IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 062027/2022

In the application of:

BLACKHOUSE KOLLECTIVE FOUNDATION NPC *Amicus Curiae* Applicant

In the matter between:

PRESIDENT: RSA Applicant

and

JACOB GEDLEYIHLEKISA ZUMA First Respondent

DIRECTOR OF PUBLIC PROSECUTIONS, KZN Second Respondent

NATIONAL PROSECUTING AUTHORITY Third Respondent

REGISTRAR, HIGH COURT: GAUTENG LOCAL DIVISION, JOHANNESBURG Fourth Respondent

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PRINCIPAL SUBMISSIONS: APPLICATION FOR ADMISSION AS *AMICUS CURIAE*

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INTRODUCTION

1. BHK brings this application to be admitted as *amicus curiae* in the application of the President -

1.1. for the setting aside of the summons issued by the fourth respondent (the registrar) on 15 and 21 December 2022 at the behest of the first respondent (Mr Jacob Zuma) in his private prosecution of the President, the setting aside of the certificate *nolle prosequi* dated 21 November 2022, the setting aside of the first respondent's private prosecution, and for certain declaratory relief;

1.2. pending determination of the setting aside application,

1.2.1. an order excusing the President from appearing before this Division in the Criminal Court on 19 January 2023 or on any other date pursuant to the certificate *nolle prosequi* and/or the summons, and

1.2.2. an order interdicting the first respondent from taking any further steps to give effect to the certificate *nolle prosequi* of 21 November 2022 and/or the summons, or to pursue the private prosecution under case number: 059772/2022 against the President in any way.

2. This *amicus* application was served on the parties on Saturday 07 January 2023. It could not have been launched earlier because the first respondent's answering affidavit was only served and filed around 15h00 on Friday 06 January 2023 for reasons explained therein. As an applicant for admission as *amicus curiae*, it was imperative that BHK first assess the case advanced by both main parties before deciding finally what issues to raise. That could only be done after a consideration of both the President's application and the first respondent's answering affidavit on Friday afternoon and early evening of 06 January 2023.

3. We submit that this *amicus* application has been launched as expeditiously as reasonably possible in the circumstances and that in light of the extreme urgency with which the President has launched his interdict application, he should have little difficulty in addressing the issues raised in similar vain.

4. Indeed, the President has considered the *amicus* application and elected not to oppose it. He does, through his legal advisor, make certain observations which we address later in these submissions.

5. The national prosecuting authority has not filed papers opposing this *amicus* application.

6. The DPP, who has also filed an answering affidavit, has not opposed this *amicus* application.

7. The fourth respondent has not opposed it either. In any event, whether the parties oppose or acquiesce in this *amicus* application, leave of this Court must still be sought. None of the parties contend that BHK has not met the requirements for admission as *amicus curiae*.

8. The first respondent has acquiesced in BHK's request to be admitted as *amicus*.

REQUIREMENTS FOR ADMISSION ARE MET

9. It is our respectful submission that BHK satisfies the requirements for admission as *amicus curiae*.

10. In the case known as *In Re: Certain Amicus Curiae Applications; Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 713 (CC)*, at para 5, the Constitutional Court identified the role of an *amicus curiae* as follows:

    10.1. To draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn.

10.2. A special duty to the Court to provide cogent and helpful submissions that assist the Court.

10.3. Not to repeat arguments already made but to raise new contentions.

10.4. Generally, the new contentions must be raised on the data already before the Court.

10.5. Ordinarily, it is inappropriate for an *amicus* to try to introduce new contentions based on fresh evidence.

11. The short judgment of the Constitutional Court in *Institute for Security Studies: In re Basson 2006 (6) SA 195 (CC)*, is to similar effect.

12. The submissions advanced by BHK in its supporting affidavit meet all these requirements.

13. In addition, the Supreme Court of Appeal in the Al Bashir judgment [reported as *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others 2016 (4) BCLR 487 (SCA)*] added the following important criteria for admission as friend of the court:

13.1. Adding additional references, whether to case law or to academic writings, on the matters canvassed in the heads of argument of the main parties, does not amount to advancing new contentions [para 29].

13.2. New contentions by an *amicus* must be those that materially affect the outcome of the case. Among these are, for example, a submission that the fundamental legal principles to be applied in determining the case are other than those submitted by the parties where the adoption of the principles advanced by the *amicus* would materially affect the outcome of the case [para 30]

14. In these respects, BHK seeks to persuade the Court to consider issues that neither party raises, and which materially affect the outcome of the case. These issues are:

14.1. the materiality of technical deficiencies in a certificate *nolle prosequi* to the title of the private prosecutor to prosecute and/or to the validity of the private prosecution itself, and what effect that has on the private prosecutor's right of access to court under section 34 of the Constitution;

11.2 the lawfulness of the intervention by the national prosecuting authority in the private prosecution to the detriment of the private prosecution, the implications of such intervention for the

independence of the prosecuting authority, and the materiality of such intervention in the determination of the President's application;

11.3 the abuse of court process (Strategic Litigation Against Public Participation or SLAPP) by the President as evinced by the punitive costs order sought by the President against legal representatives of his prosecutor.

15. None of these issues have been raised by the main parties. All these issues are capable of materially affecting the outcome of the President's application.

BHK's SUBMISSIONS

16. We make three broad submissions.

16.1. The first is that the facts of this case demonstrate that the requirement of a certificate *nolle prosequi* may serve as an impediment or unjustified limitation to the section 34 right of access to courts, especially when the national prosecuting authority – as in this case – appears to have nailed its colours to the mast of the accused person in the form and shape of the President.

16.2. Secondly, we submit that the national prosecuting authority has failed to conduct itself without fear, favour or prejudice. On the contrary, it appears to have taken the side of the President in the private prosecution.

16.3. Thirdly, the President's seeking of costs on a punitive scale against the legal representatives of his prosecutor is tantamount to what the Constitutional Court has recently termed a SLAPP suit (short for Strategic Litigation Against Public Participation).[1] It may reasonably be seen, by reasonable observers, as intended to send a strong message against any legal practitioner who may dare consider representing anyone who should cross the President. This is a clear threat to our Constitutional Democracy, especially when engaged in by the President of the country.

16.4. Fourthly, we highlight the dangers of breaching the constitutional principle of equality in section 9(1) of the Constitution.

Private Prosecution in Other Jurisdictions: No Certificate Required

17. BHK submits that the requirement that a victim of an alleged crime must first obtain a certificate *nolle prosequi* from the national prosecuting authority before she or he can earn the right to prosecute a person in the

[1] *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others* (CCT 66/21) [2022] ZACC 37 (14 November 2022) ("Mineral Sands")

courts who has escaped the prosecutorial powers of the national prosecuting authority can be an unjustified limitation on the section 34 right of the victim.

18. The facts of this case are a stark reminder of just how the prosecutorial function or power of the national prosecuting authority can either be abused or abdicated. We address this specific aspect when dealing with the unlawful intervention of the national prosecuting authority in the private prosecution, thereby evincing its lack of independence and failure to act fairly and without fear, favour or prejudice.

19. For now, we demonstrate – by way of a limited comparative study in three other jurisdictions – that the absence of a certificate *nolle prosequi*, or deficiencies in it, need not be fatal for a private prosecution, especially in circumstances where the national prosecuting authority appears supine toward the executive. The jurisdictions to which we advert have had successful private prosecutions without a requirement of a certificate of non-prosecution from the national prosecuting authority.

20. We begin with the position in South Africa and then consider the position in the United Kingdom, Canada and New Zealand.

South Africa

21. The Criminal Procedure Act, 1977 (*"the CPA"*), provides for private prosecutions on certificate *nolle prosequi*.

22. Section 7(1)(a) provides that in any case in which the Director of Public Prosecutions (*"the DPP"*), declines to prosecute for an alleged offence, any person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence, may, either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any Court competent to try that offence.

23. In terms of section 7(2)(a) the private prosecutor may only act in terms of section 7 through the process of summoning any person to answer to any charge only after she or he has obtained a certificate signed by the DPP that she or he has seen the statements or affidavits on which the charge is based and declines to prosecute.

24. Section 7(2)(c) provides that the certificate issued by the DPP shall lapse in a period of three months.

25. Thus, in South Africa, private prosecutions can only be brought after the certificate is issued by the DPP.

United Kingdom

26. The Prosecution of Offences Act[2], provides for the establishment of the Crown Prosecution Service for England and Wales.

27. As in South Africa, prosecutions are conducted by the Director of Public Prosecutions, who is the head of the Service. There are also Chief Crown prosecutors. The Chief Crown prosecutors are members of the Service and responsible to the Director for supervision of the Service in his or her area. Section 6 the Prosecution of Offences Act provides as follows:

> *"6.* ***All prosecutions instituted and conducted otherwise than by the Service***
>
> *(1) Subject to subsection (2) below, nothing in this Part shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings to which the Director's duty to take over the conduct of proceedings does not apply.*
>
> *(2) Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage"*.

28. It would thus seem that a private prosecution does not require the acquiescence of, or a certificate from, the prosecuting authority in the United Kingdom.

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[2] Section 1

Canada

29. Section 504 of the Canadian Criminal Code provides that *"anyone"* may lay information in writing and under oath before a Justice if she or he believes, on reasonable grounds, that a person has committed an indictable offence.

30. According to the Court of Appeal for Ontario, the word *"anyone"* in section 504 applies to anyone who lays an information including private citizens[3].

31. Section 504 of the Canadian Criminal Code reads:

> ***"In what cases Justice may receive information:***
>
> ***504*** *any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a Justice, and the Justice shall receive the information, where it is alleged*
>
> *(a) that the person has committed, anywhere an indictable offence that may be tried in the province in which the Justice resides and that the person*
> *(i) is or is believed to be, or*
> *(ii) resides or is believed to reside,*
>
> *within the territorial jurisdiction of the Justice;*
>
> *(b) that the person, wherever he or she may be, has committed an indictable offence within the territorial jurisdiction of the Justice"*

[3] *R v McHale*, 2010 ONCA prayer 6.1 at paragraph 5

32. Again, there appears to be no requirement for the acquiescence of the prosecuting authority in Canada before a private prosecution can commence. That is an issue for determination by a Judge.

New Zealand

33. Section 26 of the New Zealand Criminal Procedure Act 2011, provides that:

> *"**26 Private Prosecutions:***
>
> *(1) If a person who is proposing to commence a private prosecution seeks to file a charging document, the Registrar may –*
>
> *(a) accept the charging document for filing; or*
>
> *(b) refer the matter to a District Court Judge for a direction that the person proposing to commence the proceeding file formal statements, and the exhibits referred to in those statements, that form the evidence that the person proposes to call at trial or such part of that evidence that the person considers is sufficient to justify a trial.*
>
> *(2) The Registrar must refer formal statements and exhibits that are filed in accordance with subsection (1)(b) to a District Court Judge, who must determine whether the charging document should be accepted for filing.*
>
> *(3) A Judge may issue a direction that a charging document must not be accepted for filing if he or she considers that –*
>
> *(a) the evidence provided by the proposed private prosecutor in accordance with subsection (1)(b) is insufficient to justify a trial; or*
>
> *(b) the proposed prosecution is otherwise an abuse of process.*
>
> *(4) If the Judge determines under subsection (2) that the charging document should not be accepted for filing, the Registrar must –*

(a) notify the proposed private prosecutor that the charging document will not be accepted for filing; and

(b) retain a copy of the proposed charging document.

(5) Nothing in this section limits the power of a Registrar to refuse to accept a charging document for want of form."

34. Again, New Zealand does not seem to require the obtaining of a certificate *nolle prosequi* – or similar permission – from the prosecuting authority for a private prosecution to commence. Whether a private prosecution may proceed seems to be determined by a Judge, not the prosecuting authority.

35. These examples seem to demonstrate that a requirement for the issue of a certificate *nolle prosequi* by the national prosecuting authority as a licence without which no private prosecution may occur, may be an unjustifiable limitation to the victim's right of access to court to obtain justice where the national prosecuting authority has failed – either by reason of incompetence or by reason of fear or favour towards the potential accused person. The limitation of the section 34 right of access to court is particularly jarring when the potential accused is the most powerful man in the country – the President.

36. BHK makes this submission not with a view to challenging the constitutional validity of section 7 of the CPA but rather with a view to demonstrating that any attack by the accused person on the title of the private prosecutor on grounds of technical deficiencies – real or

imagined – of the certificate should not be an impediment to the exercise of a section 34 right of access to courts by the victim.

37. But even if the deficiencies in the certificate *nolle prosequi* are fatal to the first respondent's title to prosecute the President, the conduct of the President seems intended to stop the private prosecution by abuse of court process. We submit that a litigant should never obtain relief by abuse of court process. It is to that topic that we now turn.

SLAPP by Cost Order

38. The Applicant in the main case is the President of the Republic of South Africa. He is, among other things, the Commander-in-Chief of the armed forces and therefore the most powerful person in South Africa. The Constitutional Court has described the President in the following terms:

> *"The President is the head of state and head of the national executive. His is indeed the highest calling to the highest office in the land. He is the first citizen of this country and occupies a position indispensable for the effective governance of our democratic country. Only upon him has the constitutional obligation to uphold, defend and respect the Constitution as the supreme law of the Republic been expressly imposed. The promotion of national unity and reconciliation falls squarely on his shoulders. As does the maintenance of orderliness, peace, stability and devotion to the well-being of the Republic and all of its people. Whoever and whatever poses a threat to our sovereignty, peace and prosperity he must fight. To him is the executive authority of the entire Republic primarily entrusted. He initiates and gives the final stamp of approval to all national legislation. And almost all the key role players in the realisation of our constitutional vision and the aspirations of all our people are appointed and may ultimately be removed by him. Unsurprisingly, the nation pins its hopes on him to steer the*

> *country in the right direction and accelerate our journey towards a peaceful, just and prosperous destination, that all other progress-driven nations strive towards on a daily basis. He is a constitutional being by design, a national pathfinder, the quintessential commander-in-chief of state affairs and the personification of this nation's constitutional project."*[4]

39. The President of such pre-eminence and power seeks a punitive costs order against legal representatives of his prosecutor. His grounds for this extraordinary prayer appear to be his failed attempts at getting his prosecutor to abandon the prosecution of him. This is extraordinary conduct especially by a person in the position of the President of the country. It is conduct of the kind that ordinary people might view as intended to send a strong message against any attorney or member of the Bar independent enough to accept a brief to represent a sitting President's prosecutor. This the Court should not countenance.

40. It is clear on the President's own version that he first tried to persuade the first respondent to abandon his private prosecution of him, and that when that failed, he then launched his application seeking a punitive costs order against his prosecutor's attorneys and Counsel.

41. We pause here to point out that in any event the President does not appear to meet the requirements for the sort of costs order he seeks against the first respondent's lawyers. The standard for an award of punitive costs as laid down by the Constitutional Court is frivolity,

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[4] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) (*EFF 1*), para 20.

vexation, manifest impropriety, fraud, dishonesty or *mala fides* (bad faith) conduct, and conduct that amounts to an abuse of the process of court.[5] The standard for *de bonis propriis* costs is vexation, gross negligence or bad faith in connection with litigation or the fulfilment of public obligations.[6] The President appears to meet none of either standard in relation to the prosecutor's legal representatives. The President does not even allege that his prosecutor's legal representatives have acted vexatiously, frivolously, negligently, or in bad faith. Even if he had, there does not appear to be any evidence of such conduct on the part of legal representatives who are simply performing their professional duty as lawyers on brief by a client who, like everyone, is entitled to legal representation.

42. In any event, this Court cannot make adverse costs orders of any kind against the first respondent's lawyers because they are not cited in the President's application in their personal capacity. If it were so minded, this Court would first have to afford the first respondent's legal representatives an opportunity to show cause on affidavit why they should not be joined in their personal capacity and why they should not be ordered to pay the costs sought by the President in their personal

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5 *Public Protector v South African Reserve Bank* (CCT107/18) [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) (22 July 2019)**,** para 223; *Helen Suzman Foundation v President of the Republic of South Africa* [2014] ZACC 32; 2015 (2) SA 1 (CC); 2015 (1) BCLR 1 (CC) at para 36.

6 *Public Protector v South African Reserve Bank* (CCT107/18) [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) (22 July 2019), para 116; *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* (CCT48/17) [2017] ZACC 20; 2017 (9) BCLR 1089 (CC) (15 June 2017), paras 5 to 9.

capacity.[7] As ***"the first citizen of this country"*** upon whom ***"the constitutional obligation to uphold, defend and respect the Constitution as the supreme law of the Republic been expressly imposed"*** and as ***"the personification of this nation's constitutional project"*** [8] the President should be aware of these constitutional safeguards and Constitutional Court authority in relation thereto. He should know that a Court cannot willy-nilly impose costs orders on lawyers for the launching litigation proceedings at the instance of their client, just because the President feels aggrieved thereby.

43. That the President so carelessly seeks such an order without joining the first respondent's lawyers as parties in their personal capacity, and despite Constitutional Court authority, seems to suggest that the President's purpose may not be to secure the costs orders but rather to scare the first respondent's lawyers (or any other lawyer who may be minded to represent the first respondent) away from their brief at the first respondent's instance. That would clearly be an abuse of court process that should be deprecated by this Court.

44. Recently, and in relation to a complaint lodged against an eminent King's Counsel, the UK Bar Standards Board said:

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7 *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* (CCT48/17) [2017] ZACC 8; 2017 (5) BCLR 543 (CC); 2017 (3) SA 335 (CC) (17 March 2017); *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law Intervening)* (CCT48/17) [2018] ZACC 36; 2018 (12) BCLR 1472 (CC) (27 September 2018), paras 1 & 2

8 *EFF 1*, para 20.

"Barristers are not to be identified with the views of their clients. It is wholly unacceptable for barristers to be subject to abuse or harassment for carrying out their professional duty to act in unpopular cases, regardless of their personal views. Barristers who do so are acting in accordance with the ethical standards of the Bar, and are essential to the functioning of the justice system."

45. The President's seeking of a punitive costs order against his prosecutor's lawyers, for carrying out their professional duty to act in a case that the President does not like, would seem to constitute harassment.

46. The President's conduct is also an affront to the South African Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities ("the Code"). For example:

46.1. According to paragraph 22.3.1 of the Code, *"counsel are independent practitioners of advocacy and agents of the rule of law, who resist any undue influence from anyone, whose specialised services are available to all persons, in particular indigent people, regardless of any disregard in which persons requiring the services of counsel may be held by anyone"*. The President's targeting of his prosecutor's Counsel by seeking a punitive costs order against them for representing his prosecutor would seem to be an affront to this provision of the Code.

46.2. According to paragraph 23.2.12 of the Code, one of the briefs that Counsel may accept is a brief *"to undertake a criminal prosecution*

on behalf of the State or <u>on behalf of</u>, or as, <u>a private prosecutor</u>". The President's targeting of the private prosecutor's Counsel for accepting such brief is an affront to this provision of the Code.

46.3. According to paragraph 26.2 of the Code, *"Counsel shall not refuse to accept briefs in an area of practice in which they profess to practise or in a court in which they profess to practise on the grounds that they disapprove of the client or of the client's opinions or alleged conduct or because of any disregard in which such person might be held."* The President's targeting of the private prosecutor's Counsel for accepting the brief is an affront to this cab-rank provision of the Code.

47. It is the President – the most powerful man in the Republic of South Africa – who seems to be litigating vexatiously and manifestly inappropriately in his application. The President seems to have a penchant for targeting – and disposing of – people who cross him. For example, according to a judgment of the Full Court of the Western Cape High Court the President disposed of the Public Protector a day after she announced that she had decided to investigate him on the Phalaphala Farmgate scandal. The Full Court found that the President's suspension of the Public Protector was unlawful

48. This is what the Full Court said in this regard:

*"**[155]** Significantly, the sequence of events leading to the suspension of the applicant cannot be discounted or overlooked. As explained above, on 7 June 2022, the applicant informed the President in writing that she was instituting an investigation against him with regard to allegations relating to a violation of the Executive Ethics Code in respect of the Phala Phala farm incident. Thirty-one questions were raised and the President had to respond thereto within 14 days. This correspondence was followed by a public announcement by the applicant on the 8 June 2022 that she had decided to launch an investigation against the President in respect of the Phala Phala matter. In response, on the 9 June 2022, the President decided to suspend the applicant. On these objective facts, it is reasonable to form the perception that the suspension of the applicant was triggered by the decision of the applicant to institute an investigation against the President. There was no other plausible or logical explanation for the premature suspension of the applicant on the eve of a judgment meant to determine the very lawfulness of the suspension.*

***[156]** It must be stressed that at the time the applicant was suspended, the President was aware that the judgment of the Full Court in respect of Part A was pending. The application in respect of Part A was brought on an urgent basis. All the parties involved were aware that judgment would be delivered in due course. Indeed, the full court gave an undertaking on the last day of the hearing that the Part A judgment would be delivered in a week or at the latest in two weeks' time. Notably, the judgment of the full court in Part A was in respect of an interdict that the applicant sought to obtain to restrain the President from suspending her. A notice was issued by the registrar on 9 June 2022 to all the parties concerned that judgment in respect of Part A would be given on 10 June 2022. According to the President, when the notice was issued by the Registrar, he had already issued the letter of suspension. In other words, the President only became aware that judgment would be delivered on the following day, after he had already issued the suspension letter.*

***[157]** In our view, the hurried nature of the suspension of the applicant in the circumstances, notwithstanding that a judgment of the full court was looming on the same subject matter, leads this court to an ineluctable conclusion that the suspension may have been retaliatory and, hence, unlawful. It was certainly tainted by bias of a disqualifying kind and perhaps an improper motive. In our view, the President could not bring an unbiased mind to bear as he was conflicted when he suspended the applicant."*

49. The judgment of the Full Court is reported as *The Public Protector of South Africa v The Speaker of the National Assembly and Others* (8500/2022) [2022] ZAWCHC 180; [2022] 4 All SA 417 (WCC) (9 September 2022). It is pending confirmation by the Constitutional Court since the conduct of the President was declared unlawful. Argument was heard on 24 November 2022.

50. BHK asks this Court to stop the President. There is nothing presidential about his conduct in targeting legal practitioners for accepting briefs in cases that the President considers to be an inconvenience to him or his political ambitions.

51. The conduct of the President is worse than the conduct of which Mr Downer – the prosecutor of the first respondent in a criminal case pending in the Pietermaritzburg High Court – complains and seeks to have set aside. His application is set down for argument on 20 and 22 March 2023. It is worse because the first respondent did not target his prosecutor's lawyers by seeking punitive costs orders against them.

52. The President's conduct in doing this fits the description of SLAPP (Strategic Litigation Against Public Participation) as recently described by the Constitutional Court as follows:

> *"[L]awsuits initiated against individuals or organisations that speak out or take a position on an issue of public interest . . . not as a direct tool to vindicate a bona fide claim, but as an indirect tool to limit the expression of others . . . and deter that*

party, or other potential interested parties, from participating in public affairs."[9]

53. In paragraph 35 of the judgment, the Court said:

> *"SLAPP suits, by definition, limit public participation by abusing the legal process to silence and deter public participation."*

54. Further, in paragraphs 42 and 43 of the judgment, the Constitutional Court described SLAPP suits as follows:

> *"As stated, the SLAPP suit has its origin in the United States of America and Canada. The term "SLAPP" originated in the 1980's in the United States of America. Lawsuits of this kind are usually brought for the purpose of preventing or discouraging political expression and comment on public issues. Their objective is to limit protest and dissuade individuals, citizens and activists from political participation. There appears to be an increase in such cases, particularly in foreign jurisdictions like Canada and the United States of America, and they take a wide range of forms. They are often described as cases without merit brought to discourage a party from pursuing or vindicating their rights, often with the intention not necessarily to win the case, but simply to waste the resources and time of the other party, until they abandon their defence. SLAPP suits are frequently brought as defamation claims, abuse of process, malicious prosecution or delictual liability cases. Their aim is to intimidate and scare a litigant who may previously have brought to light matters of public concern.*
>
> *A common feature of SLAPP suits is that the primary aim of the litigation is not to enforce a legitimate right. The objective is to silence or fluster the opponent, tie them up with paperwork or bankrupt them with legal costs. Therefore, the hallmark of a SLAPP suit is that it often (but not necessarily always) lacks merit, and that it is brought with the goals of obtaining an economic or other advantage over a party by increasing the cost of litigation to the point that the party's case will be weakened or abandoned. They are primarily legal proceedings that are intended to silence critics by burdening*

[9] *Mineral Sands*, para 2

them with the cost of litigation in the hope that their criticism or opposition will be abandoned or weakened. In a typical SLAPP suit, the plaintiff does not necessarily expect to win its case, but will have accomplished its objective if the defendant yields to the intimidation, mounting legal costs or exhaustion and abandons its defence and also, importantly, its criticism of and opposition to the project or development. It appears from this initial analysis that both merit and motive play a role in the test for a SLAPP suit and the one may inform the other."
(footnotes omitted)

55. Private prosecution is part of public participation in the criminal justice system. The conduct of the President in pursuing punitive costs against his prosecutor's lawyers is not materially different from the conduct of the mining companies in *Mineral Sands* which sought massive amounts of damages against their critics – natural persons and environmental activists – in defamation suits. But the President's conduct is worse because he targets not just his prosecutor but also the lawyers of his prosecutor.

56. In *Mineral Sands*, the exception of the mining companies to the respondents' SLAPP suit special plea was upheld not because SLAPP suit defence does not form part of our law but because the respondents based their special plea only on ulterior motive. In this regard, the Constitutional Court said:

"The respondents' first special plea, as pleaded, is predicated upon the proposition that the actions are brought for an ulterior purpose. As I have explained, the respondents supported their special plea on the basis that improper motive alone suffices to warrant dismissal of the actions. That is not so. The merits also bear consideration. It follows that the first special plea does lack averments necessary to satisfy the requirements of the SLAPP suit defence. To this extent, the

exception taken by the applicants holds good, and must be upheld."

57. It is clear on the merits that the President's seeking of punitive costs against lawyers for doing their work as professionals is an abuse of SLAPP suit proportions. BHK asks this Court to send a strong message that this abuse, especially by a powerful person in the position of a President of the country, is an attack on the administration of justice itself and will not be tolerated by the Courts.

58. The President's legal advisor misconstrues BHK's invocation of the SLAPP suit defence. It is not BHK's case that the President's application itself constitutes a SLAPP suit or abuse of process. BHK's case is that the seeking of punitive costs against the prosecutor's lawyers, who are not party in these proceedings and who are not alleged to have acted frivolously or vexatiously, constitutes a SLAPP suit or abuse of court process.

Independence of the Prosecuting Authority and Constitutional Incompatibility of Political Considerations with that Independence

59. Like the President's attack on his prosecutor's lawyers, this is a troubling aspect of this case.

60. On 21 December 2022, the national prosecuting authority issued a media statement saying the certificate *nolle prosequi* that it had issued

does not relate to the President because the President *"was not mentioned in any of the affidavits or statements"* that form part of the docket. The first respondent denies this and attaches documents to disprove the prosecuting authority's claim.

61. But regardless of the truth of the claim by the prosecuting authority, BHK submits that once the DPP has issued a certificate, the role of the prosecuting authority is at an end, except where the national director decides to review the decision in terms of section 22(2)(c) of the NPA Act,[10] which gives effect to section 179(5)(d) of the Constitution[11], or where the director of public prosecutions decides to stop the private prosecution with a view to prosecuting the alleged crime at the instance of the State in terms of section 13 of the CPA.[12]

62. The content of the prosecuting authority's "clarification" (annexure "FA12" to the President's founding affidavit) makes matters worse because it reveals a partisan prosecuting authority descending into the arena to smooth the way for the President in a prosecution that the prosecuting

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[10] Section 22(2)(c) of the NPA Act says:
"In accordance with section 179 of the Constitution, the National Director –
(a) …
(b) …
(c) *may review a decision to prosecute or not to prosecute, after consulting the relevant Director and after taking representations, within the period specified by the National Director , of the accused person, the complainant and any other person or party whom the National Director considers to be relevant."*

[11] Section 179(5)(d) of the Constitution is to similar effect.

[12] Section 13 of the CPA says:
"An Attorney-General or a local public prosecutor acting on the instructions of the Attorney-General, may in respect of any private prosecution apply by motion to the court before which the private prosecution is pending to stop all further proceedings in the case in order that a prosecution for the offence in question may be instituted or, as the case may be, continued at the instance of the State, and the court shall make such an order."

authority had decided not to pursue. The issue it raised is a contentious issue between the parties: the first respondent and the President. By issuing that statement – claiming (falsely, according to the first respondent) that the President is not mentioned in the affidavits and statements to which the certificate relates – the prosecuting authority has poisoned the private prosecution waters and acted in contravention of section 32 of the CPA and section 179(4) of the Constitution which place a duty on the prosecuting authority to act impartially, in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.

63. It is difficult to imagine why the prosecuting authority would intervene in a pending private prosecution in the manner that it did (by issuing a media statement that can only be seen as being of assistance to the accused President) without intending to assist the President in his pursuit to avoid appearing before the Criminal Court to answer the charges preferred against him in that Court.

64. BHK finds It difficult to conceive of why the prosecuting authority would act as it did without some undue influence (at least in appearance) from somewhere being exerted on it to favour the President. The fact that the national director is appointed by, and therefore serves at the pleasure of, the President[13] and reports to the Minister of Justice and Correctional

[13] Section 179(1)(a) of the Constitution and section 10 of the NPA Act read with sections 12(4) & (6). The national director's 4 deputies are also appointed by the President and therefore also serve at the pleasure of the President (see section 11 of the NPA Act read with sections 12(4) & (6)).

Service, arguably provides a *prima facie* basis for an inference of undue influence for the prosecuting authority to act in the manner that it did.

65. The undesirability of political influence in the functioning of the national prosecuting authority was considered in *S v Yengeni* 2006 (1) SACR 405 (T) at paragraph [51] where Bertelsmann J and Preller J observed as follows:

> *"The Constitution guarantees the professional independence of the [NDPP] and every professional member of his staff, with the obvious aim of ensuring their freedom from any interference in their functions by the powerful, the well-connected, the rich and the peddlers of political influence.'*

66. The independence of the prosecuting authority is vital to the independence of the legal process. If one political faction or sectional interest gains a monopoly over its functions, there is a real risk that the judiciary will cease to be independent and will become part of a political process of the persecution of targeted political enemies and protection of those in power.

67. The issue of political interference in the functioning of the prosecuting authority was also considered by the Supreme Court of Appeal in *NDPP v Zuma* 2009 (2) SA 277, at paragraphs 28 to 39. Discussing the seeming incompatibility of the independence of the prosecuting authority with the history of the role played by politicians in the performance of its prosecutorial functions (which the Court said were not incompatible) the SCA said:

[31] Section 179 of the Constitution[14] creates a single national prosecuting authority (the NPA) consisting of a National Director, who is head of the prosecuting authority and a political appointee, and also DPPs and prosecutors. The NPA has the power to institute criminal proceedings on behalf of the State and to carry out any necessary functions incidental thereto. Although national legislation must ensure that the NPA exercises its functions without fear, favour or prejudice, the Minister must exercise final responsibility over the NPA and the NDPP must determine prosecution policy with the concurrence of the Minister.

[32] Accordingly, the Constitution on the one hand vests the prosecutorial responsibility in the NPA while, on the other, it provides that the Minister must exercise final responsibility over it. These provisions may appear to conflict but, as the Namibian Supreme Court held in relation to comparable provisions in its Constitution, they are not incompatible.[15] It held (I am using terms that conform with our Constitution) that although the Minister may not instruct the NPA to prosecute or to decline to prosecute or to terminate a pending prosecution, the Minister is entitled to be kept informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal or prosecutorial authority."

(Footnotes in original text)

68. The NPA Act was not under attack in that case. The first respondent is not challenging the constitutional validity of the Act in his answer to Part A of the President's application. However, the constitutional compatibility of the independence of the prosecuting authority, on the one hand, and the role conferred by the NPA Act on the President and the Minister in the functioning of the prosecuting authority is in our submission an issue

[14] See in general *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC).

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

that this Court ought to consider seriously as it has serious implications for the fairness of the criminal justice system especially within the context of the equality principle as enshrined in section 9(1) of the Constitution. This is an important consideration not only in the assessment of the President's review application but also in the assessment of other future cases involving the functioning of the prosecuting authority in relation to what may broadly be termed "political cases", that is, cases involving political players.

69. The troubling intervention of the prosecuting authority as described above in this case provides sufficient reason for the courts to begin considering the role of politicians in the prosecution service; more accurately, the impact of the role conferred on politicians by the NPA Act on the independence of the national prosecuting authority.

70. It is probably no accident that none of the national directors, since the establishment of the office of the national director, has completed his term of office. On each occasion, the reason appears to be political interference. Adv Pikoli, for example, was removed despite a commission of inquiry dismissing the government's claim that he was not fit for office.

71. Red flags should have started flying high when the chairman of the inquiry criticised the national director for not considering what she

termed *"the political environment in which the NPA <u>needs to operate</u>"*. The chairman said:

> *"It is also of concern that Adv Pikoli does not fully appreciate the sensitivities of the political environment in which the NPA needs to operate, and his responsibility to manage this environment…"*[16]

72. In our respectful submission, the following provisions are incompatible with the sentiment expressed by the chairman of the inquiry and with the involvement of politicians in the manner prescribed by the NPA Act:

72.1. Section 179(4) of the Constitution, which requires the national prosecuting authority to perform its functions without fear, favour or prejudice.

72.2. Section 32(1)(a) of the NPA Act which says members of the prosecuting authority must serve impartially and exercise, carry out or perform their powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.

72.3. Section 32(1)(b) of the NPA Act which says no organ of state shall improperly interfere with, hinder or obstruct the prosecuting

[16] *Report of the Enquiry into the fitness of Advocate VP Pikoli to hold the office of National Director of Public Prosecutions*, November 2008, para 351

authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.

72.4. The oath of office or solemn affirmation of the national director, deputy national directors, directors and deputy directors of public prosecutions, taken in terms of section 32(2)(a) of the NPA Act, to uphold and protect the Constitution and the fundamental rights entrenched therein and enforce the law of the Republic without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the Constitution and the law.

73. It is BHK's submission that the expectation that the national director (and by extension all members of the prosecuting authority) must consider *"the political environment in which the NPA needs to operate"* creates fertile ground for political interference in the functioning of the national prosecuting authority.

74. As pointed out earlier, the fact that the President determines whether (and when) the national director and her deputies leave office, and the Minister is in overall control of the prosecution policy, is reason enough to reconsider the role of politicians in the functioning of the prosecuting authority. The conduct of the prosecuting authority in issuing the media statement that favours an accused President who appoints and decides the tenure of the national director and her deputies can, in the view of

BHK, only reasonably be explained by reference to this *"political environment"* and the role conferred on politicians in relation to the functioning of the prosecuting authority.

Equal Protection and Benefit of the Law

75. Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law.

76. More than a decade ago, in *NDPP v Zuma* 2009 (2) SA 277 (SCA), the first respondent sought to quash his prosecution on materially the same grounds now advanced by the President: ulterior or improper purpose for prosecution. The Supreme Court of Appeal dismissed that attack and said bad motive can never be a sufficient basis for escaping prosecution.

77. Now the President seeks the same relief on largely similar grounds. BHK submits that if the equality clause in the Constitution means anything, the President cannot obtain relief where the first respondent failed. It will leave a bitter taste in the mouths of South Africans if the Courts are seen to apply one standard or law to the former President, and another to the current President.

78. In his replying affidavit, the President splits hairs in submitting that his ground of attack is not just ulterior purpose but also non-compliance of

the certificate *nolle prosequi* with statutory requirements.[17] Undenied and undeniable is the fact that the President is challenging the reasonable and probable grounds for his being prosecuted by the first respondent. That is precisely the ground which the SCA in *NDPP v Zuma* said *"can only be determined once criminal proceedings have been concluded"*. This Court is not at liberty to reverse the judgment of the SCA in this regard.

79. The President's case for his interdict application is anchored in his grounds of review. On his own version, his interdict application must be determined by reference to his grounds of review.[18] That means this Court must consider his prospects of success on review (obviously without prejudging the outcome in those proceedings) in its determination of the President's interdict application. On the authority of the SCA, the grounds that the President raises in his review application *"can only be determined once criminal proceedings have been concluded"*. Thus, a decision by this Court granting the interdict will achieve at least two things:

79.1. First, this Court will have overruled the SCA, something it is by law not permitted to do.

[17] see, for example, para 145
[18] see para 105

79.2. Second, this Court will have treated the President more favourably than other litigants in similar circumstances, thereby rendering the constitutional principle of equality before the law nothing more than a theoretical concept.

80. There is more. In *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* (CCT 52/21) [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) (29 June 2021) the Constitutional Court sentenced the first respondent to a term of imprisonment for his failure to present himself at the Commission of Inquiry as directed by the Concourt, notwithstanding a pending court challenge by the first respondent to the lawfulness of the Inquiry. The Constitutional Court had directed that the first respondent appear at the Inquiry despite the review challenge that was then pending in the high court. The President is here challenging the lawfulness of his prosecution. The same considerations should apply to him. A different decision by this Court will leave more than just an impression that different rules apply to the sitting President, thereby breaching the equality principle enshrined in section 9(1) of the Constitution.

CONCLUSION

81. In all the circumstances, we ask that BHK be admitted as *amicus curiae* and that the issues it raises be considered by the Court in the determination of the President's application in both Part A and Part B.

VUYANI NGALWANA SC
THULELO MAKOLA

Pro Bono Counsel for BlackHouse Kollective Foundation
Chambers, Sandton
11 January 2023

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12. *Nundalal v Director of Public Prosecutions KZN*2015 JDR 0876 (KZP)

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16. *R v McHale*, 2010 ONCA

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3. Criminal Procedure Act 51 of 1977
4. Prosecution Offences Act 1985 (United Kingdom)
5. Canadian Criminal Code (Canada)
6. New Zealand Criminal Procedure Act 2011 (New Zealand)

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