IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA Case no: 771/2016

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA	Applicant
and	
DEMOCRATIC ALLIANCE	First Respondent
THE ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Second Respondent
THE HEAD OF THE DIRECTORATE OF SPECIAL OPERATIONS	Third Respondent

SCA Case no: 1170/2016

In the matter between:

THE ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Applicant
THE HEAD OF THE DIRECTORATE OF SPECIAL OPERATIONS	Second Applicant
and	
DEMOCRATIC ALLIANCE	First Respondent
JACOB GEDLEYIHLEKISA ZUMA	Second Respondent

DEMOCRATIC ALLIANCE'S HEADS OF ARGUMENT IN THE APPLICATIONS FOR LEAVE TO APPEAL

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A. INTRODUCTION

1. The Applicants in both of the cases before this Court (referred to as Mr Zuma and the NPA respectively) separately seek leave to appeal against a judgment of the North Gauteng High Court of 29 April 2016 (the Full Court).

2. The underlying matter has its genesis in serious allegations that Mr Zuma received inducements to use his real or perceived political influence to affect the award of contracts for the acquisition of military equipment by the State.

3. Following a protracted investigation, on 29 November 2007 senior members of the NPA led by the then acting National Director of Public Prosecutions ("the NDPP") Adv Mokotedi Mpshe SC, resolved that a compelling case existed against Mr Zuma and that fresh charges would be presented against him.

4. At the time a discussion arose within the NPA as to when the indictment should be served. This was complicated by the fact that drafting the indictment was complex; and also that in the same period Mr Zuma was involved in a struggle for the leadership of the African National Congress ("*the ANC*"), running against then President Mbeki (Mr Mbeki). That leadership battle was decided at a national conference of the ANC in Polokwane from 16 to 20 December 2007 (*"the Polokwane conference*"). As we shall show, Adv Mpshe himself decided that to avoid any appearance of political entanglement, the service of the indictment should be delayed until after the Polokwane conference.

5. The indictment was duly finalised and served on Mr Zuma on 28 December 2007, after the Polokwane conference. It included charges of racketeering; corruption; money laundering; and fraud.

6. Mr Zuma and his legal representatives continued to suggest that his prosecution was tarnished by political motives. Nonetheless, Mr Zuma's political ascendancy continued, and he was due to be sworn in as President of the Republic on 9 May 2009. In anticipation of this event, Mr Zuma's legal representatives made wide-ranging representations to Adv Mpshe to discontinue the prosecution, which included allegations of political manipulation based on copies of intercepted telephone conversations involving the head of the NPA's Directorate for Special Operations ("*the DSO*"), Mr Leonard McCarthy. Mr Zuma has never explained how he came into possession of these recordings.

7. On 6 April 2009 Adv Mpshe announced his decision, which lies at the heart of the matter, to discontinue the prosecution. His reasons[1] are contained a press statement,[2] which make it clear that he rejected most of the representations made on behalf of Mr Zuma. Adv Mpshe thus remained of the view that the charges against Mr Zuma were meritorious and serious; the prosecution team was untainted; the underlying decision to prosecute Mr Zuma was properly made; and nothing had been presented which would undermine the possibility of a fair trial for Mr Zuma.

8. Adv Mpshe's decision was instead based wholly on supposed "policy aspects militating against prosecution",[3] arising from allegations that the intercepted telephone conversations indicated that Mr McCarthy had manipulated the timing of the service of

[1] Vol. 3: p. 317 (Hofmeyr's AA at para 12). As we explain below, in some parts of his affidavit, Adv Hofmeyr attempts to expand the reasons for the impugned decision to those which are contained in paras 12 – 51 of his affidavit.
[2] Vol. 1: p. 120
[3] Supp Vol. 1: p. 3533 (line 18)

the indictment at the behest of allies of Mr Mbeki in the run-up to, and fall-out after, the Polokwane conference.

9. Adv Mpshe's focus on this timing issue was surprising. Not only is it hard to understand how this could form a rational basis to halt an advanced prosecution of serious offences; but at the time he had indicated that the decision to hold back the service of the indictment until after the Polokwane conference was his, and his alone. Adv Mpshe subsequently attempted to explain that he actually had always agreed that the decision on the timing issue was to be made by Mr McCarthy. Although he agreed with Mr McCarthy at the time for good reasons (i.e. to avoid the appearance of political entanglement), he now claims that Mr McCarthy was actually motivated by an additional bad reason (i.e. to benefit Mr Mbkei).

10. After a number of interlocutory applications, the DA's application to review Adv Mpshe's decision eventually came before the Full Court in March 2016. In a judgment and order of 29 April 2016 the Full Court agreed with the DA that Adv Mpshe's decision fell to be set aside on the basis that it was irrational. In a further judgment and order of 24 June 2016, the Full Court refused to grant the NPA and Mr Zuma leave to appeal.

11. Mr Zuma subsequently sought leave to appeal from this Court, while the NPA instead elected to approach the Constitutional Court. On 11 October 2016 this Court (per Maya AP and Lewis JA) granted a first order allowing Mr Zuma to present oral argument in his application for leave to appeal. After the NPA's application to the Constitutional Court was rejected, it also approached this Court for leave to appeal. On 30 January 2017 this Court (per Cachalia and Leach JJA) granted a second order, also

allowing the NPA to present argument in favour of its application for leave to appeal. Pursuant to directions issued by the Court, these two matters are to be heard together.

12. The DA submits that the applications for leave to appeal ought to be dismissed with costs; or alternatively, to the extent that leave is granted, the appeals should be dismissed with costs.

B. CONSIDERATIONS ON LEAVE TO APPEAL

13. The applications for leave to appeal serve before this Court in terms of section 17(2)(d), read with section 16(1)(a)(ii), of the Superior Courts Act 10 of 2013. The decisional referents are those in section 17(1)(a), namely that (i) "the appeal would have a reasonable prospect of success"; or (ii) "there is some other compelling reason why the appeal should be heard …".

14. We submit that the applications for leave fail to meet either of these requirements. With respect to the prospects of success, it is submitted that the *Mont Chevaux Trust*[4] case correctly found that section 17(1)(a)(i) of the Superior Courts Act sets a higher standard than previously applied, and requires "a measure of certainty" that an appellate court would make a different finding. Furthermore, in *Ndubu*[5] this Court warned against the inappropriate granting of leave in undeserving cases, which increased costs and displaced cases more deserving of this Court's attention.

15. We deal below with the merits, but at this stage note two aspects:

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[4] *Mont Chevaux Trust (IT 2012/28) and Tina Goosen and 18 Others* Unreported case No. LCC 14R/2014. *Mont Chevaux* has been followed in several other decisions in the Gauteng, Free State, North West and KZN Divisions of the High Court.

[5] *Ndubu and Others v First Rand Bank Limited t/a Wesbank* (1113/2016) [2017] ZASCA 61 (26 May 2017 at para 35

15.1 First, any appeal will lie against the orders granted by the Full Court, and not against its reasoning.[6] It does not assist the NPA to show that the Full Court erred in some respects without demonstrating that the mistakes affected the outcome. Thus, for instance, both applications devote considerable attention to the Full Court's statements that complaints of abuse of process ought to be dealt with by a court;[7] and that Mr Zuma ought to face the charges in the indictment.[8] We submit that these criticisms are misplaced (for reasons below), and any ambiguity was clarified in the judgment refusing leave to appeal. But in any event, the Full Court's statements on these aspects made no difference to its main finding that Adv Mpshe's decision was irrational, and should be set aside.

15.2 Second, the Applicants fail to deal with the DA's argument of procedural irrationality. In this regard the Full Court found that Adv Mpshe irrationally failed to elicit a response to the allegations of impropriety from Mr McCarthy (and his supposed political handler, Mr Bulelani Ngcuka);[9] failed to properly source the views of the prosecution team before making his decision;[10] failed to allow the Investigating Director at DSO (who authorised the indictment) to listen to the recordings;[11] and based his approach on untested allegations.[12] These shortcomings alone are sufficient to justify the Full Court's decision to set aside the impugned decision.

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[6] *Serengeti Rise Industries (Pty) Ltd v Aboobaker NO* (845/2015) [2017] ZASCA 79 (2 June 2017) at para 12 referring to the "*trite legal principle that an appeal lies against an order of court and not the reasons*".
[7] Vol. 18: Judgment p. 3282, para 68 and p. 3284, para 71.
[8] Vol. 18: Judgment p. 3295, para 92.
[9] Vol 18: Judgment p. 3274, para 53
[10] Vol. 18: Judgment p. 3292, para 83.
[11] Vol. 18: Judgment p. 3293, para 87.
[12] Vol. 18: Judgment p. 3284, para 71

16. With regard to other compelling reasons to grant leave to appeal, the NDPP refers to questions about the powers of a court to review decisions of the NDPP; and whether the charges against Mr Zuma remain extant.[13]

17. The second argument is not developed with any conviction in the NPA's heads and we deal briefly with it in the last part of these heads. The first argument also fails as the Applicants do not raise any novel issues which demand the attention of this Court. There is no dispute that Adv Mpshe's decision amounts to an exercise of public power, which can be reviewed against the requirements of the rule of law (as enshrined in section 1(c) of the Constitution).[14] There is also no dispute that rationality is a well-established ground of legality review, or that rationality has both substantive and procedural aspects.[15] The matter thus raises a factual issue alone, based on the circumstances of a particular case. Thus unless the Applicants can show that there is a real prospect of success on the merits (which they have not), we submit that the application for leave to appeal should be dismissed.

C. THE BASES OF THE APPLICATION FOR LEAVE TO APPEAL

18. The NPA raises six grounds of appeal. Of these, the first two deal with criticisms of specific findings of the Full Court – namely that in this case Adv Mpshe ought to have referred any question of an abuse of process to a court; and that once it was found that Mr Mphe's decision was irrational, it followed as a consequence that Mr Zuma ought

[13] NDPP's heads of argument at pp. 3 – 6
[14] Vol. 18: Judgment p. 3272, para 48, citing *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (4) SA 298 (SCA) at para 27-28. This was also the finding of this Court in *Democratic Alliance v President of the Republic of South Africa* 2012 (3) SA 486 (SCA) at para 27.
[15] Vol. 18: Judgment pp. 3271 – 3272, paras 46-47, citing *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at para 51, and *DA v President, supra,*at para 34

to face the charges in the indictment. The remaining four grounds are variations on a theme, positing that Adv Mpshe's decision cannot be impugned as being irrational.

19. Mr Zuma's application for leave suggests that the rationality of Adv Mpshe's decision cannot be tested against his stated reasons alone (i.e. relating to the timing issue), but should be viewed "*in context*". By this it appears to be suggested that this Court should consider a range of other factual bases (i.e. in addition to, or other than the timing issue) which could support Adv Mpshe's conclusion, and which were raised in the representations made on behalf of Mr Zuma. This argument is made even though Mr Zuma has refused to make these representations available at any stage of these proceedings; and even though Adv Mpshe specifically indicated that he rejected these contentions in the representations.

20. Following an exposition of the factual background, we deal with these arguments as follows:

20.1 First, the rationality of Adv Mpshe's decision must be tested against the reasons given.

20.2 Second, Adv Mpshe failed to properly apply his mind to the question of whether the matter should be referred to a Court for decision and he failed to understand the test for when prosecutions should be stopped based on a proven abuse of process.

20.3 Third, the procedure followed by Adv Mpshe was irrational.

20.4 Fourth, Adv Mpshe's decision was, on an objective assessment, substantively irrational.

20.5 Finally, the Full Court correctly indicated that the consequence of setting aside Adv Mpshe's decision was that the 2007 indictment remained extant.

D. FACTUAL BACKGROUND

21. The background to both the decision to prosecute Mr Zuma (taken on 29 November 2007), and the decision to discontinue that prosecution (taken on 1 April 2009),[16] appears from the Rule 53 record[17] – which the DA managed to obtain with some difficulty from the NPA over the course of several years.[18]

22. A protracted investigation of these allegations against Mr Zuma started in 2001. Before the 2009 decision to discontinue the prosecution, the matter was the subject of no less than three decisions by the head of the NPA.

23. In 2003 Mr Ngcuka, who at that stage held the office of the NDPP, decided to charge Mr Zuma's business associate and advisor, Mr Shabir Shaik. He did not charge Mr Zuma, even though there was a *prima facie* case against him, because he believed that there was not a reasonable prospect of successfully prosecuting him.[19] The proceedings against Mr Shaik continued and he was convicted on 2 June 2005 and sentenced to an effective 15 years imprisonment.

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[16] The chronology regarding the decision to prosecute is annexed marked **"A"** and the chronology regarding the decision to discontinue the prosecution is annexed marked **"B"**.

[17] The Rule 53 record was produced over a period of several years and it is difficult to negotiate. To assist, we have compiled a "*Guide to the Minutes and Notes forming part the Rule 53 Record",* a copy of which is annexed marked **"D"**.

[18] A chronology of the litigation history is annexed marked **"C"**.

[19] Mr Ngcuka's decision not to prosecute Mr Zuma has been regarded by him to be proof of an ulterior motive on Mr Ngcuka's part, namely that he was party to an alleged political conspiracy to destroy his political career. Mr Zuma later elected not to pursue this grievance about alleged misuse of the office of the NDPP by Mr Ngcuka before the Hefer Commission (which was specifically tasked with investigating allegations against Mr Ngcuka), and chose instead to take his complaint to the Public Protector, then Mr Lawrence Mushwana, who brought out a report on 28 May 2004, criticising Mr Ngcuka. See Chronology A and Vol. 5 at p. 853, Hefer Commission Report at para 44.

24. The judgment of the court in the Shaik matter implicated Mr Zuma, which caused the then NDPP, Mr V Pikoli, to announce in June 2005 that Mr Zuma would be prosecuted.[20] This decision was announced before the investigation of Mr Zuma was complete, and at a stage at which the criminal trial could not continue. This came about in part as a result of several legal proceedings, including challenges to the validity of various search warrants;[21] and challenges to pending letters of request to the governments of Mauritius and the United Kingdom for co-operation to collect documentary evidence.[22] Because of the resultant delay, the criminal prosecution was struck from the roll by Msimang J on 23 September 2006. These preliminary matters were only resolved on 8 November 2007, when this Court dismissed all of the interlocutory applications brought by Mr Zuma against his prosecution.[23]

25. By then Mr Mbeki had suspended Mr Pikoli as NDPP, on the ostensible basis of a breakdown in his relationship with the then Minister of Justice, Ms Brigette Mabandla. Adv Mpshe was appointed as acting NDPP and remained in that position until 25 November 2009 – i.e. throughout the relevant period for this case.

26. Adv Mpshe and the NPA top management team,[24] were however neither responsible for the investigation nor the day-to-day running of the prosecution. The DSO,[25] headed

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[20] Supp Vol. 4: p. 3942, Du Plooy Affidavit paras 41 – 44
[21] Supp Vol. 4: p. 3981, Du Plooy Affidavit para 73
[22] Supp Vol. 4: p. 3986, Du Plooy Affidavit para 84
[23] *National Director of Public Prosecutions and Others v Zuma and Another* [2008] 1 All SA 197 (SCA); 2008 (1) SACR 298 (SCA) (8 November 2007); *Thint (Pty) Ltd v National Director of Public prosecutions and Others* [2007] SCA 138 (RSA); [2008] 1 All SA 229 (SCA) (8 November 2007).
[24] The management team members (other than Adv Mpshe) were:

- Adv Trish Matzke, an Acting Special Director in the NDPP's office;
- Adv Sibongile Mzinyathi, a DDPP and head of the National Prosecutions Service (NPS) in the NDPP's office;
- Dr Silas Ramaite, a Deputy National Director of Public Prosecutions (DNDPP) in the NDPP's office; and
- Adv Willie Hofmeyr a DNDPP in the NDPP's office.

[25] For present purposes, the relevant members of the DSO (other than Mr McCarthy) were:

by Mr McCarthy, was responsible for the former; and the prosecuting team,[26] headed by Adv W Downer SC, was responsible for the latter. The DSO and the prosecuting team never supported the decision to drop the charges. Indeed, only Adv Hofmeyr, a member of NPA top management, argued in favour of discontinuation.

27. After the NPA's victory in this Court in the search warrant cases, it was a foregone conclusion that the prosecution of Mr Zuma would be reinstated. The formal decision to do so was taken on 29 November 2007 by Adv Mpshe, NPA management, the DSO and the prosecuting team in what has correctly been described as a corporate decision.[27]

28. The decision could not be publicly announced, as the extensive indictment still had to be finalised. Authorisation also still had to be obtained for the institution of charges under the Prevention of Organised Crime Act 121 of 1998 (POCA), and for the centralisation of the charges under section 111 of the Criminal Procedure Act 51 of 1977 (CPA).

29. These preparations took place in the run-up to the Polokwane conference. The question obviously arose as to whether the charges should be announced before or after the conference. The prosecuting team argued that the decision to charge should be

- Adv Thanda Mngwengwe, an Investigating Director with the DSO at the time that charges were re-instituted and the prosecutor under whose hand the indictment was filed, and the Acting Head: DSO at the time they were withdrawn;
- SSI Du Plooy referred to above. He was a Senior Special Investigator with the DSO and he led the investigation;

[26] For present purposes the relevant members of the prosecuting team (other than Mr Downer) were:

- Adv Anton Steynberg, a DDPP from KZN who was a prosecutor on the case; and
- Adv George Baloyi, a DDPP from Gauteng who was a prosecutor on the case;

[27] Supp Vol. 2: p. 3558, DSO KZN memorandum dated 3 April 2009 para 13

announced as soon as the indictment was ready, without regard to the Polokwane conference.[28]

30. However, on or about 6 December 2007, after a conversation the night before with Minister Mabandla, Adv Mpshe told Adv Downer that the announcement would be held back until the new year. Adv Downer was concerned that the delay had been manipulated by Minister Mabandla, but in his response Adv Mpshe was emphatic that the decision to postpone the indictment was his alone. Adv Mpshe said that he wished to avoid any suggestion that the charges were timed to influence the events at the Polokwane conference.[29]

31. The NPA now suggests that despite Adv Mpshe's unequivocal statements at the time, the timing issue was in fact really controlled by Mr McCarthy. Yet the evidence for this proposition is tenuous.

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[28] Their view found its way into a report compiled in terms of section 33 of the National Prosecuting Authority Act 32 of 1998 to Minister Mabandla on or about 3 December 2007. The report appears at Supp Vol. 4: pp. 4052 – 4058. Adv Mpshe signed that report but it was authored by the prosecution team.

[29] The prosecuting team described what happened in their memorandum dated 6 December 2007, which appears at Supp Vol. 3: pp. 3897 – 3900. What happened is that:

- In a telephone discussion of 4 December 2007 (Supp Vol. 3: p. 3734) Adv Mpshe first raised the possibility with Adv Downer of delaying the announcement of the prosecution until after the Polokwane conference. Adv Mpshe indicated that he was waiting for Minister Mbandla's views.
- On 6 December 2007 Adv Downer again spoke to Adv Mpshe telephonically. Adv Mpshe indicated that he would "*only make the announcement next year*" (Supp Vol. 3: p. 3736, Downer's notes). He explained that he did not wish to be "*seen to be interfering with the Polokwane process*", and that he had taken account of a speech by Mr Mbeki which "*called for calm and stability prior to Polokwane*". Adv Mpshe confirmed that he had consulted with Minister Mabandla the previous evening (i.e. 5 December 2007) but he was very clear that the decision on the timing was his (Adv Mpshe's) and no-one else's.
- Significantly, Mr McCarthy was not involved in the discussions between Adv Mpshe and Adv Downer regarding the timing issue. Mr McCarthy was in fact on leave from 6 to 10 December 2007. (Supp Vol. 1: p. 3401, Conversation 7, line 10c. Adv Downer's memorandum was copied to Mr McCarthy (as head of the DSO). Adv Downer's notes record that thereafter Mr McCarthy called him on 7 December 2007, and that he (Mr McCarthy) wanted it to be clear that he had not been consulted. (Supp Vol. 3: p. 3737, Downer's notes of meeting of 6 December 2007).

31.1 From the Rule 53 record, Mr McCarthy's only input on the timing issue was a informal suggestion to Adv Downer on 12 November 2007,[30] when he suggested service of the indictment should be held back. Adv Downer disagreed, and Mr McCarthy accepted this position.

31.2 The evidence presented by the NPA in in its answering affidavits of Mr McCarthy's manipulation of the timing issue is equally uncompelling. Adv Hofmeyr there, for the first time, suggests that around 21 November 2007 Mr McCarthy also informally approached him with the suggestion that the service of the indictment be delayed. Adv Hofmeyr states that he rebuffed the suggestion, and goes so far as to assert that at this stage he realised that Mr McCarthy's true aim was to protect Mr Mbeki.[31] Curiously Adv Hofmeyr did not raise this in any meetings at the time, and also did not raise this incident (and his suspicions) when the 'spy tapes' came to light in 2009.

31.3 The high-water mark of the case that Mr McCarthy effectively influenced the timing decision is a second-hand report in the NPA's answering papers, where Adv Hofmeyr refers to an undated conversation with Adv Mpshe in which the latter supposedly confirmed that it was actually Mr McCarthy who had convinced him to postpone the service of the indictment. This was allegedly because Adv Mpshe believed that the timing decision was really for Mr McCarthy to make, and that he should support Mr McCarthy's call. Adv Hofmeyr states that the delay made him angry, and he claims that at that time he had the foresight to appreciate that the true purpose of Mr McCarthy was to

[30] Adv Downer disagreed, and Mr McCarthy conceded. (Vol. 3: p. 357, Hofmeyr's AA at para 150)
[31] Vol.3: pp. 361 – 362, Hofmeyr's AA at paras 164 – 166. Adv Hofmeyr also suggests that similar approaches were made to other people, but no evidence is provided – vol 3, p 360, Hofmeyr's AA, para 159.

support Mr Mbeki.[32] Yet there is no evidence that he expressed this to Adv Mpshe or anyone else in any way, and he made no suggestion at the time that he believed that if this interference was allowed, it would compromise the prosecution.

31.4 Adv Mpshe also at no stage – either in 2007 or 2009 – clarified that the timing decision was in fact led by Mr McCarthy. His perfunctory confirmatory affidavit in the NPA's answering papers at best confirms that he made vague statements to Adv Hofmeyr.

31.5 It was only in June 2015, when he deposed to a supplementary affidavit, that Adv Mpshe was able to provide more detail. He then recollected and mentioned a discussion between him and Mr McCarthy at some point between 29 November (when the decision to prosecute Mr Zuma was made) and 3 December 2007, in which Mr McCarthy expressed the strong view that the prosecution should be delayed because if the indictment was served before the Polokwane conference, it would destabilise the DSO, the NPA and the country. Adv Mpshe accepted this rationale (quite properly), and supposedly also accepted that the timing decision was for Mr McCarthy to make.[33] Adv Mpshe presented this view to the Minister and Adv Downer as his own, supposedly to create an appearance of unanimity.

[32] Vol 3, p 224, Hofmeyr's AA at para 185.
[33] Vol 17, pp 3233-3236, Mpshe SA at para 11-27

32. We submit that the evidence that Mr McCarthy manipulated the timing decision is weak. At the very least the decision carried the imprimatur of Adv Mpshe, based on a perfectly acceptable rationale.

33. In any event, as it turned out, the debate about the timing of the announcement was probably academic because Adv Mpshe only authorised the institution of proceedings under POCA on 14 December 2007 and the indictment was probably only finalised on 24 December 2007, well after the Polokwane conference.[34]

34. In the meantime, Mr Zuma was elected as the President of the ANC at Polokwane, and in that capacity was poised to take over as the President of the country following the coming general election.

35. On 28 December 2007, the indictment was served on Mr Zuma.

36. In the NPA's answering affidavit Adv Hofmeyr seeks to develop a second leg to the manipulation argument, namely that there was an acceleration (by a few days) in serving the indictment, post-Polokwane, at the instance of Mr McCarthy. Adv Mpshe's decision had been to wait until January 2008, but Mr McCarthy caused the indictment to be served by 28 December 2007.

37. The NPA and Mr Zuma struggle to ascribe any malign political motive to this insignificant degree of acceleration of the service of the indictment post-Polokwane. The best that Adv Hofmeyr can muster is that Mr McCarthy was fearful that Mr Mbeki would be recalled and that this would permanently frustrate the prosecution.[35] On this aspect, Adv Hofmeyr's attempt is unconvincing and odd. The suggestion really

[34] Supp Vol. 3: p. 3747 (Downer notes)
[35] Vol. 3: p. 382, Hofmeyr's AA at para 239

amounts to an admission that political interference was expected from Mr Zuma's camp and that to avoid this interference Mr McCarthy acted with alacrity. If so, we submit that this was an acceptable response and hardly an acceleration with a malign motive.

38. Mr Zuma persisted in exploring every avenue to avoid prosecution. In 2008 he challenged the decision to prosecute him, primarily on the basis that section 179(5)(d) of the Constitution required that he should have been afforded the opportunity to make representations before the decision was taken. The challenge was bolstered by wide-ranging allegations of improper political motives which tarnished the prosecution. In September 2008 Nicholson J (in the High Court in Pietermaritzburg) ruled in Mr Zuma's favour[36] However, that judgment was overturned on appeal by this Court on 12 January 2009.[37] Mr Zuma thereafter sought leave to appeal from the Constitutional Court. This was opposed by the NPA. (These proceedings fell away after the decision to halt the prosecution was taken).

39. In the same period Mr Zuma's legal representatives also indicated that he would bring an application for the permanent stay of his prosecution, which was to be launched by 18 May 2009. (A timetable for that application was also set, but it never proceeded once the charges were dropped).

40. In addition to the above, and in February 2009, Mr Zuma's legal representatives made a series of oral and written representations to the NPA management, calling for the charges to be dropped.

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[36] *Zuma v National Director of Public Prosecutions* [2009] 1 All SA 54 (N)
[37] *NDPP v Zuma* 2009 (2) SA 277 (SCA) (per Harms DP)

41. The contents of the intercepted recordings of Mr McCarthy's telephone conversations and cellphone messages (SMSs) – popularly dubbed "the spy tapes" – were introduced in the oral representations. Even though the exact nature of these representations has not been disclosed, due to alleged confidentiality, it is evident that a feature of the oral representations was the explicit threat that if the NPA persisted in its prosecution, embarrassing allegations about the conduct of members of the NPA would be made public. The prosecution team correctly referred to these threats as blackmail.

42. We deal with the events of February and March 2009 in some detail below, when addressing the issue of procedural irrationality. For current purposes we merely point out that when the decision was taken, it was known that the national and provincial general elections were scheduled for 22 April 2009. It was further clear that the ANC would retain a majority of the seats in the National Assembly and that Mr Zuma would be the next President of the country.

43. After taking the decision to discontinue the prosecution, Adv Mpshe and the NPA management realised that a factual and legal basis for the decision would have to be presented. Time was of the essence and the prosecuting team, who remained strongly in favour of continuing with the prosecution, was not invited to assist.

44. Over the following days Adv Mpshe's reasons were composed, most likely by Adv Hofmeyr and backed up with some legal research. Adv Mpshe presented his decision, and the reasons for it, at about the same time to both the public and the prosecution team on 6 April 2009. The NPA's answering papers confirm[38] that the

[38] Vol. 3: p. 317, Hofmeyr's AA at para 12. As we explain below, in some parts of his affidavit, Adv Hofmeyr attempts to expand the reasons for the impugned decision to those which are contained in paras 12 – 51 of his affidavit.

reasons for that decision were contained in Adv Mpshe's press statement of 6 April 2009.

45. The stated reasons rely almost entirely on the content of the spy tapes. Mr Zuma has never explained the provenance of these recordings nor how they came into his legal team's possession.[39] In his statement Adv Mpshe indicated that the NPA had established that similar recordings had been made by the National Intelligence Agency (NIA), as part of another investigation, which were also provided to him and on which he relied.

46. The spy tapes consist mostly of conversations and messages between Messrs McCarthy and Ngcuka. Mr Ngcuka was clearly a close friend of Mr McCarthy. It is also apparent that both supported Mr Mbeki in the leadership challenge at the Polokwane conference. In the recordings and messages, Mr McCarthy and Mr Ngcuka discuss, amongst other things, opinions on whether Mr Mbeki's prospects would be strengthened if the indictment against Mr Zuma were to be served before, during or after the Polokwane conference. They appear to have concluded that it would be better for Mr Mbeki if the indictment were to be served after the conference.

47. These conversations were considered to be evidence of collusion between Mr McCarthy and Mr Ngcuka to manipulate the timing of charging Mr Zuma for purposes extraneous to the prosecution itself. The central allegation is that Mr McCarthy overrode his own views and the advice of the prosecution team, to carry out political instructions from Mr Ngcuka and others associated with Mr Mbeki. The

[39] It appears that Mr Zuma had more of such recordings than the ones relied upon by Adv Mpshe. In these proceedings his legal team again (without explanation) included transcripts of telephone conversations between Adv Downer and members of the press which could not have been lawfully intercepted.

suggestion appears to be that the indictment was initially held back to suit Mr Mbeki's campaign at the Polokwane conference, and thereafter expedited to suit Mr Mbeki.[40]

48. As noted, in so doing Adv Mpshe explicitly indicated that this did not alter his view that the charges against Mr Zuma were meritorious and serious, and that the underlying decision to prosecute Mr Zuma was properly made. Adv Mpshe also accepted that nothing had been presented which would undermine the possibility of a fair trial for Mr Zuma. In particular he retained confidence in the skill, integrity and neutrality of the team that had compiled the indictment and who would prosecute the charges against Mr Zuma.

E. THE DECISION MUST BE MEASURED AGAINST THE STATED REASONS

49. In the NPA's answering papers, Adv Hofmeyr moves from supposition to speculation in order to construct supplementary reasons to buttress the decision of Adv Mpshe. The NPA's heads of argument, albeit tentatively, suggest that the reasons for Adv Mpshe's decision include the material raised by Adv Hofmeyr,[41] but ultimately accept that its case rests on the timing issue.[42]

50. Mr Zuma's heads of argument however appear to recognise that the timing issue alone provides an inadequate basis for Adv Mpshe's decision. An attempt is instead made to support Adv Mpshe's decision by arguing that it was justified by other facts.

51. This approach is flawed in law and in fact. As a matter of law, we submit that the rationality of a decision must be measured against the reasons given. It does not assist

[40] Whilst much is made of the latter aspect in the NPA's papers, it largely fell away during the Full Court proceedings.
[41] NPA's heads of argument, para 42, p 16.
[42] NPA's heads of argument, para 74.1, p 29.

the Applicants to point to new, additional reasons to justify Adv Mpshe's decision. This follows from the approach referred to by this Court with approval in *National Lotteries Board*.[43]

52. This view is supported by the Constitutional Court's judgment in *Allpay*,[44] in which the Court rejected an approach that ignored irregularities based on the assumption that they had made no difference to an inevitable result. Furthermore, in *Westinghouse*[45] this Court upheld the well-established principle that a decision tainted by a bad reason cannot be saved by sifting through what remained to determine if any other subsidiary or new reasons could support the impugned decision.[46]

53. In any event, as a matter of fact the additional information relied on by Mr Zuma can play no role:

53.1 First, much of the argument requires this Court to make a determination at this stage that a threatened application for a permanent stay – which has

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[43] *National Lotteries Board and Others v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at para 27. The Court referred to *Jicama 17 (Pty) Ltd v West Coast District Municipality* 2006 (1) SA 116 (C) at para 11, in which it was found that new reasons which are put forward for the first time in answering papers cannot answer a review application. This Court also cited with approval the following dicta in *R v Westminster City Council, Ex parte Ermakov* [1996] 2 All ER 302 (CA) at 315h - 316d which are equally apposite in this matter. Allowing new reasons to be presented would lead to *"a sloppy approach by the decision-maker*", and would in many cases give rise to the new reasons being "*in fact second thoughts designed to remedy an otherwise fatal error exposed by the judicial review proceedings.*"

[44] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC) at para 23-30

[45] *Westinghouse Electric Belgium SA v Eskom Holdings (Soc) Ltd and Another* 2016 (3) SA 1 (SCA) at para 44-45. Although the order in this matter was overturned by the Constitutional Court, this part of the judgment was not criticised.

[46] This principle flows from *Patel v Witbank Town Council* 1931 TPD 284 at 290:

> "What is the effect upon the refusal of holding that, while it has not been shown that grounds 1, 2, 4 and 5 are assailable, it has been shown that ground 3 is a bad ground for a refusal? Now it seems to me, if I am correct in holding that ground 3 put forward by the council is bad, that the result is that the whole decision goes by the board; for this is not a ground of no importance, it is a ground which substantially influenced the council in its decision. . . . This ground having substantially influenced the decision of the committee, it follows that the committee allowed its decision to be influenced by a consideration which ought not to have weighed with it."

never been launched – would, if made, be unanswerable. This Court is plainly not in a position to make that determination, which would be premature.

53.2 Second, the argument assumes that everything that Mr McCarthy touched, at every stage, was tarnished; and that he touched everything. This too does not follow. Adv Mpshe accepted that the prosecution team was above reproach, and the evidence against Mr Zuma was compelling. Even if Mr McCarthy was politically motivated at a point in late 2007, it cannot be assumed that he was at all stages little more than a political actor based in the NPA.

53.3 Third, Mr Zuma's heads of argument pay inordinate attention to Mr McCarthy's role in compiling the Browse Mole report, which is alleged to have been an unlawful intelligence gathering exercise by the DSO to discredit Mr Zuma. This too is misplaced, as Adv Mpshe's decision specifically noted that the Browse Mole report had not played a part in his decision, and required further investigation (which has never happened).[47] This Court can hardly be expected to make an evaluation of the lawfulness of the Browse Mole report, or the truth or otherwise of its contents.

54. In any event, even if Mr McCarthy was motivated by an improper motive, this does not result without more in the prosecution being fatally tarnished. In *NDPP v Zuma*[48] this Court found that "a prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable

[47] Vol 1, p 131, annexure "JS 10" (lines 20-30).
[48] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 37

and probable grounds for prosecuting are absent, something not alleged by Mr Zuma and which, in any event, can only be determined once criminal proceedings have been concluded."[49]

F. FAILURE TO APPLY THE MIND

55. In his press statement of 6 April 2009, giving his reasons, Adv Mpshe relies on a line of foreign cases which lay down a two-stage enquiry when assessing whether to grant a permanent stay due to proven allegations of abuse of process:

55.1 First, the question is whether the abuse will render it impossible for the accused to have a fair trial. If so, the proceedings must be stayed.

55.2 Second, and if a fair trial remains possible, the judge must weigh countervailing considerations of policy and justice and in particular, the public interest in ensuring that those charged with grave crimes should be tried, against the competing public interest in not conveying the impression that the court will adopt the approach that the end will justify the means.[50]

56. There is no evidence in the Rule 53 record or in the affidavits filed on behalf of the NPA that Adv Mpshe ever applied his mind to this two-stage enquiry before he suddenly announced his decision internally on 1 April 2009. His decision on that day was based on emotion, having listened to the recordings the night before. Even in his

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[49] The Court continued that this did "*not, however, mean that the prosecution may use its powers for 'ulterior purposes*"'. An ulterior motive which vitiated a prosecution is one in which action is taken not for the purposes of bringing a prosecution, but for another purpose not authorised by the statute, such as harassment. The Court stated that this is what ulterior purpose in this context means and that this was not the case advanced by Mr Zuma. "*In the 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."* (para 38)

[50] *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, 74G (reported as *Bennett v Horseferry Road Magistrates' Court and another* [1993] 3 All ER 138) ; *R v Latif and Shahzad* [1996] 1 WLR 104, 112F; (1996) 1 All ER 353

statement, compiled over the next few days, Adv Mpshe failed to demonstrate that he considered the following two aspects:

56.1 The foreign cases he relied on dealt with the power of courts to grant a permanent stay on the basis of an abuse of process. He failed to consider whether it was appropriate for the prosecuting authority to invoke this power in the circumstances of the case before him.

56.2 He failed entirely to engage in the balancing enquiry, i.e. the second stage of the test.

57. We deal with each of the above in turn.

(i) Adv Mpshe uncritically invoked the court's powers in permanent stay applications

58. The Full Court refers to the DA's submission that there is a striking resemblance between the authorities referred to in Adv Mpshe's statement and the Hong Kong High Court (per Seagroatt J) in the Lee Ming Tee case.[51]

59. This finding is with respect undoubtedly correct. We have prepared a comparison between the relevant part of the judgment of Seagroatt J (extract marked **"E.1"**) and the statement of Adv Mpshe (relevant part annexed marked **"E.2"**). It will be noted from the underlined parts that Adv Mpshe's statement contains the same quotes, from the same authorities, in the same order, as the judgment of Seagroatt J.

60. But exposition of the law by Seagroatt J appears to have been edited by the removal of the *dicta* which make it clear that the discretion referred to in the authorities is (1)

[51] Vol. 18: p. 3279, Judgment at para 62. *HKSAR v. Lee Ming Tee* [2002] HKCFI 1085 (13 December 2002)

exercised by a court; (2) and only in the "*most exceptional of circumstances*". In the extract from Seagroatt J's judgment (**"E.1"**), we have marked in bold the parts of the authorities which were omitted from the statement of Adv Mpshe.

61. The judgment of Seagroatt J was overturned by the Court of Final Appeal.[52] The Appeal Court held that the "*abuse of process does not exist independently of, and antecedently to, the exercise of a judicial discretion*".[53]

62. The particular discretion referred to in this line of cases cannot uncritically be appropriated by the prosecuting authority to assess whether an alleged abuse of process justifies the withdrawal of criminal charges (notwithstanding the fact that a fair trial remains possible). The balancing exercise, in particular, is designed for the courts to

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[52] Judgment of Sir Anthony Mason in *HKSAR v. Lee Ming Tee* [2003] HKCFA 34; FACC 1/2003 (22 August 2003). There are nine judgments on the HKLii website dealing with the protracted litigation between the Hong Kong Special Administrative Region (HKSAR) and Lee Ming Tee (Mr Tee). They are listed below. Numbers 2, 3 and 4 are not directly relevant as they do not deal with the various permanent stay applications brought by Mr Tee. The outcomes of the rest of the Judgments were as follows:

- The first permanent stay was initially granted by Pang J (number 9) but overturned by the Court of Appeal per Ribeiro PJ (number 5).
- The second permanent stay was granted by Seagroatt J (number 7) and overturned by the Court of Appeal per Sir Mason (number 1).
- The third permanent stay application was dismissed by Tang J.

1. *HKSAR v. Lee Ming Tee* [2003] HKCFA 34; (2003) 6 HKCFAR 336; [2004] 1 HKLRD 513; FACC 1/2003 (22 August 2003)
2. *HKSAR v. Lee Ming Tee* [2003] HKCFA 10; FAMC 1/2003 (11 February 2003)
3. *HKSAR v. Lee Ming Tee* [2003] HKCFA 8; FACC 1/2003 (25 November 2003)
4. *HKSAR v. Lee Ming Tee And Another* [2001] HKCFA 34; FACC 8/2000 (3 May 2001)
5. *HKSAR v. Lee Ming Tee And Another* [2001] HKCFA 32; [2001] 1 HKLRD 599; (2001) 4 HKCFAR 133; FACC 8/2000 (22 March 2001)
6. *HKSAR v. Lee Ming Tee* [2004] HKCFI 498; HCCC 191/1999 (8 June 2004)
7. *HKSAR v. Lee Ming Tee* [2002] HKCFI 1085; HCCC 191/1999 (13 December 2002)
8. *HKSAR v. Lee Ming Tee And Another* [2002] HKCFI 685; [2003] 1 HKC 174; HCCC 191/1999 (15 October 2002)
9. *HKSAR v. Lee Ming Tee And Another* [2000] HKCFI 817; HCCC 191/1999 (21 July 2000)

[53] See the Full Court's judgment at para 62 (Vol. 18, p. 3279). This passage was cited by the DA in its supplementary founding papers. Vol. 2: p. 250, SFA at para 291.4. In answer, the NPA merely stated that Adv Mpshe rejected the advice of the prosecution team that the matter should be left to a court on the basis that if Mr Zuma brought a permanent stay application, he would not have been able to defend it. Vol. 3: p. 462, Hofmeyr AA at para 667

apply. None of the foreign cases have recognised that the prosecuting authority may pre-judge the issue.

63. However, if the prosecuting authority is to be allowed to do so, then it should be limited to the clearest of cases. The present matter was certainly not such a case.

64. Against this background, it is submitted that the Full Court correctly held that, in the circumstances of this case, a court was the appropriate forum to deal with the alleged abuse of process and that it was irrational not to refer the matter to court.[54] This was because:

64.1 At the time when Adv Msphe made his decision, Mr Zuma had already committed to a timetable for the filing of papers in respect of the permanent stay application.

64.2 When he made the decision, Adv Mpshe did not have a full response from Mr Ngcuka and Mr McCarthy (and other relevant actors, such as former minister, Mr R Kasrils, and possibly Mr Mbeki) before him. That could have been obtained in the context of the permanent stay application. Mr Zuma's allegations were indeed untested in the sense that the prosecuting team and external counsel appointed for the matter never had a proper opportunity to

[54] Vol. 18: p. 3331, Judgment on Leave to Appeal at para 10.
It was, with reference to the facts of the case that the Full Court held that "It is thus our view that Adv Mpshe, by not referring the complaint of abuse of process and the related allegations against Mr McCarthy to court, rendered his decision irrational". See Vol. 18: p. 3284, Judgment at para 71.
In the Judgment dealing with the application for leave to appeal, the Full Court made it clear that it did not lay down a general principle that the validity of an abuse of process complaint should always be determined by a court of law. See Vol. 18: p. 3330, Judgment on Leave to Appeal at para 8.

consider possible defences, after proper consultation with Mr McCarthy and others who were implicated.

64.3 Adv Mpshe also did not have a sworn version of the allegations of abuse from Mr Zuma. This would have had to be furnished in the permanent stay application.

64.4 Even if the (untested) allegations of abuse were to be accepted at face value, no clear-cut case was made out for the kind of abuse of process which must necessarily result in the termination of a prosecution.[55] Adv Trengove SC had advised that on what he had been informed, the NPA would not "*persist with a hopeless case*" if it rejected the representations, and that the NPA should await the permanent stay application. Furthermore, as the leader of the prosecution team Adv Downer advised, the kind of complaint raised by Mr Zuma was one to be determined by an independent court of law in a public hearing and it was inappropriate (irrational, the DA submits) for the NPA to determine the issue "*behind closed doors in a process which is secret and completely lacking in transparency*."[56]

65. For all these reasons it was irrational, in the circumstances of the present matter, for Adv Mpshe to pre-empt the exercise of a discretion by a court of law on Mr Zuma's complaints of abuse of process. At the very least, Adv Mpshe should have asked himself, in the light of the authorities relied upon by him, whether it was the kind of

[55] This evidenced by the fact that until 1 April 2009, when Adv Mpshe announced his decision, the DSO and the entire prosecuting team plus independent senior counsel (Advs Trengove SC and Breitenbach SC) plus all top NPA management, with the exception of Adv Hofmeyr, felt that the representations should be rejected. Adv Hofmeyr made the case for not proceeding by himself. There is in fact no evidence on the record which shows that anyone else supported Adv Hofmeyr until Adv Mpshe announced his decision on 1 April 2009 to drop the charges.

[56] Vol. 13: p. 2365, para 9.8.3

clear cut case where it was appropriate for the prosecuting authority to pre-judge the balancing exercise which a court is called upon to make.

(ii) Adv Mpshe failed to apply his mind to the second stage of the test

66. As noted above, the second stage of the test involves a balancing process.

67. Adv Mpshe accepted that the substantive merits of the case remained good (i.e. that the evidence against the Mr Zuma was compelling); that Mr Zuma's fair trial rights remained intact; and that no practical considerations required a stay of proceedings. It is also clear that Adv Mpshe accepted that the indictment was unaffected by allegations of misconduct by Mr McCarthy; and that the rest of the prosecution team was unblemished. In these circumstances it would be expected that Mr Zuma should face the charges against him in court. Thus the first imperative, namely society's expectation that accused persons must meet the charges, weighs particularly heavily.

68. Adv Mpshe concluded that the conduct of Mr McCarthy in manipulating the timing of the service of the indictment, constituted an unconscionable abuse of process. But even if such a finding could be made, it was not be the end of the matter. Rather, consistent with the authorities relied on by Adv Mpshe, it had to be weighed against the strong societal expectation that Mr Zuma would face criminal charges.

69. Adv Mpshe's statement indicates that he was aware that such a balancing exercise was called for,[57] but the statement fails to show that he ever performed the required exercise. Rather, after presenting the allegations against Mr McCarthy, it appears that he believed

[57] Supp Vol. 1: p. 3536, unnumbered para 2 from the top

that the prosecution of Mr Zuma simply could not proceed. The NPA's affidavits also contain no evidence that the second stage of the test was ever considered.

70. The Full Court accordingly correctly accepted the DA's contention that Adv Msphe did not get to the second stage of the enquiry.[58] This meant that Adv Mpshe failed to apply his mind to a crucial issue he had to consider, and that his conclusion was irrational.

G. SUBSTANTIVE IRRATIONALITY

71. There can be no quarrel with the Full Court's understanding of the concept of rationality at the level of principle.[59] It is accepted that this involves assessing the link between the purpose of a power and the decision made. It is further accepted that the purpose for which Adv Mpshe purported to make his impugned decision was "to protect the integrity of the NPA and its processes".[60]

72. The question is accordingly how the decision to discontinue the prosecution rationally furthered this objective on the facts of the present matter. We submit that even if it is accepted that Adv Mpshe could and actually did undertake a balancing exercise, his conclusion was substantively irrational for various inter-related reasons.

    72.1 First, he failed to appreciate that the test, properly conceived, required something truly exceptional to off-set the public interest in allegations of serious criminality being prosecuted;

[58] Vol. 18: p. 3281, Judgment at para 66
[59] As set out in Vol. 18: pp. 3271 – 3272, Judgment at paras 46-48.
[60] Vol. 18: p. 3278, Judgment at para 60.

72.2 Second, the untested information contained in the spy-tapes did not rise to the requisite level or present any exceptional reason justifying the halting of the prosecution; and

72.3 Third, he failed to appreciate the reputational and institutional damage to the NPA if senior and powerful politicians were allowed to escape prosecution.

(i) <u>The test required something exceptional</u>

73. We submit that useful guidance is offered by the UK Supreme Court's judgments in *Maxwell*[61], and the judgments of that court sitting as the Privy Council in *Warren.*[62] The judgments in those matters distinguish in the first place between cases in which an alleged abuse negated the accused's ability to receive a fair trial, and those in which a fair trial was still possible. [63]

74. In cases in which an accused's fair trial rights are implicated,[64] prosecution would almost invariably be inappropriate. No question of balancing competing interests arises Notably, Adv Mpshe's reasons make it clear that this is not such a case, and that there is no reason why Mr Zuma could not face a fair trial.

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[61] *R v Maxwell* [2010] UKSC 48; [2011] 1 WLR 1837; [2011] 4 All ER 941. That case did not technically involve an application for a stay, but whether a retrial should be ordered. The accused had been convicted, but that conviction had been quashed based on evidence that evidence from the State's key witness was obtained by offering improper inducements. The question arose whether the accused could face a retrial, based on untarnished evidence and several post-conviction admissions of guilt. The judgments (particularly that of Lord Brown) provide a useful synopsis of the law dealing with abuse of process cases. Lord Dyson warned that the analogy should not be pressed too far (at para 21).

[62] *Warren v HM's Attorney General for the Balliwick of Jersey* [2011] UKPC 10; [2011] 2 All ER 513

[63] In *Maxwell* this is contained in the majority judgment of Lord Dyson, para 13 and the minority judgment of Lord Brown, para 98. Lord Dyson quotes his statement in Maxwell in his judgment in *Warren*, at para 22.

[64] The most common example of this would be unreasonable delay. In these cases it must be shown that the delay is such that it will no longer be fair to hold a hearing (*Altaf v The Crown Prosecution Services, West Midlands* [2007] EWCA Crim 691). Another example is where evidence is destroyed in breach of a duty to maintain (*R (on the application of Ebrahim) v Feltham Magistrates* [2001] 2 Cr App R 23; [1993] 2 All ER 474

75. In cases in which a fair trial is still possible, the overarching principle is that established in the *Bennett* and *Latif* cases, referred to above, which requires a balancing of competing interests in prosecuting those reasonably suspected of guilt, and the integrity of the criminal justice system.[65]

76. In this balancing exercise, a significant (but not necessarily decisive) factor is whether, but for the abuse, an accused would not have been before a court at all – referred to as the "but for" principle.[66] This arises in, for instance, cases involving the abduction and improper rendition of an accused;[67] disguised extradition or improper deportation;[68] entrapment;[69] and prosecutorial breach of bargain.[70]

77. In the *Maxwell* case, the majority and minority judgments differ on the significance of the but for principle. The judgments all accept that the case fell into the but for category.[71] For the minority,[72] this factor was decisive, and in such cases the usual rule

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[65] *Maxwell*, judgment of Lord Dyson, para 20; and Lord Brown, para 98; *Warren*, judgment of Lord Dyson at para 23-24.

[66] Lord Brown notes that he made this characterization of abuse cases in the judgment of the Privy Council in *Panday v Virgil* [2008] 1 AC 1386. In the Warren case Lord Brown moderates this approach by suggesting that a 'but for' situation only arises when the unlawfulness alters the accused's actual conduct (at para 76).

[67] *Bennett v Horseferry Road Magistrates, supra* which involved an accused who was unlawfully taken to the UK from South Africa by collusion between police officers of both jurisdictions. (Although, in the *Warren* case Lord Hope adds a gloss, at para 65-68) which notes that Bennet may have been incorrectly decided, in that subsequent events had shown that the UK officials were not responsible for any unlawfulness). In South Africa a case concerning abduction is *S v Ebrahim* 1991 (2) SA 553 (A), in which the Court refused to exercise jurisdiction.

[68] See *R v Mullen* [2000] QB 520. A disguised extradition involves the use of deportation procedures with the actual intention of circumventing extradition procedures. In *R v Staines Magistrates Court and Others, ex parte Westfallen and others* [1998] 4 All ER 216 the court noted that the question was ultimately one of intention.

[69] *R v Latif, supra*. Although in the *Maxwell* case, Lord Brown notes that this would only cover cases in which an accused was lured, incited or pressurised into committing a crime that he or she would not otherwise commit; and did not cover cases in which an accused was offered "an unexceptional opportunity to commit a crime of which he had freely taken advantage" (citing *R v Looseley* Attorney General's Reference 9No 3 of 2000) [2001] 1 WLR 2060); [2001] 4 All 897.

[70] The case of *Fox v Attorney-General* [2002] 3 NZLR 62, referred to by the NPA, is such a case. In England the principle appears to be that this will only apply if an unequivocal undertaking is given, and the accused relies on it to his or her detriment – Crown Prosecution Service: Abuse of Process Guidelines (accessible at http://www.cps.gov.uk/legal/a_to_c/abuse_of_process/).

[71] In that the post-conviction admissions by the accused, which would form the centre-piece of any retrial, would never have been made but for his earlier, tarnished prosecution.

[72] Per Lords Brown and Collins.

should be that no prosecution could take place.[73] For the majority,[74] the but for factor was material but not decisive.[75] Thus even though the abuse in that case had been very serious,[76] the majority did not find that this was an obstacle to a retrial of the accused because of other countervailing considerations.[77] So too in *Warren*, the fact that serious misconduct underpinned the evidence (labelled as "most reprehensible") [78] was not on balance on obstacle to the prosecution.

78. Whether a case involves a but for situation may sometime be contentious.[79] For the current case the relevance is that the Court is not faced with a but for situation at all. But for Mr McCarthy's supposed interference, Mr Zuma would still have faced the same charges and the same case.

79. Outside of the but for cases a residual and exceptional category of cases arises, in which a fair trial is possible, and the interference has caused no prejudice to the accused's

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[73] Lord Brown, at para 102 and 108.
[74] Per Lords Dyson, Rodgers and Mance.
[75] Lord Dyson (at para 26 and 32, followed by Lord Rodger, at para 46, and Lord Mance, at para 56-57). In the *Warren* case this is restated in the judgment of Lord Dyson, at para 26-30, where he warns against rigid classifications.
[76] The accused had previously shared a cell with the prosecution's star witness. The witness had informed the accused of two old men who had large amounts of cash in their house. After the accused left prison he and his accomplices robbed and attacked the old men on two occasions, killing them on the second occasion. The witness was induced to give evidence by financial payments; access to drugs; visits to brothels; and even allowing him to have sexual relations with a police officer while in prison. This was all deliberately concealed from the prosecuting court, which was explicitly misled. The truth only came out after two separate investigations.
[77] The majority accepted that the post-conviction statements would not have been made but for the first wrongful prosecution, but was swayed by the fact that they were made voluntarily. The court was also clearly affected by the fact that the crimes were shocking.
[78] At para 45. Lord Hope in his concurring judgment refers to it as "a sustained, deliberate and, one might say, cynical act of law-breaking.". In that case police officers had unlawfully installed a tracking and audio recording device in a rental vehicle in France, and tracked the accused's movements across Europe. They knew that the Attorney General only permitted this with the consent of the foreign States, and that this consent had been refused. The Court again accepts that this is a but for case *par excellence* (at para 46). This was balance against the seriousness of the charges; the fact that the accused was a professional drug-dealer; bad advice had been received from a legal advisor; the court was not misled; and there was urgency when the police acted
[79] So for instance, in Warren the majority believed it was clearly a but for case; while Lord Brown saw it differently, and moderates his approach in the *Maxwell* case by saying that it is only when unlawfulness alters an accused's conduct that a but for situation arises (at para 76).

defence, but in which the court would still find that on balance a trial "would unacceptably compromise the moral integrity of the criminal justice system".[80]

80. The current case would fall into this residual category. The importance of this is that in this residual category, something very extraordinary would be required to tilt the balance away from the public interest in prosecuting those accused of crime. In *Maxwell* Lord Dyson thus held that the purpose of preventing a prosecution could not merely be to "mark the court's disapproval of that historical misconduct and to discipline the police", as that was not the function of criminal courts.[81] Lord Brown noted that it would only be very exceptionally that a court would "regard the system to be morally compromised by a fair trial (retrial) in a case which cannot be slotted into any but for categorisation … Executive misconduct ought not generally to confer on the suspect immunity from a fair trial (or retrial)."[82] In such cases the misconduct would be relevant, but so would the seriousness of the offences, and the strength of the evidence.[83]

81. Cases of this are hard to find. The English case of *Grant*[84] involved an example in which misconduct caused a court to stay proceedings outside a but for case. That case involved officers eavesdropping on attorney-client discussions. Even though this caused no prejudice, the court was affronted by the attack on a fundamental principle of the justice system. But even here, in *Maxwell*[85] and *Warren*[86] doubts were expressed that the Grant case had been correctly decided – because even though the affront to the

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[80] Per Lord Brown in *Maxwell*, at para 108. In Warren Lord Dyson also reasserts the notional possibility of cases in which a stay would be possible outside of the 'but for' cases (at para 36).
[81] At para 24. This is repeated in *Warren*, at para 37.
[82] Ibid
[83] At para 104.
[84] *R v Grant* [2006] QB 60
[85] At para 28 (per Lord Dyson for the majority) and 96 (per Lord Brown for the minority).
[86] Lord Dyson, at para 31-36.

prosecution system was serious, "the misconduct had no influence on the proceedings at all".[87].

82. What constitutes an affront to the moral integrity of the legal system differs in different jurisdictions.[88] In South African law the established position is that a claim to halt a prosecution would require something exceptional, as even in a but for case the court would not without more stop a prosecution. Thus, for instance, entrapment does not create a defence. Problems are dealt with by an exclusionary rule and by allowing the courts a discretion as to whether to admit evidence.[89] In the *Hammond* case,[90] for instance, this Court found that even though it was reprehensible that police officers had made false statements, and prosecutors had failed to lead evidence of those who had set up a trap, this did not impinge on the accused's fair trial.

83. So too in *Key*,[91] the Constitutional Court found that there was no automatic objection to unlawfully obtained evidence. Kriegler J stated as follows:

> "In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the

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[87] *Warren*, at para 36.

[88] Thus, for example, in the US, courts are likely to exclude all illegally obtained evidence and all derivative evidence, based on the principle established in *Mapp v. Ohio*, 367 U.S. 643 (1961). Yet in *Ker v Illinois* 119 US 436 (1886), the US Supreme Court held that the forcible abduction of the accused from Peru to the United States was "no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court." This was followed in *US v Alvarez-Machain* 504 US 655 (1992), in which a Mexican citizen was abducted from Mexico with the assistance of Mexican agents. This is at odds with the approach in South Africa, and is why US cases are of little guidance in this area.

[89] *S v Kotze* 2010 (1) SACR 100 (SCA) at para 21; *S v Hammond* 2008 (1) SACR 476 (SCA) at para 22

[90] *Ibid*.

[91] *Key v Attorney-General, Cape Provincial Division, and Another* 1996 (4) SA 187 (CC) at para 7 and 13

> accused be given a fair trial. Ultimately, as was held in Ferreira v Levin, fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision."

84. Furthermore, in *Bothma v Els*[92] the Constitutional Court noted that even in cases of delay of prosecution, a material consideration had to be the seriousness of the crime, and that in serious offences a court should be slow to grant a permanent stay as the societal demand to bring the accused to trial is that much greater. In that case the court also emphasised that in South Africa a permanent stay was seldom granted in the absence of extreme trial prejudice.[93]

85. Unfairness is thus ordinarily a matter which can be dealt with in the criminal proceedings, and cannot be used in blanket fashion to avoid criminal proceedings from commencing. We thus submit that even if it is recognised that prosecutorial misconduct may be a good basis to halt a prosecution, something truly exceptional would be required in the current case.

86. Furthermore, in South Africa the balance must be materially influenced by the fact that crime, and particularly crimes of corruption, are a scourge.[94] Holding back on the prosecution of the powerful, in the face of compelling evidence, would be a radical departure.

(ii) <u>There is nothing exceptional in this case</u>

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[92] *Bothma v Els* 2010 (2) SA 622 (CC) at para 39 and 45.
[93] Para 70 ff
[94] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 57:

> *"Corruption has become a scourge in our country and it poses a real danger to our developing democracy. It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights. Organised crime and drug syndicates also pose a real threat to our democracy. The amount of drugs confiscated inside our borders testifies to this. The sophisticated international network that is responsible for transporting these drugs requires urgent attention.'"*

87. The NPA contends that this abuse was "*the most egregious imaginable*" because it was designed "*to swing an election*" (i.e. the ANC's elective congress at Polokwane in December 2007),[95] and it criticises the Full Court for not agreeing that this created the rational link required to sustain Adv Mpshe's decision.[96] This loses sight of several factors.

88. In the first place, the evidence of Mr McCarthy's role in the timing decision is weak. At best the NPA's version indicates that Adv Mpshe was himself critically involved in the timing decision, and agreed with the explicit reason supposedly given by Mr McCarthy – i.e. to protect the integrity of the NPA in the lead up to the ANC's Polokwane conference. There is no suggestion that this reason was bad. On the contrary, it was perfectly sensible.

89. In the second place, there is no compelling evidence that Mr McCarthy was motivated by a further, concealed, and malign motive. The NPA mistakenly suggests that the DA (and the Full Court) was obliged to accept, as a fact, the allegations made by Adv Hofmeyr (on behalf of the NPA) that Mr McCarthy was actuated by hidden political motives – based on the approach in the *Plascon-Evans* case.[97] This is incorrect. Adv Hofmeyr could at best relate the contents of intercepted telephone conversations. Those conversations nowhere reveal that Mr McCarthy agreed to act against his prosecutorial duties based on a mandate, or instruction, from Mr Ngcuka.

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[95] NPA's heads of argument, para 25, page 9. The NPA does not appear to persist in allegations that Mr McCarthy also acted improperly after the Polokwane conference by causing the indictment to be served immediately, rather than waiting until January 2010 (as favoured by Adv Mpshe).

[96] The NPA has been strikingly inconsistent. It is argued that the allegations against Mr McCarthy involve the worst imaginable prosecutorial abuse, but no attempt has ever been made to follow this up, or to take any action against those involved. Rather, once the charges against Mr Zuma were withdrawn, the issue was apparently forgotten.

[97] NPA's heads of argument, para 35, page 12, citing *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635.

The NPA's position is instead based on Adv Hofmeyr's interpretation of the recorded conversations, and his own inferences. A court is as well placed as Adv Hofmeyr to interpret the transcriptions of intercepted telephone calls. In fact, the NPA has failed to point to any part of the transcript which supports Adv Hofmeyr's thesis.

90. In the third place, Mr Mpshe rapidly reached an emotional conclusion, without proper investigation, and without giving Mr McCarthy an opportunity to explain the conversations. The NPA mistakenly suggests that the Full Court found that Mr McCarthy's conduct constituted a serious breach of prosecutorial authority.[98] But what the Full Court in fact found was that his conduct, if proven, deserved censure.[99]

91. In the fourth place, even if it was established as a fact that Mr McCarthy guided the timing decision, and that he was actuated by an additional improper motive, that does not necessarily mean that the prosecution could not continue. Adv Mpshe ought to have also considered that Mr Zuma would face a fair trial; that the evidence was untarnished, and that any evidence which was tarnished could be challenged at the trial; that no material delay was caused to the prosecution itself; that the evidence against Mr Zuma was deemed to be strong; and that the crimes were of a very serious nature.

92. Furthermore, even if Mr McCarthy believed that his interference would assist Mr Mbeki and harm Mr Zuma, he was demonstrably wrong. Mr Zuma was elected as the President of the ANC at the Polokwane conference, and duly became President of the country.

93. We submit that in these circumstances no rational decision that the proceedings should be halted could be reached.

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[98] NPA's heads of argument, para 36, page 12.
[99] NPA's heads of argument, para 52, page 25.

(iii) Damage to the NPA

94. In addition, while Adv Mpshe apparently considered the damage to the NPA's reputation if the prosecution continued, there was no consideration of the damage to the NPA if the prosecution were to be discontinued. This was particularly relevant, because Mr Zuma was on the brink of ascending to the Presidency, and the view formed by many people would be that the politically powerful and connected could use technicalities to escape prosecution.

(iv) Separation of powers and deference

95. In the heads of arguments of the applicants, Mr Zuma in particular seeks to insulate Adv Mpshe's decision from review by contending that prosecutors' decisions can only be reviewed in limited circumstances; and that a court should defer to the NPA and respect the doctrine of separation of powers.

96. We submit that deference is not indicated where the relevant decision-maker failed to apply his or her mind. In such cases, the doctrine of the separation of powers cuts the other way. A review of decisions on this basis, lies in the heartland of the judicial function.

(v) The *Corner House* case

97. It is necessary to briefly deal with certain aspects of the decision of the House of Lords in the *Corner House* case,[100] as much reliance is placed on it by the NPA and Mr Zuma.

98. It is submitted that *Corner House* is not of assistance because:

[100] *R (Corner House Research) v Director of Serious Economic Offences* [2008] 4 All ER HL 927

98.1 *Corner House* was not an abuse of process case. It involved a situation where the investigating authorities were faced with a threat to people's lives if an investigation continued. The House of Lords found the situation was "*not easily distinguished"* from a decision to release a prisoner to avert a threat by abductors to execute hostages.[101]

98.2 The decision was one to terminate an investigation, which decision was taken by the investigating authorities, and not the prosecuting authority. Although reference was made to the views of the Attorney-General in *Corner House*, that official is part of government in the United Kingdom and has the primary role of advising the government on any legal repercussions of government action, (akin to our Chief State Law Advisor). The UK Attorney-General is not normally involved decisions to prosecute (or not to prosecute).

98.3 In *Corner House* the director, who had to make the decision, was obliged and entitled to rely on the expert assessment of others regarding the credibility of the threat.[102] Those experts felt that the termination was justified because the security threat posed was not remote or improbable; the potential for loss of life was great; and the threat was to those whose safety it was the primary duty of the British authorities to protect.

98.4 None of these considerations, which are akin to justification of wrongful conduct on the basis of necessity, are present in abuse of process cases such as this matter.

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[101] At para 39.
[102] See para 40.

99. For these reasons, Adv Mpshe did not rely on the reasoning in Corner House. As explained above, Ad Mpshe relied on the abuse of process cases.

H. PROCEDURAL IRRATIONALITY

100. It is not disputed that the Full Court correctly found Adv Mpshe's decision was an exercise of public power susceptible to review on legality grounds, and that the ambit of legality review includes substantive and procedural rationality.[103]

101. In their heads of argument, the NPA and Mr Zuma fail to deal at all with the Full Court's findings of procedural irrationality, and the central finding that the impugned decision was based on "*legally untested allegations*".[104]

102. Most notably, the Full Court correctly found that the allegations against Mr McCarthy required enquiry.[105] Instead, what followed was a "*half-hearted attempt at investigation*", which did not provide the recordings themselves to Mr McCarthy or Mr Ngcuka for their comment;[106] nor did it await the responses from Mr McCarthy to a list

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[103] Vol. 18: pp. 3269 – 3270, Judgment para 45, following *Ful* 2014 (4) SA 298 (SCA) at para 29.
[104] Vol. 18: p. 3284, Judgment at para 71.
[105] *Ibid*.
[106] Both Mr Ngcuka and Mr McCarthy took the understandable position that they wanted to hear the recordings and to have a reasonable opportunity to make submissions:

- In the case of Mr Ngcuka, during the course of the interview on 24 March 2009, he took the position that it was grossly unfair to him to be confronted with "third-hand information". He and his lawyer complained about not being granted access to the recordings themselves. See Supp Vol. 3: p. 3571, unnumbered paragraph at the bottom of the page.
- In the case of Mr McCarthy, in his letter dated 31 March 2009, he, as had Mr Ngcuka, indicated that he wanted, amongst other things, "access to a complete set of the recordings with dates, times, identities of parties and subject matters allegedly discussed". Mr McCarthy further indicated that he wanted to "assist as best he could, but was limited by the absence of critical information". Supp. Vol. 3: p. 3905

Adv Hofmeyr suggested, at the meeting of 1 April 2009, after the decision had been taken, that if Mr McCarthy wanted to listen to the tapes he should come to South Africa. Supp Vol. 3: p. 3763.

of questions. The questions were in fact sent after the decision to discontinue the charges had already been taken.[107]

103. Furthermore, the Full Court quite correctly found (and it cannot be controverted) that Adv Mpshe took a hasty decision in the absence of consultation with the prosecution team;[108] and in the face of a looming permanent stay application in which the viability of the prosecution would have been considered.[109] The prosecuting team delivered their final response to Mr Zuma's written and oral representations on 2 and 3 April 2009,[110] after Adv Mpshe had already made the decision to drop the charges.

104. Furthermore, to the extent that NPA and Mr Zuma can at this stage put up new reasons to bolster Adv Mpshe's decision, these only expose the procedural irrationality in this case. If the recordings of intercepted telephone conversations and other information received from Mr Zuma's legal representatives are to be interpreted as *prima facie* evidence of a wide ranging political conspiracy, then the supposed conspirators (Mr Kasrils, Mr Mbeki, etc.) should have been investigated.

105. The Full Court's findings on procedural irrationality are critical and fatal to the applications for leave to appeal. Even if the NPA were to be successful in convincing

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[107] At the meeting of 1 April 2009, Adv Hofmeyr suggested that Mr McCarthy must be approached with a set of questions. See Supp Vol. 1: p. 3464. The list of questions was sent to Mr McCarthy on the following day (2 April 2009). Supp Vol. 3: p. 3901. It was stated that "fairness dictates that you be given the opportunity to indicate / comment your attitude should you so wish". Basically Mr McCarthy was asked to respond to the questions the day after the decision was taken to drop the charges. That could not have served any purpose. It is accordingly disingenuous to contend as Adv Hofmeyr does at Vol. 3: p. 460, Hofmeyr's AA at para 651, that Mr McCarthy had refused to respond to the NPA's questions. He (McCarthy) was hardly given a proper opportunity to do so.

[108] Vol. 18: p. 3292, Judgment at para 83.

[109] Vol. 18: p. 3283, Judgment at para 70.

[110] Supp Vol. 2: pp. 3556 – 3560

this Court on all other aspects, the impugned decision would still be procedurally irrational, and invalid.

I. THE CONSEQUENCES OF THE FULL COURT'S ORDERS

106. At paragraph 92 of its judgment the Full Court stated that "*the envisaged prosecution against Mr Zuma was not tainted by the allegations against Mr McCarthy. Mr Zuma should face the charges as outlined in the indictment."*

107. The NPA contend that this statement is an inappropriate transgression of the separation of powers doctrine and reliance is placed on *NDPP v Freedom Under Law* ("Ful") 2014 (4) SA 298 (SCA). This ground can be disposed of briefly.

107.1 In *Ful*, this Court held that "*the setting-aside of the withdrawal of the criminal charges … has the effect that the charges and the proceedings are automatically reinstated*" and that the court below went too far by directing, in addition, that the executive authorities should "*ensure that the prosecution of these charges is enrolled and pursued without delay*".[111]

107.2 The DA in the present matter did not ask for the further relief sought in *Ful*, which this Court refused to grant. On the contrary, the relief sought and granted in the present matter is the same as that which was granted by this Court in *Ful*.

[111] *Ful* at para 51

107.3 In any event, to the extent that there could have been any doubt, the Full Court clarified in the judgment on the application for leave to appeal that its orders did not go any further than what *Ful* permits.[112]

108. The NPA confuses matters by referring to the comments of this Court in *Ful* regarding the effect of withdrawal of charges under s6 of the Criminal Procedure Act 51 of 1977. Such a withdrawal, this Court stated, is "*final*". But the decision to withdraw obviously loses its final effect (indeed any effect) when set aside on review by a court. The charges and proceedings are then automatically reinstated, as held by this Court in *Ful*.

109. This does not imply that Mr Zuma may not raise an abuse of process argument again later. If the Full Court's judgment were to stand, the NPA would not be able to prevent Mr Zuma from bringing the long threatened permanent stay application based on allegations of abuse of process. All that the DA contends is that, if the Full Court's decision is upheld, no further decision is required from the NPA on whether or not to charge Mr Zuma. The 2007 decision to charge him would stand. So much is clear from the *Ful dictum* referred to above.

J. CONCLUSION

110. In the circumstances it is submitted that Adv Mpshe's decision was clouded by emotion, unsubstantiated facts, an inadequate investigation, confusion about his own role, and confusion about the effect of Mr McCarthy's actions. Adv Mpshe also failed to apply his mind to crucial parts of the test he had to consider in terms of the foreign jurisprudence he relied on. This is the very antithesis of a rational decision. Based on the material before him, he could not rationally have reached the decision he did that

[112] Vol. 18: p. 3330, Judgment on Leave to Appeal at para 8.

this case involved an abuse of the kind which was so serious and so egregious, that it justified the extraordinary step of withdrawing the prosecution of the Mr Zuma.

111. For all these reasons, it is submitted that the applications for leave to appeal should be dismissed with costs, including the costs of three counsel.

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