

REPUBLIC OF SOUTH AFRICA



NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO: 19577/09

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
<u>16/08/2013</u>	<u>[Signature]</u>
DATE	SIGNATURE

In the matter between:

DEMOCRATIC ALLIANCE

APPLICANT

And

**THE ACTING NATIONAL DIRECTOR
OF PUBLIC PROSECUTIONS**

FIRST RESPONDENT

**THE HEAD OF THE DIRECTORATE
OF SPECIAL OPERATIONS**

SECOND RESPONDENT

JACOB GEDL'EYIHLKISA ZUMA

THIRD RESPONDENT

J U D G M E N T

MATHOPO J

- [1] This is an application to compel the Acting Director of Public Prosecutions (The First Respondent) to produce and lodge with the

Registrar of this court, in terms of Supreme Court of Appeal (SCA order) which record shall include a copy of a telephonic recording and transcript referred to by the first respondent when he formally withdrew charges against the third respondent (Mr Zuma) on the 6th April 2009, as well as any internal memoranda, reports or minutes of meetings dealing with the contents of the recordings and or transcript itself insofar as these documents do not already refer to the third respondent's written or oral representations.

- [2] The applicant further seeks an order that the first respondent be held in contempt of the SCA order for failing to produce the said records which include the documents referred to above.
- [3] To fully contextualise the issues between the parties, it is necessary to set out the brief narrative of facts and circumstances leading to this application.

Background

- [4] During March 2009, and in pursuance of his right to make representations to the first respondent, the third respondent made representations on the basis of confidentiality and on a without prejudice basis. It is common cause that following those representations, the first respondent finally announced its decision to withdraw the charges against the third respondent on the 6 April 2009, in a public statement which detailed that:

- 4.1 The third respondent had made representations which included reference to telephone conversations and recordings motivating for the withdrawal of the charges pending against the third respondent;
- 4.2 The first respondent had thereafter investigated the authenticity of reference and legality to the telephone conversations and had

been advised through the offices of the National Intelligence Agency ("NIA") that it had such taped conversations which had been lawfully obtained. The NIA provided the first respondent with transcripts of the telephone conversations.

[5] Subsequent to that decision, the applicant launched review proceedings in respect of the first respondent's decision in this court, together with an application in terms of Rule 6(11), seeking an order compelling the first respondent to provide the applicant with the reduced record of its decision not to prosecute the third respondent. Such record was to exclude the written and oral representations and any memorandum report or minutes in connection thereto. The court per Ranchod J, dealt with the matter and made certain orders which were taken on appeal.

[6] This application was subsequently dealt with on appeal by the Supreme Court of Appeal in ***Democratic Alliance and Others v Acting National Director of Public Prosecutions & Others 2013(3) SA 486 SCA*** which substituted the order of Ranchod J with an order which included as part of paragraph 1.3, the following:

"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 the representations (the reduced record). The reduced record shall consist of the documents and materials relevant to the interview, including the documents before the first respondent when making the decision and any documents informing such decision."

[7] As a result of the SCA order, the applicant as it was entitled to called upon the first respondent to comply with the order by producing a

reduced record in terms of Rule 6(11). The first respondent did not comply with the applicant's request. No communication, extension of time or explanation was requested. The 14 day period set in the order expired on the 10th April 2012. On the 12th April 2012, the first respondent represented by the State attorney responded to the applicant and advised the applicant that:

7.1 The State Attorney was in the process of preparing copies of the reduced record.

7.2 A list of documents which according to the State Attorney comprised the reduced record was furnished.

7.3 There were, in addition, certain tape recordings which were in the process of being transcribed but that process had not been completed and would take some additional time.

7.4 The First respondent was obliged to afford the third respondent's legal team an opportunity to consider whether there was any objection to the disclosure of the transcripts. On completion of that process, if there was no objection to disclosure, the transcripts would be made available as supplement to the record.

[8] On the 12 April 2012 the State Attorney delivered certain documents as part of the reduced record. The copies of the documents received from the applicant and others aimed at persuading the first respondent not to discontinue with the prosecution of the third respondent, were lodged with the Registrar of the High Court on the 13th April 2013. The copies of the recordings and transcripts as well as any internal memoranda, reports or minutes of meetings dealing with the contents of the recordings and/or transcripts themselves, insofar as these documents did not directly refer to the third respondent's written or oral

representation, were, however not produced and lodged with the Registrar.

Frustrated by what it regarded as a deliberate attempt to disregard the order of the SCA and unnecessary indulgences granted to the third respondent, the applicant decided to launch the present proceedings to compel the first respondent to comply with the SCA order.

- [9] With regard to the outstanding documents which formed part of this application, the first respondent invoked paragraph 33 of the SCA judgment and order *supra* which among others, directed that the concern expressed by the third respondent that there might be material in the record of decision which might adversely affect his rights be met by an undertaking on behalf of the first respondent that the National Director of Public Prosecutions office would inform the third respondent of its contents. On the 27 September 2012 Hulley & Associates representing the third respondent wrote to the office of the State attorney advising that the third respondent's position was that it neither consented nor waived the confidentiality provisions which underpinned the representations.

- [10] The issue in this case concerns the interpretation of the SCA order.

ISSUES

- [11] Principally there are three issues to be determined:

- 11.1 First, whether the first respondent should hand over to the applicant electronic recordings and transcript thereon.
(transcripts)
- 11.2 Second, whether the first respondent should be ordered to produce internal NPA memoranda, reports or minutes of meeting dealing with the contents of the recordings and

transcripts insofar as these documents do not directly refer to the third respondents written or oral representations.

11.3 Third, whether the first respondent is in contempt of the SCA order of the 20th March 2012.

- [12] The third respondent did not file any affidavit opposing the relief sought instead he filed a notice in terms of rule 6(5) (d)(iii) wherein he raised a point of law namely that in terms of the SCA order, the material in issue do not form part of the qualified record of the proceedings. In short, the position adopted by the third respondent is that production of the transcripts as well as written or oral representations are excluded and protected by the confidentiality, as prescribed by the SCA order.

The position of the parties re: transcripts

- [13] As regards the transcripts, the stance adopted by the first respondent is that it abides the decision of the court, and that the matter should be debated or argued by the applicant and the third respondent. In essence what this argument boils down to is that the first respondent as the custodian of the documents and against whom the order is made for the production of the document has no objection to the production of the transcripts. During argument counsel for the first respondent unequivocally made the concession that the first respondent has “no view” regarding the transcripts or recordings.
- [14] On the second issue, the first respondent’s position is that the order should be refused because the SCA order does not require it to produce the documents which are protected by the confidentiality undertaking between the first and third respondents, as acknowledged in the judgment and order of the SCA. In essence, the basis of the objection is that the said documents are inextricably linked with the confidential communications made by the third respondent.

- [15] As regards the third issue for determination, the case advanced for the first respondent is that the delay in providing the transcript arose as a result of the conduct of the third respondent, thus no case has been made by the applicant for the contempt.
- [16] The third respondent's contention is the SCA order, confidentiality applies to all the documents that were placed before the NDPP as part of the representations. In support of this contention counsel for the third respondent submitted that on a proper interpretation of the SCA order, the transcripts formed part and parcel of the order and are protected on the basis of privilege or confidentiality.
- [17] It was submitted that since the first respondent did not have the recordings but accessed them through the efforts of the third respondent, separating them from the representations would be illogical and irrational. Counsel for the third respondent accordingly urged upon me to accept that it is not possible on any logical or rational basis, to understand the process without acknowledging and accepting that the conveyance of the transcripts and its contents were inextricably linked with the representation.
- [18] Counsel argued that when a distinction is drawn between the order and the ratio, the exclusion in the order was to protect confidentiality. To buttress this argument counsel referred extensively to the statement by the Acting Director of Public Prosecutions (Mr Mpshe), as authority for the proposition that the transcripts were indeed part of the representations. Mr Mpshe at page 96 is recorded as saying:

"Possible abuse of process

In the course of the representations, the defence made certain very serious allegations about alleged manipulation of the NPA and indicated that these were substantiated by recordings of certain telephone conversations which it intended handing into

court during intended application for a permanent stay of prosecution.

The NPA decided that it would listen to these recordings because it felt that the allegations were serious enough to impact on the NPA's decision if they were true. It felt it should do so despite the fact that it was not clear whether the recordings had been intercepted legally or were legally in the possession of the defence.

I appointed a senior team consisting of Messrs Mzinyathi and Hofmeyr to listen to, verify and investigate the contents of the recordings."

- [19] Counsel for the third respondent further submitted that since the SCA order was made against the background of this statement, it is not possible to construe the transcripts as not forming part of representations. The submission made is that on a rational and logical basis, the conveyance of the transcripts and contents thereof were part and parcel of the representations. Counsel for the third respondent further submitted that if anybody on that day had asked whether the facts and information regarding the transcripts were part of the representations or not, the answer would have been in the affirmative. On the basis, he urged me not to separate the transcripts from the representations and vigorously argued that the transcripts are protected by the order relating to confidential documents in the SCA order.
- [20] The applicant's contention on the first issue is that there is no legal basis why the transcripts or recordings should not be produced. The submission made is that the transcripts were not submitted as part of the representations by the legal representatives of the third respondent. The transcripts, as the argument goes, were given to the first respondent by the National Intelligence Agency (NIA) after

enquiries were made by the first respondent as part of the written or oral representation by the third respondent's legal representatives. As the first respondent was merely given access to and not the copies of the recordings. It is contended that there is no legal impediment to their disclosure on the basis of confidentiality. This is especially so because during his public statement, Mpshe referred to a substantial portion of the recordings when justifying his decision to quash the criminal charges against the third respondent.

[21] The applicant has alleged in its papers that the transcripts are not protected by confidentiality. The third respondent confronted with such serious allegation elected not to submit any evidence to gainsay the averments. It is settled law that a bare or unsubstantiated denial will only pass muster where there is no option available to a respondent due, for example, to a lack of knowledge or because nothing more can be expected from the respondent. A bare denial in circumstances where a disputing party must, necessarily be conversant with the facts averred and is in a position to furnish an answer or countervailing evidence as to its truth or correctness, does not create a real or genuine dispute of fact. A proper answer to the material averments under reply requires at the minimum, a separate and unequivocal traversal of each and every allegation which the party seeks to contend.

[22] It should have been obvious to the third respondent that, in the absence of any countervailing evidence particularly since the parties accorded different interpretations to the SCA order, more was required to clarify his position instead of seeking refuge on a point of law. The objective facts submitted by the applicant cried out for an answer, yet the third respondent elected not to respond. This approach is not without consequences. The third respondent imperilled his position in the circumstances by failing to put up any cogent explanation as to why he is entitled to the confidentiality.

- [23] Another compelling reason advanced by the applicant is that because a substantial portion of the transcripts have already been disclosed and is in the public domain, the contention that the third respondent is entitled to confidentiality in respects of the transcripts is misplaced. It was submitted that at no stage during the public disclosure by Mpshe, did the third respondent raise any privilege or confidentiality and neither did he raise breach of confidentiality before the SCA.
- [24] It seems clear to me that both the applicant and the first respondent understood the order of the SCA to exclude the transcripts. The third respondent however seems to have obfuscated the issues by contending that Mpshe, in his address included the transcripts as part of the representation. If that was the position then one would have expected the legal representatives of the third respondent, in the interests of the third respondent, to have clarified the position before the SCA to avoid any apparent ambiguity in the order. This was not the case of the third respondent before the SCA. To now contend otherwise is incongruous. The effect of the third respondent's argument is that Mpshe in his public address breached the confidentiality or privilege of the third respondent by releasing the transcripts. This submission in my view is devoid of merit. No compelling evidence has been adduced by the third respondent as to how and in what respect Mpshe breached his confidentiality. This issue was not raised nor debated before the SCA. It is opportunistic for the third respondent to now contend that there was a breach of confidentiality when he benefitted from the alleged disclosure.
- [25] After assessing the transcripts which were declassified by NIA as authentic, Mpshe together with his team, rightly or wrongly came to the conclusion that the integrity of the prosecution was compromised and quashed the charges on the basis of what he regarded as an abuse of the process by certain officials of the NDPP. It is desirable that the transcripts be produced to test and properly contextualise whether the decision of Mpshe was based on rational grounds or not. I must also

add that the remaining parts of the transcripts will complete a picture and give true meaning to that decision.

- [26] As indicated earlier, the first respondent was merely given access to and not copies of the recordings or transcripts. Mr Mpshe in his statement of the 6 April 2009 did not acknowledge that the transcripts emanated from the third respondent. This in my view gives credence to the proposition that there is no legal basis to withhold them.
- [27] I fully agree with the applicant that on a proper construction of the SCA order, confidentiality does not extend to the transcripts. To now assert privilege or confidentiality is without foundation. The third respondent furthermore did not raise any prejudice. It is difficult to understand why the third respondent raises the defence of confidentiality at this belated stage.
- [28] I fail to understand the third respondent's assertion that disclosure of the transcripts would affect his right to confidentiality or privilege. It has not been contended by any of the parties that Mpshe referred to anything more than a discussion by certain officials of the NPA on the question whether the charges should be brought before the African National Congress (ANC) Polokwane Conference or not. The excerpts of the transcripts which formed part of the record and which Mpshe extensively referred to in his address specifically related to the timing of the charges. In the light of this, I fail to see how the discussion on the timing of the charges would impact on the integrity of the charges.
- [29] In my view it is not appropriate for a court exercising its powers of scrutiny and legality to have its powers limited by the *ipse dixit* of one party. A substantial prejudice will occur if reliance is placed on the value judgment of the first respondent. To permit the first respondent to be final arbiter and determine which documents must be produced is illogical. First respondent is not an impartial stakeholder. It was a party to the SCA order. The SCA order obliges it to produce the record

save where the third respondent raises confidentiality or privilege. The third respondent has not put up any case why the representations are confidential. Accordingly I fail to understand how, and on what basis the first respondent is objecting to the disclosure. Paragraph 33 of the SCA order makes it clear that the concerns of the third respondent must be addressed. No such concerns have been raised by the third respondent. In the absence of such concerns the first respondent has no right to independently edit the record. It must produce everything. To the extent that the third respondent claims confidentiality, he must set out the relevant facts why he is entitled to confidentiality. The first respondent is not entitled to accommodate the third respondent in vacuum. Sufficient basis must exist. In my view none has been shown to exist.

[30] On a proper interpretation of the SCA order, the transcripts were in the public domain. The construction of the order depends upon both the wording in the ordinary sense and the context which in the court order was made. Regard being had the language used and context, none of the parties save the third respondent understood the confidentiality to extend to the transcripts as they were the public domain hence no confidentiality or privilege could be attached to them. See ***Firestone South Africa (Pty) Ltd v Genticuro 1977(4) SA 298 (A)***.

[31] The submission by the third respondent that the transcripts are inextricable and formed part and parcel of the entire representation is rejected. Equally, untenable is the submission that producing the transcripts would infringe the third respondent's right to fair trial. No cogent or plausible evidence has been advanced by the third respondent to show that producing the transcripts would adversely or materially affect his rights. In my view, if the third respondent intended or wished the representation to have any extended meaning he should or ought to have made the appropriate submission in that regard. It was open to him to approach the court to ask for protection if the first respondent was inclined to reveal the documents. Having not done so,

the third respondent has failed to demonstrate that he will suffer any prejudice if the documents are released.

- [32] Finally on this point, I need to say something about the conduct of the first respondent with regards to the transcripts. Counsel for the first respondent quite surprisingly, submitted that the first respondent "holds no view" with regard to the transcripts and does not join issue with the applicant and third respondent and will abide the decision by the court. The stance adopted by the first respondent is irresponsible, if regard is had to the fact that it was one of the parties to the proceedings in the High Court and SCA. In terms of the SCA order, it is obliged to file the record. Adopting a neutral position is akin to abdicating its duties and responsibilities. It most certainly misconceived its position.

The position of the parties re: representations (memoranda, minutes, reports etc)

- [33] The first respondent's case is that the internal memoranda notes and minutes that were generated for the purpose of the decision making process involved reference not only to what is contained in the electronic recordings and transcripts but also to matters that were conveyed in strict confidence in terms of the undertaking provided to the third respondent's legal team. The submission made in this regard is that the contents of the memoranda relate to the representations as well as the recording and that they are inextricably linked. In short, what the first respondent contends is that disclosure of the contents would breach the confidentiality in which the SCA order directed not to be disclosed unless the third respondent consent or waives the privilege or confidentiality.
- [34] The first respondent contended that it is the professional responsibility of the office of Director of Public Prosecution to fully respect the right to privacy or confidentiality of those with whom they enter into representations. The said discussions are protected by confidentiality

and the DPP cannot be forced to disclose information revealed during representations unless specific exception to privilege exists. . And such information cannot be revealed without the consent of the representor (in this case the third respondent).

- [35] In essence, the contention of the first respondent is that the consideration of public interest makes it obligatory, when a party makes representations to the Acting NDPP on conditions of confidentiality, to expect that such an undertaking would be honoured.
- [36] Counsel for the first respondent conceded that the transcripts can be severed from the documents forming part of other representations. This concession appears astounding and self-contradictory when regard is had to the submission made by the first respondent in its answering affidavit which read as follows.

Further the NPA confirms that the contents of the conversations that had been intercepted and were transcribed were indeed dealt with in the memoranda, minutes and notes of meetings etc, by officials of the NPA in the process of internal discussion and consultation leading up to the decision by Adv Mpshe.

- [37] As in the transcripts, the third respondent did not file any affidavit to explain how and why the disclosure of the memoranda, minutes, notes reports etc would affect his right to confidentiality. The submission made against disclosure is based on what he considers to be a correct interpretation of the SCA order, which excluded such representation. In short, the case advanced for the third respondent is that the necessary implication of the SCA order is that the material used in support of the representation, and disclosed to the NPA, and any memoranda and reports generated as a result of the representations are covered by the confidentiality applicable to the representations.

- [38] It would seem to me that the position adopted by the third respondent is that the SCA order envisaged a blanket prohibition of the disclosure of the memoranda, minutes or notes, reports etc, despite the fact that no legal claim of confidentiality has been asserted by the third respondent.
- [39] The submission of the applicant is that it is not for the first respondent to ultimately decide whether the documents must be disclosed or not. The applicant submitted that as an organ of state, the first respondent should carry out its obligations without fear or favour, and prejudice because this is a matter where the exercise of its constitutional functions and powers is under scrutiny, it must act and be seen to be acting in an impartial manner. Counsel further submitted that the first respondent must be astute and not allow its powers limited by the *ipse dixit* of the first respondent. The applicant went on to submit that relying exclusively on the value judgment of the first respondent, as the final arbiter on the question of whether the documents are disclosable or not is untenable, because the third respondent did not file any contrary evidence suggesting that he will suffer prejudice if the documents are disclosed. Since no legal impediment to the disclosure has been demonstrated by the third respondent, I agree with the applicant that relying on submissions from the bar as a ground for confidentiality or is misplaced.
- [40] The first respondent, as an organ of state, has a duty to prosecute without fear, favour or prejudice by upholding the rule of law and the principle of legality. It is also a constitutional body with a public interest duty. It behoves its officials to operate with transparency and accountability. The first respondent has a duty to explain to the citizenry why and how Mpshe arrived at the decision to quash the criminal charges against the third respondent. In pursuance of its constitutional obligations it is incumbent upon the first respondent to pass the rationality test and inform the public why it quashed the charges. In my view, the converse would make the public lose

confidence in the office of the NDPP. The documents, sought by the applicant, will assist in enquiring into the rationality of the decision taken by Mpshe. It cannot simply be said that all the documents submitted, whether oral or written, are covered by privilege. That would amount to stretching the duty of privilege beyond the realms of common sense and logic.

- [41] The order of the SCA does not envisage a blanket prohibition to disclosure. The order specifically excludes only matters that the third respondent may consider confidential or privilege. It is not good enough for the third respondent or the first respondent when called upon to disclose documents to hide behind privilege. The third respondent must specify and itemise the relevant material and state in what respect he is protected by privilege or confidentiality. There is an obligation on his part to disclose matters which concerns confidentiality. In the absence of any, he cannot seek to rely on the SCA order.

- [42] It should have been easier for the third respondent to itemise with reference to dates, minutes, notes, the documents set to be confidential. The third respondent know which documents are protected and covered by confidentiality. All this information or documents is peculiarly within the personal knowledge of the third respondent.

- [43] In a nutshell the argument of the applicant is that absent any cogent or plausible evidence to the contrary, the documents should be disclosed. It was further submitted any concerns raised by the third respondent relating to the confidentiality can be dealt with by making an order similar to that of ***ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd 1998(2) SA 109 (W)*** where the court dealing with the issue of confidentiality relating to commercial tenders held as follows:

"[24.2] I do not have a copy of the tender document. Part of it, such as the tender price, the tenderer's experience and expertise cannot be confidential. Other parts of it may well contain confidential information as this term is understood in the considerable case law involving confidential information and which should be protected from disclosure. On the facts before me I cannot decide whether any tender contains confidential information. I am also of the opinion that this issue should not be decided on the question of onus in opposed applications. (See Ngqumba en 'n Ander v Staatspresident en Andere; Damons NO en Andere v Staatspresident en Andere; Jooste v Staatspresident en Andere 1988 (4) SA 224(A). In my judgment, it would be counter-productive and contrary to the Constitution to allow the respondent to hide behind an unsubstantiated blanket claim to confidentiality on behalf of tenderers. By way of example only a claim to confidentiality should not protect from disclosure a side letter containing terms other than those appearing in the tender or for that matter the provision for a 'kick back'."

- [44] In the alternative, it was submitted that if I am disinclined to grant the order, the first respondent should be directed to produce the memoranda minutes, notes etc and delete the parts which infringes upon the confidentiality of the third respondent. In support of this, alternative argument, reliance was placed on the case of ***Tetra Mobile Radio (Pty) Ltd v MEC Department of Works 2008(1) SA 438 (SCA)*** where the court per Mthiyane JA held as follows:

*"[14] The appellant contended that the respondents had not made out a case for reliance on confidentiality: if there was any apprehension on the part of the respondent regarding any specific document, that concern could be met by making an order similar to the one granted by Schwartzman J in *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd*, where the parts of the documents in respect of which disclosure might result in breach of confidence were to be identified and marked as confidential and the applicant's attorney was prohibited from disclosing*

such parts to any other party, including the applicant, save for the purpose of consulting with counsel or an independent expert. In that way a fair balance could be achieved between the appellant's right of access to documentation necessary for prosecuting its appeal, on the one hand, and the third respondent's right to confidentiality, on the other."

[45] In my view, whatever prejudice the third respondent may have can be protected by an order similar to the ABBM, which appears to be logical and on sound legal basis. However what I find more persuasive is the order granted in the Tetra Mobile case, in terms of which the third respondent would be ordered to produce the documents but record the parts which infringe upon his confidentiality. This approach finds favour with me because it does not leave the determination as to confidentiality to the first respondent or the third respondent alone. Thus where confidentiality is claimed both parties will be required to set out the basis why those particular documents should not be disclosed. To deny the applicant the remedy in this case would in my view be contrary to the spirit and purport of the SCA order. The approach in Tetra Mobile will take into account the third respondent's right to privilege and confidentiality in relation to the specific documents.

[46] The respondent's objection to the standard approach in Tetra Mobile is that the court dealt with confidentiality in respect of commercial tenders. What the respondents seem to be implausibly suggesting is that because the court dealt with confidential commercial tenders, this case is clearly distinguishable from the present case. I do not agree. The principles underpinning confidentiality is the same. There is no reason why the ratio in the Tetra Mobile case should not apply with equal force to the present case. Applying this approach will clearly protect the third respondent's right to confidentiality by affording him an opportunity if so advised to explain in what respects his right to confidentiality would be breached by the disclosure. Such an order is

consistent with the SCA order which excludes information in terms of which a concern relating to confidentiality is raised by the third respondent. The order of the SCA was not made in vacuum. I am convinced that it must have been foremost in the minds of the SCA that the parties will call to aid the sound guiding principles in the above cited cases to resolve any dispute based on confidentiality. In my view to construe this order as imposing a blanket prohibition as the third respondent contend is manifestly unfounded.

I now turn to deal with the contempt of court application.

[47] The contempt application is premised on the basis that after the applicant sent various letters to the first respondent aimed at persuading them to comply with the order, the first respondent delayed in responding or alternatively did not fully or adequately comply with the applicant's request further alternatively it granted the third respondent unnecessary indulgence without sound legal basis. It is the applicant's case in this regard that there is no conceivable basis why the first respondent elected to give the third respondent the opportunity to object before complying with the order.

[48] It is common cause between the parties that part of the record was produced 2 days after the deadline. Counsel for the applicant did not persist with the argument that such conduct, albeit late, falls within the threshold of deliberate and wilful conduct on the part of the first respondent. The main thrust of his argument was limited to the suggestion that the first respondent allowed itself to be dictated upon by the legal representative of the third respondent. This to my mind is not grounds for contempt. The test to determine whether a party is in contempt of court or not, was eloquently stated in ***Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)*** as follows:

"[41]... Once the applicant proves the three requisites (order, service and non-compliance), unless the respondent provides evidence raising

a reasonable doubt as to whether non-compliance was wilful and mala fide, the requisites of contempt will have been established... is that the respondent no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but need only lead evidence that establishes a reasonable doubt. It follows, in my view that establishes a reasonable doubt. It follows, in my view, that Froneman J was correct in observing in Burchell (in para [24]) that, in most cases, the change in the incidence and nature of the onus will not make cases of this kind any more difficult for the applicant to prove. In those cases where it will make a difference, it seems to me right that the alleged contemnor should have to raise only a reasonable doubt.”

- [49] In response, the first respondent crisply submitted that it would have been reckless on her part to produce the documents without regard to the third respondent's entrenched rights to confidentiality, which have been acknowledged in the SCA order. The first respondent further submitted that the answer to the contempt charge is met by the contents of the letter of the 12 April 2012 in particular paragraph 5 thereof which is consistent with the undertaking in the SCA judgment. Paragraph 5 of the letter states as follows:

“There are in addition certain tape recordings which are in the process of being transcribed, but that process has not been completed as yet and will take some additional time. On completion thereof, we are obliged to give an opportunity to Mr Zuma's legal team to consider whether there is any objection to disclosure of such transcripts. On completion of that process, if there is no objection to disclosure, they will be made available as a supplement to the record.”

- [50] The submission advanced on behalf of the first respondent is that the delay if any, was occasioned by the third respondent's legal representative in considering whether to object to the transcript or not. Thus no fault could be attributed to the State attorney or first respondent because in terms of the SCA's order, the first respondent

was obliged to afford the third respondent, an opportunity to indicate whether he has any objection or not. I agree with the first respondent that affording the third respondent an opportunity to raise his concerns was in line with the SCA order. This conduct in my view cannot be regarded as deliberate or wilful non compliance with the order. It follows that the contempt of court application must be dismissed.

[49] I therefore make the following order:

1. The First Respondent is directed to comply with the order of the Supreme Court of Appeal in case no. 288/11 dated 20 March 2012 ('the SCA order'), within five days of the date of this order.
2. The record to be produced and lodged by the First Respondent with the Registrar of this Court, in terms of the SCA order, shall include a copy of the electronic recordings and a transcript thereof referred to by the First Respondent in the announcement of the First Respondent's decision on 6 April 2009 as well as any internal memoranda, reports or minutes of meetings dealing with the contents of the recordings and/or transcript itself, insofar as these documents do not serve to breach the confidentiality of the Third Respondent's written or oral representations.
3. With regard to the memoranda, minutes and notes of meetings, referred to by the First Respondent in paragraph 26 of her answering affidavit ('the internal documentation'):
 - 3.1. within five days of the date of this order, the First Respondent shall cause to be delivered to the Applicant's Cape Town

attorney Minde Schapiro & Smith (Mr M Smith) and to the Third Respondent's attorney of record copies thereof;

- 3.2. on the copy of each document referred to in 3.1 above, the First Respondent shall mark or record that part of the document which she considers to be confidential;
 - 3.3. save for the purpose of consulting with counsel, the Applicant's attorney shall not disclose to any other party, including the Applicant, any part of the document in respect of which the First Respondent claims confidentiality;
 - 3.4. should the Applicant dispute any claim to confidentiality and should the parties be unable to resolve such dispute, the Applicant shall on notice to the Respondents and any person having an interest therein, have the right to apply to a Judge of the North Gauteng High Court in chambers for a ruling on the issue;
 - 3.5. should the circumstances require, any of the parties shall have the right to apply to a Judge of the North Gauteng High Court in chambers for an amendment to paragraphs 3.2, 3.3 and 3.4 of this order.
4. The First Respondent and the Third Respondent shall pay the Applicant's costs (including the costs of two counsel) jointly and severally, the one paying the other to be absolved.



RS MATHOPO

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant : Adv. SP Rosenberg SC
with Adv HJ de Waal

Instructed by : Minde Shapiro & Smith

For the First and Second : Adv. P Kennedy SC

Respondents : with Adv Maenetjie

Instructed by : The State Attorney Johannesburg

For the Third Respondent : Adv. KJ Kemp SC

with Adv JP Broster

Instructed by : Hulley & Associates

Date of hearing : 24 July 2013

Date of Judgment : 16 August 2013