IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2022-062027

In the matter between:

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Applicant

and

JACOB GEDLEYIHLEKISA ZUMA AND OTHERS First to Fourth Respondents

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FIRST RESPONDENT'S HEADS OF ARGUMENT

PREAMBLE

"The appellants do not seek to impugn the provisions of the CPA in any way, yet they are seeking to assert their fair trial rights before a civil court. That should give pause for thought. Why are issues germane only in the context of criminal proceedings being canvassed and determined in civil proceedings and not in the constitutionally compliant forum, and in accordance with the constitutionally compliant statute, provided for the adjudication of criminal cases?"[1]

[1] *Moyo v Minister of Justice and Constitutional Development and Others; Sonti v Minister of Justice and Correctional Services and Others* 2018 (8) BCLR 972 (SCA) at para [157].

A: INTRODUCTION

1. In this Part A of the application, the Applicant who is the Accused person in private prosecution proceedings set down for 19 January 2023 and which were initiated or started on 15 December 2022 by the First Respondent as the Private Prosecutor, seeks an urgent interim interdict for extremely wide and unprecedented relief:-

    1.1. to prevent the four Respondents from "*taking any further steps*":-

        1.1.1. to commence or continue the private prosecution or to give effect to the accompanying 21 November 2022 *nolle prosequi* certificate and/or summons; *or*

        1.1.2. to pursue the private prosecution under case number 0597772/2022 against the Applicant in any way; and

    1.2. to be exempted from attending his first appearance on 19 January 2023, as directed in the relevant summons duly served on him by the Sheriff on 15 December 2022.

2. At different placed the Applicant articulated the different positions that the Part A relief is being sought pending *"the final determination"* [2] *"the*

[2] Notice of Motion (Caselines 001 – 3).

finalisation"[3] and "*the outcome"*[4] of the application in Part B which is a review application in respect of the decisions of:-

2.1. the Private Prosecutor in instituting the private prosecution;

2.2. the DPP/NPA in issuing the *nolle prosequi* certificate issued on 21 November 2022 which forms part of the relevant evidence; and/or

2.3. the Registrar in issuing the summons (which summons were duly served by the Sheriff as confirmed in the return service).

3. Notably the *nolle prosequi* certificate issued on 6 June 2022 is not challenged. The significance of this fact will be dealt with later.

4. The First Respondent has raised a number of preliminary objections or defences to the Part A applications which, if successful, will be fatal to the application and result in its being dismissed or, at best, struck off the roll. This will mean that this Honourable Court does not have to reach the merits of the Part A application.

5. In particular it will be highlighted that the application is certainly not urgent, any alleged urgency is self-created and the Court has no jurisdiction to entertain the issues raised, which should rather be referred to the criminal

[3] FA, para 11.1 (Caselines 001 – 13).
[4] FA, para 11.1 (Caselines 001 – 13).

court seized with the proceedings as a whole. Even if the jurisdiction of the court is not, strictly speaking ousted, there are no exceptional circumstances sufficient to overcome the courts' general aversion towards:

5.1. Interference with prosecutorial decisions;

5.2. Interference in incomplete proceedings;

5.3. Preliminary litigation;

5.4. Interdicting the exercise of a public or statutory power; and

5.5. Granting an interim interdict where there are no prospects of success on review and/or the main application is not likely to succeed.

6. The present case presents all those features and, what is more, it is rooted in the undermining of the sacrosanct principle of equality before the law and the presumption of validity also known as *omnia praesumuntur rite esse acta.* It is known as a rebuttable presumption of law and may well be actually successfully be rebutted in Part B. For now and in relation to Part A and in the absence of contrary evidence, formal validity must be presumed.

7. However, and in the unlikely event of all the preliminary objections not being upheld, then the application still stands to be dismissed on the merits because the Applicant has dismally failed to satisfy the requirements for

interdicts even if the ordinary *Setlogelo* test were to be applied, let alone the heightened OUTA test which is applicable to the present application due to the character of the relief sought. In particular it will be demonstrated that the Applicant has a countless plethora of alternative remedies. He has also failed to even address, let alone satisfy, the OUTA test as prescribed by the Constitutional Court.

8. This application raises very serious and relatively complex issues of weighty legal importance not only because it involves the current and former holder of the highest office in the land but also because it invokes some of the most sacred values of our constitutional order including access to justice, the rule of law, separation of powers, prosecutorial independence, (criminal) accountability and above all equality of all before the law in terms of section 9(1) of the Constitution. It is also anchored on the rights of citizens to bring private prosecutions in the exercise of the fundamental right enshrined in section 34 of the Constitution and specified in sections 7 to 17 of the Criminal Procedure Act 51 of 1977 (“the CPA”).

9. In essence, the Applicant who is the serving President of the Republic seeks to be exempted from the normal consequences of being criminally charged which are endured by thousands of accused persons appearing in our courts on a daily basis whether in the lower courts or the superior courts which are spread across the length and breadth of our country. He goes as far as seeking to be exempted even from the mere appearance in Court, even before his prosecution may or may not be set aside in a court of law at the

end of Part B. He seeks such exemptions until the final determination of Part B, that is, including all appeals in respect of both Part A and B in all courts up to and including the Constitutional Court on both counts.

10. It would therefore be the biggest understatement to say that such relief is overly wide, broad unprecedented and completely unheard of. Yet no exceptional circumstances, other than the fact that he holds a certain office, have been advanced as to why this particular accused in this particular matter would be deserving of such special, favourable preferential treatment. The holding of the office is self-evidently not enough justification for such. If anything, the holding of such office, compels the court to apply the rule that all are equal before the law. That the rule was specifically designed to deal with these kinds of situations and to prevent the wanton discrimination and unfairness of the previous era where justice was, sadly, not blind.

11. He only cites as reasons his belief that the prosecution is not compliant with the requirements of the relevant statutory provisions and that it is politically motivated, both of which are deemed in sufficient detail by the First Respondent.

12. It is worthy of mention at this early stage that the scheduled court appearance of the Accused person is within a few days of the hearing of the "*urgent*" application. This puts beyond doubt that the sole and exclusive purpose of this application is to avoid what is likely to be a very brief first appearance and guaranteed postponement of the matter. It is customary and

predictable to any court of law that the trial itself will certainly not likely even commence on that day, more especially in the light of the pending Part B application. The application is therefore fruitless and intended to serve a very narrow selfish and egotistic purpose fuelled by the arrogance of power and an air of relative superiority in comparison to other "*ordinary*" citizens. This cannot be countenanced under a democracy worthy of that description, not even in Part B, let alone in the urgent court.

13. Before delving into the merits of the application, we shall first deal with the 5 preliminary objections or points *in limine* which have been raised in the papers. The broad structure of these submissions will contain:

13.1. The definition of the issues;

13.2. The preliminary objections (including in particular the lack of urgency and jurisdiction);

13.3. The merits (especially the non-fulfilment of the legal requirements and/or the OUTA test); and

13.4. The issue of personal and punitive costs which must be paid by the Applicant.

14. Regarding the certificates and the charges themselves, the best shortcut is to make short/thrift of the grossly and deliberately and absurd exaggerated claim that the reference to "*any person*" in the second certificate means that the Private Prosecutor may charge any of the 60 million human beings living in South Africa. That view is based on wilful blindness and a deliberate distortion of the clear wording of the certificate together with the further correct explanation thereof by even the biased NPA. Firstly, the certificate does not just refer to "*any person*" but to "*any person in connection with this matter*". Secondly the NPA itself "*clarified*" that "*the nolle prosequi certificates apply to any persons who are specifically mentioned in the docket*". These qualifications make it clear that the certificates in actual fact can only apply to a maximum of 6 individuals who are named or clearly identified in the said police affidavit, including the Applicant. These are:-

14.1. Adv Downer;

14.2. Ms Maughan;

14.3. Adv Breytenbach;

14.4. President Ramaphosa;

14.5. Minister Lamola; and/or

14.6. Advocate Shamila Batohi (the NDPP).

15. In turn, it can be demonstrated from the papers that all these 6 people are specifically named in the police affidavit and/or the ongoing prosecution in KwaZulu-Natal, either as suspect, accused persons or key witnesses. The exaggerated and alarmist interpretation of the certificates as literally applying to "*any person*" without qualification, is mischievous and intended to mislead the court.

16. The second fallacy which must also be briefly put to bed is the complaint of the Applicant that he cannot be an accessory after the fact because, the principal crime having been allegedly committed on 9 August 2021 was completed before his involvement in the matter on 19 August 2021. This can only come from an embarrassing failure to understand the crime of accessory <u>after</u> the fact. Far from being a defence, it is actually a definitional requirement of that crime that the principal crime must have been completed. Therefore the Applicant's complaint is in actual fact a confession to an essential element of the crime!

17. However, and furthermore, what must rank as the most fatal mistake is the failure by the Applicant to challenge the inclusion of the alternative offence of defeating the ends of justice. This means that the charges must stand even if the challenge to the main offence was somehow sustainable, which is denied.

18. For all these reasons it can never be doubtful that:-

18.1. The *nolle prosequi* certificate(s) apply to the Applicant;

18.2. The summons as issued by the Registrar is outwardly valid;

18.3. There is a strong *prima facie* case of criminal liability as an accessory after the fact; and/or

18.4. Failing the above there is a strong case in respect of the alternative offence of defeating the ends of justice.

19. In these circumstances, the Applicant like all the accused and charged persons against whom there is a *prima facie* case and in respect of whom the NPA has issued a *nolle prosequi* certificate, must face his trial and exercise his right to prove his innocence. This must be done in the criminal courts not in the civil courts, let alone the urgent motion court.

20. There is no law for Presidents and other law for "*ordinary citizens*". There is no separate law for the rich and famous and other law for the unknown citizens. It is identified by Wallis JA in the *Moyo* case at paragraph [169], as follows:

> "*The trial has not yet commenced. It is commonplace to see in the media that the first step in any criminal litigation involving a prominent person that they will challenge the constitutionality of the charge or*

> *the process leading up to the commencement of (the) criminal proceedings. The term "Stalingrad defence" has become a term of art in the armoury of criminal defence lawyers. By allowing criminal trials to be postponed pending approaches to the civil courts, justice is delayed and the speedy trials for when the Constitution provides do not take place. I need hardly add that this is of particular benefit to those who are well-resourced and able to serve the services of the best lawyers."*

21. This application is nothing but a typical example of the abovementioned objectionable behaviour. It must be nipped in the bud, in the interests of justice and equality before the law.

22. It is incumbent upon us to bring to the attention of the (urgent) Court that the SCA decision in *Moyo v Minister of Police* 2020 (1) BCLR 91 (CC)(was overturned on appeal in the Constitutional Court. However, it was overturned only on the merits and not the procedural parts identified by Wallis JA. On the contrary the Constitutional Court unanimously endorsed the remarks regarding the undesirability of abstract challenges, of which preliminary litigation such as in the present case, is a category.

23. It will also be demonstrated that the Applicant, using some subtle and not so-subtle strategies had shifted and re-tailored his case to try to escape some of the difficulties pointed out in the answer. In certain key respects the grounds of attack have metamorphosised and the case continues to grow

legs at each stage ranging from the initial correspondence, the founding affidavit and now the replying affidavit.

24. Examples of the above include the ground based on timelines which emerged for the first time in the second letter sent by the Applicant's attorney, the ground based on payment of security, which emerged for the first time in the founding affidavit and the ground based on the alleged expiry of the first *nolle prosequi* certificate which has now been raised for the very first time in reply. This method of chameleonic litigation and gradualistic ambush is unacceptable and ought properly to be deprecated. It is impossible for the Respondent to exercise his right to meet a case which changes in colour everytime the Applicant opens his mouth.

25. No doubt we will be confronted with yet a new case in argument, including the new and preposterous attempt to distinguish between ulterior motive and ulterior purpose. That abandonment of ulterior motive is informed only by the realisation that it is on incompetent basis for the relief sought. Ironically, it was the Applicant, not the First Respondent, who introduced the grounds of ulterior motive and/or used the term interchangeably with ulterior purpose. This much will be demonstrated during legal argument.

26. Against this broad background we now define the issues more sequentially.

B: THE ISSUES

27. It will be convenient to define the issues as answers to the following questions (which we shall then proceed to answer) in the rest of this document:-

27.1. Ought the application not be disposed of on the basis of any one or more of the following preliminary objections (i.e. without any need to reach the merits):-

27.1.1. failure to comply with the Presidential Regulations on Commissioners of Oaths?

27.1.2. *locus standi* and/or authority to act?

27.1.3. lack of urgency?

27.1.4. jurisdiction and/or prematurity?

27.1.5. failure to exhaust internal remedies?

27.2. Failing the above and if the merits are reached, does the Applicant pass the following legal hurdles:-

27.2.1. the requirements for interim interdicts?

27.2.2. the OUTA test?

27.2.3. the judicial exercise of the court's discretion?

27.3. Regarding costs:-

27.3.1. if the application is successful are there any grounds which have been pleaded and established for a punitive costs order against the First Respondent alternatively his (unidentified) legal representatives?

27.3.2. if the application fails, as it should, ought not the Applicant properly be mulcted with a personal and punitive order of costs?

28. This being the urgent court, we now turn to dealing with the issues defined above and listed in the preceding paragraph. We do so in such a way that if any of the earlier points are upheld there should be no need to proceed to the rest. However, we are, of course in the hands of the court as to the most time economical way in which the entire matter must be conducted.

29. In delivering the written submissions and during oral argument, we shall advisedly begin with the preliminary legal points or objections identified above and raised in the First Respondent's answering affidavit, taking into account the responses thereto which have been offered in the Applicant's replying affidavit and the applicable principle of law. It will be clear that those responses are, in the particular circumstances of this case, woefully inadequate. Accordingly, the points of law must be upheld.

30. Since any one or more or all of these points of law is/are dispositive of the entire Part A application, it will be appropriate for them to be raised and determined upfront as to avoid the pointless exercise of canvassing the very complex merits of the present application(s). This is not the type of case where the issues of urgency, jurisdiction, prematurity, *locus standi*, et cetera, can be conveniently collapsed into one single argument with the merits which may unnecessarily take the entire day given the complex issues raised and which should be best left for the Part B court to consider properly and in due course without any rush.

31. To be sure and regarding the merits, the papers are understandably voluminous because this particular case involves a number of very complex issues straddling across a minimum of 5 areas of law or academic subjects, namely:-

31.1. Criminal Procedure;

31.2. Criminal Law;

31.3. Administrative Law;

31.4. Constitutional Law; and

31.5. Civil Procedure (especially Interdicts).

32. In respect of each subject, the Applicant has demonstrated an acute misunderstanding or propensity to misrepresent the most basic principles. It is not clear whether these are deliberate or innocent misrepresentations. Either way, they are fatal to the Applicant's case, more particularly in Part A. These very intricate discussions and analyses can be easily avoided upon the realisation that there is no need to reach the merits due to the various unanswerable preliminary objections raised *in limine.*

33. In addition, the matter involves issues of interpretation of countless statutory provisions of the CPA the NPA Act and the Constitution itself, as well as important legal documents including as the *nolle prosequi* certificates, the police affidavits and the return and the return of service.

34. It is a near impossibility to do justice to all these complex issues in the context of the urgent court and also have then adjudicated in the short time available.

35. Before dealing with the legal points it will be appropriate firstly to briefly outline some of the salient facts which inform this application. It must also be pointed out that sadly when it comes to the presentation of the facts, the Applicant has made himself guilty of several misrepresentations, distortions, untruths and even downright perjury. Examples of these will be isolated during oral argument.

C: BRIEF SYPNOSIS OF THE SALIENT AND MATERIAL FACTS

36. This matter has a long history which has been dealt with in the First Respondent's decided cases and is well-known in the public domain. This being the urgent court we will therefore only zoom succinctly into some of the key facts relevant to the Part A application. These facts hereunder are largely common cause and not seriously disputed or disputable. They can also be gleaned from the pleadings, the summons, the Summary of Substantial Facts, the correspondence and other annexures forming part of the record. There remains a large body of materially disputed facts and conclusions.

37. On or about 7 July 2022 the First Respondent was imprisoned for a 15-month term at the Estcourt Correctional Centre for allegedly ignoring an order to appear before the Zondo Commission.

38. While serving his sentence the First Respondent fell seriously ill and was admitted to a private hospital in Pretoria under the care and supervision of the South African Military Health Services, a division of the South African National Defence Force, due to his status as a former Head of State. The medical personnel was headed by General Mdutywa.

39. While still being hospitalised the First Respondent was due to appear in his criminal trial in Pietermaritzburg. Due to the refusal by the NPA to agree that he be excused from appearance due to ill health, and because he was legally compelled to appear physically in terms of section 158 of the CPA, it became necessary for him to make a postponement application. A confidential letter written by General Mdutywa describing some details of the seriousness of his condition was sent to the NPA in connection with the matter.

40. On 9 August 2021 which was a public holiday, Advocates Breitenbach and Downer, acting for the NPA, caused the confidential letter to be disclosed to a journalist, a Ms Maughan without the authorisation of the NDPP. This was an apparent breach of section 41(6) of the NPA Act, read with section 41(7).

41. On 19 August 2021 the First Respondent wrote to the Applicant herein *inter alia* reporting the abovementioned criminal conduct and demanding that an enquiry be instituted. On 25 August 2021, the latter responded by stating that the matter was indeed serious and that he had referred it to the Minister who

would also refer it to the Legal Practice Council. To date nothing more has been heard from the President, Minister of Justice or the Legal Practice Council.

42. Aggrieved by all the above and on 21 October 2021 the First Respondent laid a criminal complaint at the Pietermaritzburg Police Station. He submitted a detailed affidavit setting out the background. To that affidavit he attached among other things, the letter he had written to the President and his response. The following is said in the police affidavit which forms part of the police docket[5]:-

"*17. <u>The alleged conduct also forms part of</u> separate investigations which are conducted by the President of the Republic of South African, Mr Cyril Ramaphosa, the Minister of Justice, Mr Ronald Lamola and/or the Legal Practice Council. The relevant complaint letter written to President Ramaphosa and his response form part of the full papers in an application which I ought to supplement my (plea) in my criminal trial. The full application is attached hereto marked "C".*

18. The purpose of bringing the information contained in this affidavit to the attention of the police is to initiate a process which must necessarily lead to the prosecution of the suspects, failing which a certificate to the contrary must be duly issued by the National

[5] AA (Annexure JZP6)(Caselines 009 – 110)

Director of Public Prosecutions, who is incidentally the person ultimately responsible for the deployment of the suspects.

19. I am prepared to give further clarificatory statements under oath in support of the above should that be deemed necessary. <u>The criminal violations set out in the attached documents</u> should serve as a useful basis of (sic) determining the scope of criminal investigations that the SAPS may conduct in this complaint <u>and the inclusion of further suspects and/or accomplices."</u>

43. It should therefore be obvious that the criminal liability was confined to a closed list of persons connected to the principal crime(s) of breaching section 41(6) of the NPA Act by the principal perpetrator(s) but also to extend to other participants such as accomplices and/or accessories therein.

44. On or about 7 April 2022 the NPA declined to prosecute but steadfastly refused to issue the requisite *nolle prosequi certificate* until 6 June 2022 and after being threatened with legal action.

45. In September 2022 criminal summons was issued in respect of some of the persons mentioned in the police complaint whilst others were included in the witness list. President Ramaphosa was listed as the second witness in that list.

46. In October 2022 Accused 1 and 2 instituted motion court proceedings to challenge the charges and the commencement of the proceedings on the basis *inter alia* that the *nolle prosequi* certificate did not apply to Ms Maughan. This view was disputed under oath by the First Respondent. However in order to put the issue beyond doubt a letter demanding a clarification was sent to the NPA. After initial refusal and resistance following threats of legal action, the NPA issued a second and clarificatory certificate on 21 November 2022 (The certificate was duly delivered to the Pietermaritzburg High Court in respect of Ms Maughan's application).

47. On 15 December 2022 the First Respondent caused the current summons to be delivered to the Applicant following the issuance thereof by the Registrar. What happened thereafter has been further detailed in the papers and in the section of those summons and it has culminated in the present application dealing with urgency.

D: <u>THE POINTS *IN LIMINE*/PRELIMINARY OBJECTIONS</u>

48. It is therefore to the specific legal points raised *in limine* that we now turn, in the order in which they are listed at sub-paragraph 10.1 above.

D1: Non-compliance with the applicable Presidential Regulations

49. It is by now common cause that the founding affidavit suffers from the undisputed defect that the alleged Commissioner of Oaths failed, *inter alia*, to affix any details the purpose of which is to make him or her identifiable or traceable. Neither his or her full name, gender, business address or any such means of identification can be discerned. Not only does this constitute a clear and total non-compliance with the peremptory provisions of the Regulations but it defeats the very purpose thereof namely to enable the traceability of the Commissioner where the authenticity of the affidavit is disputed as in the present case.

50. There can be no discussion of "*substantial or sufficient compliance*" especially with the relevant regulation 4(2) when what we have is no compliance at all. The exceptions to the general rule of invalidity and nullity which are found in the case authorities therefore do not even get off the blocks. Even if it were to be found that Regulation 4(2) was directory and not peremptory, which is disputed, the courts discretion can only be exercised if there is substantial compliance. In this matter there is none.

51. In simple terms, the identified jurisdictional facts or prerequisites for a valid affidavit have not been met and only invalidity may result.

52. Unlike the Applicant who even stubbornly refuses to acknowledge that he failed to plead the requisite OUTA requirements, the Commissioner of

Oaths Mr Mabusela has thankfully and candidly owned up to the non-compliance.

53. While this is to be welcomed and appreciated, it does not cure the defects nor trigger the discretion of the court to condone absent any compliance.

54. What aggravates the situation and makes it irreversible is the inexplicable repetition of the same defects even in the subsequent explanatory or "*supporting*" affidavits as dealt with in the supplementary affidavit. There can never be talk of the substantial compliance in the wake of such serial non-compliance. There is no discretion to be exercised.

55. This is in sharp contrast to the First Respondent's alleged non-compliance in respect of the payment of security in terms of section 9 of the CPA. Even assuming that section was indeed applicable, which is disputed, there was substantial compliance and repeated efforts to do so and there is *prima facie* "*satisfaction*" on the part of the Registrar. This position is bolstered by the applicable presumption as well as reference to the relevant provisions of Rule 47 and Rule 54 of the Uniform Rules of Court.

56. To aggravate this situation, the First Respondent did afford the Applicant ample opportunity to remedy the defects. The opportunity was turned down and unwisely spurned.

57. In the circumstances and there being no valid or condonable application before which has been delivered in this Honourable Court, the matter ought to be dismissed alternatively struck off the roll, with punitive costs.

58. The above issue comprises of two legs which cannot be separated. The first leg is to investigate whether the provisions of s 4 of the Regulations are peremptory or directory? The second leg is an investigation on whether the "alleged" commissioner of oaths, by failing to comply with section 4(2)(b) of the Regulation, renders the Applicant's founding affidavit a nullity? [6], assuming that the escape clause of condonability does not apply due to the absence of sufficient or substantial compliance.

59. Section 4 is couched in the following terms:

> *"4. (1) Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.*
>
> *(2) The commissioner of oaths shall—*
>
> *(a) sign the declaration and print his full name and business address below his signature; and*

[6] *Schierhout v Minister of Justice* 1926 AD 99 at page 110.

(b) state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment ex officio."

60. In dealing with the first leg and as a point of departure, what needs to be considered is the manner in which the words are couched in the relevant provision. However, this consideration is not the test and certainly not a decisive factor. The language of a predominantly imperative nature, like the use of the word "*shall*" is one of the two decisive factors and is indicative of peremptoriness.[7] In considering these issues, the Court in *Bezuidenhout v AA Mutual Insurance Association*[8], where an appellant failed to bring an application for damages within a period of 90 days prescribed by the relevant Act, expressed as follows:

> "*There can, in my view, be little doubt that both the learned Judge of first instance and the Court a quo correctly held that the wording of sec. 24 (2) (b) (i) of the Act is peremptory in form. The use of the word "shall" and the negative form of the provision are strong indications to that effect*." (Emphasis added)

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[7] *Messenger of the Magistrate's Court*, *Durban v Pillay* 1952 (3) SA 678 (A) at 683C–D. See also: *Feinberg v Pietermaritzburg Liquor Licensing Board* 1953 4 SA 415 (A) at 419G–H; *R v Busa* 1959 3 SA 385 (A) 390C; *Maharaj v Rampersad* 1964 (4) SA 638 (A) at 643H–644B; *Harrington v Fester* 1980 4 SA 424 (C) 429F–G.

[8] 1978 (1) SA 703 (A).

61. Accordingly, the word “shall” in s 4 of the Regulations is peremptory and should be treated as such.

62. An argument which could be raised by the Applicant based on a plethora of cases, that regulation 4 is directory as there has been substantial compliance with the regulations should not be accepted for the basis that substantial compliance may amount to an evasion of the effects of a provision and in turn frustrate the achievement of that provision’s purpose. [9]

63. In considering the second issue, and it being the second decisive factor, the purpose or object of the legislation which is a dominant factor in the interpretation of statutes needs to be taken into account. Regulation 4(2)(b) provides that below the deponent's signature or mark the commissioner of oaths shall state the manner, his or her full names, his or her place of business, the date of taking the declaration and his designation and the area for which he holds his appointment, or the office held by him if he holds his *appointment ex officio*.

64. Accordingly, compliance with the above regulations provides a guarantee of acceptance in evidence of affidavits attested in accordance therewith. In order for such evidence to be accepted, the affidavit must substantially comply with the formalities set out in the regulations[10], which is not the case in this matter.

[9] *Trust Bank van Afrika Bpk v Eksteen* 1964 3 All SA 507 (A); 1964 3 SA 402 (A) 411H–412C.
[10] *S v Sebejan* 1997 (8) BCLR 1086 (T).

65. It is by now accepted that our Constitutional Court has endorsed the approach which gives effect not only to words like "*shall*" or "*may*" but to the purpose of the provision and whether it has been achieved or not.[11] In the *ACDP* case, which is on point, a political party's non-compliance with the payment of a compulsory deposit which should be paid before it could be eligible to contest elections. O'Regan J held that:-

> *"There would be little purpose served by a narrow interpretation of ss 14 and 17, concluding that, that surplus did not constitute adequate compliance with the section."*

66. She held further that the requirements could be narrowed, relaxed and in such a way as to '*facilitate participation in elections, in a manner consistent with the overall goals of our Constitution. To hold (otherwise) … promotes no legitimate purpose of the statute that I can discern.'*

67. This purpose driven approach to substantial or adequate performance was also followed in All Pay 1, by the Constitutional Court.

68. In the matter of *S v Sebejan* (supra), the Court, in dealing with the purpose of Regulation 4 of the Act correctly stated that:

[11] See *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC); and *All Pay Consolidated Investments Holding (Pty) Ltd v Chief Executive Officer, SASSA 2014* (1) SA 604 (CC).

"Contemporaneous recording of the name and identity and authority of the commissioner is an essential protection of the integrity of the document. It purports to be a solemn statement made on oath in the full knowledge of the meaning and import of an oath to the effect that the statement is known and understood by the deponent and the contents are true and correct, the signature of the commissioner and recordal of the identity of the commissioner vouches that the deponent did indeed make such a declaration, that the prescribed questions were put to the deponent, that the person asking the questions and recording the answers is a person authorised to do so. The date, time identify the document, the signature, name, status and authority ensure that enquiries as to the validity of the document can be made of a responsible person. Failure to record this information contemporaneously prejudices these safeguards."

69. This is a clear indication that the purpose of the above regulation is to safeguard and protect the integrity of an affidavit as a statement made under oath to ensure that the deponent is speaking the truth. The purpose of Regulation 4(2) is obviously to ensure that the Commissioner can be easily traced so as to confirm the authenticity of his or her signature. There is absolutely zero compliance with that purpose. This problem is not capable of being fixed in reply.

70. It is clear from the Applicant's affidavit that it cannot be determined as to whose signature was put at the foot of the affidavit. This leads to a legitimate conclusion, speculation and suspicion that the person who signed the affidavit is not a suitable commissioner of oaths or is not a person responsible and authorised to do so or even familiar with the relevant regulations.

71. Accordingly, it is our respectful submission that the deficiencies in this regard are material, incurable at this stage and render the Applicant's founding affidavit susceptible of being declared null and void for lack of conformity with the Regulations. Even if there is any discretion, on the specific facts of this case, that discretion ought properly to be exercised in favour of invalidity and nullity.

72. In the alternative, it should be unthinkable that a court could condone the total non-compliance of the Applicant but refuse to condone comparably more substantial compliance of the First Respondent even in the face of the presumed satisfaction of the Registrar – which may or may not be rebutted in Part B.

73. I now turn to deal the issue of urgency.

D2: <u>Lack of Urgency</u>

74. Even if it may be found that there is indeed an application before this Court, which is still disputed, it will now be demonstrated that it irrefutably lacks urgency and the requirements of Rule 6(12) of the Uniform Rules of Court, read with the applicable case law.

75. The application with respect fails upon each of the three most important requirements of urgency, namely that:

75.1. The matter must not be capable of resolution in due course;

75.2. The urgency must not be self-created; and

75.3. The degree of urgency must match the circumstances.

76. This particular application, given its nature, is not only capable of but it must of necessity be determined in due course, in the criminal proceedings and most importantly upon a proper enquiry and full ventilation of the disputed issues. For example, the relationship between the two certificates, the interpretation of the complaint affidavit, the supplementation of the charges and/or the summons, are all relevant issues which cannot be glossed over under the conditions of urgency. Some of these issues may only be determined after the leading of evidence and a proper weighing up of the probabilities.

77. Similarly substantive issues such as the definitional elements of the offences, the degree of participation as perpetrator, accomplice or accessory after the fact, competent verdicts, the alternative charge of defeating the ends of justice (which has surprisingly and fatally not been addressed at all in the founding affidavit), require careful analyses which is not suitable to the urgent court even on a *prima facie* basis, which will be determined, at best, at stage of section 174 of the CPA which is inevitably "*in due course*". Such an enquiry is never conducted in the urgent court. That is unheard of.

78. The primary basis upon which the Applicant alleges that he will not receive adequate redress in due course is that "*by the time the (Part B) matter is heard, in the ordinary course, the prosecution would be well underway, if not complete".* This is a deliberate distortion. Firstly the trial is unlikely to start in the foreseeable future. Secondly and in any event the Applicant himself has indicated the intention to approach the Judge President or his Deputy for a preferential and expedited hearing of Part B to which the First Respondent has expressed no aversion. The main application will therefore be heard and probably decided within the next 3 to 6 months.

79. In any event the urgency is self-created because the original basis for urgency which relates to the claim of seeking to disqualify the Applicant from eligibility to run for office at the ANC National Conference, clearly evaporated upon his candidature and successful election on or about 17 to 19 December 2022. Thereafter the remaining disputes were fully capable of resolution

either in the ordinary motion court or in the case of the related criminal proceedings. Issues like the prosecutor's title to prosecute can be raised in terms of section 106 alternatively PAJA, in the appropriate forum. Issues such as frivolity must be raised at the end of the trial. The list goes on.

80. Alternatively, the application should have been brought on any date shortly after the first appearance set down for 19 January 2023, as has happened for example, in respect of the related criminal proceedings taking place in the High Court in Pietermaritzburg. This is common cause.

81. In this regard, the only factor which differentiates this Accused from all other accused persons countrywide and/or the Accused persons in the Pietermaritzburg proceedings, is that he holds the job of President. This is clearly an insufficient and arbitrary ground to escape the clutches of section 9(1) of the Constitution. On the contrary, in the eyes of the law, the powerful must be treated equally as the less powerful. That is the essence of thar clause.

82. Lastly, the degree of urgency which has been invoked is clearly unsustainable in the given circumstances where the criminal proceedings are taking place within a matter of a few days.

83. This Honourable Court cannot conceivably consider the period when the Applicant by his own admission unwisely elected to "*ignore*" the summons

even after having taken legal advice as early as 15 December 2023 within hours of service.

84. In his founding affidavit, Applicant states that he received the criminal summons on 15 December 2022, and immediately sought legal advice from his legal representatives who wrote a letter to the Applicant requesting him to withdraw the summons. This letter gave the First Respondent until 19 December to respond.[12]

85. On 17 December 2022, the First Respondent's legal representatives responded to the letter clearly refusing to withdraw the summons.[13]

86. On 21 December 2022, the First Respondent issued the Applicant with a further summons informing him that he is required to appear in Court on 19 January 2023.[14]

87. On 27 December 2022, the First Respondent received (defective) application papers from the Applicant.[15]

88. Accordingly, the Applicant knew about the matter as early as 15 December 2022, on receipt of the first summons. He got engaged in futile correspondence intended to buy and waste time.

[12] FA, page 17, para 37. (Caselines 001 – 25).
[13] FA, page 18, para 38. (Caselines 001 – 26).
[14] FA, page 21, para 47. (Caselines 001 – 29).
[15] AA, page 21, para 44. (Caselines 001 – 29).

89. It is submitted that the application could have been brought on or about 16 to 17 December 2022, or even between 18 to 26 December 2022.

90. Even if the Applicant's version that he was either preoccupied between the period 15 to 21 December 2022, or he was waiting on the First Respondent to withdraw his summons, which is denied, he still fails to explain, explicitly what he did between 22 to 26 December 2022, before issuing the summons on 27 December 2022.

91. The Court in *Marcé Projects (Pty) Ltd and another v City of Johannesburg Metropolitan Municipality and another*[16], formulated the test for urgency as follows:

> *"Thus, the test for urgency when an audience is sought in the urgent court is two-fold:*
>
> > *whether the applicant brought the application with the requisite degree of urgency; and*
> >
> > *whether, not hearing the application on the basis of urgency will deny the applicant substantial redress in due course.*

92. It is clear from case law and under the Rules of this Court that in seeking an urgent order, the Applicant must clearly demonstrate that the application is

[16] [2020] 2 All SA 157 (GJ) at para [35].

urgent and that it warrants being heard as such. In doing so, the Applicant must justify the truncated time period placed on the respondent for the filing of the affidavits. With all respect, the applicant sat supine for a period of about 2 weeks before bringing this matter and fails to explain exactly what he did on each day as it passed by before he decided to serve his papers on 27 December 2023.

93. The day our urgent courts accommodate this type of pre-emptive strike application will be the day powerful people can buy their way out of accountability and equal treatment. Anarchy and chaos will also prevail if organs of state can adopt the attitude that they are entitled to ignore administrative decisions. The well-known *Oudekraal* principle is an antidote against such anarchy.

94. In this regard it must be remembered that the issuing of a criminal summons, whether by the private prosecutor or, as in the present case by the Registrar, is merely one of the three principal ways of securing the attendance of an accused person at the criminal proceedings. The other two methods are arrest and notice. The most dramatic method is obviously arrest hence an arrested person must be brought to court within 48 hours while a summons must be issued only 14 days before the first appearance.

95. In principle however the two methods serve the same purpose. The present Part A application is therefore similar to an arrested person approaching the urgent court to avoid his or her first appearance in 48 hours' time or, even

worse, to seek exemption from physically appearing in the criminal court, in spite of the prescriptive provisions of section 158 of the CPA. Such proceedings are totally unheard of and would amount to an extreme abuse of the court process and the urgent court.

96. Finally, it must be pointed out that all the acts which underlie the proposed interdict are presumed to be valid in our law, to the extent that they all qualify to be defined as administrative action. The acts or decisions are:-

96.1. The First Respondent's institution of the (private) prosecution;

96.2. The Second and Third Respondents issuance of the certificate(s); and

96.3. The Fourth Respondents issuance of the summons.

97. Without having rebutted the *omnia praesumuntur* presumption which will operate even in Part B, the court cannot grant urgent relief to interdict the operation of these outwardly valid decisions. The presumption is therefore a further impediment to the relief sought.

98. Ultimately, any analysis of the timeframes set out in the answering affidavit must therefore lead to the ineluctable conclusion that the application is not urgent whether viewed from the point of view of the unexplained delay

between 15 and 27 December 2022, the unreasonable timeframes afforded to the Respondents and/or the availability of an alternative platform within a few days. For example, section 168 of the CPA allows the Accused to apply in the criminal court for an adjournment of the matter pending his review application. This happens frequently in our courts, expressly if the review application is then reciprocally expedited by agreement between the parties or by the Judge President, as the case may be. The bottom line is that these are not matters suitable for the urgent motion court.

99. To add insult to the injury, the only logical basis on which this application could have been brought in the urgent court, when the first appearance is in the following week is the unreasonable expectation that the decision must be made within a few days in respect of such a complex matter with voluminous papers running into hundreds of pages. To impose such an extreme obligation on this Honourable Court, when it is completely unnecessary, deserves personal and punitive costs. This is merely an undesirable appeal for Ramaphosa exceptionalism and special treatment.

100. In summary the Applicant's case on urgency is based on the following 5 unsustainable grounds:-

100.1. The mere institution of the charges triggers urgency;

100.2. The fact that he is a sitting President creates special urgency;

100.3. The threat of the step-aside rule is a ground for urgency;

100.4. There was no undue delay or dilatoriness on his part resulting in self-created urgency; and

100.5. He cannot receive redress in due course because the trial may be completed by the time Part B is heard.

101. As none of those grounds hold any water, there is therefore no legally sustainable basis upon which this application may be heard as a matter of urgency either at all or to the degree required herein. It must accordingly be stuck off the roll for lack of urgency, with punitive costs.

D3: <u>Jurisdiction and/or Prematurity</u>

102. Although the two objections are raised separately in the papers and for the sake of convenience due to their close interrelatedness, we discuss them under one heading. To some extent they are two sides of the same coin, although conceptually separate into two.

103. In this regard it will be convenient to first put to bed Prayer 2.2 relating to the exemption from appearance in court. The civil court clearly has no jurisdiction to make an order compelling the criminal court to so exempt the

Accused person from appearance and in breach of the peremptory provisions of section 158, read with section 159 of the CPA. We then turn to the alleged jurisdiction to grant Prayer 2.1.

104. The essence of the jurisdiction point is that, even assuming that the objections of title to prosecute, improper motive, absence of jurisdictional requirements for a private prosecution, and the like, were sustainable, which is denied, they are being raised in the inappropriate forum both in respect of Part A and even Part B. The usual and appropriate forum to raise these matters is the criminal proceedings. There are no exceptional circumstances which justify any departure from the general rule that our courts are averse:-

104.1. To interfere with prosecutorial discretionary decisions;

104.2. To interfere in ongoing and incomplete proceedings; and

104.3. To determine special pleas without hearing evidence.

105. In the absence of exceptional circumstances, having been pleaded this Honourable Court lacks the jurisdiction to hear this matter. It is trite that the civil court will only interfere in extremely exceptional circumstances. Otherwise the general rule of non-interference must hold.

106. That rule was succinctly put as follows by Wallis JA in Moyo (*supra*) at paragraph [167]:-

"*As a general rule departures from the procedures laid down in the CPA and the effective removal of criminal proceedings to the civil courts should not be countenanced."*

107. This is a variation of the old debate which has been raging in our courts about the need to respect the legislative allocation of disputes arising from specialised areas of law away from the forums designed to deal with those disputes (such as the labour courts, electoral court, equality court, land claims court, criminal courts and so on) to the ordinary civil courts. In *Gcaba*[17] the Constitutional Court, per Van der Westhuizen J said:

"*Once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system."*

108. Our courts have been at pains to instil the discipline that, save in very exceptional and rare circumstances, which do not apply here, whenever the legislature, by passing a statute, has assigned particular disputes to a specialist court, those disputes must be decided in such specialist courts to which they have been legislatively allocated. The alternative is legal uncertainty and the possibility of conflicting decisions or approaches his untenable delays all of which is not in the interests of justice.

[17] *Gcaba v Minister of Safety & Security* 2010 (1) SA 238 (CC).

109. It must be pointed out that the claim of urgency and/or basis for judicial interference in this case is mainly pivoted on the alleged ulterior motives of the First Respondent in setting the law in motion for the prosecution of the Applicant. The Constitutional Court has recently pronounced itself against the competence of escaping a prosecution based on bad motives. At paragraph 68 of the *Redell* case, the apex court stated in the strongest possible terms that:

> "*bad motive in and of itself can <u>never</u> be an adequate ground for escaping arrest <u>and prosecution.</u> The criminal law can simply not countenance it."*

110. The issue could not be expressed more emphatically. The above dictum is binding on this Honourable Court. It allows for no exceptions. The principle involved were earlier articulated by the SCA in *Zuma v National Director of Public Prosecutions.*[18]

111. In this respect, on the one hand this Court lacks jurisdiction because it is not the court seized with the criminal prosecution but also the application is in any event does premature because the pleading stage has not yet been reached. On either score, the application ought accordingly to be dismissed alternatively struck off the roll either on the basis of lack of jurisdiction or prematurity (or both).

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[18] [2008] 1 All SA 234 (SCA).

112. Specifically, regarding the assessment of the grounds for prosecuting, Harms DP in the Zuma case (supra) put it beyond that this *"can only be determined once criminal proceedings have been concluded".* The proposition cannot be more clearly stated, in a binding decision of the SCA.

113. Neither can this particular Applicant seek or find refuge in the caveat or exception defined in the case of Highstead and discussed by Harms DP in Zuma (*supra*) to the effect that the general principle set out above could be deviated from if there was "*evidence that the prosecution of Mr Zuma was not intended to obtain a conviction…".*

114. Needless to say in the present case there is no such evidence. On the contrary and in terms of the Plascon-Evans rule there is ample evidence that the conviction of the Accused is the only objection. This may also be indirectly corroborated by the fact that, contrary to the Applicant's political conspiracy theory, which is the only "*evidence*" tendered to dispute the intended conviction the First Respondent has forged ahead with the prosecution even long after the elective conference relied upon. Furthermore there is concrete and irrefutable evidence that this prosecution forms a part of a bigger and earlier effort by the First Respondent to obtain justice and achievement by means of the private prosecution mechanism. That broader effort cannot, by any stretch of the imagination, be related to the ANC's elective conference or "*step aside* rule. If those issues also coincidentally apply, then so be it. The evidence of the First Respondent to this effect is

largely undisputed and must accordingly be accepted in terms of the Plascon-Evans rule. There is a big difference between speculative suspicions, conspiracy theories and "*evidence*".

115. In any event the undisputed version of the First respondent is that he had ample other less expensive prior opportunities to campaign for the non-eligibility of the Applicant to stand as ANC President if he had the wish or inclination to do so. It is common cause that the First Respondent was an influential branch delegate at the ANC conference. He never raised the matter from the floor or influenced any person to do so. There is no evidence to that effect. The proposition of ulterior motive is therefore an absurdity based on pure fantasy and speculation.

116. The less said about the Applicant's disingenuous and belated attempt to draw some artificial distinction between ulterior motive and ulterior purpose, the better. The two concepts must either be reviewed as synonymous or at most largely overlapping in the context of this case. The distinction is in any event contrived and not borne out by the papers.

117. Finally the court also lacks the jurisdiction to exempt the Applicant as an accused person from being present at the criminal proceedings scheduled for 19 January 2023. No provision of the CPA or any other law has been invoked to deviate from the peremptory provisions of section 158 of the CPA that:

"*… all criminal proceedings, in any court, shall take place in the presence of the accused."*

118. In terms of the CPA, any departure from that rule of law, must be entertained by the criminal court, in terms of section 159 for instance. This Honourable Court therefore lacks the jurisdiction to grant such an order.

119. It must also be remembered that section 7(1) itself prescribed that private prosecutions be conducted "*in any court competent to try that offence*". That court is the criminal court, whether in the lower court or the superior court, obviously depending on the nature of the offence. The present procedure of effectively removing the matter from the criminal court to the civil motion court is therefore as absurd as a litigant in the Labour Court, raising an objection to a disciplinary charge sheet or an allegedly defective CCMA certificate, in the High Court and in the urgent court at that, when the matter has already been allocated to a date and a court in the Labour Court. That scenario could never be countenanced. It must equally be rejected here.

120. The fact of the matter is that even where there is concurrent jurisdiction once a party has chosen a forum he or she must remain in that forum. In the present case the forum has already been legislatively chosen or prescribed and it is also specified in the summons. There is therefore no "*choice*" of forum which is available to the Accused. In this regard Nugent JA correctly put it as follows in *Makhanya v University of Zululand*[19]:

[19] 2010 (1) SA 62 (SCA) at para [27].

"Naturally a claim that falls within the concurrent jurisdiction of both the high court and a special court could not be brought in both courts. A litigant who did that would be confronted in one court by either a plea of lis pendens (the claim is pending in another court) or by a plea of res judicata (the claim has been disposed of by the other court). A claimant who has a claim that is capable of being considered by either of two courts that have concurrent jurisdiction must necessarily choose in which court to pursue the claim and, once having made that election, will not be able to bring the same claim before the other court."

121. Turning now to the related issue of prematurity, reference will also be made to the recent decision of Koen J in *The State v Zuma*[20], that even when correctly brought in the criminal court in terms of section 106(1)(h), the issue of the title to prosecute must be decided at the end of the trial and after hearing the relevant evidence. Surely that law which was applied against me and serially confirmed by the SCA and the Constitutional Court, must apply with equal force to the present Accused person. It is improbable to think of a legitimate reason for proceeding otherwise. When the shoe was on the First Respondent's foot Koen J recently held that even at the pleading stage a challenge to the title to prosecute would be premature. In doing so he also surprisingly held that no distinction can be made between private and public prosecutions. These findings were indirectly endorsed by the SCA and the Constitutional Court.

[20] 2022 (1) SACR 575 (KZP).

122. The issue of the prematurity has also been raised in respect of the claim that the prosecution is vexatious, frivolous and/or unfounded. These claims also invoke the objections of jurisdiction and prematurity, respectively and more particularly in that section 16(2) of the CPA provides that such issued be raised before the criminal court jurisdiction and also at the end of the trial (prematurity). In terms of that section.

> "*Where the court is of the opinion that a private prosecution was unfounded and vexatious, it shall award to the accused at his request , such costs and expenses incurred in connection with the prosecution, as it may deem meet."*

123. The applicant has instituted what has been termed in our case law as "*preliminary litigation*" that should be discouraged in criminal proceedings.[21] It offends the principle against piecemeal litigation which invariably results in delayed criminal proceedings in breach of section 35(3)(d) of the Constitution which guarantees the right to have a trial begin and conclude without unreasonable delay.

124. The applicant is an accused person in criminal proceedings set down on 19 January 2022, just seven court days apart from the hearing of the defective "*urgent*" application to interdict his criminal proceedings from "*commencing*". The proceedings have already commenced and that cannot be interdicted.

[21] *Van Der Merwe v National Director of Public Prosecutions and Others* 2011(1) SACR 94 (SCA), para 32.

The trial itself has not commenced until the pleading stage. It is at that stage that section 106(1)(h) may be invoked. Hence this application is premature.

125. "*The Criminal Procedure Act 51 of 1977 (CPA) regulates the full and entire spectrum of criminal proceedings…"*[22], <u>including the way the accused may be charged and brought to court by a private prosecutor</u>.[23]

126. Opting out of the criminal court to the civil courts cannot therefore happen willy nilly when the criminal courts are already seized with the matter.

127. Furthermore, in terms of section 12 of the CPA, in our law a private prosecution is conducted in the same way as if it was a public prosecution. The accused in a private prosecution does not have *carte blanche* freedom to hop and skip from forum to forum to exercise his rights.[24] He should, like all other accused charged by the state, attend and raise any incidental issue in the criminal court.[25] there can be no extra-legal avenues only available to those who are powerful, rich or using taxpayers' money.

128. In addition to what was said in *Moyo (supra)* as quoted above, more recently, the court in *Mokhesi and Others v S*[26] held as follows:

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[22] *Mokhesi and Others v S* 2022(2) SACR 326 (FB), para [36].
[23] Section 7 of the Criminal Procedure Act 51 of 1977.
[24] *Moyo v Minister of Justice and Constitutional Development and Others: Sonti v Minister of Justice and Correctional Services and Others* 2018 (8) BCLR 972 (SCA), para 167.
[25] *Moyo v Minister of Justice and Constitutional Development and Others: Sonti v Minister of Justice and Correctional Services and Others* 2018 (8) BCLR 972 (SCA), para 158.
[26] 2022 (2) SACR 326 (FB), at para [38].

"The court tasked with adjudicating a criminal trial is the forum which must be approached with regard to challenges or objections relating to criminal charges, during the course of the criminal trial".

129. As a jurisdictional point to the private prosecution against him, the applicant is mainly challenging the title of the prosecutor and the validity of the summons on a plethora of grounds. Of course, his challenges do not end on the validity of the summons, he goes at great length to plead the alleged defectiveness of the charges and his innocence. '*The Criminal Procedure Act as a whole applies to private prosecution...*'. Section 106 (1) (h)[27] and section 85[28] of the Criminal Procedure Act are applicable to the Applicant's concerns about the charges. Section 257 is applicable to the issue of liability as an accessory after the fact. The list goes on.

130. The bottom line is no exceptional circumstances exist for by passing the prescribed criminal court, pre-empting the pleading stage or breaking the provisions of section 158 regarding presence in court.

131. The applicant, albeit prematurely, is challenging the first respondent's tittle to prosecute him for want of jurisdictional facts contained in section 7 of the CPA. This too should be raised in the criminal proceedings at the right time.

[27] *Williams and Another v Janse Van Rensburg and Others* (2) 1989 (4) SA 680 (C), at 682I.
[28] *Mokhesi and Others v S* 2022(2) SACR 326 (FB), para 37.

132. Reinforcing what has already been said above and hopefully putting the issue beyond doubt, the Full Court in *Nundalal v Director of Public Prosecutions KZN and Others*[29], held as follows:

> *"Usually an accused would raise non-compliance with the jurisdictional requirements under s 106(1)(h) of the CPA as a plea to the prosecution's lack of title to prosecute. As jurisdictional prerequisites and matters of standing, non-compliance can be raised at any stage of the prosecution. The court may determine the issue of title in limine or after hearing evidence. However, a decision to deny a private prosecutor the right to prosecute should be taken cautiously not least because it implicates the right to access to the court under s 34 of the Constitution."* (Emphasis added)

133. The current proceedings go against this sentiment. It applies even to the Part B proceedings, let alone the Part A stage which is subject to a stricter test.

134. From the reading of the founding affidavit, it is unclear why the applicant chose the civil motion court to raise issues that are clearly suited for criminal court. It is not the way the proceedings are prosecuted that determine the forum, but the nature of the proceedings determines the forum as to whether the matter is civil or criminal. This has been clarified in *Sita and Another v Olivier, NO, and Another*[30]

[29] AR723/2014) [2015] ZAKZPHC 25 (8 May 2015) at para [54].
[30] 1976 (2) SA 442 (A), at 499 B-D

'It is in my view not the form of the procedure adopted but the subject matter of the proceedings which determines their character as either a civil or criminal matter. The fact that such proceedings, because of the form in which they are brought before the court of review, are fresh proceedings in the sense that it is in that form that they are first considered by the court of review, is in my view irrelevant to the question as to the forum in which those proceedings originated. What is relevant to that question seems to me to be the forum in which the subject matter in dispute in the subsequent proceedings first arose.

Nor in my view does the fact that the relief was sought by way of a declaratory order, interdict and mandamus make the proceedings before the Court a quo a civil matter originating in that Court.'

135. The current proceedings clearly originate from the pending criminal proceedings and should be raised in that forum which will sit in only one week after this application. Considering the above legal expositions, this court lacks jurisdiction to hear this matter. If the court has jurisdiction, the application is in any event premature. Even if the court has jurisdiction and the proceedings are not premature, there is no compelling reason or exceptionality to justify any departure from the general rule articulated in cases such as *Moyo* and the cases relied upon therein such as the *Thint* case.

136. Finally on prematurity, we raise the issue in relation to the ostensibly separate objection of the Applicant's failure to exhaust available and internal remedies in relation to the impugned decision to issue the certificate which stems directly from the decision to decline to prosecute.

D4: <u>The failure to exhaust internal remedies</u>

137. The structure of the relevant provisions of the Constitution and the National Prosecuting Act 32 of 1998 is such that the Applicant has unlawfully jumped the gun in prematurely approaching this Court without first having sought a review of the impugned decision before the NDPP.

138. Section 179(5)(d) of the Constitution provides that:

> "*(5) The National Director of Public Prosecutions*
>
> *…*
>
> *(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:*
>
> *(i) The accused person.*

(ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant."

139. The failure to invoke the above provisions cuts two ways against the Applicant. Firstly, it is a bar to the review application. Secondly it puts paid to the Applicant's complaint of not having been afforded a hearing by the DPP before it issued the certificate(s). in terms of the applicable provisions of the Constitution and legislation, the Applicant has voluntarily abandoned and bypassed his opportunity to be heard, which is guaranteed in terms of section 175(5)(d)(i) of the Constitution. Incidentally, the Applicant's failure also deprived the First Respondent, as complainant, from making representations.

140. Once again, the Applicant has not even attempted to advance any exceptional circumstances as to why the provisions of section 7(2) of PAJA must be deviated from. Accordingly there is not even a need to cite any authority and direct reliance may be placed on the statute.

141. The issue of internal remedies also leads to the next objection regarding the non-joinder of the NDPP.

142. In addition to the above and with specific reference to the purported review of the decision of the DPP to issue the certificate of non-prosecution, the

application is also premature in the sense that the Applicant's failure to exhaust internal remedies before approaching the Court. The Applicant was dutybound to approach the NDPP for an internal review of the underlying decision not to prosecute. The lame excuse that it is the mechanical issuance of the certificate which is being renewed and not the underlying discretionary decision not to prosecute or that those two things can be artificially separated, simply needs to be stated to be rejected.

143. The application ought accordingly and properly to be dismissed, in limine, on the basis of prematurity without even reaching the merits. Alternatively, it stands to be dismissed, on the merits for failure to meet the requirements for interim interdicts such as the one sought in Part A.

D5: <u>Non-joinder/Misjoinder</u>

144. Under this heading, which is also based on the structure of the Constitution and the NPA Act, it is respectfully submitted that the NPP has a separate and direct interest in this matter and ought accordingly and properly t have been joined as an additional respondent.

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145. Firstly, in terms of section 179(5)(d) and as already explained above, the NDPP is the ultimate decision maker.

146. Secondly, and in relation to the principal offence based on section 41(6) of the NPA Act, it is the NDPP who must give the permission for the release of prosecutorial information.

147. Thirdly, the NDPP has reluctantly involved herself in the matter by authorising the issuance of the false statement by her office, to the effect that the Accused person was not mentioned in the docket. To her knowledge, that false statements still stands to date.

148. Finally, and given the nature of the matter and the persons involved including the former and current Heads of State as well as the lead prosecutor in the trial before Koen J in the Pietermaritzburg High Court, Mr Downer (who was assigned by the NDPP) it is logically and highly unlikely that any of the major decisions in this matter, including the provision of State Attorney assistance to Mr Downer, were taken without the direct involvement of the NDPP.

149. In all the major cases of this nature, the NDPP is normally the first respondent, for good reasons. In terms of the Constitution she is the ultimate decision maker.

150. In the circumstances, it is respectfully submitted that this Honourable Court ought accordingly to uphold the objection non-joinder and order the joinder of the NDPP, in the interests of justice. On this basis alone, the matter ought to be struck off the urgent roll with punitive costs.

151. It is not clear why the NPA has been joined in these proceedings. This amounts to misjoinder more particularly in view of the contradictory statements that no relief is sought against the NPA while prayers are also directed to it.

152. This matter also relates to the belated but very interesting affidavit filed on behalf of the Second and Third Respondents and deposed to by the author of the *nolle prosequi* certificates. This affidavit is significant for what it does not say than what it says. It fails to deal with the circumstances under which the certificates were granted and their validity which will be raised in Part B or in the criminal proceedings. More significantly it fails to repeat or justify under oath the demonstrably false media statement which was issued to the public. Despite the strong sworn objections and evidence, to date that statement has never been retracted. That is a complete shame, to say the least. This Honourable Court will be called upon to express itself strong on this issue which poses a threat to our democracy and the ideal of prosecutorial independence.

153. The said affidavit correctly also identifies the legally permissible scope for the involvement of the NPA in private prosecutions in terms of sections 7 and 12 of the CPA. None of this includes the issuing of media statements expressing false facts and siding with persons who are suspected or accused of criminality. It should have been obvious that it is now the duty of the appropriate court to interpret the certificates and the police affidavit, not the NPA in the media space. Such conduct is wholly inappropriate and only

aggravated by the failure to deal with the issue under oath and when the failure to deal with the issue under oath and when the opportunity is now available to assist the Court. More on this will be dealt with Part B and before the Legal Practice Council.

154. This then takes us to the final issue of locus standi and/or Rule 7.

155. The silence of the NPA on this scandal is, to say the least, deafening.

D6: *Locus Standi* / Rule 7

156. In this connection, we respectfully submit that it is common cause that the Accused person is Mr Cyril Matamela Ramaphosa in person. That is how he has been charged and arraigned. There is no question of various criminal liability, even though the alleged crimes were admittedly committed as President. Criminal liability cannot be transferred in this manner. This is no technical objection. It goes to the essence of section 38 of the Constitution in relation to standing.

157. It was for that reason that the original summons was served at his home and reference was made therein to his personal attorneys. In this regard there is no difference between this matter and the sealing of CR 17 documents (in respect of which this Court may take judicial notice). In that case, also known as **BOSASA** case, Mr Ramaphosa protested that he should be cited in

person, the same should apply with even more force, in respect of criminal proceedings in which he is Accused of pursuing his own personal, blatant and malicious liability towards the victim of the crime.

158. In any event and even if it could be established that the President of the country, qua President, had a separate or additional interest in the litigation the correct procedure would have been to apply for his joinder as such, not by effective unilateral substitution of the Accused for the President, without any authorisation by any court. In this way, the same objection may be raised as the non-joinder of the Accused person who clearly has a direct and substantial interest in the matter. Either way, the matter ought to be dismissed, alternatively struck of the roll, with punitive costs on this ground. At best for the Applicant he ought to have brought the application both in his personal and official capacities. As matters currently stand, the Accused is not before the court.

159. Such deliberate conduct also deserves and adverse, personal and punitive order of costs. This issue was sufficiently canvassed in the pre-application correspondence.

160. Given that the President is here to assert own interest standing, in the absence of any direct injury, he must fail the standing test even on the generous standards confirmed in the leading case of *Giant Concerts.*[31]

[31] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 251 (CC).

161. To the extent that the President has no official role to play in this matter, the authority of the State Attorney as his attorney has also been challenged in terms of Rule 7.

162. In all the circumstances and on the basis of any one or more or all of the preliminary objections raised above, the Part A application ought properly to be dismissed alternatively struck off the roll, with punitive costs.

E: THE MERITS

163. In the unlikely event of all the points in limine not being upheld, then we now turn to dealing with the merits of the Part A application, which is for the following prayers, that:

163.1. "*The respondents are interdicted from taking any further steps to give effect to the nolle prosequi certificate of 21 November 2022 ("the certificate") and/or the summonses issued by the Registrar on 15 and 21 December 2022 ("the summons") or to pursue the private prosecution under case number: 059772/202 (the private prosecution) against the applicant in any way";* and

163.2. "*The applicant is excused from appearing before this Curt on 19 January 2023 or on any other date pursuant to the certificate and/or the summon*".

164. This Honourable Court will be called upon an implored to analyse and dissect the relief sought with a fine toothcomb so as to find, as it must, that there is no case for Part A on the merits.

165. It needs to be stated clearly and upfront that the interdicts sought are illogical and incompetent in that neither the First Respondent nor any other Respondent is planning to take "*any further steps*" to give effect to the *nolle prosequi* certificate of 21 November 2022 and/or the summons. Those steps have already been taken. The real relief sought therefore is against the pursuance of the private prosecution. A court does not easily interdict the exercise of statutory and constitutional rights in the proposed manner; unless the OUTA test has been satisfied.

166. It is also very instructive that the Applicant has specifically refrained from attaching the 6 June 2022 certificate. This is a fatal error in that, prior to the effectiveness of the proposed section 86 amendment, the original summons stands as a valid basis for the *prima facie* validity of the summons issued on 15 December 2022. It must be remembered that, although that certificate admittedly relates to Mr Downer, it has always been the First Respondent's case that it also covers the other suspects mentioned and/or foreshadowed

in the certificate in the first place. This is of course a matter of interpretation which will be more fully canvassed in the main review application.

167. Furthermore this Court cannot "*excuse*" the Applicant from appearing before a differently constituted and defined criminal court of equal status when section 158 of the CPA prescribed the presence of the Accused.

168. That, with respect, should be the end of the matter on the merits and if we even get there, which should not be the case.

169. Therefore, and in the absence of any evidence to the contrary, the June certificate is presumed to be valid. More importantly there is no pending Part B application or prayer to set that (first) certificate aside.

170. Accordingly, and even if the 21 November 2022 certificate could be set aside, in Part B, the Applicant must still appear in court on 19 January 2023, on the basis of the original summons which has not been seriously challenged in the present papers, despite threats to do so contained in the letter of 16 December 2022. Any earlier indications of the intention to do must accordingly have been abandoned by election since the missing information was provided on 21 December 2022.

171. The merits of the application must therefore be approached on the basis that the 6 June certificate is not only valid but it is unchallenged. To the extent that the original 15 December summons is anchored on that certificate, the

appearance date of 19 January 2023 stands. As painstakingly explained in the answering affidavit, strictly speaking, at this stage, there are no "*two summonses"* but one 15 December summons which will be supplemented or amended in due course in line with the 21 December 2022 new documents which were erroneously omitted. Whether or not that amendment will be granted in the criminal proceedings, there will always be one summons namely, the 15 December 2022 summons in its original form or as amended on 21 December 2022 or the date of the section 86 order. Either way, the Applicant must appear in court on 19 January 2023.

172. The discussion above provides two separate useful shortcuts which will lead to the inevitable dismissal of the Part A application for an interim interdict. However and if the Court is still nevertheless inclined to deal with the matter any further, we will now address the requirements of the interim interdict(s) sought in Part A.

173. That discussion will, ironically and immediately, bring about a third shortcut namely the Applicant's failure to address, let alone fulfil, the OUTA test which is multiply and indisputably applicable in this matter in respect of the three or any impugned administrative decisions identified above.

174. The belated attempts to deal with these obligatory requirements in reply must be summarily rejected. They ought properly to have been raised in the founding papers so as to give the Respondents a fair opportunity to deal with

them. The Part A application must be dismissed on the merits, on this basis alone.

175. In any event and even based on the ordinary *Setlogelo* test or the long road, the application falls short.

F: THE REQUIREMENTS OF AN INTERIM INTERDICT

176. An interdict is, by definition an extraordinary remedy which can only be given in respect of future invasions of right and when all the legal requirements have been satisfied, even then the court retains the discretion to refuse to grant an (interim) interdict.

177. We now discuss the four well-known requirements in turn. Thereafter and for what it still worth, we demonstrate that the extra (unpleaded) OUTA[32] test requirements have also in any event not been satisfied. The OUTA test was authoritatively confirmed in *EFF v Gordhan*[33]. It is breath-taking that the Applicant has dismissably failed to address its requirements even though it applied thrice-over in the present application. The application must fail on this ground alone.

[32] *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC).
[33] *Economic Freedom Fighters v Gordhan 2020 (6) SA 325 (CC) at para [42].*

F1*:* ***Prima facie* right**

178. It is not clear exactly what *prima facie* right(s) the Applicant asserts in support of the interdictory relief sought and in what capacity such rights may be asserted.

179. As President he has no right not to be prosecuted. He has no right not to appear in court when summoned to do so. He has not automatic right to a postponement.

180. As an individual, although he has not applied as such, he also has no rights other than the rights accorded to all accused persons in terms of section 35(3) of the Constitution, none of which are threatened in any way in this matter.

181. The highwater mark of the rights seemingly invoked by the President come from his assertion at paragraph 14 of the founding affidavit that:

> "*A criminal prosecution, private of public, has consequences potentially invasive and destructive of an accused person's substantive rights to, amongst other things, personal freedom and security and the rights to a fair trial, of which the right to be informed of one's accuser and the nature of the accusations are paramount."*

182. We of course agree with this general statement. However, we submit that it has no application in the present matter because:-

182.1. The Applicant herein litigate in his official capacity only and not as President;

182.2. The rights of the present Applicant are therefore not as stake; and

182.3. The Accused person has in fact been sufficiently informed of his accuser and the nature of the accusation in the indictment, Statement of Substantial Facts, the witness list and the relevant annexures.

183. To the extent that he invokes the wider public interest, he has not right to litigate, as an accused person, purportedly on behalf of the public without invoking section 38(d) of the Constitution. It is the public which has a right to be protected from his alleged criminal conduct. Confidence in the country will only be adversely affected if he receives preferential treatment which he seeks from this Court.

184. Simply put, the President, like every citizen who faces private prosecution, has the right to have his dispute decided in a fair and public court, and have the equal opportunity to defend his case in a similar fashion.

185. The application must fall for want of discernible *prima facie right* which is exercisable in this Court and no other alternative forum.

F2: <u>Irreparable Harm</u>

186. Similarly, there is no irreparable harm which the Applicant may reasonably apprehend if the interdict is not granted. The work of the state will not suffer simply because the President is being held accountable for his actions and/or failure to act. The appearance on 19 January 2023 is unlikely to last for more than an hour or two at worst. First appearances almost invariably never last for longer than that. No harm can result therefrom. If it does it will certainly not be irreparable . He can easily make up the loot hour or two.

187. Whether or not the criminal charges are "*unfounded"* is beyond the powers of this Honourable Court. In any event, if that turns out to be true then the President will be acquitted and vindicated and any harm, he may suffer will be repaired by a suitable costs order in terms of section 16(2) of the CPA or possible damages claim, if he suffers harm at all, which is doubtful, it will be repaired at his instance. This is the case with all accused persons.

188. If of course, he is convicted then there will have been no undue harm to him.

189. To establish irreparable harm the applicant is tasked with to show on a balance of probabilities that there are grounds for a reasonable apprehension that his rights will be detrimentally affected.

190. In the matter of *Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another*[34], Mr Zuma alleged that the timing of the service of the indictment was in relation to the African National Congress' (ANC) national elective conference to be held from 16-20 December 2007 at Polokwane. He was (then) a candidate to be elected President of the ANC, with the ultimate precursor to predictably being elected the President of South Africa. He similarly protested that the charges were occasioned by the ulterior motive to prevent his election as ANC President.

191. In his papers the Applicant also contends that:-

> *"The earlier summons was served on me a day before the ANC 55th National Conference was due. It is common knowledge that I will be standing for re-election as President of the ANC. It is also commonly known that the step aside rule of the ANC would preclude any member of the ANC from contesting the elections while a criminal charge was pending against them in a court of law."*[35]

[34] *Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another* 2018 (1) SA 200 (SCA) at para [33].
[35] FA at para 88.

192. In *National Director of Public Prosecutions v Zuma*[36] the court dealt at length with the non-contentious principle that the NPA must not be led by political considerations and that ministerial responsibility over the NPA does not imply a right to interfere with a decision to prosecute. It however and as already mentioned above, emphatically pronounced that an improper purpose is irrelevant in the assessment of the lawfulness of a prosecution.

193. Finally and further, the First Respondent has amply demonstrated on the answering affidavit that no public harm will follow and also there are many local and international precedent for charging siting or former political leaders without the falling of the skies. The alleged public harm is therefore speculative and non-existent. On the contrary such public harm will certainly materialise if there is any sense that the President is unfairly favoured and treated preferentially.

194. In the premise, the Applicant has dismally failed to establish reasonable apprehension of irreparable harm.

195. It was correctly held in *Botha v Els and others*[37] that an accused person in private prosecution is clearly protected by the broad fair trial requirements of section 35(3). No further protection is therefore required in the form of any interim interdict,

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[36] 2009 (2) SA 277 (SCA) at paras [37] and [38].
[37] 2010 (6) SA 622 (CC) at para 29. See also *Nundalal* at [60].

F3: <u>Alternative remedy</u>

196. It has been remarked that the satisfaction this ground is totally unattainable for this Applicant on the present facts and legal position. The entire case for an interim interdict must fall on this ground. It features equally in both the original *Setlogelo* and OUTA tests.

197. Firstly, the submissions made by him at paragraph 105 to 111 of the founding affidavit are indecipherable, make no sense and certainty do not address the conclusion of the alleged absence of any alternative remedies. The onus is not discharged.

198. Furthermore, and in any event, it has been amply demonstrated that there is a countless plethora of adequate and alternative remedies provided in our law to aid a person in the position of the Applicant, starting with all the remedies postulated in the sections dealing with jurisdiction and/or prematurity above.

199. The related submissions repeatedly made above in respect of jurisdiction and especially prematurity must be read as if incorporated herein, *mutatis mutandis.*

F4: <u>Balance of convenience</u>

200. The test for the balance of convenience requirement is whether the prejudice which the Applicant will suffer if the relief is refused, and he becomes successful in Part B will outweighs the prejudice which the First Respondent (and the public interest) will suffer if the relief is denied and the Part B application is subsequently dismissed.

201. Properly understood against the correct test, we respectfully submit that the balance of convenience in the present matter clearly favours the dismissal of the interdict, more particularly in that:-

201.1. Granting the interim interdict under these circumstances will inevitably lead to inordinate delays in the prosecution which is prejudicial not only to the Accused but also the victim of his alleged crime, and the public interest. As such the SCA put it in *NDPP v King*[38]

> *"The fair trial right does not mean a predilection for technical niceties and ingenious legal stratagems, or to encourage preliminary litigation".*

[38] 2010 (2) SACR 146 (SCA) at para [5].

201.2. By the time Part B is dismissed, the *nolle prosequi* certificate will long have expired and lapsed;

201.3. Even an expedited hearing of Part B will never take place before the 21 February 2023 expiry date;

201.4. Witnesses' memories will fade prejudicing the prosecution;

201.5. The interdict is notably sought "*pending the final determination of Part B"* which may well take quite a number of years to materialise;

201.6. The private prosecutor will also be deprived of the opportunity to consolidate the two envisaged trials in terms of section 111 of the CPA when allows for the possible consolidation of related trials, which would save a lot of resources on all sides as well as scarce judicial resources.

202. By way of comparison the Applicant will suffer absolutely no prejudice other than the minor inconvenience of attending court, probably for less than an hour while exercising his constitutional right to defend himself. This pales into insignificance compared to the real multiple forms of prejudice set out in the preceding paragraph.

203. In addition to the above, this Court is called upon to also consider the adverse impact of the separation of powers harm which will surely result if the interdict is granted, given the related:

203.1. Interference with the First Respondent's prosecutorial discretion;

203.2. Interference with the decisions of the NPA not to prosecute; and

203.3. Interreference with the authority of the Registrar and the related discretionary powers exercised in issuing the impugned summons.

204. Nothing can justify such breach of the general duty to defer to the abovementioned decision-makers.

F5: <u>Other requirements of the OUTA test not met</u>

205. In addition to the above it is respectfully submitted that no exceptional circumstances have been pleaded nor do any exist in this matter. At the risk of repetition, the mere failure to arrest these by the onus-bearing party is fatal to the Part A application, simply on the basis of the resultant failure to meet the onus;

206. The prospects of success in Part B are particularly dismissal, especially given the common cause facts, the failure to exhaust internal remedies, the

jurisdictional hurdles and the pronounced failure to set aside the June 2022 certificate which will therefore remain valid.

207. Another remarkable feature of this case is the inexplicable failure of the Applicant to even deal with the alternative charge of defeating the ends of justice. It must therefore follow that, even if the main charge were to be somehow defeated, the likelihood of a conviction on the alternative remained undisputed.

208. In all the circumstances it can hardly be argued that this is one of "*the clearest of cases*" for granting an interim interdict against the exercise of statutory and constitutional powers.

G: PROSPECTS OF SUCCESS

209. Regarding the prospects of success and to the extent that additional reliance has now belatedly been placed on the new ground of alleged non-payment of security, such is non-fatal because firstly and as a matter of law, the provision relied upon is *prima facie* inapplicable to the present case and/or in any event there is, in the peculiar facts of this matter, substantial compliance with this requirement. Thirdly it is rectifiable and may well be remitted to the decision maker. In any event this type of collateral challenge flies in the face of the presumption of lawfulness and validity.

210. On a proper construction of section 9 of the CPA it applied to summons which have been issued by the private prosecutor and not by the Registrar. If necessary, further legal argument will be advanced in respect of this legal defence which is purely based on statutory interpretation. Reference will also be made to the provisions of Rule 54 and the CPA.

211. In any event and alternatively, in the present circumstances and given the efforts made by the attorneys, the directions of the Registrar and the instruction to demarcate the funds, there was substantial compliance.

212. Further alternatively, the alleged defect is not incurably material and is of the order which may be remedied by rectification more particularly in view of the technical nature of the objection and the absence of any conceivable prejudice to the Applicant/Accused. Binding precedent supports this approach and must be preferred over non-binding precedent such as *Nundalal,* which is in any event distinguishable on the facts.

213. In any event, the case of *Nundalal* is arguably authority for the proposition that, depending on the specific facts, even on the peremptory requirements of the CPA, may be remedied subsequent to the issuing of the summons by fixing the shortcomings, especially where there is no immediate prejudice from the accused.[39]

[39] At paras [34] and [35].

214. On either basis, and depending on the exercise of the Part B court's discretion, the alleged non-compliance does not lead to the *prima facie* invalidity of the summons.

215. The other four grounds of review relied upon are all non-starters or targeted at the wrong non-essential documents such as the 21 November certificate or at substantive defences whose merits cannot successfully be determined in the urgent court.

216. The application must accordingly fail for want of the satisfaction of the legal requirements for interdicts whether on the Setlogelo or the OUTA tests.

H: DISCRETION

217. Even in the unlikely event of the requirements having been met, it is respectfully submitted that given the values of equality, justice and accountability and the rule of law as raised in various contexts above, the Court ought properly to exercise its discretion against granting the interim interdict sought in the particular case.

218. The principal basis upon which discretion ought to be exercised against granting the relief is that it is generally undesirable to allow the preliminary litigation envisaged in Part B and the issues raised therein should preferable be raised in the criminal proceedings.

219. Secondly, the real relief sought by the Applicant namely exemption from appearance at the criminal proceedings is legally incompetent.

220. Thirdly the entire application is an excuse in futility in that, even if the summons in case number 0597772/2022 were, for arguments' sake to be invalidated or even withdrawn, the private prosecution itself will be instituted on a fresh summons and no effective remedy will eventuate. Rectification would therefore be the best outcome since none of the alleged defects are incurable.

221. Fourthly, the risk of preferential treatment, real or perceived, ought properly to be avoided in the public interest. No such unprecedented relief which would otherwise not be granted to any other criminal suspect should be granted to the most powerful person in the Republic.

222. Fifthly and given the fact that the criminal proceedings in question are literally around the corner, no real prejudice can be suffered by the Accused person if the general rules against preliminary litigation and removal of criminal proceedings to the civil courts are adhered to.

I: SUBSTANTIVE ISSUES OF CRIMINAL LAW RAISED

223. For the sake of completion we return to the definitional issues of criminal law which have been raised by the Applicant. It is not strictly necessary to do so

because these are issues which will clearly feature in the criminal trial and must accordingly be raised there. They have also been dealt with in the Introduction section at the beginning of these submissions. However, it may be important merely to demonstrate that there is indeed a *prima facie* case and probable case for the prosecution which is also very likely to result in a conviction. It is well established that:-

> ***"An accessory after the fact is not a participant, for he neither causes the crime nor furthers it. He comes into the picture only after the crime has been completed, and then helps a perpetrator or an accomplice to escape justice."***[40] (Emphasis added)

224. From the onset, with respect, we wish to state that this is a discussion to be entertained in detail by the criminal court as the Court to decide whether the Applicant is guilty of the offence as defined. Having said that, we scan through what is necessary and adequate for these proceedings to avoid overburdening this Court.

225. In trying to avoid liability, the Applicant is blowing hot and cold and seems to be confused with regards to what an accessory after the fact is. On the one hand, he states correctly that "*an accessory after the fact is a person who knowingly renders assistance after the completion of the crime".*[41] He further correctly states that according to his understanding, the essential elements

[40] CR Snyman *Criminal Law* (Lexis Nexis, 6th Ed) page 271.
[41] FA, page 29, para 67. (Caselines 001 – 37).

of the offence are intention and knowledge of unlawfulness.[42] On the other hand, he states that a person cannot be an accessory after the fact to their own crime.[43] This means that, according to the Applicant's understanding, the First Respondent brings proceedings against him as a person who committed the principal crime.

226. Snyman, correctly explains an accessory after the fact as a person protecting either the perpetrator/co-perpetrator or the accomplice. A person qualifies as an accessory after the fact only if his act takes place after the crime in respect of which he is the accessory after the fact has already been completed.[44]

227. In the matter of *R v Sikepe*[45]*,* it was stated:

> "*But where a man is found guilty of being an accessory after the fact to the crime charged this means that he has behaved in a certain way in regard to another wrongdoer and the latter's crime. It follows that a man may himself have taken part in the perpetration of a crime and also have been an accessory after the fact in assisting his partner in crime to escape the due consequence of his act."* (Emphasis added)

[42] FA, page 30, para 69. (Caselines 001 – 38).
[43] FA, page 30, para 68. (Caselines 001 – 38).
[44] At 271.
[45] 1946 AD 745 757.

228. It is clear from the definitions above that a person qualifies to be an accessory after the fact only if the crime has been commissioned and completed. When he or she comes into the picture his involvement is only to assist the person(s) who commissioned the principal crime escape liability. With respect, this is exactly what the Applicant did and is being charged for.

229. Nowhere in the papers does it state that the Applicant commissioned the principal crime of leaking the First Respondent's medical condition, but that he assisted in the furtherance of that crime, as defined by the NPA Act, when assisting the officials of the NPA to escape the liability of committing a crime.[46]

230. In his defence, the Applicant goes further to state that the mere failure to act does not constitute assisting a person to evade capture for the commission of a crime. That it constitutes a crime where a positive duty rests on that person in order to act.[47] With respect, this assertion by the Applicant is absurd and nonsensical as it is exactly what the First Respondent asserts the Applicant did.[48]

231. The mere fact that he failed to act and enabled the relevant officials of the NPA to evade liability, constitutes a conduct by omission which is what led to him acquiring criminal liability.[49]

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[46] *R v Saraveja* 1947 3 All SA 375 (SR); 1947 3 SA 209 (SR) 211.
[47] FA, page 30, para 69. (Caselines 001 – 38).
[48] FA, page 30, para 68. (Caselines 001 – 38).
[49] FA, page 15, para 30.8. (Caselines 001 – 23).

232. The Applicant does not deny that Mr Downer SC received the First Respondent's confidential medical condition information. He (Mr Downer) thereafter authorised Ms Maughan to disclose the information without obtaining a written authorisation from the NDPP.

233. He also does not dispute that the actions by the said officials amount to a crime in terms of section 41 (6) of the NPA Act. Also, that the Applicant's legal representatives wrote to him requesting that he take steps to set up an inquiry or investigation into the conduct or misconduct of the NPA officials. That he failed to take steps to institute or facilitate the institution of an inquiry against the NPA officials.[50]

234. The writing is obviously on the wall. It is not clear, why the Applicant disputes that he is liable as an accessory after the fact. The Applicant had a legal duty to ensure that the relevant NPA officials do not escape criminal liability by their conduct or misconduct. It is only the through the Applicant establishing an inquiry or facilitating an investigation that these officials would have faced liability for their actions. This means that the Applicant had a duty to act positively by instituting the inquiry and this, he omitted to do.

235. In the Appellant Division matter of *Williams and others v S*[51] the Appellants, who were members of the South African Police at the time of the commission of the offences, appealed against convictions for being accessories after the fact. The three appellants and two other accused were charged in the Natal

[50] FA, pages 13 – 15, (Caselines 001 – 21 to 001 - 23), paras 30 – 30.8 ((Caselines 001 – 38 to 001 - 23).
[51] [1998] JOL 2669 (A).

Provincial Division with eleven offences, including one count of arson and four counts of murder. They pleaded not guilty to all charges. They were convicted on certain counts and were sentenced to imprisonment. They appealed against their convictions only on the counts on which they were found guilty as accessories after the fact. The question to be considered was whether a policeman who had knowledge of the commission of the offence and the identity of the perpetrator would ordinarily be liable as an accessory after the fact if he deliberately failed to report the crime with the intention of assisting the perpetrator to evade justice?

236. Melunsky AJA as stated as follows with regards to the liability of the accessory after the fact:

> *"… it is desirable to deal in more detail with this aspect because this Court has not, as far as I am aware, decided that an accessory 's liability can properly be based upon an omission in the circumstances which I have mentioned. It should be emphasised that the views expressed in this regard are confined to the criminal responsibility of an accessory after the fact and not to the wider question of whether, or under what circumstances, a person may incur criminal liability for failing to avert harm, a question that was raised but left open in this Court in S v A en 'n ander 1993 (1) SACR 600 (A) at 606e–607a. In the circumstances it is not necessary to consider all of the problems relating to criminal responsibility for omissions that have arisen in other jurisdictions. Some of these have been discussed by George*

Fletcher Rethinking Criminal Law at 585–634 and Criminal Omissions: Some Perspectives, 24 American Journal of Comparative Law 703 (see also Andrew Ashworth The Scope of Criminal Liability for Omissions (1989) 105 LQR 424 and Glanville Williams Criminal Omissions (1991) 107 LQR 86).

Reverting then to the question of whether criminal liability may arise out of the failure to report a crime, it would seem to be clear that such liability cannot be present in the absence of a duty to act. But where the duty is placed upon a person in terms which suggest active conduct the further question that has to be considered is whether liability should be imposed for failing to act (see Glanville Williams Textbook of Criminal Law 2ed 149). This depends on considerations of policy or, as it is called, the legal convictions of the community. There is no doubt that a police officer has a duty to report a crime….

What remains for decision is whether the failure to carry out the duty results in criminal responsibility if the other requirements of accessorial liability are present. I have no difficulty in holding that it does. Any other answer would give rise to surprise and even indignation. More than forty years ago the Privy Council held that a headman in Basutoland, who failed to arrest murderers on his arrival on the scene of the murder or to report the murder, had assisted the murderers by giving them an opportunity to escape. He was therefore

liable as an accessory after the fact to the murder (see Majara v The Queen [1954] AC 235 (PC))".

237. Having said that, it is common cause and will be proven, during the criminal proceedings that the Applicant has fulfilled the requirements to qualify as an accessory after the fact. As already stated somewhere above, this discussion is not for this Court to entertain and will be dealt with extensively in the relevant forum.

238. All we seek and need to demonstrate at this stage is that there is a *prima facie* case and that the prosecution has been instituted in good faith. That much is well-established on the common-cause facts. This section also seems to reinforce the argument on the absence of the prospects of success.

J: <u>COSTS AND CONCLUSION</u>

239. The Applicant seeks punitive costs against the First Respondent and in the alternative costs *de bonis propiis* against his unidentified legal representatives without pointing to any conduct or misconduct justifying such. The suggestion must accordingly be rejected out of hand.

240. On the other side of the coin, the unacceptable conduct of the Applicant in even daring to bring this application in the circumstances described above

while initially electing to ignore the summons and when the First Respondent took the trouble to warn against such, added to the waste of the financial and judicial resources of the public, the parties and the Court, respectively, among other things, must surely qualify this matter as a good candidate to mulct the Applicant with a personal and punitive costs. Such conduct is plainly grossly unreasonable and in bad faith.

241. In the totality of the circumstances the First Respondent prays and we respectfully submit that it may please the Court to grant an order:-

241.1. Dismissing the part A application;

241.2. Alternatively, striking the matter off the roll; and

241.3. Ordering the Applicant to pay the costs of opposition personally and on the attorney-and-client scale.

DC. MPOFU SC

L. MOELA

S. MAMOEPA

M. MAVHUNGU

K. PAMA-SIHUNU

Counsel for the First Respondent

Chambers

SANDTON

11 January 2023

LIST OF AUTHORITIES

A. STATUTE

1. *Criminal Procedure Act* 51 of 1977.

2. *Constitution of the Republic of South Africa* 108 of 1996.

3. *National Prosecuting Act* 32 of 1998

4. Promotion of Administrative Justice Act 3 of 2000.

B. REGULATIONS

Regulations Governing the Administering of an Oath or Affirmation.

C. BOOKS

CR Snyman *Criminal Law* (Lexis Nexis, 6th Ed)

D. CASE LAW

1. *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC).

2. *All Pay Consolidated Investments Holding (Pty) Ltd v Chief Executive Officer, SASSA 2014* (1) SA 604 (CC).

3. *Bezuidenhout v AA Mutual Insurance Association* (1) SA 703 (A).

4. *Bothma v Els and others* 2010 (6) SA 622 (CC).

5. *Economic Freedom Fighters v Gordhan* 2020 (6) SA 325 (CC).

6. *Feinberg v Pietermaritzburg Liquor Licensing Board* 1953 4 All SA 288 (A).

7. *Gcaba v Minister of Safety & Security* 2010 (1) SA 238 (CC).

8. *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 251 (CC).

9. *Harrington v Fester* 1980 4 All SA 744 (C).

10. *Moyo v Minister of Justice and Constitutional Development and Others; Sonti v Minister of Justice and Correctional Services and Others* 2018 (8) BCLR 972 (SCA).

11. *Schierhout v Minister of Justice* 1926 AD 99.

12. *Messenger of the Magistrate's Court*, *Durban v Pillay* 1952 3 All SA 449 (A).

13. *R v Busa* 1959 3 All SA 406 (A).

14. *Maharaj and Others v Rampersad 1964 (4) SA 638 (A).*

15. *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA).

16. *Marcé Projects (Pty) Ltd and another v City of Johannesburg Metropolitan Municipality and another* [2020] 2 All SA 157 (GJ).

17. *Mokhesi and Others v S* 2022 (2) SACR 326 (FB).

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

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

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

21. *R v Saraveja* 1947 3 All SA 375 (SR); 1947 3 SA 209 (SR).

22. *R v Sikepe* 1946 AD 745 757.

23. *S v Sebejan* 1997 (8) BCLR 1086 (T).

24. *Sita and Another v Olivier N.O and Another* 1976 (2) SA 442 (A).

25. *The State v Zuma* 2022 (1) SACR 575 (KZP).

26. *Trust Bank van Afrika Bpk v Eksteen* 1964 3 All SA 507 (A).

27. *Van Der Merwe v National Director of Public Prosecutions and Others* 2011(1) SACR 94 (SCA).

28. *Williams and Another v Janse Van Rensburg and Others* (2) 1989 (4) SA 680 (C).

29. *Williams and Others v S* [1998] JOL 2669 (A).

30. *Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another* 2018 (1) SA 200 (SCA).

31. *Zuma v National Director of Public Prosecutions* [2008] 1 All SA 234 (SCA).