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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COURT ADDRESS: *AMICUS CURIAE*

INTRODUCTION

1. BHK *amicus* application is unopposed. I shall qualify that submission shortly in relation to the NPA and the DPP.

2. The President has considered the *amicus* application and elected not to oppose it. He does, through his legal advisor, make certain observations about the stage at which the *amicus* submissions become relevant. He says our submissions are only relevant in relation to the review application. This is not entirely correct as we shall demonstrate.

3. The NPA has not filed papers opposing this *amicus* application. It has, around 11am yesterday, sent a notice of opposition without more. We shall address that issue shortly.

4. The DPP, who has also filed an answering affidavit, has elected not to oppose the *amicus* application in his affidavit. In fact, he does not address it at all. Only yesterday, around 11am, did he make common cause with the NPA in filing a notice of opposition without more.

5. The fourth respondent has not opposed the application.

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

7. We shall first address the NPA and DPP belated position.

8. Thereafter, we shall summarise our position with a view to satisfying this Court that BHK meets the requirements for admission as friend of the Court.

9. Then we highlight the 4 legal points BHK wishes to address.

NPA & DPP ARE ESTOPPED AND/OR PEREMPTED

10. BHK requested all parties to express their position on its *amicus* application by 16h00 on Thursday 05 January 2023. But by 18h31 on Saturday 07 January 2023 when the *amicus* application was delivered to the parties, only the first respondent had responded, acquiescing in BHK's admission as friend of this Court. None of the other parties had responded [**004-8 para 9**].

11. This Court had already issued a directive on Friday 06 January 2023 around 13h33 directing that the respondents file their answering papers by 12 noon on Monday 09 January 2023. By then, the amicus application had already been filed and served on all parties. There is therefore no reason to suppose that the directive did not relate to the amicus application too.

    11.1. By 12 noon on Monday 09 January 2023, the NPA had filed no papers opposing the *amicus* application. Neither had the DPP. The answering affidavit that the DPP did file on 09 January 2023 did not deal at all with BHK's *amicus* application.

    11.2. In its notice of motion, BHK had invited all parties to file opposing papers by close of business on Monday 09 January 2023 [**004-2**]. This abbreviated period was occasioned by the extreme urgency with which the President had launched his application. None of the parties, including the NPA and the DPP, had filed any opposing papers to the *amicus* application by close of business on 09 January 2023.

    11.3. The option that BHK had provided for the filing of opposing papers within 5 days was subject to a possibility of the interdict application being postponed for whatever reason. That option does not avail the NPA and DPP if there is no postponement of the interdict application.

11.4. Belatedly, at around 10h43 on Wednesday 11 January 2023, the NPA and the DPP served a notice of opposition to the *amicus* application. By that time, BHK's heads of argument had already been settled for filing by 12 noon in compliance with this Court's directive. Alas, the loadshedding phenomenon intervened from 10h00 to 12h30 to delay transmission to the attorneys for uploading on CaseLines. This was done when power returned.

11.5. The result is that as we prepared our heads of argument, and as we prepared for oral argument, we had no idea what the basis for opposition was so that we could meet it. It would be prejudicial to BHK to be non-suited by a mere filing of a late notice of opposition without being given any notice of what grounds of opposition we would have to meet.

12. In any event, by their insouciant attitude towards the *amicus* application until, literally, the eleventh hour,[1] the NPA and the DPP are estopped from opposing it. As our written submissions make clear, we have prepared our argument on the basis that there is no opposition to this *amicus* application. A sudden and belated emergence of opposition by mere notice to that effect is detrimental to BHK's cause. By their consistent failure to respond to BHK's request on 05 January, 09 January by noon, and 09 January by close of business, the NPA and DPP represented to BHK that they are not opposing the *amicus* application and BHK relied to its detriment on that representation. It is not an unreasonable reliance given that the main protagonist – the President – is not opposing the application and has made clear in his answering affidavit to this *amicus* application that the issues BHK raises are relevant [see **005-3 paras 6 & 10; 005-4 para 13**].

[1] According to the first Court Directive of Friday 06 January the parties had to file heads of argument by 12 noon on 11 January. The NPA and the DPP served their notice of opposition at 10h43 of that day, after BHK's heads had been settled.

13. Alternatively, the NPA and the DPP are perempted. The doctrine of peremption remains part of our law as was confirmed in *Samancor Group Pension Fund v Samancor Chrome* (452/09) [2010] ZASCA 77; 2010 (4) SA 540 (SCA) ; [2010] 4 All SA 297 (SCA) (27 May 2010), para 25. It may be useful to discuss it in greater detail.

14. The legal principles pertaining to peremption are well established. In *Dabner v South African Railways and Harbours* 1920 AD 583 at 594, Innes J stated:

> *"The rule with regard to peremption is well settled and has been enunciated on several occasions by this court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven."*

15. In *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 600A-B, the appeal court said:

> *"The right of an unsuccessful litigant to appeal against an adverse judgment or order is said to be perempted if he, by unequivocal conduct inconsistent with an intention to appeal, shows that he acquiesces in the judgment or order . . . ."*

16. In *Meiklereid v Bank of Africa Ltd* 1905 TS 749 at 751, the court held that the doctrine of peremption is not based on *estoppel* but on acquiescence.

17. In *Hlatshwayo v Mare & Deas* 1912 AD 242 at 254, the appeal court held that in order to show acquiescence it was not necessary to prove an

agreement between the parties that the appeal should be abandoned nor that the appellant's conduct was such as to estop him from denying acquiescence nor even that the appellant in fact abandoned any intention of appealing, the question being the inference to which his conduct objectively gave rise.

18. The concept of estoppel is not confined to appeals. It applies in equal measure to other forms of relief where a party had outwardly demonstrated an unequivocal conduct inconsistent with an intention to challenge the decision.

19. Thus, in *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 268, Innes CJ said:

> *"If a man has clearly and unconditionally acquiesced in and decided to abide by the judgment he cannot thereafter challenge it"*

20. In *Hlatshwayo* the Appeal Court said:

> *"At bottom the doctrine is based upon the application of the principle that no person can be allowed to take up two positions inconsistent with one another, or as it is commonly expressed to blow hot and cold, to approbate and reprobate."*

21. As pointed earlier, the doctrine remains part of our law as confirmed by the SCA in *Samancor Group Pension Fund v Samancor Chrome*.

22. Other additional authorities in this respect include

    22.1. *South African Revenue Service v CCMA and Others* [2017] 1 BLLR 8 (CC) at paras 24-29.

22.2. *South African Local Authorities Pension Fund v Registrar of Pension Funds and another* [2017] 1 BPLR 201 (FSAB) at para 24.

22.3. *Administrator, Orange Free State and Others v Mokopanele and Another* 1990 (3) SA 780 (A) at 787G-H;

22.4. *IMATU v MEC: Environmental Affairs, Developmental Social Welfare and Health, Northern Cape Province and Others* 1999 (4) SA 267 (NC) at 281E-G.

23. More recently, in the State Capture judgment reported as *President of The Republic of South Africa v Public Protector and Others* 2018 (2) SA 100 (GP), the Full Bench of the Pretoria High Court, dealing with the President's bid to avoid peremption in relation to the Public Protector's remedial action for the establishment of the State Capture Commission, said:

> *"[179] … As we understand the argument, what is in fact contended for is that the remedial action is not to be equated with a judgment or order of a Court and, therefore, the doctrine of peremption is not applicable.*
>
> *[180] We do not agree with that submission…*
>
> *[181] The President's assertion that his utterances in Parliament and in the media did not amount to an acceptance or acquiescence in the remedial action cannot be accepted. On a proper reading of the statement released by the Office of the Presidency on 26 May 2017, it is plainly evident that the President was not opposed to the implementation of the remedial action contained in the Public Protector's State of Capture Report and that reports to the contrary were incorrect. This was a clear intimation that the President accepted the remedial action contained in the Report, relating to the establishment of a judicial commission of inquiry."*

24. Of course, the President referred to in the excerpt is one Jacob Zuma, the first respondent. The question is whether this Court will apply the same standard to the NPA and the DPP as it did to the former President.

25. From these authorities it seems evident that, in order to clear the peremption hurdle, the NPA and the DPP will have to demonstrate that

    25.1. their election not to respond to the request of 05 January 2023
    25.2. their election not to file opposing papers by close of business on 09 January 2023 as invited in BHK's notice of motion
    25.3. their election not to file opposing papers to the *amicus* application by 12 noon on 09 January 2023 as directed by this Court

    did not constitute unequivocal conduct that is inconsistent with an intention to oppose the *amicus* application.

26. We submit that this is an impossible task.

27. In any event, even if this Court at this late stage accepts their opposition notice, without more, as meriting consideration, we submit that BHK meets the requirements for admission as a friend of this Court.

REQUIREMENTS FOR ADMISSION ARE MET

28. This aspect is covered fully in our written submissions at paras 9 to 15,[2] and in BHK's supporting affidavit at paras 10 *et seq* [**004-9**]. We do not intend repeating those submissions. We stand by them.

29. In his answering affidavit to the amicus application, the President considers the issues raised by BHK to be relevant in the determination of his application. He says while some issues are relevant for Part A (the

[2] There are, in error, no paras 12, 13 & 14

SLAPP suit issue on punitive costs against legal representatives) the rest are relevant for Part B [**005-3 paras 6 & 10; 005-4 para 13**].

30. For all these reasons, it is our respectful submission that BHK satisfies the requirements for admission as *amicus curiae*. The issues it raises are new and are likely materially to affect the outcome of the President's application.

BHK's SUBMISSIONS

31. We make four broad submissions.

31.1. 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.

31.2. 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.

31.3. 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 in *Mineral Sands* has recently termed a SLAPP suit (short for Strategic Litigation Against Public Participation). 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.

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

32. All these issues are canvassed in great detail in our written submissions at paras 17 to 80 [**011-62 to 011-90**]. We do not regurgitate them here.

33. A few aspects, in relation to each of the 4 issues that we raise, need emphasising:

34. The limited comparative study upon which we have embarked as regards private prosecutions in other Western democracies is not done with a view to challenging the constitutional validity of section 7 of the CPA. Rather, it is done 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 – in the certificate *nolle prosequi*, should not be an impediment to the exercise of a section 34 right of access to courts by the victim.

35. It is not BHK's case that section 7 of the CPA is unconstitutional. Its case is that a predilection for technical niceties should not avail an accused facing private prosecution. Because, on the President's own argument, his interdict application must be determined by reference to his grounds of review [**010-44 paras 104 to 105**], 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. This issue is therefore relevant to the determination of the interdict application.

36. As regards the SLAPP suit defence, the President's legal advisor misconstrues BHK's invocation of it.

37. 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. To the extent that the President seeks such costs in the interdict application, a consideration of this issue is very much relevant in this interdict application.

38. As regards the NPA's lack of independence, we submit that the NPA's intervention is curious and unlawful. It issued a so-called "clarifying" media statement after it had, exactly a month previously, elected not to prosecute *"any person in connection with this matter"* to which the certificate relates. The term *"in connection with"* is wide enough to include every person who had anything to do with the private prosecution of Mr Downer and Ms Maughan. The President is listed as a witness in the witness list. He is also alleged to have failed to act to stop the furtherance of a criminal offence. Whether that is a reasonable and probable basis for prosecution is a matter for the criminal court. What is clear is that the President is a person *"in connection with the matter"*. Once the NPA had decided it would not prosecute *"any person in connection with"* that matter, its role was at an end, except where the national director decides to review the decision in terms of section 22(2)(c) of the NPA Act, 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. That is not the case here.

39. The issue raised by the NPA in its media statement is a contentious issue between 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 NPA 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.

40. The spectre of political influence in the NPA lurks in the shadows of the role played by politicians (the President and the Minister of Justice) in the functioning of the NPA. We point to the fact 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. By way of example, we cite the case of Adv Pikoli who was removed despite a commission of inquiry dismissing the government's claim that he was not fit for office. It is concerning that the chairman of the inquiry criticised Adv Pikoli 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…"*[3]

41. We reiterate what we said in our written submissions that 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 [**011-85 para 72**]:

    41.1. Section 179(4) of the Constitution, which requires the national prosecuting authority to perform its functions without fear, favour or prejudice is incompatible with the NPA taking political considerations.

[3] *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

41.2. 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 is incompatible with the NPA taking political considerations.

41.3. Section 32(1)(b) of the NPA Act which says no organ of state shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions is incompatible with the NPA taking political considerations.

41.4. 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, is incompatible with the NPA taking political considerations.

42. 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.

43. 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 for the courts to reconsider the compatibility of the role of politicians in the functioning of the NPA with the independence of the NPA. The conduct of the NPA 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 NPA.

44. The issue of the NPA's independence is as relevant in the determination of the President's interdict application as it is in the determination of his review application.

45. Finally, as regards the equality principle, we emphasise this. 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. By this application the President is challenging the lawfulness of his prosecution. That is why he seeks to interdict it. 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. Again, a consideration of this issue is as relevant to the interdict application as it is to the review application – on the President's own argument in para 105 of his replying affidavit.

CONCLUSION

46. We thus 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
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12 January 2023