on evidence or the provisions of the NPA Act.

the impact of the evidence and judgment in the Shaik trial; there was the availability of additional evidence which, apart from strengthening the prima facie case, placed a different complexion on the corruption counts and in the mind of the NDPP justified the addition of counts of money laundering and racketeering; there are now four main corruption counts; and there is evidence about further crimes, such as tax evasion and fraud on Parliament.[66]

[74] There is another consideration flowing from the differences between the counts underlying the Ngcuka decision and the indictment that was ultimately before Nicholson J. Even on his interpretation of s 179(5)(d) he was obliged to excise the good from the bad. However, he held that the 'offer [by Mr Ngcuka] to hear [Mr Zuma's] representations probably covered any charges against him should the [NDPP] decide to charge him' (para 244). As a finding of fact it is wrong because Mr Ngcuka's alleged offer was not open-ended and it also overlooks the fact that a review by the NDPP of a decision not to prosecute under s 179(5)(d) has nothing to do with any prior 'offer' to hear representations.

[75] In addition, as held by the Constitutional Court, as soon as the matter had been struck from the roll by Msimang J, the criminal proceedings were terminated and the proceedings were no longer pending. Removal of a matter from the roll aborts the trial proceedings.[67] The effect of this is that what went before the Mpshe decision was spent and a new decision to prosecute was required. The Mpshe decision was not simply a review of the Ngcuka decision, which was no longer extant. On these facts, s 179(5)(d) had, irrespective of whichever interpretation is correct, no application, and Mr Zuma's reliance on it was misplaced.

LEGITIMATE EXPECTATION

[66] Mr Zuma's submission that because he had settled his tax matters after the indictment was served meant that the prosecution was not justified is not understood and was not presented in argument.

[67] *Thint Holdings (Southern Africa) (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2008 (2) SACR 557 (CC) para 41-42.

[76] I now turn to consider the argument based on legitimate expectation, which is an alternative cause of action. I found it difficult to come to grips with Mr Kemp's argument on both the expectation and its legitimacy.

[77] The argument underwent a metamorphosis and ultimately it was that Mr Zuma ought to have been given an opportunity (more accurately, to have been invited) to make representations, not about the reversal of the Ngcuka decision but about the 'effective decision not to afford [him the opportunity] to make representations which could or would relate also to issues which have nothing to do with the merits of the criminal trial'. This sleight of hand was apparently due to a tacit recognition that decisions to prosecute are not covered by 'specialised legislative regulation of administrative action',[68] and that they are not reviewable on the ground of legitimate expectation by virtue of PAJA. The problem with this argument is that there is nothing on the papers to suggest that the NDPP decided not to afford Mr Zuma the opportunity to make representations. To dissect any administrative decision into discrete sub-decisions as counsel would have it is contrived since, as Mr Trengove said, any procedural unfairness would then imply a prior decision, whether express or tacit, not to follow the correct procedure.

[78] It is to be noted that Mr Kemp scuppered the case as presented to and found by Nicholson J. He no longer sought to rely on the Ngcuka announcement or on the Hulley/Mpshe correspondence as having created any expectation because, as he said, he could not point to any representation in them. To indicate how valueless the Ngcuka announcement was for purposes of extricating from it a promise to invite representations, it is worth quoting:

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

As said, Mr Zuma never purported to make representations under the NPA Act.

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[68] *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC); [2007] ZACC 22 para 91-94, 103-104.

[79] Mr Kemp sought to rely on an accumulation of facts namely that (a) the Ngcuka decision was preceded by a careful investigation; (b) during that investigation Mr Zuma, instead of being subjected to a warning statement, was asked to answer written questions, some of which he did; (c) the NDPP knew that Mr Zuma suspected political meddling and strenuously denied that there was any real new evidence; (d) Mr Zuma asserted that s 179(5)(d) applied and Mr Hulley by implication had requested the NDPP to comply with s 179(5)(d) and the NDPP refused; and (e) the NPA is bound by its policy directives. If I have omitted any it is because the written and oral argument on this aspect of the case was rather opaque.

[80] An expectation can be legitimate only if it is based on a practice of or a clear and unambiguous representation by the administrator.[69] Instead of relying on any representation, Mr Zuma relies on self-created expectations based on his own perceptions of the law and the facts, which have always been in dispute. As to practice, the best Mr Kemp could do was to quote at length from the NPA's prosecution policy without pointing to any provision that established any practice or contained a representation on which Mr Zuma relied.

THE STRIKING OUT

[81] I have already referred to the impugned allegations in the founding affidavit which were completely irrelevant. It is not necessary to analyse the allegations objected to by the NDPP because it makes no sense to strike them out at this late stage of the proceedings. The damage has been done. This does not mean that the order of the court below should stand. Most of the allegations were not only irrelevant but they were gratuitous and based on suspicion and not on fact. The excuse for including them was unconvincing especially in the light of the disavowal of any intention to rely on them. The prejudice to the NDPP was manifest. Instead of having a short and simple case, the matter not only ballooned but burst in the faces of many. There may well be reason to hold that many of the allegations were

[69] *SA Veterinary Council v Szymanski* 2003 (4) SA 42 (SCA) para 19; *Minister of Defence v Dunn* 2007 (6) SA 52; [2007] ZASCA 75; [2008] 2 All SA 14 [SCA] para 31-32.

vexatious and scandalous but, once again, it is not necessary to do so for present purposes.

[82] An order on the scale of attorney and client is fully justified, especially since it is not the first occasion on which Mr Zuma has insisted on including such irrelevant allegations.[70] One cannot escape the impression that the founding affidavit was cut and pasted from other court papers and that in response the NDPP followed suit. Mr Kemp submitted that we could not interfere because the court below had exercised its discretion. However, the court did not exercise any discretion and to the extent that it purported to do so it relied on incorrect principles and had the facts wrong.

[83] Mr Zuma's unusual application to strike out the affidavit in support of the NDPP's application to strike out was, in the light of this, ill-conceived and should not have succeeded in the court below.

THE INTERVENTION APPLICATION

[84] It ought to be apparent by now that Mr Mbeki and other members of Government had ample reason to be upset by the reasons in the judgment which cast aspersions on them without regard to their basic rights to be treated fairly. It is not necessary to revisit those issues since they have been dealt with in sufficient detail. However, they make the applicants' desire to intervene at the appeal stage understandable.[71]

[85] Nevertheless, to be able to intervene in proceedings a party must have a direct and substantial interest in the outcome of the litigation, whether in the court of first instance or on appeal.[72] The basic problem with the application is that the applicants have no interest in the order but only in the reasoning. They are in the position of a witness whose evidence has been rejected or on whose demeanour an unfavourable finding has been expressed. Such a person has no ready remedy, especially not by means of intervention. To be able to intervene in an appeal, which

[70] See the unreported judgment of Van der Merwe J in a case between the parties dated 14 September 2007 (TPD).
[71] See *Standard Bank of SA Ltd v Harris* [2002] 4 All SA 164; 2003 (2) SA 23 (SCA).
[72] *United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd* 1972 (4) SA 409 (C) 415-417.

is by its nature directed at a wrong order and not at incorrect reasoning, an applicant must have an interest in the order under appeal.[73] The applicants do not have such an interest.

[86] They also sought leave to join as *amici curiae*. In the light of the NDPP's argument their intervention in this regard was not required since it did not add anything new.

[87] In the result the application stands to be dismissed. The question of its costs remains. Mr Zuma filed a lengthy answering affidavit which was unnecessary and inappropriate. Since Mr Kemp fairly conceded that the court below had no grounds for making (most, if not all) the impugned findings, Mr Zuma's opposition is not understood. He had no legal interest in upholding the denigration of the applicants and in opposing the intervention because it did not affect the order he sought to uphold. The submission that we should not reconsider these findings because they are not appealable is cynical. He should therefore bear his own costs in this regard.

THE ORDER

[88] In the light of the foregoing the following order is made:

A The appeal is upheld with costs including the costs of three counsel.

B Paragraphs 1 to 4 of the order of the court below are set aside and replaced with the following:

'1 The application is dismissed.

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

3 On the respondent's application to strike out, the applicant is ordered to pay the costs on the attorney and client scale.

4 The applicant's application to strike out is dismissed with costs on the attorney and client scale.'

C The application to intervene is dismissed.

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[73] *Western Johannesburg Rent Board v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A); *Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A) 715D-F.

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