IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 0027676/2022

In the application of:

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Applicant
And	
JACOB GEDLEYIHLEKISA ZUMA	First Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS,	Second Respondent
KWA-ZULU NATAL	
NATIONAL PROSECUTING AUTHORITY	Third Respondent
THE REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA;	
GAUTENG LOCAL DIVISION, JOHANNESBURG	Fourth Respondent

APPLICANT'S HEADS OF ARGUMENT – PART A

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INTRODUCTION

1 Section 179(2) of the Constitution vests the national prosecuting authority with the power to institute criminal proceedings on behalf of the state, and to carry out any functions incidental thereto. Thus, the starting point in terms of the South African Constitution is that all prosecutions are public and carried out in the name of the state.

2 There are two exceptions to this general rule: the first is in section 7 of the Criminal Procedure Act 51 of 1977 ("**the CPA**"). That provision permits a private person to institute criminal proceedings, but subject to certain jurisdictional requirements that are set out in the CPA; among them the issuing of a *nolle prosequi* certificate by the prosecuting authority, and the payment of security by the private prosecutor, as is set out in section 9 of the CPA. The second exception is where the law expressly confers a right of private prosecution upon a particular body or person. This is contemplated in section 8 of the CPA.

3 For a private prosecution in terms of section 7 to be lawful and valid, the requirements in sections 7 and 9 of the CPA must be satisfied. Sections 7(1) read with (2) of the CPA require that before a private prosecution can be instituted, the Director of Public Prosecutions ("**DPP**") must have declined to prosecute an offence or charge against a specific person. The DPP must further have issued a *nolle prosequi* certificate in respect of that offence and that person. This specificity ensures that summonses to commence private prosecutions comply with the rule of law – i.e section 1(c) of the Constitution. A *nolle prosequi*

certificate may therefore not be issued against unnamed persons in respect of an unnamed and unspecified offence or charge.

4 Section 9 of the CPA requires a security deposit to be made by the private prosecutor before a valid private prosecution may be authorised. No private prosecutor shall take out or issue any process commencing the private prosecution unless he deposits "with the magistrate's court in whose area of jurisdiction the offence was committed"[1] the security deposit.

5 On 15 and 21 December 2022 respectively, the first respondent caused summonses ("**summons**"/ "**summonses**") to be issued in terms of which the applicant was summoned to appear and remain in appearance before this Honourable Court at 09h30 on 19 January 2023.

6 It is common cause that the private prosecution against the applicant by the first respondent (interchangeably referred to as "**Mr Zuma**" in these heads of argument) stems from what Mr Zuma deems as an unlawful disclosure of his medical certificate dated 8 August 2021. The alleged unlawful disclosure was by Mr Downer SC of the National Prosecuting Authority ("**NPA**") to Ms Karyn Maughan, a journalist employed by Media24. This alleged disclosure is said to have occurred on 9 August 2021 during an application for postponement in the criminal proceedings in which Mr Zuma is a co-accused in the KwaZulu-Natal Division, Pietermaritzburg. The prosecution is being led by Mr Downer SC. Ms Maughan reports on the criminal proceedings.[2]

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1 Section 9(1) of the CPA.
2 FA paras 24-34, at p 001-19; First respondent's AA, paras 193-194, p 009-72.

7 In the summons, Mr Zuma summarises the factual basis for the charges against the applicant as follows:

7.1 Mr Downer SC had, in his capacity as a member of the NPA [and in the context of Mr Zuma's criminal trial], received information or a letter pertaining to Mr Zuma's medical condition. The letter is dated 8 August 2021 and was marked as "Medical confidential". It was authored by one Brigadier General Mdutywa of the South African Military Health Service, Department of Defence.

7.2 Mr Downer SC authorised and/or allowed Mr Breytenbach SC – also a member of the prosecuting team against Mr Zuma – and Ms Karyn Maughan, a journalist employed by News24, to disclose information which came to [Mr Downer SC's] knowledge in the performance of his functions in terms of the National Prosecuting Authority Act 32 of 1998 ("**NPA Act**"). The disclosure was made without obtaining the written authorisation of the National Director of Public Prosecutions ("**NPDD**") or a person designated by the NDPP.

7.3 Section 41(6) of the NPA Act criminalises the disclosure of information by anyone without the written authorisation of the NDPP or her designate.

7.4 On 19 August 2021, Mr Zuma's legal representatives wrote a letter to the applicant requesting that he take steps to set up an inquiry or investigation into the conduct or misconduct of the NPA and its officials acting in their capacity as state functionaries.

7.5 On 25 August 2021, the applicant responded to Mr Zuma's request. He acknowledged the serious nature of Mr Zuma's complaints and undertook to refer the matter to the Minister of Justice – as the appropriate functionary.

7.6 Within about a week of the applicant's response, on 5 and 6 September 2022, Mr Downer SC and Ms Maughan were charged with contravening section 41(6)(a) and/or (b) read with section 41(7) of the NPA Act as perpetrators and accomplices under case number C52/2022P in the Kwa-Zulu Natal Division of the High Court, Pietermaritzburg.

7.7 The NDPP declined to prosecute Mr Downer SC and Ms Maughan in connection with the criminal matter for the contravention of section 41(6) of the NPA Act.

7.8 To date, the applicant has omitted to take action and failed to institute or facilitate the institution of an inquiry against the officials and thereby wrongfully, unlawfully and intentionally acting in furtherance of the commission of the offence or to take any steps to bring the perpetrators and/or accomplices to justice.

8 Based on the above, Mr Zuma sought to prosecute two alternative charges against the applicant. Under count 1, it is alleged that the applicant unlawfully and intentionally contravened section 41(6)(a) and/or (b) as an accessory after the fact. The alternative count is that of defeating or attempting to defeat the ends of justice.

9 The two summonses are underpinned by two *nolle prosequi* certificates, respectively dated 6 June 2022 and 21 November 2022.[3]

10 The applicant's case is that the summonses were issued without a valid *nolle prosequi* certificate that relates to the applicant and for an offence or charge against the applicant. This breaches both section 7 of the CPA and section 179(1) and (2) of the Constitution.

11 As regards section 179(1) and (2) of the Constitution, Mr Zuma's conduct attempts to bypass the constitutional scheme which states that the national prosecuting authority has the primary power to institute criminal proceedings. Private prosecutions are conducted pursuant to the national prosecuting authority first exercising its powers by considering whether to prosecute an offence or charge against a person, declining to do so and issuing a *nolle prosequi* certificate regarding that offence or charge against the specific suspect.

12 The Constitution does not allow the courts to permit this deliberate and unprovoked abuse of highly coercive and invasive statutory or state power by any person. As the Constitutional Court reminded us in the *Nkandla* case, the values underlying the Constitution, including the rule of law, "*must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that*

[3] First respondent's AA, para 179, at p 009-68.

one and all should be driven by a moral obligation to ensure the continued survival of our democracy".[4]

13 This means that the courts must insist on a scrupulous compliance with the statutory requirements for a private prosecution, i.e., the rule of law. Where there is a failure to comply, the courts are obliged to stop the illegal conduct to protect everyone affected that is guaranteed rights under the Constitution.

Non-compliance with section 7 of the CPA

14 The *nolle prosequi* dated 6 June 2022:[5]

14.1 relates to the offence of contravening section 41(6) read with 41(7) of the NPA Act;

14.2 says that the alleged offence was committed on 9 August 2021; and

14.3 specifically mentions Mr William Downer SC of the NPA as a suspect.

15 On its clear content, this *nolle prosequi* certificate does not relate to the applicant as a suspect; relates to an offence allegedly committed on 9 August 2021; which is the primary offence of contravening section 41(6) and (7) of the NPA Act and not one of accessory after the fact or defeating the ends of justice.

16 Additionally, section 7(2)(c) provides that:

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4 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) at para 1.

5 CaseLines p001-113.

> *"A certificate issued under this subsection shall lapse unless proceedings in respect of the offence in question are instituted by the issue of the process referred to in paragraph (a) within three months of the date of the certificate."*

17 The purported criminal proceedings against the applicant were instituted on 15 December 2022 (at the earliest). That is long after the three-month period that the CPA determines. This means that the 6 June 2022 *nolle prosequi* certificate expired on 6 September 2022 before Mr Zuma instituted his private prosecution.

18 The *nolle prosequi* certificate dated 21 November 2022:[6]

18.1 does not specify or name any suspect. It says only that the state declines to prosecute "*any person*" in connection with the matter.

18.2 like the 6 June 2022 certificate, it stipulates that it relates to an alleged offence committed on 9 August 2021.

18.3 it also says that it relates to the offence of contravening section 41(6) read with section 41(7) of the NPA Act.

19 "*Matter*" can only be understood to relate to the alleged offence committed on 9 August 2021. It is that offence that the national prosecuting authority declined to prosecute, and not an offence committed after 25 August 2021.

20 The first respondent relies on these two *nolle prosequi* certificates to purport to charge the applicant as an accessory after the fact to the contravention of section 41(6)(a) read with section 41(7)(a) and/or (b) of the NPA Act, in the alternative,

[6] CaseLines p001-166.

defeating or attempting to defeat the ends of justice. The particulars of the charges against the applicant by the first respondent are as follows:

> *"**Count 1***
>
> *The [applicant] is guilty of contravening section 41(6)(a) and/or (b) read with section 41(7) of the NPA Act, as an accessory after the fact, in that after the commission of the offence(s) and **on or about 21 August 2021 to date**, at or near Pretoria, he did wrongfully, unlawfully and intentionally engage in conduct by commission and/or omission which enabled the perpetrators of and or accomplices in the offence(s) to evade liability for their actions and/or facilitated such person's evasion of liability and/or escaping of justice at the expense of injuring the dignity, privacy, bodily integrity and security rights of the [first respondent].*
>
> ***Count 2** (alternative to Count 1 above)*
>
> *The commission of the offence of obstructing or attempting to obstruct the ends of justice in that by the conduct defined in respect of count 1 at paragraphs 1 to 7 above, the accused did unlawfully and intentionally obstruct and/or attempt to obstruct the course of the administration of justice."* (own emphasis)

21 We make three points on these charges, relative to the *nolle prosequi* certificates.

21.1 The first is that Mr Zuma purports to charge the applicant for being an alleged accessory after the fact, alternatively, with obstructing or attempting to obstruct the course of the administration of justice. The *nolle prosequi* certificates do not relate to any of these offences. The offence in the certificates is that of contravening sections 41(6) read with section 41(7) of the NPA Act. There is no allegation – and none served before the DPP – that the applicant disclosed confidential information in contravention of section 41(6) and (7) of the NPA Act.

21.2 The second is that the summonses issued by Mr Zuma say that the applicant allegedly committed these offences on or about 21 August 2021

to date. The *nolle prosequi* certificates relate to an offence allegedly committed on 9 August 2021.

21.3 If the DPP had considered and declined to prosecute an offence committed on or about 21 August 2021 by the applicant, the *nolle prosequi* certificate would have said so. It does not say so because that was not the offence considered and in respect of which the DPP declined to prosecute the applicant.

21.4 There is no permissible rule of interpreting written documents that would yield the result that the offence allegedly committed on 9 August 2021 includes an offence committed on or about 21 August 2021 and of an accessory nature. The accepted rules of interpreting written documents require that the language used in the document serves as the point of departure in interpreting a document, in the light of its context and purpose. A sensible interpretation is to be preferred.[7]

21.5 On language used, context and purpose, the *nolle prosequi* certificates plainly do not relate to the charges that Mr Zuma pursues against the applicant in his summons.[8]

21.6 Third, the 6 June 2022 certificate cannot be relied upon – alone or with another certificate. It expired before Mr Zuma issued his summons.

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7 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.

8 FA, paras 77.2 and 77.5, at pp 001-43 and 77.5; RA, paras 14.2 and 14.3 at p 010-12.

22 The result is that summonses were issued against the applicant without a *nolle prosequi* certificate that relates to him and an offence or charge against him.

23 The summonses (and their by-product, the private prosecution) are invalid for this reason alone. They clearly breach section 1(c) of the Constitution and section 7 of the CPA.

24 But that is not the only reason for the unlawfulness of the summons and the purported private prosecution.

Non-compliance with section 9 of the CPA

25 Section 9 of the CPA requires a security deposit to be made before a valid private prosecution may be authorised. The first respondent did not pay a security deposit before issuing the summons. The general and unfocused allegations that he makes in the answering affidavit that he did, are not supported by any evidence that security was in fact paid, *at all*; or to the magistrate's court in whose area of jurisdiction the alleged crime was allegedly committed. No summons should have been issued without proof that a security deposit was paid and issuing the summons in such circumstances was unlawful.

26 Despite these obvious failures to satisfy the provisions of the CPA, the first respondent insists that the private prosecution is lawful, and that the applicant is required to appear and remain in attendance in the criminal court on 19 January 2023, failing which Mr Zuma will issue a warrant for his arrest.[9]

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[9] First respondent's AA, para 8.3, at p 009-8.

27 It is this insistence in the face of unlawfulness that has forced the applicant to apply for an interim interdict, pending Part B, to protect and preserve his constitutional and statutory rights, as the rule of law entitles him to do. These rights include that to equal protection of the law, dignity, personal freedom of movement and security of the person, and the right to a fair trial.

28 The applicant has established *prima facie* that the purported private prosecution is unconstitutional, unlawful, and invalid. He will suffer irreparable harm if the unlawful, unconstitutional, and invalid private prosecution is allowed to commence and/or continue against him pending the outcome of the application in Part B.

29 In circumstances like this, where a private prosecutor vexatiously insists on continuing with an impugned private prosecution, it has been held many years ago in 1950 that:-

> *"this Court would in my opinion by virtue of its inherent power be entitled to set aside a criminal summons issued by its own officials or to interdict further proceedings upon it."*[10]

30 Having provided an overview of the matter thus, we turn forthwith to submissions on why this matter is urgent.

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[10] *Solomon v Magistrate, Pretoria, And Another* 1950 (3) SA 603 (T) at 607-608.

THE APPLICATION IS URGENT

31 In terms of Rule 6(12)(a):

> *"(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to it deems fit.*
>
> *(b) In every affidavit or petition filed in support of any application under paragraph (a) of this sub-rule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that the applicant could not be afforded substantial redress at a hearing in due course…"* (own emphasis.)

32 The decisive question whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the absence of substantial redress in an application in due course. Whether the applicant will not be able to obtain substantial redress in an application in due course is determined by the facts of the case; even if the applicant had delayed, as the first respondent contends, in instituting these proceedings. Delay in instituting urgent proceedings (which is denied here) is not *per se* a ground for refusing to regard the matter urgent.

33 Rule 6(12) allows the Court to come to the assistance of the applicant if he can demonstrate that he will not obtain substantial redress in due course. The relevant law on the score was succinctly set out in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others.* [11]

[11] *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011) at paras 5 to 9.

34 In *East Rock*, the court held that:[12]

> *"[5] The issue of whether a matter should be enrolled and heard as an urgent application is governed by the provisions of 6(12) of the Uniform Rules. The aforesaid sub rule allows the court or a Judge in urgent applications to dispense with the forms and service provided for in the rules and dispose of the matter at such time and place in such manner and in accordance with such procedure as to it seems meet. It further provides that in the affidavit in support of an urgent application the applicant "… shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course."*
>
> *[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.*
>
> *[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course, but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard.*
>
> *[8] In my view the delay in instituting proceedings is not, on its own a ground, for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might be an indication that the matter is not as urgent as the applicant would want the Court to believe. On the other hand, a delay may have been caused by the fact that the Applicant was attempting to settle the matter or collect more facts with regard thereto.*
>
> *[9] It means that if there is some delay in instituting the proceedings an Applicant has to explain the reasons for the delay and why despite the delay, he claims that he cannot be afforded substantial redress at a hearing in due course. I must also mention that the*

[12] *East Rock* at paras 5 to 9.

> *fact that the Applicant wants to have the matter resolved urgently does not render the matter urgent. The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course, then the matter qualifies to be enrolled and heard as an urgent application. If, however despite the anxiety of an Applicant he can be afforded a substantial redress in an application in due course the application does not qualify to be enrolled and heard as an urgent application."* (own emphasis.)

The circumstances that render this application urgent

35 This application is urgent for two reasons.

36 The first and decisive in this case is that the applicant will not be afforded substantial redress at a hearing in due course. It is common cause that the applicant has been summoned to appear and remain in attendance before the criminal court on 19 January 2023 at 09h30. This is on the basis of summonses that are unlawful.

37 Once the applicant is forced to appear before the criminal court, and to remain in attendance on the strength of an unlawful private prosecution, his rights will have been irreparably and irreversibly harmed. These include the applicant's rights to:[13]

37.1 equal protection of the law;

37.2 human dignity;

37.3 personal freedom, movement and security; and

[13] RA, para 112.1, pg 010-47.

37.4 a fair trial.

38 The limitation to the applicant's freedom of movement involves his ability to attend international obligations as President of the Republic. This is inherently and seriously prejudicial both to the applicant's person, as well as to the Republic and its citizens.[14]

39 By the time the application to set aside the summonses and the certificates is heard, the unlawful private prosecution, in breach of the applicant's rights, will have progressed. The applicant's constitutional rights, dignity and reputation will have been irreparably harmed.[15]

40 The first respondent does not deny that there is no substantial redress in ordinary proceedings.[16] He contends, instead, that the applicant should raise the issues before the criminal court on 19 January 2023.

41 In other words, the first respondent insists that the applicant must stand by and have his rights first harmed and then complain in the criminal court. This is at best cynical; and at worst provides no legal response of any kind.

42 It is reiterated that the rights violations would have happened by 19 January 2023 when the applicant is required to attend the criminal proceedings. The applicant is not required to remain supine and enable the irreparable trampling of his constitutional rights. The powers of this Court under sections 38, 172 and 173

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14 RA, para 112.1, pg 47.
15 FA, para 120, pg 58.
16 AA, para 163, pg 63.

of the Constitution enjoin it to intervene urgently to protect and promote the applicant's constitutional rights and vindicate the rule of law.

43 The Court's decision in *Van Deventer v Reichenberg and Another*[17] finds application here. In that case the respondent had purported to institute a private prosecution against a judge of the Cape Provincial Division of the Supreme Court of South Africa. The applicant (the judge) applied in urgent proceedings to interdict the respondent from pursuing the prosecution. The respondent disputed that the application was urgent. This is what the court said, in relation to urgency:

> *"I am satisfied that this application is, indeed, manifestly one of urgency, that it has properly been brought as such and that the Court is in terms of Rule 6(12) entitled to dispense with the prescribed time periods. The applicant is called upon to appear in the criminal court on 21 December 1995. If this application had been brought in the ordinary course, it would not have been heard before then and, in all likelihood, it would only have been heard in the course of the second term of 1996 at the earliest. It is quite clear that the applicant would, therefore, not be able to obtain redress at an ordinary hearing in due course."*[18] (own emphasis)

44 The first respondent's own papers demonstrate why the matter is urgent. In paragraph 8.3 of his answering affidavit, Mr Zuma explains that:

> *"As the matters currently stand, [the applicant] is duty bound to appear and be present at [the applicant's] criminal trial, which is set down on 19 January 2023, failing which a warrant for [the applicant's] arrest will be issued."*[19]

45 Ultimately, and as Sutherland J (as he then was) said in *Bidvest*,[20] "*the question of the utility of interim relief and urgency are bound together*".

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17 *Van Deventer v Reichenberg and Another* 1996 (1) SACR 119 (C).

18 *Van Deventer* at 124C-E.

19 AA, at p 009-8.

20 *Bidvest Protea Coin (Pty) Ltd v Airports Company of South Africa SOC and Others* (2017/7509) [2017] ZAGPJHC 110 (30 March 2017) at para 28.

46 Secondly, the summonses were issued on 15 and 21 December 2022 respectively. Between these dates, the applicant wrote to the first respondent, through their respective legal representatives requesting the first respondent to withdraw the first summons of 15 December 2021 (which was the only summons at the time) because the summons was plainly unlawful and invalid. The applicant's attorneys highlighted to the first respondent the reasons why the summons was unlawful. The first respondent was given until 21 December 2022 to withdraw the summons.

47 Although the first respondent declined to withdraw the summons of 15 December 2022 and instead issued the summons dated 21 December 2022, he plainly acknowledged the defects in the summons of 15 December 2022. He insisted on conditionally withdrawing them, i.e., withdrawing them only to be reissued. The applicant's attorneys rejected this and insisted on an unconditional withdrawal of the unlawful summons.

48 Once it was clear to the applicant, with the issuing of the 21 December 2022, that the first respondent would not withdraw the unlawful summons, he instructed his legal team to prepare an application to court urgently. The application was duly served on the first respondent via email on 26 December 2022. The first respondent cannot contest these facts.

49 The applicant sets out the above facts in paragraphs 34 to 43 and 115 to 119 of his founding affidavit.[21]

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[21] At pp 001-24 to 001-28 and 001-57 to 001-58.

50 The allegation that there has been self-created delay is plainly wholly unfounded.[22] It was not necessary, as the first respondent suggests, to launch the urgent application after the summons of 15 December 2022 were issued. The applicant's urgency does not lie in the fact that the ANC National Conference was being held. The urgency lies in the summons to appear before a criminal court and remain in attendance on 19 January 2023.[23]

51 In any event, the ANC's step aside rule remains relevant for as long as the applicant is compelled to attend criminal court on 19 January 2023 and remain in attendance. As the applicant explains in his replying affidavit, if the applicant attends criminal court and remain in attendance on 19 January 2023, the first respondent "*will likely be one of the first persons to demand that [he steps aside from his] elected position in the ANC and in government as President of the Republic*".[24]

52 There is thus no urgency that previously existed but which has fallen away. This is a self-serving contention that does not square up with the common cause facts.

LACK OF COMPLIANCE WITH THE CPA

53 The primary basis for challenging the summons and the private prosecution is that the summonses are unlawful, unconstitutional, and invalid because they do not meet the jurisdictional requirements for a valid private prosecution. These requirements, as indicated, are set out in sections 7 and 9 of the CPA.

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22 AA, para 11.3 pg. 009-10; AA, para 85, pg. 009-42.
23 RA, para 35, pg. 010-23.
24 RA, paras 38-40, p 010-24 to 010-25.

54 We demonstrated in the introductory section how and why the summonses fail to meet the jurisdictional requirements in sections 7 and 9 of the CPA. The submissions made in that regard will not be repeated. It is, however, necessary to demonstrate, with reference to the first respondent's facts underlying the charge against the applicant that the summonses fail to meet the requirements of sections 7 and 9 of the CPA. The starting point is the wording of these provisions, and a few general principles concerning these provisions.

The language of section 7 of the CPA

55 Section 7 provides, in relevant parts:

> *"7 Private prosecution on certificate nolle prosequi*
>
> *(1) In any case in which a Director of Public Prosecutions declines to prosecute for an alleged offence-*
>
> *(a) any private 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.*
>
> *(2) (a) No private prosecutor under this section shall obtain the process of any court for summoning any person to answer any charge unless such private prosecutor produces to the officer authorized by law to issue such process a certificate signed by the attorney-general that he has seen the statements or affidavits on which the charge is based and that he declines to prosecute at the instance of the State.*
>
> *(b) The attorney-general shall, in any case in which he declines to prosecute, at the request of the person intending to prosecute, grant the certificate referred to in paragraph (a)." (*own emphasis)

56 In terms of section 7(1)(a), there are certain grounds that must exist before a private prosecution may be brought. First, the Director of Public Prosecutions

must have declined to prosecute for an alleged offence. Second, the person who brings the private prosecution must have a peculiar and substantial interest in the subject matter and that such interest must be grounded in an injury suffered because of the commission of the offence. Section 7(2)(a) requires a director of public prosecutions (DPP) to issue a *nolle prosequi* certificate confirming that they will not prosecute. This means declining to prosecute the suspect in respect of the alleged offence.

57 The *nolle prosequi* certificate must be obtained from the DPP and in it, the DPP must certify that s/he has seen the statements or affidavits on which the charge is based and that s/he declines to prosecute at the instance of the state. This is necessary to ensure that the DPP has in fact studied the facts of the case, applied his/her mind and took the decision not to prosecute the suspect for the alleged offence.

58 A few observations are made regarding a *nolle prosequi* certificate.

58.1 First, the certificate is *prima facie* proof that the DPP has declined to prosecute an alleged offence against a suspect.

58.2 The DPP may only decline to prosecute once "*he has seen the statements or affidavits on which the charge is based*". This is a necessary safeguard to ensure that the DPP has in fact studied the facts of the case and has declined to prosecute the suspect for the alleged offence.

58.3 The requirement that the DPP studies the statements and affidavits on which the charge is based means that before the DPP may issue a

certificate, there must be a charge before him or her and a person to whom that charge relates. In other words, the DPP cannot issue a blanket certificate in the absence of a charge against any person.

59 In *Nundalal v Director of Public Prosecutions KZN and Others*,[25] the full bench expressed the view that the statutory requirements for a private prosecution in section 7 seek the important purpose of avoiding frivolous and vexatious prosecutions. Usually, the requirements must be adhered to strictly to ensure a fair trial. This is so because a criminal prosecution, private or public, has consequences potentially invasive and destructive of an accused's substantive rights to, amongst other things, personal freedom and security and the rights to a fair trial.[26]

60 The material facts underlying the charges against the applicant demonstrate that the requirements of section 7 have not been met. These are addressed in the introductory section above. The essence is that the applicant has demonstrated, *prima facie*, that there is no *nolle prosequi* certificate issued in relation to the applicant, i.e., on a charge or alleged offence against the applicant.

61 This is buttressed by the statement issued by the NPA on 21 December 2022.[27] That statement clarified that: (a) the DPP issued two *nolle prosequi* certificates in relation to docket number CAS309/10/21 which contained statements and affidavits relating to specific individuals for alleged contraventions of section

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25 *Nundalal v Director of Public Prosecutions KZN and Others* (AR723/2014) [2015] ZAKZPHC 25 (8 May 2015).
26 *Nundalal* para 30.
27 FA paras 44-45, pg. 009-28.

41(6) read with section 41(7) of the NPA Act; and (b) the two *nolle prosequi* certificates apply to persons who are specifically mentioned in the docket.

62 The first respondent shirks the statement by the NPA, and places reliance on paragraphs 17 – 19 of "JZP6".[28] This paragraph 17 reads:

> *"The alleged conduct also forms part of separate investigations which are conducted by the President of the Republic of South Africa, Mr Cyril Ramaphosa, the Minister of Justice, Mr Ronald Lamola, and/or the Legal Practice Council. . . "* (own emphasis)

63 This paragraph or the paragraphs that follow do not suggest at all that the applicant was a suspect or faced any charge, including a charge as an accessory after the fact or for defeating the ends of justice. It confirms only that the applicant together with the Minister of Justice and the Legal Practice Council, were requested to investigate.[29] The "*alleged conduct*" in the quoted statement refers to the alleged contravention of section 41(6) and (7) of the NPA Act.

64 No amount of ingenuity can alter this simple and obvious fact.

65 In any event, what matters is what the *nolle prosequi* certificate says, and it says nothing about the charges of an accessory after the fact or for defeating the ends of justice.

66 The applicant submits that the summonses plainly do not meet the jurisdictional requirements of section 7 of the CPA.

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28 AA para 221 at pg 009-81.
29 RA para 211-213 at pg. 010-74.

The language of section 9 of the CPA

67 Section 9(1) of the CPA reads:

> *"(1) No private prosecutor referred to in section 7 shall take out or issue any process commencing the private prosecution unless he deposits with the magistrate's court in whose area of jurisdiction the offence was committed—*
>
> *(a) the amount the Minister may from time to time determine by notice in the Gazette as security that he will prosecute the charge against the accused to a conclusion without delay; and*
>
> *(b) the amount such court may determine as security for the costs which the accused may incur in respect of his defence to the charge."* (own emphasis)

68 The language of section 9(1) is clear and peremptory. The payment of security precedes the issuing of any summons to commence a private prosecution. Before the Registrar issues a summons to commence a private prosecution, s/he must be satisfied on proper proof that such amount determined as security has been deposited. In the absence of such proof, the Registrar is precluded from issuing a summons to commence any private prosecution. Any summons issued to commence prosecution in such circumstances is unlawful, unconstitutional, and invalid.

69 While the first respondent disputes that proof of security is required, he admits that security must be paid before the private prosecution can be commenced.[30]

70 In the answering affidavit, the first respondent explains that there were attempts by him to pay the security, but due to the fact that the Registrar informed him that there was no bank account, he was not able to pay the amount. The first

[30] First respondent's AA, para 240 at p009-86.

respondent explains further that a payment of R200 000 has been made to his attorneys as security and that the Registrar is satisfied that the amount is earmarked to serve the purpose of indemnifying the accused in the event of an acquittal.[31]

71 Two observations are made here: First, there is nothing in the correspondence that the first respondent provides to show that the requirement of security was complied with. Second, in the summons, the first respondent represents that he paid the security, but never in fact attaches proof of such payment. There is not even an affidavit from his attorneys of record to confirm (by attaching proof) that such security was in fact paid prior to the summons being issued.[32] There is no proof at all that the Registrar was provided with proof of such payment to the authority stipulated in section 9(1) of the CPA before the summonses were issued on 15 and 21 December 2022.

72 There is again clear non-compliance with section 9 of the CPA and the summons are accordingly unlawful.

THE SUMMONSES AND/OR *NOLLE PROSEQUI* CERFICATES ARE UNLAWFUL

73 Both summonses are unlawful.

74 The implications of the failure to comply with section 7 of the CPA is that the summonses are not underpinned by a valid *nolle prosequi* certificate(s) that relates to the applicant and that identify a charge against him. The charge

[31] First respondent's AA, paras 198-206, p 009-73.
[32] RA paras 206-207 at pg. 010-73.

underlying the purported private prosecution was never placed before the NPA. The DPP never took a decision not to prosecute the applicant in relation to that charge.

75 The purported private prosecution constitutes an impermissible attempt to bypass the NPA, which is the primary decision maker over criminal prosecutions. It is therefore unconstitutional.

76 The failure to lodge security, in terms of section 9, amounts to a clear case of "*non-compliance with a jurisdictional requirement amounting to a material defect in the private prosecution of the applicant*".[33]

77 There are other reasons why the applicant contends that the summonses and/or the *nolle prosequi* certificates are unlawful, that establish that the summonses, alternatively the *nolle prosequi* certificates, are unlawful. They are as follows:[34]

77.1 The summonses are unconstitutional and invalid because the purported private prosecution is pursued for an ulterior purpose, in breach of section 1(c) of the Constitution, and constitutes an abuse of process. It is well established that ulterior purpose can invalidate a criminal prosecution, including a private prosecution.[35] The sequence of events set out in the applicant's founding affidavit, as well as the reality that the facts on which the alleged offences are based do not disclose a criminal offence show that the purpose of the prosecution is not genuinely to obtain a criminal

33 *Nundalal* para 45.
34 FA paras 19-21, p 001-16.
35 *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 38.

conviction in respect of a criminal offence. It is to harass the applicant for political ends.[36]

77.2 It is unlawful and an abuse of process that the applicant must face two purported summonses by Mr Zuma, both of which he contends are valid and binding until set aside, in respect of the same alleged offences and for appearance on the same day, i.e. on 19 January 2023.

77.3 The alleged failure that Mr Zuma relies on to found an alleged criminal offence in the summons against the applicant does not constitute a criminal offence. Accordingly, the DPP acted irrationally and failed to properly apply his or her mind in issuing the *nolle prosequi* certificate to justify any private prosecution against the applicant for conduct that does not constitute a criminal offence.[37]

77.1 The *nolle prosequi* certificate of 21 November 2022 fails to meet the standard required for a valid *nolle prosequi* certificate if it relates to the applicant. At best, it is void for vagueness. It fails to indicate with any reasonable certainty that the DPP declined to prosecute any offence against the applicant. It thus fails to inform the applicant with any reasonable certainty whether the first respondent is entitled to prosecute him under section 7 of the CPA.[38] The primary contention is that it does not indicate this because it is not about the applicant. The challenge is

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36 FA, paras 77.7-77.8, at pp 001-45 to 001-46, paras 86-88, at pp 001-49 to 001-50.

37 FA, paras 77.7-77.10, at pp 001-45 to 001-47.

38 *Affordable Medicines Trust and Others v Minister of Health of RSA and Another* 2005 (6) BCLR 529 (CC) at para 108.

based on the premise that this primary contention is rejected by the review court.

77.2 Issuing the 21 November 2022 *nolle prosequi* certificate constitutes administrative action under the Promotion of Administrative Justice Act, 3 of 2000 ("**PAJA**"). Under PAJA, failure to afford the applicant an opportunity to be heard before the *nolle prosequi* certificate was issued is unlawful.[39]

77.3 To the extent that PAJA does not apply to the issuing of a *nolle prosequi* certificate, to act rationally, the DPP was required to hear the applicant before issuing *the nolle prosequi* certificate.[40]

77.4 The purported criminal prosecution is frivolous and vexatious. In such circumstances, Mr Zuma has no substantial and peculiar interest as envisaged in section 7 of the CPA, justifying the purported private prosecution. There is no valid criminal offence to be pursued with any reasonable prospects of success. As the Court said in *Nundalal* at paragraph 48,

> *"[c]orrelatively, if the private prosecutor fails to prove that he has a substantial interest then no private prosecution can ensue. An example of an insubstantial interest is, if the issue is de minimis or frivolous and vexatious."*

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39 *Nundalal* at para 8.

40 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) SA 30 (CC) at para 64-65.

78 These further grounds will be ventilated in Part B. For purposes of Part A, they all *prima facie* bear prospects of success. On a peek into these grounds of review, it is clear that their prospects of success are strong.[41]

THE REQUIREMENTS FOR AN INTERIM INTERDICT HAVE BEEN MET

79 The requirements for an interim interdict are trite. They are these:

79.1 a *prima facie* right to the relief sought in the main proceedings;

79.2 a well-grounded apprehension of irreparable harm if the interim interdict is not granted and the ultimate relief (in Part B) is granted;

79.3 the balance of convenience favours the granting of interim relief; and

79.4 the applicant has no alternative remedy.[42]

80 The different requirements should not be considered separately or in isolation but in conjunction with one another in order to determine whether the court should exercise its discretion in favour of the grant of the interim relief sought.[43]

81 At the interim relief stage, the court is guided by the following principles, set out by Rabie J in *Air France-KLM S.A and Another v SAA Technical SOC Ltd and Others*[44] in determining whether the interim relief sought should be granted:-

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41 *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* 2020 (6) SA 325 (CC) at para 42.
42 *Setlogelo v Setlogelo* 1914 AD 221 at 227.
43 *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383E–F.
44 *Air France-KLM SA and Another v SAA Technical SOC Ltd and Others* (52406/2016) [2016] ZAGPPHC 877 (23 September 2016) at para 14.

> *"The requirements that need to be satisfied in a matter such as the present are as follows. First, there must be a prima facie right, although open to some doubt, on the part of the applicant; second, there must be a well-grounded apprehension of irreparable harm if interim relief is not granted and final relief is ultimately granted; third, the balance of convenience must favour the granting of interim relief; and fourth, there must be no other ordinary remedy that is available to give adequate redress to the applicant. Where there are factual disputes, the facts set out by the applicant must be taken together with any facts as set out by the respondent which applicant cannot dispute and the court must consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief. The facts set up in contradiction by the respondent then fall to be considered. An applicant upon whose case serious doubt is thrown cannot succeed in obtaining temporary relief. If a well-grounded apprehension of irreparable harm is established, in the absence of an adequate ordinary remedy, the court is vested with a discretion which will usually resolve into a consideration of prospects of success and the balance of convenience. The stronger the prospect of success, the less need for such balance to favour the applicant.* (own emphasis*)*

82 The Court is entitled at the interim relief stage to peek into the grounds of review raised in the main review application and assess their strength. Once this is done, this Court will conclude that the review is likely to succeed and that the interim interdict may be granted.[45]

83 Further, the court possesses a general and overriding discretion whether to grant an application for interim relief. This discretion must be exercised judicially upon a consideration of all the facts, including the prospects of success in the main action.[46]

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[45] *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* 2020 (6) SA 325 (CC) (29 May 2020) at para 42.

The applicant has established a *prima facie* right

84 The applicant has a right not to be subjected to an unlawful, unconstitutional and invalid criminal prosecution. If the private prosecution is permitted to commence by requiring him to appear before this Court and remain in attendance on 19 January 2023, the applicant's right not to be subjected to an unlawful, unconstitutional and invalid private prosecution will be irreparably breached or harmed. His constitutional rights to human dignity, equal protection of the law, personal freedom and security of the person, freedom of movement and fair trial will be irreparably and irreversibly harmed.

85 The setting aside (in due course) of the summonses and the private prosecution will not restore the applicant's rights in this regard, nor his reputation.[47] In addition, the unlawful, unconstitutional and invalid private prosecution adversely affects the wider public interest and the interests of the country. It directly affects the reputation of the President, should he be required to stand accused of criminal offences and stand trial in an unlawful criminal prosecution. Confidence in the national executive leadership of the country and its direction are adversely affected. The Rand suffers against major currencies. This translates in harm to the economy and the public interest.[48]

86 The answers that the first respondent proffers to this are the following. He contends that there is no right not to be criminally prosecuted. Second, that the applicant cannot assert individual rights if he is acting in his capacity as the

47 FA para 100, at pg. 001-53.
48 FA para 101, at p 001-54.

President. That the applicant cannot request this Court to sanction an order that excuses him from attending a criminal hearing as an accused. Lastly, that the appropriate place to raise these defences is the criminal court.[49]

87 The applicant, like anyone, has a right not to be subjected to an unlawful private prosecution where the private prosecution does not meet the requirements of sections 7 and 9 of the CPA. The first respondent plainly does not meet these requirements. The applicant, like anyone, is entitled to claim a breach of his individual rights even as the President.

88 The order excusing the applicant from appearing in the criminal court on 19 January 2023 and remaining in attendance is a necessary consequence of the grant of the interim interdict in paragraph 2.1 of the notice of motion against the first respondent. In other words, it follows that if the interim interdict is granted, he is excused from the hearing pending the determination of Part B. There is nothing odd or contradictory about such an order. The consequence would follow even if the order in paragraph 2.2 of the notice of motion was not sought or granted. It is sought out of an abundance of caution. Once the private prosecution is interdicted in the interim, he would not be obliged by law to appear in the criminal court on 19 January 2023 and remain in attendance.[50]

89 The facts and submissions already made above establish a *prima facie* right to the interim interdict sought. That right will be irreparably harmed if the interim interdict is not granted.

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49 AA paras 117 – 123, p 010-34.
50 RA paras 70-75, at pg. 010-34 – 36.

The applicant's rights will be Irreparably harmed

90 The applicant is summoned to appear in court on 19 January 2023 and remain in attendance, for a private prosecution that is unlawful, unconstitutional and invalid. Should the applicant be subjected to these criminal proceedings, and have to appear before the Court on 19 January 2023, and continue to do so pending the final outcome of Part B, his constitutional rights and reputation will be irreparably harmed. The interests of justice and the public interest will be irreparably harmed. It will mean that he must routinely attend court on an unlawful prosecution and on unfounded charges, while the work of the state for which he is responsible, suffers. The country and the public will suffer manifest harm. The only way to avoid this irreparable harm is by granting the interim interdict.[51]

91 Despite all of this, the first respondent contends that there is no harm.[52] The first respondent implies that the applicant is not special and must be treated the same as other accused persons. These contentions do nothing to the demonstrated case of irreparable harm that the applicant has made. They only suggest that at the first respondent's whim the applicant must be subjected to an unlawful prosecution. There is absolutely no legal sense in this.

The balance of convenience favours the granting of the interdict

92 The balance of convenience favours the granting of the interim interdict. There is no harm that the first respondent will suffer if the order is granted pending

[51] FA paras 103 – 105, at pg 001-54.
[52] AA paras 124 – 133, at pg 001-60.

Part B. He has demonstrated none in his founding affidavit. His right to access to justice is not implicated where the purported prosecution is unlawful. The suggestion in his answering affidavit that this Court will somehow be exempting the applicant from criminal proceedings in granting the order is plainly not accurate. These are interim relief proceedings.[53]

93 Harm to the applicant pending Part B in the absence of an interim interdict is manifest. Any success in Part B will be vacuous. The first respondent will have irremediably trampled on the applicant's constitutional rights. Any argument to the contrary beggars belief. It is simply too extraordinarily unbelievable.

94 Lastly, in *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others*[54], the Court held that:

> *"[53] The OUTA test patently underscores that courts should be slow to grant interim orders against the Executive and that interim orders must be granted only in exceptional circumstances and in the clearest of cases. I cannot conceive of any reason why this rationale should not apply to interim interdicts against the Public Protector. I am of the view that the OUTA test is flexible enough to take into account the constitutional role of the Public Protector and it is evident that the OUTA test cautions courts not to lightly grant interim orders – especially because of the separation of powers consideration. The President, Executive and Parliament all exercise and source their powers and functions from the Constitution, like the Public Protector. The argument that the Public Protector exercises a constitutional power does not render her unique to the extent that a stricter test is required, which allows the granting of interim interdicts only in 'extraordinary circumstances'."*

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53 FA paras 106-107 at pg 001-55. AA paras 143-152, p 009-58.

54 *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* (2020 (6) SA 325 (CC).

95 The *OUTA* test establishes that the balance of convenience enquiry must carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of Government:

> "*The enquiry must, alongside other relevant harm, have proper regard to* what *may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define "clearest of cases". However one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights."*[55]

96 The consideration of separation of powers harm does not apply to the first respondent's unlawful exercise of the coercive and invasive statutory powers.

97 In any event, the applicant has clearly demonstrated a clear and strong case or an exceptional case for this Court's intervention by the grant of interim relief.[56]

98 Second, there will also not be any harm to the constitutional or statutory powers of the second to fourth respondents. None of them have raised such harm. The simple fact is that all three respondents have exercised their powers. The second respondent has filed an answering affidavit in which this contention is not raised at all. Furthermore, the media statement by the NPA shows that it is the first respondent's attempt to unlawfully privately prosecute the applicant which is at odds with the statutory powers of the NPA and the second respondent. The fourth respondent has not filed any opposition or affidavit.[57] In any event, interdicting reliance on invalid summons can never constitute an impermissible

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55 *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) para 47.
56 RA para 63, at pg. 010-33.
57 RA para 64, at pg. 010-33.

breach of the separation of powers doctrine. The applicant cannot rely on *OUTA* as a defence since the requirement does not apply to him.[58]

99 As confirmed in the applicant's replying affidavit, the applicant no longer pursues any order against the second and third respondents under paragraph 2.1 of the notice of motion.[59] The fourth respondent does not oppose any of the relief sought in paragraph 2.1. Therefore, any submissions by the first respondent relying on the *OUTA* test are merely self-serving, inapplicable to him and must be disregarded.

There is no alternative remedy available

100 Without the granting of the interim interdict, Mr Zuma will persist with the private prosecution. The applicant will be required to appear before this Court on 19 January 2023 and on any date thereafter until Part B is finally determined. This will permit Mr Zuma to continue to trample on the applicant's constitutional rights and reputation, and to expose him to continuing harm and harm to the public interest. This is serious injustice and unnecessary hardship that ought to be prevented from happening by this Court. The applicant has exceptional and strong prospects of success in Part B.[60]

101 The respondent's primary contention regarding remedy is that the applicant should raise defences in the criminal court, in terms of section 106 of the CPA. The applicant does not have to subject himself to an unlawful private prosecution.

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58 RA para 64, at pg. 33.

59 RA to second respondent's AA, para 8, at p 010-4.

60 FA para 110, at pg. 001-56.

It is not an alternative to say that that he can complain at the hearing of the criminal proceedings.[61] This is also a ground that the first respondent raises under his preliminary points, in regards to jurisdiction. It has no merit.

102 In sum, the applicant has met the requirements for the interim interdict.

103 There are no interests of justice considerations that would justify the Court nevertheless refusing to grant interim relief. For all the reasons submitted above, the interests of justice point to the contrary, i.e., that interim relief should be granted to avoid a serious injustice from an abuse of power and court process.

THE FIRST RESPONDENT'S PRELIMINARY POINTS ARE DEVOID OF ANY MERIT

104 The first respondent has raised several points, styled as preliminary points, in the answering affidavit. Some of these, including that this court does not enjoy the requisite jurisdiction to hear this matter, are briefly addressed below. The contention by the applicant is that none of the preliminary points have merit.

<u>This court enjoys the requisite jurisdiction</u>

105 We address jurisdiction first.

106 The first respondent contends that this court lacks jurisdiction to determine this application, and that the applicant ought to have raised the complaints as defences in the criminal proceedings. In doing so, the first respondent

[61] RA para 79 at pg. 010-37.

mischaracterises the applicant's main claim as being premised on an improper motive or ulterior purpose.[62]

107 The cases on which the first respondent relies concern prosecutions by the national prosecuting authority. In those cases, the accused persons in the criminal proceedings complained that their prosecutions were premised on an improper motive and/or ulterior purpose. Those cases are immediately distinguishable from the instant application on the basis that in those cases the court was never invited to consider whether a civil court has jurisdiction to stay criminal proceedings where a party seeks to invoke section 7 of the CPA but without having met the requirements of that provision. In other words, the competence at all of those prosecutions never arose.

108 As the Constitutional Court confirmed in *Gcaba*,[63] jurisdiction is determined on the basis of the pleadings and not the substantive merits of the case. We add that it is not based on the first respondent's wrong construction of the applicant's case.

109 The applicant's case is that the first respondent is not entitled to institute private prosecution proceedings against him, because he has not complied with the provisions of sections 7 and 9 of the CPA and attempts to bypass section 179(1) and (2) of the Constitution. It is an unlawful, unconstitutional and invalid private prosecution.

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62 AA para 20-42, p 009-14.

63 *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC) at para 75.

110 The applicant's additional ground of ulterior purpose will be determined by the review court. It does not have to be finally determined at this interim relief stage under Part A.

111 This court has jurisdiction.

112 There are cases that establish that an applicant is entitled to apply to interdict a vexatious and unlawful private prosecution. In *Solomon v Magistrate, Pretoria, And Another*[64]:

> *"I can find in the sections relied upon no evidence that the provisions relating to the costs of unfounded and vexatious prosecutions or the title of the prosecutor to bring the proceedings, were intended by the Legislature to be exhaustive and to exclude any right to invoke the assistance of the Supreme Court, as the applicant now does. Mr. Retief maintained (I think in support of his contention that the provisions referred to were exhaustive) that under secs. 17 and 18 of the Act the private party who had obtained the Attorney-General's certificate was given an absolute right to prosecute, of which he could not be deprived by the Court. No doubt the sections referred to do bestow a right to prosecute, subject to the necessary conditions, but I cannot take the view that that fact excludes the jurisdiction of the Court to interfere on proper cause. If Mr. Retief's contention were correct, this Court would have no power to intervene even though it were shown in the clearest possible manner that the party who had instituted the private prosecution had no interest whatever in the outcome of the trial and had embarked upon it for some ulterior motive, such for example as to prevent a business competitor from leaving the country on his lawful business, or to delay him in so doing. In such a case, if the prosecution were launched in a superior Court, I do not consider that it could be held that the remedies provided in the sections of the Act to which Mr. Retief referred were exhausted. The taking out of the summons would clearly be an abuse of the process of the Court, in that it had been undertaken not with the object of having justice done to a wrongdoer, but in order to enable the prosecutor to harass the accused or fraudulently to defeat his rights (see King v Henderson (1898, A.C. F 720); cf. Berman v Brimacombe (1925 TPD 548)). The process of the Court, provided for a particular purpose, would be used not for that purpose, but for the achievement of a totally different object, namely for the oppression of an adversary. The Court has an inherent power to prevent abuse of its process by frivolous or*

64 *Solomon v Magistrate, Pretoria, And Another* 1950 (3) SA 603 (T) at 607-608.

vexatious proceedings (Western Assurance Co v Caldwell's Trustee (1918 AD 262); Corderoy v Union Government (1918 AD 512 at p. 517); Hudson v Hudson and Another (1927 AD 259 at p. 267)), and though this power is usually asserted in connection with civil proceedings it exists, in my view, equally where the process abused is that provided for in the conduct of a private prosecution. In such a case as I have postulated, therefore, this Court would in my opinion by virtue of its inherent power be entitled to set aside a criminal summons issued by its own officials or to interdict further proceedings upon it. It is also by virtue of its inherent power that the Court interferes to restrain illegalities in inferior courts either by way of interdict or mandamus or by declaratory order, as it has on occasion done (see, e.g., Rex v Boon (1912 TPD 1136); Schlosberg v. Attorney-General (1936, W.L.D. 59); cf. Joseph Baynes, Ltd v Minister of Justice (1926 TPD 390), per STRATFORD, J., at p. 398; Rascher v Minister of Justice (1930 TPD 810)). I have no doubt whatever that in a similar case the Court would have power to stop a private prosecution in an inferior court.

Mr. Retief referred me to Rex v Diab (1924 TPD 337 at p. 341), in which MASON, J.P., said that the right and duty of prosecution was absolutely under the control and management of the Attorney-General and, so long as he complied with the provisions of the law with reference to prosecutions and trials the Court was not entitled to interfere. He argued that similarly a private prosecution was absolutely under the control and management of the private prosecutor and that the Court could not intervene. The case of the private prosecutor is, however, different from that of the Attorney-General, in that the title of the former to prosecute is conditional upon his possession of such an interest as is described in the Act, and the Court is therefore entitled to inquire into the question whether he has such an interest or not." (own emphasis.)

113 In *Van Deventer*, the court granted a final interdict to a vexatious and non-compliant unlawful private prosecution.

114 If this Court were satisfied on all the facts placed before it that the private prosecution is incurably unlawful, unconstitutional and invalid, it could grant a final interdict in the terms set out in paragraph 2.1 of the notice of motion, as adapted by it in terms of its wide powers under section 172 of the Constitution.

These wide powers are not limited by the specific relief that a litigant seeks in his notice of motion and founding affidavits.[65]

115 But this Court certainly has the power to grant the interim interdict sought.

116 In *Nedcor Bank Ltd And Another v Gcilitshana And Other*s,[66] the court held that the power to interdict a private prosecution that was irregular, vexatious or an abuse of the process of the Court derived from the inherent jurisdiction of the superior Courts to prevent abuse of their process.[67] This court also has jurisdiction under sections 38, 172 and 173 of the Constitution to halt an unlawful private prosecution that threatens constitutional rights, including the rights in sections 9, 10, 12(1)(a), 21 and 34 (fair trial) of the Constitution.

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65 *Head of Department : Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) at paras 96-97:

"*The power to make such an order derives from section 172(1)(b) of the Constitution. First, section 172(1)(a) requires a court, when deciding a constitutional matter within its power, to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. Section 172(1)(b) of the Constitution provides that when this Court decides a constitutional matter within its power it "may make any order that is just and equitable". The litmus test will be whether considerations of justice and equity in a particular case dictate that the order be made. In other words the order must be fair and just within the context of a particular dispute.*

It is clear that section 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in section 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases, this Court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is valuable and advances constitutional justice particularly by ensuring that the parties themselves become part of the solution."

66 *Nedcor Bank Ltd And Another v Gcilitshana And Other*s 2004 (1) Sa 232 (SE).

67 At para 27.

117 The inherent power of the High Court to grant interim *pendente lite* relief to avoid injustice and hardship is well known. It has been described as "*a salutary power which should be jealously preserved and even extended where exceptional circumstances are present and where but for the exercise of such power a litigant would be remediless*".[68] This power may even be utilised to effectively grant an interim licence where a case is made out.[69]

118 In a case by Mr Zuma whilst President of the Republic, the Court applied the interests of justice to grant a stay of the implementation of the Public Protector's remedial action in the State Capture report.[70] This standard has been applied in subsequent proceedings for a similar stay.[71]

119 The effect of the interim interdict sought in paragraph 2.1 of the notice of motion is in substance a stay of the private prosecution pending the final determination of Part B.

120 This Court can determine Part B. It can grant interim relief pending the outcome of Part B.

121 The objection to the Court's jurisdiction should be rejected.

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68 *Airoadexpress (Pty) Ltd. v Chairman and Others* 1986 (2) SA 663 (A).

69 *Airoadexpress* and *Bidvest* cited above.

70 *Democratic Alliance v Zuma and Another* (21029/2017) [2017] ZAGPPHC 612 (29 September 2017) at para 42.

71 *President of the Republic of South Africa v Public Protector of the Republic of South Africa and Others* (41636/19) [2019] ZAGPPHC 368 (8 August 2019) at para 53.

Alleged defects in the founding affidavit are not fatal and were cured

122 To the extent that it is necessary to address the contention that the application is fatally defective due to certain omissions in failing to include the details of his office by the commissioner of oaths, the following submissions are made. First, the omission does not render the application fatally defective as there has been substantial compliance with the prescripts of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 and the Regulations ("**the Regulations**") issued in terms thereof.[72] Second, and despite this, the commissioner of oaths, Warrant Officer Mabusela, has deposed to an affidavit in which he explains that the omission was an oversight. The applicant requests this Court to condone the inadvertent omissions.[73]

123 It is in the interests of justice to condone the omissions. Mr Zuma will suffer no prejudice because he has fully addressed the applicant's case as pleaded. So has the second respondent. There is even an intervening party wishing to be heard on the case as pleaded.

Alleged failure to exhaust internal remedies

124 This objection is irrelevant at the interim relief stage. There is no internal remedy regarding the interim interdict to stop the unlawful summons pending Part B.

125 As regards the objection premised on section 179(5) of the Constitution, Mr Zuma misses the point of Part B. It is only a challenge against the *nolle prosequi*

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72 *S v Munn* 1973 (3) SA 734 (NC); *Mare v ABSA Bank Limited and others* [2019] JOL 40748 (GP).
73 RA, para 31, p 010-21.

certificates if they are found to relate to the applicant. It is not a challenge against any decision by the DPP not to prosecute the applicant – if such a decision was taken at all in relation to the applicant. This is addressed fully in the applicant's replying affidavit and there is no need to repeat what is said here.[74]

126 The objection only serves to waste time.

Alleged misjoinder or non-joinder of the NDPP

127 This objection is addressed fully in the applicant's replying affidavit at paragraphs 55 to 60.[75] It also serves only to waste time.

128 The first respondent overlooks the constitution of the NPA under section 179(1) of the Constitution. That constitution expressly includes the NDPP. Citing the NPA includes citing the NDPP.

129 The NPA routinely gets cited in cases and often institutes proceedings in its own name. That is, as the NPA defined in section 179(1) of the Constitution, inclusive of the NDPP. An example is given at paragraph 58 of the applicant's replying affidavit.[76]

130 As the NPA, as defined in section 179(1) of the Constitution, can competently institute legal proceedings in its own name it can equally be cited as a respondent in motion proceedings.

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74 RA, paras 48-53, pp 010-27 to 010-30.

75 At pp 010-30 to 010-32.

76 At p 010-31.

131 In any event, the NPA and the DPP raise no objection to the citation of the NPA. On the contrary, the DPP has filed an answering affidavit in which she makes it clear that the parties are prepared to abide the decision of the Court. This means that they will consider themselves bound by any judgment and order of this Court. There can be no need to cite the NDPP in that instance.

132 Respectfully, Mr Zuma seems to think, on legal advice, that the DPP has a personal interest in the matter apart from that of the NPA. She does not. She speaks in her official capacity and clearly represents the NPA as well in what she says in her answering affidavit.

133 The other issues raised as *in limine* points relate to the merits of the urgent interim relief application and have been addressed above.

PUNITIVE COSTS

134 It is trite that in awarding costs, the court has a discretion to be exercised judicially upon a consideration of the facts in each case, and that in essence the decision is a matter of fairness to both sides. By leaving the court a discretion, the law contemplates that it should take into consideration the circumstances of each case, carefully weighing the issues in the case, the conduct of the parties and any other circumstance which may have a bearing on the issue of costs and then make such order as to costs as would be fair and just between the parties. The common law rules in relation to the ordering of punitive costs orders are well-established and are buttressed by the Constitution. Thus, the

Constitution must inform and permeate the long-established common law tests of bad faith and gross negligence.[77]

135 Although Mr Zuma and his legal representatives are litigating as private persons and not as public officials, the principles set out by the Constitutional Court to apply to personal costs orders against public officials provide useful guidance.

136 In *EFF*, the court said this in relation to personal costs against public officials:

> *"[91] Personal costs orders against a public official are primarily aimed at vindicating the Constitution. They protect the Constitution, its values and its vision. They ensure that public officials who impermissibly flout the Constitution are held accountable. It is a constitutional demand that public officials are held accountable and observe heightened standards in litigation and in the execution of their duties. Recognising this, Froneman J stated that: "Within that constitutional context the tests of bad faith and gross negligence in connection with the litigation, applied on a case by case basis, remain well founded. These tests are also applicable when a public official's conduct of his or her duties, or the conduct of litigation, may give rise to a costs order."*
>
> *[92] It cannot be gainsaid that personal costs orders are punitive in nature and a court must be satisfied that the conduct of a particular incumbent, in the execution of their duties or conduct in litigation, warrants the ordering of a personal costs order. This cannot be done in the abstract and the facts must plainly support an order of this nature. A court would be derelict in its duties if it imposed a personal costs order where the facts do not justify that. Similarly, a court would be derelict in its duties if it failed to furnish the reasoning for imposing a personal costs order."*

137 There is no good reason why these principles should not apply against Mr Zuma, alternatively, costs *de bonis propriis* against his legal representatives. Mr Zuma was given multiple opportunities to withdraw the summons.[78] The opportunities

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[77] *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* 2020 (6) SA 325 (CC) (29 May 2020) at para 90 ("**EFF**").

[78] FA paras 121-123, pg. 001-59.

were afforded against a clear demonstration that the summons was unlawful and an abuse of court process. This is borne out by all the facts presented to this Court.

137.1 The first opportunity was on 17 December 2022 when the applicant's legal representatives pointed out the defects with the summons.

137.2 The second occasion was between 18 December 2022 and 21 December 2022 after the applicant's legal representatives pointed out further defects with the summons.

137.3 The final occasion was on 21 December 2022, when the NPA clarified that the *nolle prosequi* certificate of 21 November 2022 does not relate to the applicant.

137.4 All the while, Mr Zuma has been represented by able legal representatives.

138 In these circumstances, it is submitted that this is an appropriate case to order punitive costs against Mr Zuma, alternatively, costs *de bonis propriis* against his legal representatives.

139 In the event that this application is unsuccessful, there should be no order as to costs against the applicant. I made several attempts to engage and settle the matter with Mr Zuma to avoid litigation. The application is also intended to protect my constitutional rights and reputation. The basis for the application is

not frivolous nor vexatious. There is a solid basis for the application. Therefore, the *Biowatch* principle should apply in the applicant's favour.

AMICUS INTERVENTION APPLICATION

140 The application for intervention by the *amicus* is addressed in an affidavit filed on behalf of the applicant at page 005-1.

141 The upshot of the submissions made is that there is nothing helpful under Part A that the *amicus* will submit to the Court that is not already addressed by the applicant and the first respondent.

142 The contentions regarding SLAPP, other jurisdictions and the first respondent's rights under section 9 of the Constitution, as well as the independence of the NPA are irrelevant to Part A or both Part A and Part B.

143 The issue of punitive costs, which is a matter entirely in this Court's discretion, is fully addressed by the applicant and the first respondent. Nothing useful is submitted by the *amicus* as SLAPP is irrelevant.

144 Having said this, the applicant abides the decision of the Court on the *amicus*' application, its admission and the conditions of its admission.

CONCLUSION

145 In these circumstances, the applicant prays for the orders as against the first respondent, as set out in the notice of motion under Part A. A draft order will be presented to the Court in these terms.

146 No order is sought against the other respondents.

NGWAKO MAENETJE SC
NYOKO MUVANGUA
PHUMZILE SOKHELA

Counsel for the applicant

Sandton Chambers
11 January 2023

LIST OF AUTHORITIES

1. *Affordable Medicines Trust and Others v Minister of Health of RSA and Another* 2005 (6) BCLR 529 (CC)

2. *Air France-KLM SA and Another v SAA Technical SOC Ltd and Others* (52406/2016) [2016] ZAGPPHC 877 (23 September 2016)

3. *Airoadexpress (Pty) Ltd. v Chairman and Others* 1986 (2) SA 663 (A)

4. *Bidvest Protea Coin (Pty) Ltd v Airports Company of South Africa SOC and Others* (2017/7509) [2017] ZAGPJHC 110 (30 March 2017)

5. *Democratic Alliance v Zuma and Another* (21029/2017) [2017] ZAGPPHC 612 (29 September 2017)

6. *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011)

7. *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* 2020 (6) SA 325 (CC) (29 May 2020)

8. *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (3) SA 580 (CC)*

9. *Gcaba v Minister for Safety and Security and Others 2010 (1) SA 238 (CC)*

10. *Head of Department : Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC)

11. *Law Society of South Africa and Others v President of the Republic of South Africa and Others 2019 (3) SA 30 (CC)*

12. *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)*

13. *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA)

14. *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC)

15. *Nedcor Bank Ltd And Another v Gcilitshana And Other*s 2004 (1) Sa 232 (SE)

16. *Nundalal v Director of Public Prosecutions KZN and Others* (AR723/2014) [2015] ZAKZPHC 25 (8 May 2015)

17. *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D)

18. *President of the Republic of South Africa v Public Protector of the Republic of South Africa and Others* (41636/19) [2019] ZAGPPHC 368 (8 August 2019)

19. *S v Munn* 1973 (3) SA 734 (NC); *Mare v ABSA Bank Limited and others* [2019] JOL 40748 (GP)

20. *Setlogelo v Setlogelo* 1914 AD 221

21. *Solomon v Magistrate, Pretoria, And Another* 1950 (3) SA 603 (T)

22. *Van Deventer v Reichenberg and Another* 1996 (1) SACR 119 (C)