

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 0027676/2022

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO

DATE
5 JULY 2023

SIGNATURE

In the matter between:

**PRESIDENT OF THE REPUBLIC OF SOUTH
AFRICA**

Applicant

And

JACOB GEDLEYIHLEKISA ZUMA

First Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS,

Second Respondent

KWA-ZULU NATAL

NATIONAL PROSECUTING AUTHORITY

Third Respondent

THE REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA;

GAUTENG LOCAL DIVISION, JOHANNESBURG

Fourth Respondent

BLACKHOUSE KOLLECTIVE FOUNDATION NPC

Amicus Curiae

JUDGMENT

THE COURT:

INTRODUCTION

[1] The main question that arises for determination in this application is whether an accused person may only challenge a prosecutor's title to prosecute by way of a plea in terms of s106(1)(h) of the Criminal Procedure Act ("CPA").¹ As judgments relied on by the parties demonstrate, the question is not novel. Accused persons have frequently mounted frontal challenges to their prosecution for various reasons. Some have done so in the Criminal Court where they are charged while others have deviated from the Criminal Court and approached the Civil Court for a civil remedy. The latter is the procedure the applicant, the President of the Republic of South Africa (the President"), in these proceedings resorted to. This Court ought to determine whether such resort is competent on the present facts and under the prevailing circumstances. The President contends that it is. The first respondent, Jacob Gedleyihlekisa Zuma ("Mr Zuma") contends that it is not.

[2] There are other ancillary issues this Court ought to determine which are dealt with in this judgment.

[3] The application originates from the issuing of summons on 15 and 21 December 2022, by Mr Zuma against Cyril Matamela Ramaphosa ("Mr Ramaphosa") out of this Court, instituting a private prosecution.² To each summons, Mr Zuma attached a *nolle prosequi* certificate dated 6 June 2022 and 21 November 2022 respectively. Mr Zuma charges Mr Ramaphosa as an accessory after the fact to criminal conduct, alternatively for defeating the course of justice. He called on Mr Ramaphosa to appear before this Court at 9h30 on 19 January 2023.

¹ 51 of 1977.

² The two summons were issued under the same case number being 2022-059772.

[4] Mr Zuma is the immediate former President of the Republic of South Africa. Mr Ramaphosa is the incumbent President of the Republic of South Africa. The allegations that ground the criminal offence allegedly committed by Mr Ramaphosa arise from the performance of his functions as the President. Mr Zuma issued summons against Mr Ramaphosa in his personal capacity. The President brings this application in his capacity as the President. Consequently, Mr Ramaphosa features in this application in three capacities, namely, the President, an accused person and the applicant. From time to time, the context requires that a distinction is drawn between the three capacities in which Mr Ramaphosa features in this application. For convenience, where reference is made to him in his official capacity, he is referred to as the President. Where reference is made to him as the applicant, he is referred to as such. Where reference is made to him as an accused person in the impugned private prosecution, he is referred to as Mr Ramaphosa.

[5] The Applicant instituted the present application on 28 December 2022, seeking relief in two Parts, A and B. In Part A, he sought an interim order interdicting the respondents from taking any further steps to give effect to the 21 November *nolle prosequi* certificate and the two summons. The Applicant contended that at that time, he was unaware that the 6 June *nolle prosequi* certificate was attached to the 15 December 2023 summons. He is seeking an amendment to his notice of motion to, amongst other changes, incorporate this *nolle prosequi* certificate in the relief he seeks in this application. We elaborate on the proposed amendment later in this judgment.

[6] The Applicant also sought an order excusing Mr Ramaphosa from attending Court on 19 January 2023. The order would operate as an interim order pending the determination of Part B of the application.

[7] Mr Zuma opposed Part A of the application. He contended that the application represented an extreme case of the egregious abuse of this Court's process, designed to shield Mr Ramaphosa from accountability for his alleged criminal conduct. He also contended that the relief the Applicant sought is unprecedented, special and if granted, would afford Mr Ramaphosa preferential treatment.

[8] Part A served before the Full Court on 12 January 2023. On the same date, the Full Court granted the orders the Applicant sought under Part A, thus for the time being, excusing Mr Ramaphosa from appearing before the Criminal Court to answer to charges brought against him by Mr Zuma until Part B of the application is disposed of.

[9] The present proceedings relate to Part B of the application.

[10] In Part B, in an amended notice of motion, the Applicant seeks an order declaring that the two summons are unlawful, unconstitutional, invalid and of no force and effect and setting them aside. He also seeks the same order in respect of the 6 June and 21 November *nolle prosequi* certificates to the extent they are interpreted to relate to Mr Ramaphosa. In addition, he seeks an order declaring the private prosecution unlawful, unconstitutional, invalid and of no force or effect, and setting aside and interdicting the private prosecution.

[11] Mr Zuma opposes Part B of the application.

[12] Since the parties sought an expedited hearing of Part B of the application, after the Full Court in Part A granted the orders, Sutherland DJP held a case management meeting with the parties on 18 January 2023. At the Case Management meeting, directives for the further filing of papers were issued.

[13] Although the second respondent, the Director of Public prosecutions, Kwa Zulu Natal (“DPP”) and third respondent, the National Prosecution Authority (“the NPA”) (jointly, “the prosecuting authorities”) have filed an answering affidavit seeking that the 21 November *nolle prosequi* certificate should be declared unlawful, invalid and unconstitutional and set aside only to the extent that it is interpreted to apply to Mr Ramaphosa, they otherwise abide this Court’s decision.

[14] The Registrar has filed an answering affidavit. He too abides the Court’s decision.

[15] The DPP and the Registrar have filed their respective records that led to the issuing of the impugned *nolle prosequi* certificates and summons as called upon to do so by the President in terms of Uniform Rule 53.

[16] Mr Zuma and the Applicant filed their supplementary answering and replying affidavits and heads of argument out of time. They seek condonation for filing these documents late. None of these parties are opposing the other's condonation application. Part B of the application is ripe for hearing. The issues to be determined are fully ventilated in all the papers filed. It is in the interests of justice that this Court determines the issues between the parties as set out in all the papers filed. Therefore, condonation for the late filing of the relevant papers is granted to both parties. The costs of the condonation applications are costs in the cause.

[17] By consent between the parties, the Blackhouse Kollektive Foundation NPC ("BKH") was admitted as *amicus curiae* (friend of the Court).

[18] This judgment sets out the facts underlying the application upfront. Then, the parties' respective cases are outlined. Thereafter, the legal framework on which the Applicant rests his case is outlined. Then, the points in *limina* are determined, followed by the merits. Then, the Applicant's prayer for interdictory relief is considered. Lastly, the issues relating to the *amicus* are considered, followed by the costs of the application. An order concludes the judgment.

BACKGROUND FACTS

[19] The background facts are common cause. The Applicant sets them out in paragraph 24 to 33 of his founding affidavit. In paragraph 194 of his answering affidavit, Mr Zuma expressly admits them.

[20] The private prosecution of Mr Ramaphosa by Mr Zuma stems from the alleged unlawful disclosure of Mr Zuma's medical certificate dated 8 August 2021 by Mr Downer SC of the NPA to Ms Karyn Maughan, a journalist employed by Media24. The disclosure is alleged to have occurred on 9 August 2021 during an application for postponement in the criminal proceedings in which Mr Zuma is a co-accused in the Pietermaritzburg High Court. Mr Downer SC leads Mr Zuma's public prosecution. Ms Maughan reports on the criminal proceedings.

[21] On 19 August 2021, Mr Zuma's legal representatives addressed correspondence to the President, requesting an urgent enquiry into the alleged disclosure of his medical certificate by Mr Downer SC and other NPA officials. He requested a response from the President by 31 August 2021.

[22] On 25 August 2021, the President replied to Mr Zuma's request and expressed concern that the Presidency viewed the allegations of misconduct against NPA officials in a very serious light. He advised Mr Zuma that he had referred the matter to Ronald Lamola, the Minister of Justice and Correctional Services ("the Minister"), as he is the executive authority which exercises oversight of the NPA. He had also requested the Minister to refer the allegations of misconduct by legal practitioners to the Legal Practice Council ("LPC") for further investigation.

[23] Just over a week later, on 5 and 6 September 2022, in the Pietermaritzburg High Court, under case number C52/2022P, in a private prosecution, Mr Zuma charged Mr Downer SC and Ms Maughan with contravening s41(6) (a) and/or s41(6) (b) read with s41(7) of the National Prosecuting Authority Act³ ("NPA Act") as perpetrators and accomplices.

³ 32 of 1998.

[24] Between 25 August 2021 when the President replied to Mr Zuma and 15 December 2022 when Mr Zuma issued and served the first summons on Mr Ramaphosa, Mr Zuma did not address any further communication to the President regarding his request.

[25] Mr Zuma seeks to prosecute Mr Ramaphosa on two alternative charges described in the indictment attached to the summons. In count 1, Mr Zuma alleges that Mr Ramaphosa unlawfully and intentionally contravened s41(6)(a) and/or s41(6)(b) as an accessory after the fact to the crimes he accuses Mr Downer SC and Ms Maughan of. In count 2, brought as an alternative charge to count 1, Mr Zuma charges Mr Ramaphosa with the offence of obstructing or attempting to obstruct the ends of justice by the conduct defined in respect of count 1.

[26] In his private prosecution of Mr Ramaphosa, essentially, Mr Zuma alleges that the President failed to act on his request to institute an enquiry against Mr Downer SC and other NPA members and when he so failed to act, Mr Ramaphosa was pursuing his personal interest in line with his frequent personal attacks on him as the kingpin of the so-called “state capture” and the false gospel of the “9” wasted years. Hence, he is prosecuting him in his personal capacity.

THE PARTIES RESPECTIVE CASES

[27] On the grounds set out below, the Applicant contends that the orders he seeks in Part B ought to be granted:

- 27.1 the 6 June and 21 November *nolle prosequi* certificates do not relate to a charge against Mr Ramaphosa. Therefore, there is no *nolle prosequi* certificate and none served before the Registrar justifying the issuing of the summons against Mr Ramaphosa;
- 27.2 to the extent that they are interpreted to relate to a charge against Mr Ramaphosa and to justify a private prosecution against him in relation to any offence including those set out in the summons, the *nolle prosequi certificates* are unlawful, unconstitutional and invalid;

- 27.3 it is unlawful and an abuse of process that Mr Zuma has subjected Mr Ramaphosa to two summons in respect of the same offence for which he must appear in court on the same day. The Registrar ought to have ensured that no such two summons are issued against Mr Ramaphosa. Doing so constitutes a substantively and procedurally irrational exercise of public power. Alternatively, when he issued the summons, the Registrar simply followed the dictates of Mr Zuma's lawyers. Therefore, the summons and the private prosecution, purportedly instituted under the summons are unlawful;
- 27.4 there is no evidence that proof of a security deposit by Mr Zuma served before the Registrar when he issued the impugned summons;
- 27.5 the purported private prosecution is pursued for an ulterior purpose in breach of s1(c) of the Constitution.

[28] In the event that this Court interprets the 6 June and 21 November *nolle prosequi* certificates to apply to Mr Ramaphosa and to justify the purported private prosecution against Mr Ramaphosa, then the *nolle prosequi* certificates fall to be declared unlawful, unconstitutional, invalid and of no force and effect and set aside on the following grounds:

- 28.1 the *nolle prosequi* certificates do not relate to a charge against Mr Ramaphosa. They relate to a charge allegedly committed by officials of the NPA that are bound by s41(6) and (7) of the NPA Act. These provisions do not create any offence by the President of the Republic of South Africa;
- 28.2 the *nolle prosequi* certificates lack the particulars and specificity required of a *nolle prosequi* certificate in terms of s7 of the CPA. They do not specify a specific charge against the President of the Republic of South Africa that may justify any private prosecution against him in terms of the summons. They do not mention him or link him in any way with the charge mentioned in the *nolle prosequi* certificates;
- 28.3 the *nolle prosequi* certificates fail to meet the requirements in s7 of the Criminal Procedure Act and s1(c) of the Constitution;
- 28.4 the *nolle prosequi* certificate(s) are void for vagueness;

- 28.5 the allegations relied on by Mr Zuma to found an alleged crime against Mr Ramaphosa in the summons do not constitute a criminal offence. Therefore, the DPP failed to apply her mind to issue a *nolle prosequi* certificate to justify a prosecution against Mr Ramaphosa for conduct that does not constitute a criminal offence. By so doing, she acted irrationally;
- 28.6 issuing a *nolle prosequi* certificate constitutes an administrative action in terms of PAJA. The DPP owed Mr Ramaphosa the duty to afford him an opportunity to be heard. She failed in that duty, thereby acting irrationally.

[29] On the grounds set out below, the private prosecution is unlawful, invalid and must be set aside:

- 29.1 the conduct complained of does not constitute a criminal offence. The private prosecution is frivolous and vexatious. Mr Zuma has no substantial and peculiar interest as envisaged in s7 of the CPA, justifying the private prosecution against Mr Ramaphosa;
- 29.2 Mr Zuma is abusing the process of court for an ulterior purpose;
- 29.3 Mr Zuma and his legal team lack the independence required of prosecutors under our law.

[30] Although the issue in 27.1 is dispositive of the rest of the issues in [27] and those in [28], save for the issue in 29.6 which the Applicant contended this Court does not have to decide, as urged by the Supreme Court of Appeal, this Court determines all the issues.⁴ However, since of the grounds relied on in respect of the issue in [28] and [29] overlap somewhat with those in [27], in the event the question in 27.1 is answered in the Applicant's favour, the remaining grounds in [27] and the grounds relied on in [28] and [29] are clustered under the applicable topics to avoid duplicating this Court's reasoning.

[31] Mr Zuma has raised the following four points in *limina*:

- 31.1 *lack of locus standi* – he contends that the President lacks the necessary *locus standi* to challenge a private prosecution in which Mr Ramaphosa is

⁴ See *Theron and Another NNO v Loubser NO and Others* 2014 (3) SA 323 (SCA) para 25-27.

charged. He also challenges the authority of the State Attorney to represent the President in this matter;

31.2 *lack of jurisdiction* – he contends that this Court, sitting as a Civil Motion Court, lacks jurisdiction to hear this application;

31.3 *prematurity* – he contends that a challenge to the private prosecutor’s title is pre-mature in these proceedings. Mr Ramaphosa ought to raise it in the Criminal Court when he pleads in terms of s106(1)(h) of the CPA;

31.4 *invalid amendment of the notice of motion* – he contends that the purported amendment of the notice of motion to introduce prayer 3 (seeking an order reviewing and setting aside the 6 June *nolle prosequi* certificate – the President initially only sought such in order in respect of the 21 November *nolle prosequi* certificate) and prayer 6, interdicting the private prosecution, is invalid.

[32] Mr Zuma also opposes the application on the merits. He contends that:

32.1 properly interpreted applying the approach in *Endumeni*,⁵ read with the complaint affidavit filed with the South African Police Services (“SAPS”) on 21 October 2023, the *nolle prosequi* certificate(s) apply to Mr Ramaphosa;

32.2 he met the jurisdictional requirements to acquire title as private prosecutor when he caused the Registrar to issue the summons;

32.3 he has since paid the security deposit in terms of s9 of the CPA in the amount determined by the Registrar. Based on the principle of substantial compliance, accepting the explanation he gave, and with the President’s agreement, the Full Court in Part A condoned the late payment of the security deposit;

32.4 the Applicant does not meet the requirements for a final interdict.

[33] In the event that this Court finds in his favour and dismisses the application, Mr Zuma seeks a punitive cost order and/ or personal costs against the President and/ or Mr Ramaphosa.

⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (SA) 593 (SCA).

[34] In the answering affidavit filed on behalf of the prosecution authority, the DPP essentially aligns herself with the Applicant's case, save for his criticism of her conduct and the cogency of the process that led to the issuing of the 21 November *nolle prosequi* certificate. She explains that to the best of her knowledge, Mr Zuma never laid charges in respect of the charges he seeks to prosecute Mr Ramaphosa for. Since *nolle prosequi* certificates are province specific, they may only be utilised for private prosecutions in the area of jurisdiction of the DPP who issued them. Mr Zuma may not use the *nolle prosequi* certificates as he purports to, charging Mr Ramaphosa in this division.

[35] Further, this court does not have jurisdiction over the relevant offences as they are alleged to have been committed in Pretoria. Similarly, she lacks jurisdiction to issue a *nolle prosequi* certificate in respect of the relevant charges. She then sets out a version regarding the wording of the 21 November *nolle prosequi* certificate.

[36] In the explanatory affidavit the Registrar filed, deposed to by Thabiso Cedric Maponya who was acting in the Registrar's position when the impugned summons were issued, the Registrar explains that the impugned summons were issued by uploading on Court on Line, this Court's electronic filing and document management system. Once uploaded, the documents are received by Clerks in the Registrar's office who check the summons for general compliance with Uniform Rule 17. This rule is applicable to summons initiating civil proceedings. The checking Clerks are not trained in law. They only checked for compliance with Uniform Rule 17, found the summons compliant and issued them.

[37] When issuing summons initiating a private prosecution, the private prosecutor or his legal presentative ought to approach the Registrar for directives in respect of compliance with s7 and 9 of the CPA. In this case, they never did. Mr Zuma's attorney only sought directives regarding the payment of the security deposit.

[38] For reasons set out at the end of this judgment, the relevance of the *amicus'* submissions were subjected to intense scrutiny during oral argument. It is for that reason that, out of the three issues that *amicus* intended addressing this Court on, it

was only permitted to address the Court on the independence of the NPA, a collateral issue raised by Mr Zuma.

THE APPLICABLE LEGAL FRAMEWORK

[39] The Applicant primarily grounds his case on the relevant provisions of the Constitution, the NPA Act and the CPA which constitute the legal framework for prosecutions, as well as the definition of the common law ancillary criminal offences that Mr Ramaphosa is accused of.

[40] In terms of s1(c) of the Constitution, South Africa is a sovereign, democratic state founded on the values of constitutional supremacy and the rule and law.

[41] The Applicant explains that there are three types of prosecutions. State prosecutions are governed by the Constitution and the NPA Act. S179 of the Constitution provides for a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament and empowers the prosecuting authority to institute criminal proceedings on behalf of the state. The NPA Act gives effect to the State's prosecutorial powers. It is empowered to prosecute in the public interest, on behalf of the State.

[42] The other two categories of prosecutions are an exception to the above prosecutorial rule in that they are not instituted on behalf of the state. They are both private prosecutions. One is instituted on a *nolle prosequi* certificate as regulated by s7 and s9 of the CPA. The other is based on a statutory right to prosecute as regulated by s8 of the CPA. The type of prosecution in issue in these proceedings is a prosecution on a *nolle prosequi* certificate. For brevity, we continue to refer to it as "private prosecution".

[43] The CPA makes provision for the administration of criminal justice in South Africa, including the regulation of private prosecutions. In relevant parts, s7 provides as follows:

"7 Private prosecutions on certificate nolle prosequi

(1) in any case in which a Director of Public Prosecutions declines to prosecute for an alleged offence-

(a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence;

(b) ...

(c) ...

(d) ...

May.... either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence.

(2) (a) No private prosecutor under this section shall obtain the process of any court for summoning any person to answer any charge unless such private prosecutor produces to the officer authorized by law to issue such process a certificate signed by the attorney-general that he has seen the statements or affidavits on which the charge is based and that he declines to prosecute at the instance of the State.

(b) The attorney-general shall, in any case in which he declines to prosecute, at the request of the person intending to prosecute, grant the certificate referred to in paragraph (a)."

[44] Mr Zuma grounds his title to prosecute on s7(1)(a) read with s7(2)(a) and (b).

[45] S9 of the CPA makes provision for the payment of a security deposit. In relevant parts, s9(1) provides as follows:

"9 Security by private prosecutor

"(1) No private prosecutor referred to in section 7 shall take out or issue any process commencing the private prosecution unless he deposits with the magistrate's court in whose area of jurisdiction the offence was committed-

"(b) the amount such court may determine as security for the costs which may be incurred in respect of the accused's defence to the charge."

[46] The NPA Act regulates the exercise of public prosecutorial powers and functions. It also creates various offenses in the event of breach of certain statutory duties and obligations, not only by NPA officials, but others who commit the proscribed conduct. The offence relevant to Mr Zuma's private prosecution of Mr Ramaphosa is s 41 (6) read with s41 (7) of the NPA Act. These sections provide as follows:

"(6) Notwithstanding any other law, no person shall without the permission of the National Director or a person authorised in writing by the National Director disclose to any other person:

"(a) any information which came to his or her knowledge in the performance of his or her functions in terms of this Act or any other law;

"(b) the contents of any book or document or any other item in the possession of the prosecuting authority, or...

“(7) Any person who contravenes subsection (6) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period exceeding 15 years or both such fine and such imprisonment.”

[47] The crimes of being an accessory after the fact and defeating the ends of justice are both ancillary crimes. A person may be found guilty as an accessory after the fact when he knowingly renders assistance to a person who has committed an offence to aid him or her to evade justice. He is defined as: “someone who unlawfully and intentionally, after the completion of the crime, associates himself or herself with the commission of the crime by helping the perpetrator or accomplice to evade justice.”

[48] The crime of defeating the ends of justice consists in unlawfully and intentionally engaging in conduct which defeats the course or administration of justice.

[49] Mr Zuma confirms the correctness of these prescripts. To the extent that they are applicable, he contends that he has complied with them in his private prosecution of Mr Ramaphosa.

POINTS IN LIMINA

Lack of locus standi

[50] Mr Zuma challenges the Applicant’s *locus standi* on several grounds. He contends that Mr Ramaphosa is charged with a criminal offence in his personal capacity. By bringing this application in his official capacity as President, the President impermissibly substituted Mr Ramaphosa. This is inappropriate as the President lacks criminal liability. Mr Ramaphosa’s criminal liability is not transferable to the President’s successor in title. The exception to this general rule as provided for in s332 of the CPA, which imputes criminal liability to corporate entities and members of associations, is inapplicable under these circumstances. So is the defence of vicarious liability. Lastly, Mr Zuma contends that Mr Ramaphosa has provided no evidence that the Presidency has authorised such substitution.

[51] Mr Zuma also challenges the authority of the State Attorney to represent Mr Ramaphosa in these proceedings in terms of Uniform Rule 7. He contends that the State Attorney may only represent the President. Since Mr Ramaphosa is cited in his

personal capacity in the impugned private prosecution, he is not entitled to be represented in these proceedings by the State Attorney which, in the circumstances, constitute an abuse of State resources.

[52] Mr Zuma relies on the authority in *Zuma v Democratic Alliance*.⁶ This authority does not assist Mr Zuma. Although in *Zuma v Democratic Alliance* and in the impugned private prosecution, both Mr Zuma and Mr Ramaphosa are charged with a criminal offence in their personal capacities, the two cases are materially distinguishable on the facts. In *Zuma v Democratic Alliance*, it was held that:

“[34] In relying on s 3(1), the Presidency and the State Attorney appear to conflate when a government official acts in an official (or representative) capacity with that of an official acting in his or her personal capacity. There has been no suggestion that Mr Zuma was advancing any governmental interest or purpose. The prosecution was instituted against him in his personal capacity. The thrust of the allegations against him is that he used his official position and influence in government to advance his private interest. His interest in the Shaik trial was that of a potential accused in his personal capacity. So too was Mr Zuma's interest in the DA's application to review the discontinuation decision.”
(Emphasis added)

[53] The criminal charges in respect of which Mr Zuma privately prosecutes Mr Ramaphosa are grounded on the President's alleged failure - in his capacity as the President - to investigate Mr Zuma's complaints against Mr Downer SC and other NPA officials. These allegations are materially distinguishable from the allegations that ground the criminal charges brought against Mr Zuma. Mr Zuma does not allege that the charges against him relate to the performance of his duty as the President. Mr Zuma could not, in the performance of his official duties have received bribes as alleged.

[54] The President relies on the test for standing as set out in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd*⁷ where the Constitutional Court, after analysing the

⁶ 2021 (5) SA 189 (SCA) at paragraph [34].

⁷ 2012 JDR 2298 (CC).

Court's approach to interpreting own interest standing within the margins of s38 of the Constitution⁸ in three cases,⁹ held that:

"[41] These cases make it plain that constitutional own-interest standing is broader than the traditional common law standing, but that a litigant must nevertheless show that his or her rights or interests are directly affected by the challenged law or conduct. The authorities show:

a) To establish own-interest standing under the Constitution a litigant need not show the same "sufficient, personal and direct interest" that the common law requires, but must still show that a contested law or decision directly affects his or her rights or interests, or potential rights or interests.

b) This requirement must be generously and broadly interpreted to accord with constitutional goals.

c) The interest must, however, be real and not hypothetical or academic.

d) Even under the requirements for common law standing, the interest need not be capable of monetary valuation, but in a challenge to legislation purely financial

self-interest may not be enough – the interests of justice must also favour affording standing.

e) Standing is not a technical or strictly-defined concept. And there is no magical formula for conferring it. It is a tool a court employs to determine whether a litigant is entitled to claim its time, and to put the opposing litigant to trouble.

f) Each case depends on its own facts. There can be no general rule covering all cases. In each case, an applicant must show that he or she has the necessary interest in an infringement or a threatened infringement. And here a measure of pragmatism is needed.

[42] The impact of the Constitution on own-interest standing is evident in *Ferreira, Eisenberg* and *Kruger*. However, it is in my view necessary to emphasise that in each of those cases the own-interest litigant showed that his or her interests or potential interests were "directly affected" by the action sought to be challenged. It should be noted that the own-interest provision in section 38(a) is not isolated – it stands alongside section 38(b)-(e). These provisions create scope for public interest, surrogate, representative and associational challenges to illegality. The risk that an unlawful decision could stand because an own-interest litigant cannot establish standing is diminished by the fact that broad categories of other litigants, not acting in their own interest, are entitled to bring a challenge.

[43] The own-interest litigant must therefore demonstrate that his or her interests or potential interests are directly affected by the unlawfulness sought to be impugned." (Emphasis added)

⁸ Section 38 of the Constitution provides that:

"38 Enforcement of rights

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

(a) anyone acting in their own interest;"

⁹ The three cases referenced in paragraph 42 of the extract quoted at paragraph 54 of this judgment are: *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC)(Ferreira), *Kruger v President of Republic of South Africa and Others* 2009 (1) SA 417 (CC)(Kruger) and *Minister of Home Affairs v Eisenberg & Associates: In re Eisenberg & Associates v Minister of Home Affairs and Others* 2003 (5) SA 281 (CC)(Eisenberg).

[55] Mr Zuma has cited no authority that contradict the test for standing in *Giant Concerts*. Neither has it been contended on Mr Zuma's behalf that the Applicant incorrectly relies on that authority or that *Giant Concerts* was wrongly decided. As the Applicant contends, he meets the test on standing in *Giant Concerts*. On the present facts (which are common cause), the interest or potential interest that is directly affected by the impugned private prosecution relate to Mr Ramaphosa both as an individual person occupying the Office of the President and in his official capacity as President.

[56] As an individual person occupying the Office of the President, Mr Ramaphosa is the bearer of constitutional rights. The impugned private prosecution threatens to breach his constitutional rights. When his constitutional rights as an individual are threatened, he has standing as the President to protect those rights by having the impugned conduct in the form of a private prosecution declared unlawful and set aside.

[57] The President as an organ of State also has a direct interest in the potential impact of impugned private prosecution. The allegations that ground the private prosecution arise from the performance of official duties as the President. The prosecution will result in undue interference with the performance of the President's duties. It will also have an adverse impact in the confidence in the State and in the President as an organ of State.

[58] The President has a constitutional obligation to uphold and defend the constitution as the supreme law of the Republic. This includes defending respect for the rule of law which is the founding value of the Constitution. This case vindicates the rule of law as it involves defending it. The Applicant seeks to assert the legal requirements applicable to a private prosecution in s7 and 9 of the CPA that a private party has no automatic right to institute a private criminal prosecution against another party, grounded in the performance of his official duties, without complying with applicable statutory provisions which embody the requirement of legality and the rule of law.

[59] The President as applicant in these proceedings and not Mr Ramaphosa in his personal capacity, is entitled to be represented by the State Attorney in terms of s3 (1) and (3) of the State Attorney's Act¹⁰, which provide as follows:

“3 Functions of offices of State Attorney

“(1) The functions of the offices of State Attorney shall be the performance in any court or in any part of the Republic of such work on behalf of the Government of the Republic as is by law, practice or custom performed by attorneys, notaries and conveyancers.

...

“(3) Unless the Minister of Justice and Constitutional Development otherwise directs, there may also be performed at the offices of State Attorney like functions in or in connection with any matter in which the Government or such an administration as aforesaid, though not a party, is interested or concerned in, or in connection with any matter where, in the opinion of a State Attorney or of any person acting under his or her authority, it is in the public interest that such functions be performed at the said offices.”

[60] As found above, the Applicant in his capacity as the President has an interest in this matter. It is also in the public interest that the President protects, defends and uphold the rule of law in these proceedings.

[61] Zuma's challenge to the Applicant's standing and the State Attorney's authority to represent the President in these proceedings lacks merit. Therefore, this point *in limine* stands to be dismissed.

Lack of jurisdiction and prematurity

[62] Mr Zuma's counsel has characterised two of Mr Zuma's points in *limina* as two sides of the same coin. The first of these is about in which court (differently put, where) may the Applicant impugn Mr Zuma's title to prosecute. This point *in limine* is referred to in Mr Zuma's answering affidavit as the jurisdiction point in *limine*. The second is about when (at what point of the court proceedings) the Applicant may mount such a challenge. This point in *limine* is referred to in Mr Zuma's answering affidavit as the prematurity point in *limine*.

[63] These two questions are the focus of this segment of the judgment.

¹⁰ 56 of 1957.

Jurisdiction

[64] Mr Zuma contends that it is not open to a person who is charged with a criminal offence to avoid pleading his defence in a criminal court by pursuing parallel Motion Court proceedings with a view to stopping the criminal prosecution by claiming in the main, that the prosecution against him is actuated by ulterior motive. The court that is competent to entertain and decide defences to a criminal charge is the Criminal Court in which the criminal charge is pending. For that reason, this Court, sitting as a Motion Court and constituted as a Full Court in terms of s14(1)(a) of the Superior Courts Act¹¹ lacks jurisdiction and power to entertain and decide this application.

[65] The Applicant contends that this court has jurisdiction. He also contended that the Full Court in Part A has already determined the jurisdiction point. It found that there is no distinction between a Civil and a Criminal Court. That distinction only serves to organize the functions of this Court as a division of the High Court. Mr Zuma ought to persuade this Court that the ruling of the Full Court in Part A on this point was wrongly made.

[66] Mr Zuma contends that this Court may not ground its jurisdiction on the ruling of the Court in Part A because it was wrongly made. Hence, he is appealing its judgment in the Constitutional Court.

[67] For different reasons set out below, this Court finds that the finding on jurisdiction by the Full Court in Part A was not wrongly made.

[68] The distinction or lack thereof between the Civil and Criminal Court oversimplifies Mr Zuma's complaint because, notwithstanding that the two Courts (criminal and civil) fall within the same hierarchy of courts, in the same Division of the High Court, and are often presided over by the same judges as contended by the Applicant, the High Court may only arrive at its decisions in a manner provided for in

¹¹ 10 of 2013. This section provides as follows:

14 Manner of arriving at decisions by Divisions

(1) (a) Save as provided for in this Act or any other law, a court of a Division must be constituted before a single judge when sitting as a court of first instance for the hearing of any civil matter, but the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, may at any time direct that any matter be heard by a court consisting of not more than three judges, as he or she may determine.

s14 of the Superior Courts Act. Differently put, the High Court only has the power to make a particular decision in the manner and for the purpose provided for in this provision. If not accordingly constituted for the purpose of making a particular decision as provided for in s14, it lacks jurisdiction.

[69] Therefore, depending on how and for what purpose it is constituted, the jurisdiction of the High Court differs in respect of the type of matter and the decision it is empowered to make. For example, the High Court, presided over by a single judge lacks appeal jurisdiction over the decision of another single High Court judge. This court, seating as a Full Court has no jurisdiction to hear a criminal trial and render a verdict and sentence in a criminal trial because s14(2), read with s145 of the CPA deprives it of such powers.¹² Similarly, when seating as a Criminal Court constituted in terms of s14(2), this Court exercises powers in terms of the CPA and will not determine the relief the President seeks in this application.

[70] Although the dispute between the parties has its genesis in criminal proceedings, the relief the President seeks is civil in nature. This Court seating as a Full Court and constituted in terms of s14(1)(a) of the Superior Courts Act has jurisdiction to review, to declare unlawful, unconstitutional and invalid and set aside the *nolle prosequi* certificates, summons and private prosecution and to grant the final interdict on the terms the Applicant seeks. It derives jurisdiction from s14(1)(a) of the Superior Court's Act, the Promotion of Administrative Justice Act¹³ ("PAJA") if it considers this to be a PAJA review and section 1(c) read with section 172 of the Constitution if it considers it to be a legality review. The Applicant stressed that it is not necessary for the Court to determine whether this is a review in terms of PAJA or the principle of legality because its grounds of review straddle these two realms. Mr Zuma took no issue with this.

¹² S14(2) provides as follows:

"14 Manner of arriving at decisions by Divisions

(2) For the hearing of any criminal case as a court of first instance, a court of a Division must be constituted in the manner prescribed in the applicable law relating to procedure in criminal matters."

S145 provides as follows:

145 Trial in superior court by judge sitting with or without assessors

(1) (a) Except as provided in section 148, an accused arraigned before a superior court shall be tried by a judge of that court sitting with or without assessors in accordance with the provisions set out hereunder.

¹³ 3 of 2000.

[71] Therefore, the core question that arises from the gravamen of Mr Zuma's case is whether it is improper for Mr Ramaphosa to avoid facing criminal charges by challenging the private prosecutor's title in the Civil Court. This question stands to be determined in relation to Mr Zuma's prematurity point *in limine*.

Prematurity

[72] Mr Zuma contends that to the extent that the Applicant wishes to challenge his title to prosecute Mr Ramaphosa for any reason, including the alleged non-compliance with statutory requirements, s106(1)(h) of the CPA makes provision for a plea to that effect. Allowing the Applicant to challenge Mr Zuma's title to privately prosecute Mr Ramaphosa in the Motion Court renders the constitutional principle of equal protection and benefit of the law in s9 of the Constitution meaningless. The Applicant has cited improper motive and political conspiracy as grounds of review only to shield Mr Ramaphosa from accountability. Relying on the Constitutional Court judgment in *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others*,¹⁴ Mr Zuma argued that improper motive is not an adequate ground for escaping prosecution as it is not dispositive of the criminal trial. He also placed reliance on *Nedcor Bank Ltd and Another v Gcilitshana and Others*,¹⁵ *Zuma v Democratic Alliance* and *S v Mokhesi*¹⁶, arguing that these cases support his basis for opposing the relief the Applicant seeks.

[73] The Applicant contended that properly interpreted, s106(1)(h) of the CPA does not provide that Mr Ramaphosa may challenge Mr Zuma's title to prosecute only when he pleads to criminal charges. The Applicant placed reliance on the authority in *Solomon v Magistrate, Pretoria and Another*¹⁷, *Nedcor, Van Deventer v Reichenberg and Another*¹⁸ and *Nundalal v Director of Public Prosecutions KZN*.¹⁹

[74] As already observed, contrary to the argument advanced on behalf of Mr Zuma, a frontal challenge to the private prosecutor's lack of title to prosecute in the Civil Court is not novel. If allowed, it will not afford Mr Ramaphosa any special treatment not afforded to other accused persons. Therefore, it does not implicate either of the party's

¹⁴ 2023 (2) SA 68 (CC).

¹⁵ 2004 (1) SA 232 (SE).

¹⁶ 2022 (2) SACR 326 (FB).

¹⁷ 1950 (3) SA 603 (T).

¹⁸ 1996 (1) SACR 119 (C).

¹⁹ 2015 JDR 0876 (KZP).

constitutional right to equality and to equal protection of the law. A frontal challenge to a prosecution has been brought in several cases that are relied on by the parties with, without or with partial success.

[75] In *Solomon*²⁰, *Nedcor*²¹ and *Van Deventer*²², the applicants were charged in the Magistrate Court by private prosecutors. Challenging the private prosecutor's title, they approached the High Court for relief setting aside the summons and interdicting the private prosecution. They were successful.

[76] In *Nundala*²³, the applicant raised a frontal challenge to the private prosecutors' title in the Magistrate's Court where he was charged. When the Magistrate dismissed the frontal challenge, Nundala successfully approached the High Court to review and appeal the Magistrate's decision.

[77] In *Moyo and Another v Minister of Police and Others 2020*²⁴, charged in the Magistrate Court with the statutory crime of intimidation, the accused approached the High Court to challenge the constitutionality of the relevant provisions of the Intimidation Act.²⁵ The matter landed in the SCA where the accused were unsuccessful. Mr Zuma places much reliance on Wallis's JA's adverse remarks about frontal challenges in that case. The remarks, which I quote below, remain relevant in circumstances where the Court finds that the frontal challenge lacks merit and is merely dilatory.

[78] That the Constitutional Court reversed the SCA judgment in *Moyo* on appeal, thus disposing of the criminal charges is an important observation to make, ignored by Mr Zuma as he makes no reference to that judgment. *Moyo* (Constitutional Court) demonstrates that in appropriate circumstances, the interest of justice may be better served by allowing a frontal challenge than subjecting an accused person to an unlawful and unconstitutional prosecution. Unless they brought a frontal challenge, the

²⁰ Fn 17.

²¹ Fn 15.

²² Fn 18.

²³ Fn 19.

²⁴ *Moyo* (1) SACR 373 (CC). See also *Moyo and Another v Minister of Justice and Constitutional Development and Others* 2018 (2) SACR 313 (SCA).

²⁵ Act 72 of 1982.

accused in *Moyo* would have endured a criminal trial on charges which would later be declared unconstitutional and if convicted, sentenced. Unless they were allowed bail pending appeal, given the considerable length of time it takes for appeals to reach and be determined by the Constitutional Court, the injustice that would have resulted if their frontal challenge was disallowed would be irreversible.

[79] Contrary to the contention advanced on behalf of Mr Zuma, *Moyo* (SCA) is not authority for a hard and fast rule against frontal challenges in criminal proceedings. *Solomon, Van Deventer and Nedcor* confirm the absence of such a rule. So does the Constitutional Court judgment in *Moyo*.

[80] Relying on *Mokhesi*²⁶ also does not help Mr Zuma. There, the applicants are facing criminal charges (the criminal case was still pending when this application was determined). They sought to review the criminal charges and the State's evidence in the Civil Court. The Civil Court found that the frontal challenge in that matter falls within the scope of Wallis's JA's warning in *Moyo* and dismissed the application. To succeed here on the basis of *Mokhesi*, Mr Zuma will have to persuade this Court that the present application falls within the scope of Wallis JA's warning. That warning is not novel. The Constitutional Court had expressed a similar warning in *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others*,²⁷ which I quote below.

[81] In *Thint*, the frontal challenge concerned whether search warrants and the searches undertaken pursuant thereto breached the individual rights of the accused and his attorney. The frontal challenge was partially successful. The Court remarked as follows:

"[65] I nevertheless do agree with the prosecution that this court should discourage preliminary litigation that appears to have no purpose other than to circumvent the application of s 35(5). ... Generally disallowing such litigation would ensure that the trial court decides the pertinent issues, which it is best placed to do, and would ensure that trials start sooner rather than later. There can be no absolute rule in this regard, however. The courts' doors should never be completely closed to litigants. If, for instance, a warrant is clearly unlawful, the victim should be able to have it set aside promptly. If the trial is only likely to commence far in the future, the victim should be able to engage in

²⁶ *Mokhesi* fn 16.

²⁷ *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC).

preliminary litigation to enforce his or her fundamental rights. But in the ordinary course of events, and where the purpose of the litigation appears merely to be the avoidance of the application of s 35(5) or the delay of criminal proceedings, all courts should not entertain it. ..." (*Emphasis added*)

[82] The following principles emerge from cases referenced above:

- 82.1 There is no absolute rule against a frontal challenge to a prosecutor's title to prosecute. A frontal challenge ought to be discouraged and pertinent issues left to the trial court, where it lacks merit and only mainly serves to delay the commencement of the criminal trial. It ought to be allowed where a litigant wishes to challenge a clearly unlawful process in order to enforce his or her fundamental rights;²⁸
- 82.2 the sections that permit a plea of lack of title to prosecute are not exhaustive to exclude the right of an accused person to approach the court for a civil remedy;²⁹
- 82.3 the sections relied upon (in this case, s7 and 9 of the CPA) bestow a right to privately prosecute on certain conditions, but not to exclude the jurisdiction of the court to intervene on proper course. Otherwise the court would have no right to intervene even though it were shown in the clearest possible manner and that the party who has instituted the private prosecution has no interest in it and has instituted it for an ulterior motive;³⁰
- 82.4 the taking of the summons is an abuse of process where the objective of obtaining justice is absent but the prosecutor is rather enabled to harass the accused or fraudulently to defeat his rights. The interest of the private prosecutor lies in obtaining a conviction against a man who has caused him injury in a criminal act;
- 82.5 where is it inconsistent with public policy, a private prosecution has been disallowed;³¹
- 82.6 the court ought to exercise its inherent power to prevent the abuse of its process by frivolous and vexatious proceedings to set aside summons issued by its own officials or to interdict further proceedings on it;³²

²⁸ Moyo (Constitutional Court) fn 24.

²⁹ *Solomon* fn 17 at 607A-B.

³⁰ *Solomon* fn 17 607B-D.

³¹ *Van Deventer* fn 18 at 126D-E.

³² *Solomon* fn 17 at 607E-H.

82.7 the court should not be called upon to determine an abstract question of law;³³

82.8 while motive is irrelevant in the case of public prosecutions, it is also not permissible to use the power to prosecute for personal financial gain. To do so undermines the objectivity of the prosecuting process.³⁴

[83] In *Reddell*, citing the above principles in *Phillips v Botha*³⁵ with approval, the Constitutional Court held that the prosecution must be brought in the public interest and not to pursue some private objective.³⁶

[84] What clearly appears from the cases relied upon by the parties is that while a frontal challenge is generally disallowed, there is no absolute general rule against it. When determining whether it should be allowed or not, the interests of justice are paramount. Each case is determined on its facts, bearing in mind the nature of the challenge and grounds of review relied upon. In such an enquiry the court is concerned with ensuring that the jurisdictional requirements for a private prosecution are met, the private prosecution is not frivolous and vexatious and brought not to achieve justice but to harass the accused or achieve some other ulterior purpose, the taking of the summons and the private prosecution does not amount to an abuse of process and that the frontal challenge is not merely dilatory.

[85] From the merits of this application, it is clear that the present frontal challenge is not brought prematurely. It is brought to enforce the individual rights of the accused person not to be subjected to a clearly unlawful private prosecution process, thus protecting and vindicating the rule of law. As articulated below, the private prosecution does not meet the jurisdictional requirements for a title to prosecute. It was for an ulterior purpose in what amounts to be an abuse of this Court's process. The private prosecution falls outside the scope of the warning against frontal challenges in *Moyo* (SCA) and *Thint*.

[86] Therefore, this point *in limine* falls to be dismissed.

³³ *Mokhesi* fn 16 at paragraph 44.

³⁴ *Solomon* fn 17 at 607-608.

³⁵ 1999 (2) SA 555 (SCA).

³⁶ *Reddell* fn 14 at 54.

Amendment to notice of motion

[87] In his notice of motion, the Applicant had called the DPP and the Registrar to show cause in terms of Uniform Rule 53(1)(a) why the 21 November *nolle prosequi* certificate and the two summons should not be set aside. In terms of Uniform 53(1)(b), he also called on these parties to deliver to the Registrar within 15 days of receiving the notice, records of proceedings pursuant to which the *nolle prosequi* certificates and the summons were issued together with reasons these respondents are required by law to make. The Applicant would, on receiving the records and reasons, amend his notice of motion and/ or file a supplementary founding affidavit in terms of Uniform Rule 53(4).

[88] The DPP and the Registrar duly complied with this directive.

[89] On 6 February 2023, the Applicant filed an amended notice of motion in terms of Uniform Rule 53(4), seeking to declare the *nolle prosequi* certificate of 6 June 2022 invalid, and an order interdicting Mr Zuma from instituting a further prosecution of Mr Ramaphosa for the charges set out in the summons and the facts described in the indictment. He sought this relief in prayers 3 and 6 of his amended notice of motion.

[90] Initially, Mr Zuma challenged the procedure the Applicant followed to amend his notice of motion. He contended that the purported amendment is of no force and effect as it was not made in accordance with the procedure set out in Uniform Rule 28.

[91] Counsel for Mr Zuma submitted from the bar that his client no longer persists with this point in *limine*. Therefore, this court need not determine it. Therefore, the amendment introduced by the Applicant is allowed. This application is determined on the basis of the prayers sought in the amended notice of motion.

THE MERITS

Whether the nolle prosequi certificate(s) apply to Mr Ramaphosa?

[92] The Applicant contends that the *nolle prosequi* certificate(s) do not relate to the person of and charge against Mr Ramaphosa. Mr Zuma contends that they do. Both parties have argued their respective cases with reference to the wording in s7(1)(a) read with s7(2)(a) of the CPA, the wording of the certificate(s), Mr Zuma's complaint affidavit made under PMB CAS 309/10/21 and the objective facts, contending that when employing the *Endumeni* approach to interpreting documents, this court ought to uphold their respective cases on this point.

[93] In *Endumeni*³⁷ the SCA articulated the approach to interpreting texts as follows:

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or businesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[94] s7(1)(a) read with s7(2)(a) of the CPA are simply worded. In terms of these provisions, when the DPP has declined to prosecute for an alleged offence, any private person who has a substantial and peculiar interest arising out of an injury which he suffered in consequence of the commission of the said offence may conduct a private prosecution in respect of such offence. Such a person ought to request the DPP to

³⁷ 2012 (4) SA 593 (SCA) at 18.

issue a *nolle prosequi* certificate to him. When issuing the certificate, the DPP ought to sign it to confirm that that she has seen the statements or affidavits on which the charge is based and that she declines to prosecute at the instance of the State. The prospective private prosecutor may not obtain summons against the person he intends prosecuting unless he has obtained a *nolle prosequi certificate* from the DPP. When having summons issued to initiate the private prosecution, the private prosecutor must produce the *nolle prosequi* certificate to the Registrar. If proceedings for the offence in respect of which the *nolle prosequi* certificate has been issued do not commence within three months of the date of the certificate, the certificate shall lapse.

[95] In relevant parts, Mr Zuma's complaint affidavit reads as follows:

"6. This criminal interference in my case has not been investigated or reported by any law enforcement agency. Consistent with the pattern of leaks and criminal interference in the recent past, I learnt during the court proceedings in Pietermaritzburg that the Advocate Downer SC breached the aforementioned provision when he unlawfully handed a medical report involving me in an affidavit leaked to a journalist, Karyn Maughan, I attach a copy of the affidavit as "B". Advocate Downer authorised the leaking of sensitive and private information obtained in the course and scope of his employment and in breach of the aforementioned provision of the NPA Act... (sic)

"7. I therefore report and seek that a criminal case be opened and investigated by the police in relation to the conduct of Advocate WJ Downer SC, a senior Deputy Director of Public Prosecutions in the NPA. I wish to extent my complaint of criminal wrongdoing to cover all other persons reflected in the documents above who are either prosecutors and or investigators who have violated the NPA Act and the Constitution.

"8. The conduct I demand be investigated by the South African Police Service (SAPS) relates to contravention of section 41 of the National Prosecuting Authority Act primarily but extend to other criminal activities, particularly those reflected in the affidavit of Mr Hofmeyer involving criminal interference in my prosecution by foreign spies with the assistance of local investigators and prosecutors. I believe that the interference of foreign spies contravenes the law governing our intelligence services and would in that regard refer to the report of JSCI referred to above for further guidance.

"9. I have no doubt that beyond criminal conduct involving the leaking of confidential information to persons outside the NPA, the scope of criminal conduct is far wider and in the scope of diligent investigation, the SAPS will discover clear evidence showing the violation of section 41 by prosecutors, investigators and other persons who are directly involved in my case. The specific details of the criminal activities which, at this stage, I wish to report for criminal investigation and prosecution are:

“Count 1

“10. ...

“Count 2

“11. ...

“Preliminary analysis

“12. The admitted conduct of Advocate WJ Downer SC and his accomplices clearly contravened the provisions of section 41(6), read with 41(7) of the National Prosecuting Authority Act.

“13. The criminal conduct set out in the affidavit of Hofmeyer also reports a number of criminal activities that were committed in violation of the law, for example possibly the Intelligence Act and ultimately the Constitution.

“17 The alleged conduct also forms part of separate investigations which are conducted by the President of South Africa, 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 had brought to supplement my plea in my criminal trial...

The 6 June nolle prosequi certificate

[96] In relevant parts, the 6 June *nolle prosequi* certificate is worded as follows:

“CERTIFICATE IN TERMS OF SECTION 7(2) OF ACT 51 OF 1997

“I, ELAINE ZUNGU, duly appointed Director of Public Prosecutions, KwaZulu-Natal, hereby certify that I have seen all the statements and affidavits on which the charge particularized below is based and that I decline to prosecute at the instance of the State.

“SUSPECT: WILLIAM JOHN DOWNER

“COMPLAINANT: JACOB GEDLEYIHLEKISA ZUMA

“ALLEGED CRIME: CONTRAVENTION OF SECTION 41(6) READ WITH SECTION 41(7) OF THE NATIONAL PROSECUTING ACT 32 OF 1998 (sic)

“DATE OF THE ALLEGED CRIME: 9 AUGUST 2021

“POLICE REFERENCE: PMB CAS 309/10/21”

[97] Contrary to the argument advanced on behalf of Mr Zuma, Ms Zungu's version is not completely irrelevant to this interpretation exercise. What is irrelevant is her view regarding the meaning this Court should attach to the impugned *nolle prosequi* certificate(s). Ms Zungu's version is relevant to establish the context to the preparation and production of the *nolle prosequi* certificate(s), the material known to her at the time and the purpose for which she produced these documents.

[98] The DPP's record show that the only criminal complaint that Mr Zuma laid with the SAPS was against Mr Downer SC. The charge Mr Zuma laid against this person is that on 9 August 2021, he contravened s41(6) read with s41(7) of the NPA- Act. Subsequently, Mr Zuma's criminal complaint was referred to the DPP to determine whether she will prosecute Mr Downer SC on behalf of the state. The DPP declined to prosecute and issued the 6 June *nolle prosequi* certificate. The certificate expressly mentions Mr Downer SC as the person the DPP declined to prosecute. The charge for which the DPP declined to prosecute Mr Downer is specified as contravention of s41 of the NPA act. The date of the offence is 9 August 2021. The 6 June *nolle prosequi* certificate is particularised to the person charged, the offence and date of offence. It bears no ambiguity. It expressly articulates the DPP's decision not charge the person, for the offences committed on the date expressly specified in the certificate. This is the purpose for which it was created.

[99] The complaint affidavit Mr Zuma made to the police only refers to the President as the person to whom Mr Zuma made a request that he investigate the conduct of Mr Downer SC and other NPA officials. No allegation is made in the complaint affidavit in pursuit of a personal interest, Mr Ramaphosa abused his office and failed to investigate the conduct of Mr Downer SC as requested. This allegation is a primary element of the offences Mr Zuma is privately prosecuting Mr Ramaphosa for. Yet, it was not made in the complaint affidavit.

[100] Mr Zuma specifically requested an investigation against Mr Downer SC in respect of the offences already mentioned in this judgment. He then made reference to a wide investigation beyond the complaint against Mr Downer SC and his accomplices. Nothing in Mr Zuma's complaint affidavit suggests that Mr Ramaphosa falls within the ambit of the persons Mr Zuma requested the police to investigate. The

wider investigation Mr Zuma envisaged is against persons who interfered in his investigation including foreign spies. Nothing in the wording used in the complaint affidavit suggests that Mr Ramaphosa falls within this ambit. No particularity is given regarding how Mr Ramaphosa might have interfered in Mr Zuma's case or leaked information to foreign spies. The President is only mentioned in so far as Mr Zuma addressed the 21 August 2021 letter to him requesting that he institute an inquiry against Mr Downer SC and other NPA officials. The President is only described in the complaint affidavit as an official executing that request and not as a person guilty of the offence of being an accessory after the fact or having defeated the ends of justice in respect of the crimes Mr Zuma sought Mr Downer SC and other NPA officials investigated for.

[101] According to Ms Zungu, she considered the relevant docket for the purpose of making a decision whether to prosecute Mr Downer SC. She could not have considered it for the purpose of making a decision to prosecute Mr Ramaphosa because he was not mentioned as a suspect in the docket.

[102] It clearly appears from the 6 June *nolle prosequi* certificate that the DPP declined to prosecute Mr Downer SC for the specific offence referred to as 'alleged crime' on the certificate. The offence was committed on 9 August 2021. The police reference is that under which Mr Zuma laid criminal charges with the Pietermaritzburg Police against Downer SC. In the certificate, the DPP certifies that terms of s7(2) she has seen all the statements on which the charge particularised on the certificate is based. As specified on the certificate, the charge is that brought against Mr Downer SC. The DPP confirms that, at the instance of the State, she declines to prosecute Mr Downer SC on the particularised charges.

[103] The DPP's version regarding the scope of her jurisdiction to issue *nolle prosequi* certificates in respect of the charges Mr Zuma has charged Mr Ramaphosa with as set out in paragraph 34 of this judgment is also relevant to establish the background for preparation and production of the impugned certificates. Her version that issuing the *nolle prosequi* certificates for the purpose contended by Mr Zuma falls outside her jurisdiction is an objective consideration that this Court may not ignore.

[104] This is the certificate Mr Zuma produced to the Registrar when he caused the 15 December summons issued, instituting his private prosecution of Mr Ramaphosa, charging him with the offences of being an accessory after the fact and defeating the ends of justice. The 6 June *nolle prosequi* certificate clearly does not relate to the charges Mr Zuma has brought. It also does not relate to Mr Ramaphosa as a suspect. Further, Mr Zuma charges Mr Ramaphosa with offences which could not have been committed earlier than 21 August 2021 when he addressed a letter to the President requesting him to institute an inquiry against Mr Downer SC and other members of the NPA. Therefore, Ms Zungu's signature on the certificate does not constitute confirmation that she has seen the statement on which the charges against Mr Ramaphosa is based and that she has declined to prosecute him at the instance of the State for the relevant charges.

[105] When properly reading the complaint affidavit and considering the purpose for which Ms Zungu issued the certificates, there is no basis for interpreting the 6 June *nolle prosequi* certificate to relate to the person of, charges against and the date on which Mr Ramaphosa is alleged to have committed the relevant offences.

The 21 November nolle prosequi certificate

[106] This certificate is similar to the 6 June *nolle prosequi* certificate in material respects. The only difference is that it replaces Mr Downer SC's name as the suspect with the words "Any Person".

[107] The context and purpose for the production of this certificate is common cause. When he instituted proceedings in the Pietermaritzburg High Court to prosecute Mr Downer SC and Ms Maughan, Ms Maughan objected to the charge on the basis that the 6 June *nolle prosequi* certificate only relates to Mr Downer SC. As a result of this objection, Mr Zuma approached the DPP to amend the certificate and issue one that also reflects Ms Maughan as a suspect. The DPP replied that the only suspect before her was Mr Downer SC and the 6 June *nolle prosequi* certificate only relates to him. Mr Zuma's legal representatives demanded a *nolle prosequi* certificate that includes Ms Maughan. On 21 November 2022, the DPP issued a certificate which reflects that the suspect is "Any person". The charge is contravention of s41(6) read with s41(7) of the NPA Act. The offence was committed on 9 August 2021.

[108] Even if Mr Zuma wanted this court to find that “Any person” in the 21 November certificate includes Mr Ramaphosa, the charge in respect to which the certificate was issued and the date the offence was committed does not sustain such a finding. The earliest date Mr Ramaphosa could have committed the offence Mr Zuma has charged him with is on 21 August 2021 when he requested the President to institute an enquiry against Mr Downer SC. There was no basis for the DPP to conjecture from Mr Zuma’s complaint affidavit that Mr Ramaphosa could possibly be an accessory after the fact in relation to the charge brought against Mr Downer SC or guilty of the offence of defeating the ends of justice.

[109] The record reflects nowhere that Mr Zuma expressly state that he laid charges against Mr Ramaphosa and that he requested a *nolle prosequi* certificate in relation to him as he did with Ms Maughan.

Findings

[110] This Court therefore finds that the 6 June *nolle prosequi* certificate does not apply to Mr Ramaphosa. “Any person” in the 21 November *nolle prosequi* certificate also does not include Mr Ramaphosa. These certificates relate only to the charge of contravening s41(6) read with s41(7) of the NPA Act committed on 9 August 2021. There is no allegation that Mr Ramaphosa is guilty of such an offence. In any event, this charge is not what Mr Zuma now seeks to charge Mr Ramaphosa with. Mr Ramaphosa could not on 9 August 2021 have rendered himself guilty as an accessory after the fact in relation to the charge specified in the certificates or the crime of defeating the ends of justice because he only committed the alleged criminal conduct on or after 21 August 2021 when he received the request from Mr Zuma to intervene in his dispute with Mr Downer and other members of the NPA.

[111] For the above reasons, when she considered Mr Zuma’s request for a *nolle prosequi* certificate, the DPP could not have considered the request in respect of Mr Ramaphosa as a suspect and in relation to the charges now brought against him.

[112] To the extent that the DPP intended (and on the present fact, there is no basis for finding that she harboured such an intention) the *nolle prosequi* certificate(s) to

apply to Mr Ramaphosa, the defects discussed above render the *nolle prosequi* certificate(s) vague.

[113] In the premises, the *nolle prosequi* certificates are unlawful, invalid and unconstitutional and fall to be set aside.

Whether the 6 June 2022 certificate had expired when summons was issued against Mr Ramaphosa on 15 December 2022

[114] Even if this Court had found that the 6 June *nolle prosequi* certificate applies to Mr Ramaphosa, it was no longer valid when the 15 December summons was issued against him. To be valid against Mr Ramaphosa, s7(2)(c) of the CPA requires that proceedings in relation to which the certificate were issued ought to be instituted within three months of the date of the certificate, failing which the certificate lapses. The three months' period expired on 5 September 2022. By this date, Mr Zuma had not instituted his private prosecution against Mr Ramaphosa. The institution of legal proceedings against Mr Downer SC and Ms Maughan on an earlier date, does not extend the validity of the certificate against Mr Ramaphosa. To interpret s7(2)(c) to permit such an extension would inadvertently extend the validity of the certificate. Once a private prosecutor is furnished with a *nolle prosequi* certificate, he has three months in which to institute legal proceedings. Doing so piece-meal against different accused persons does not extend the term of the certificate. The time limitation promotes certainty and the effective administration of justice.

The validity of the summons

[115] The 15 and 21 December summons, issued on the strength of *nolle prosequi* certificates that are vague and do not relate to Mr Ramaphosa, are unlawful, invalid and unconstitutional as they fail to meet the requirements in s7(2)(iv) of the CPA. They therefore fall to be set aside.

Whether Mr Zuma complied with the requirement to pay security

[116] It is common cause that when he caused summons to be issued against Mr Ramaphosa on 15 and on 21 December 2022, Mr Zuma had not deposited with the Magistrates Court with jurisdiction over the alleged offences, the amount of security

as determined by the court as required in terms of s9(1)(b) of the CPA. He only did so in April 2023.

[117] It was contended on his behalf that the Full Court in Part A condoned non-compliance with s9(1)(b) of the CPA. The Applicant disputes that such an order was granted at a case management meeting presided over only by the presiding Judge in Part A and at which the other two judges who constituted the Full Court were not present. Mr Zuma's attorneys have not filed an order to this effect as directed by this Court. If the Full Court in Part A granted condonation as contended on behalf of Mr Zuma, it would have issued an order to that effect. This issue would also not be disputed between the parties.

[118] Counsel for Mr Zuma has not furnished us with any authority that this Court may condone non-compliance with s9. On the authority in *Nundala*³⁸, such non-compliance constitutes a material defect in Mr Zuma's private prosecution of Mr Ramaphosa.

[119] Even if this Court could condone non-compliance with s9 of the CPA, under the prevailing circumstances, Mr Zuma would not meet the test for condonation. The impugned summons stand to be set aside for reasons set out in this judgment. Therefore, Mr Zuma has not established good cause. The grounds of defence he relies on lack prospects of success.

[120] In the premises, this Court finds that when he caused summons to be issued against Mr Ramaphosa, Mr Zuma had not complied with s9(1)(b) of the CPA.

Whether when issuing the summons, the Registrar complied with the requirements of s7(2)(a) and s9

[121] The Applicant contends that s7(2)(a) and s9 of the CPA place obligations on a Registrar issuing summons instituting a private prosecution. When he issued the impugned summons, the Registrar of this Court failed to comply with these statutory provisions.

³⁸ *Nundala* fn 19 at paragraph 45.

[122] Mr Zuma accepts that these statutory provisions place obligations on him as the private prosecutor and that he duly complied.

[123] As to the person on whom s7(2)(a) places an obligation, there is no ambiguity in the wording in s7(2)(a). It is the private prosecutor who may only have summons issued by the Registrar when he has produced to the Registrar a *nolle prosequi* certificate. S7(2)(a) places no obligation on the Registrar to ensure that the private prosecutor produces a valid certificate. To interpret this provision otherwise would place a heavy burden on the Registrar beyond his duties. The validity of the certificate may be disputed, as it is here, on grounds that call for the interpretation of the applicable statutory provision. The interpretation of statutory provisions is a judicial function.

[124] As I have already found, it is Mr Zuma and not the Registrar who, for the reasons set out in paragraphs 92 to 113 above, failed to produce to the Registrar valid *nolle prosequi* certificate(s) when took out the 15 and 21 December summons. The fact that the Registrar issued the summons on the basis of *nolle prosequi* certificate(s) Mr Zuma attached to the summons does not mean that the validity of the *nolle prosequi* certificate(s) is beyond scrutiny. If the accused (or an interested party as the President has done here) adopts the view that the *nolle prosequi* certificate(s) attached to the summons is invalid, institutes proceedings to impugn them; and (as is the case here) establishes that the private prosecutor fails in his obligation to comply with s7(2)(a), this renders the summons issued by the Registrar invalid.

Whether the private prosecution is unlawful and invalid

[125] In contending that the private prosecution is unlawful and invalid, the President relies on overlapping grounds. Firstly, he contends that the private prosecution is unlawful and invalid because Mr Ramaphosa's alleged conduct does not constitute a criminal offence. Secondly, he contends that the private prosecution constitutes an abuse of process. He has pleaded two bases on which he contends that Mr Zuma's private prosecution of Mr Ramaphosa constitutes an abuse of process. Firstly, he contends that Mr Ramaphosa's alleged conduct does not constitute any of the criminal offences Mr Zuma has charged him with. Therefore, Mr Zuma's private prosecution of Mr Ramaphosa is not pursued to obtain a genuine criminal conviction. Secondly, he

contends that Mr Zuma instituted the private prosecution in pursuit of an ulterior purpose.

[126] Therefore, in the main, the President contends that Mr Zuma's private prosecution constitutes an abuse of process because Mr Ramaphosa's alleged conduct does not constitute a criminal offence and that the private prosecution has been instituted for an ulterior purpose. These grounds of review implicate Mr Zuma's non-compliance with s7(1)(a) of the CPA, specifically whether Mr Zuma has a "substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence."

Abuse of process

[127] The President relies on the definition of abuse of court process in *Phillip*³⁹ *Solomon*⁴⁰ and *Reddell*.⁴¹ Mr Zuma also relies on *Reddell*.

[128] Authorities on whether a private prosecution constitutes an abuse of process are clear. In *Phillips*⁴², cited with approval in *Reddell*⁴³, the Supreme Court of Appeal defined abuse of process as follows:

"The term abuse of process connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the court is asked to adjudicate they are regarded as an abuse for this purpose."

[129] In *Solomon*, the Court held that when summons instituting a private prosecution are taken not with the object of having justice done to a wrongdoer, but in order to enable the prosecutor to harass the accused or fraudulently defeat his rights, that constitutes an abuse of process.⁴⁴ The Court further held that motive is irrelevant in the case of public prosecutions. However, it is not permissible to use the power to prosecute for personal financial gain. To do so undermines the objectivity of the

³⁹ *Phillip* fn 35 at 565E.

⁴⁰ *Solomon* fn 17 at 607E-G.

⁴¹ *Reddell* fn 14 at 49-51.

⁴² *Phillips* fn 35 at 565E.

⁴³ *Reddell* fn 14 at 50.

⁴⁴ *Solomon* fn 17 at 607-608.

prosecuting process. It is not the motive, but the independence of the private prosecutor which is the problem.

[130] In *Reddell*, citing the above principles in *Phillips* with approval, the Constitutional Court held that the prosecution must be brought in the public interest and not to pursue some private objective.⁴⁵ Where the Court finds an attempt made to use for an ulterior purpose machinery devised for the administration of justice, it is the Court's duty to prevent such abuse. This power, however, is to be exercised with great caution and only in a clear case.⁴⁶

[131] We proceed to enquire whether on the alleged facts, the charges Mr Zuma brought against Mr Ramaphosa would lead to a conviction.

Would the charges lead to a conviction?

[132] It was contended on Mr Zuma's behalf that whether the private prosecution would lead to a conviction is a subjective question. It differs from the question whether the private prosecutor has prospects of success. The latter is an objective question. It is premature to make such a claim because no evidence has been led to gainsay Mr Zuma's belief that the charges are valid and will lead to a conviction. It is the function of the trial court to pronounce on the validity of the charges. Mr Zuma placed reliance on the judgment in *Mokhesi*.⁴⁷

[133] But, *Mokhesi* provides no authority for this proposition. The proposition is at also odds with the latest Constitutional Court pronouncement on this issue in *Reddell*,⁴⁸ that an enquiry into abuse of process depends on the facts and circumstances of each case. One of the issues the Constitutional Court in *Reddell* had to determined was whether the so called SLAPP⁴⁹ suit defence enjoyed recognition in our law under the common law abuse of process doctrine. The defence was raised in a defamation claim to which the plaintiff excepted. The Constitutional Court followed

⁴⁵ *Reddell* fn 14 at 54.

⁴⁶ *Reddell* fn 14 at 71. Also see *Solomon* fn 17 at 607F—H.

⁴⁷ *Mokhesi* fn 16 at 38.

⁴⁸ *Reddell* fn 14 at 49.

⁴⁹ Acronym for Strategic Litigation Against Public Participation.

the trite approach to determining exceptions, by accepting the facts alleged by the defendants as established.

[134] Here too, to enquire into whether Mr Ramaphosa's alleged conduct would lead to a conviction, we accept Mr Zuma's allegations against Mr Ramaphosa as established. Therefore, the fact that evidence is yet to be led and can only be led in the criminal court is not prejudicial to Mr Zuma.

[135] In *Mokhesi*, the accused sought declaratory orders in the Civil Court in relation to the evidence the State intended leading at the criminal trial. The accused contended that the prosecution was based on evidence obtained from the State Capture Commission which could not be used against the applicants in the criminal trial in terms of the provisions of the regulations relating to the State Capture Commission. The Court in *Mokhesi* determined that the accused sought to challenge the evidence the State intended leading at the trial in the Civil Court prematurely. It refused to be drawn into that enquiry because of its abstract nature. It found it pre-mature to pre-empt the evidence the prosecution would lead at the trial and held that the Criminal Court is best suited to determine the admissibility of the evidence. It therefore, exercised its discretion against granting the declaratory order sought by the accused (applicants).⁵⁰

[136] In count 1, Mr Zuma alleges that Mr Ramaphosa unlawfully and intentionally contravened s41(6) (a) and/or s41(6) (b) of the NPA Act as an accessory after the fact in that:

“after the commission of the offences [allegedly by Mr Downer SC and Ms Maughan], on or about the period 21 August 2021 to date, at or near Pretoria, [Mr Ramaphosa] wrongfully, unlawfully and intentionally engaged in conduct by commission or omission, which enabled the perpetrator/s and/ or accomplices [Mr Downer SC and Ms Maughan] in the offences to evade liability for their actions and/ or facilitated such persons' evasion of liability and/ or escaping of justice at the expense of injuring the dignity, privacy, bodily integrity, and security rights of the private prosecutor.”

[137] In the summary of substantial facts attached to the summons, Mr Zuma alleges that Mr Ramaphosa failed to conduct an enquiry as he had requested. It is common

⁵⁰ *Mokhesi* fn 16 at 43 and 44.

cause that the President did not ignore Mr Zuma's request. He referred it to the Minister and informed Mr Zuma accordingly.

[138] An accessory after the fact is a person who unlawfully and intentionally, after the commission of an offence, associates himself or herself with the commission of the offence by helping the perpetrator or accomplice to evade justice. Mr Zuma alleges that Mr Ramaphosa failed to conduct an enquiry as requested, thereby making himself guilty as an accessory after the fact, alternatively defeating the ends of justice. As contended on behalf of the Applicant, the President's response to Mr Zuma's request was perfectly lawful. It is consistent with his powers in terms of s91(2) of the Constitution to assign functions to members of his Cabinet. His action does not amount to rendering assistance to the perpetrator to escape conviction.

[139] It is not Mr Zuma's complaint that Mr Ramaphosa has assisted Mr Downer SC or associated himself with his conduct as an accessory after the fact in relation to the charges he brought against Mr Downer SC or that he assisted him to evade justice in those proceedings. Mr Zuma has not particularised how Mr Ramaphosa might have unlawfully rendered assistance to Mr Downer SC.

[140] However, it is odd that more than 1 year after the President referred Mr Zuma's request to the Minister, it is unknown what has become of the referral. The Applicant does not appraise this Court in that regard. Be that as it may, on the present facts, whatever inaction the President may be criticised of in this regard does not amount to associating himself with their alleged criminal conduct or assisting Mr Downer SC and other NPA members to evade justice.

[141] Curiously, Mr Zuma is not privately prosecuting the Minister to whom his request the President referred.

[142] The NPA Act criminalises and provides a penalty for Mr Downer SC's alleged conduct. Mr Zuma pursued justice against him and Ms Maughan in the Pietermaritzburg Court. That Court recently upheld Mr Downers SC's frontal challenge to Mr Zuma's title to prosecute.

[143] For the reasons set out above, Mr Zuma's allegations against Mr Ramaphosa would not yield a conviction on counts 1 and 2.

Ulterior purpose

[144] Mr Zuma denies that he instituted the private prosecution for an ulterior purpose. As I find below, the basis of his denial is so far-fetched that this court may not reasonably rely thereon.

[145] The alleged ulterior motive is the triggering of the ANC's step aside rule to prevent Mr Ramaphosa from contesting elections at the ANC's 55th National Conference which was due to commence the day after the first summons was issued. The step aside rule prevents any person who is charged with a criminal offence from standing as a candidate in the elections.

[146] At no point between 21 August 2021 when he requested the President to institute an enquiry and the issuing of summons on 15 December 2022, did Mr Zuma communicate further with the President. He never enquired on the progress made by the Minister. He never complained that the President's response amounts to failure to act on his request.

[147] As already determined, Mr Zuma never laid criminal charges with SAPS against Mr Ramaphosa in respect of the charges. He never mentioned Mr Ramaphosa as a possible suspect in his complaint affidavit. He never entered into any correspondence with the office of the DPP regarding whether the 6 June 2021 *nolle prosequi* certificate applies to Mr Ramaphosa. He also never demanded that the 6 June *nolle prosequi* certificate should be amended to include him as he did with Ms Maughan. Mr Ramaphosa is not the only person mentioned in Mr Zuma's complaint affidavit who the DPP declined to prosecute and who is not specifically mentioned in the *nolle prosequi* certificates. Amongst all other persons mentioned, that Mr Zuma only singled out Mr Ramaphosa and suddenly issued summons against him supports the President's ulterior motive claim.

[148] Mr Zuma's contention that he only caused his attorneys to issue summons against Mr Ramaphosa on 15 December 2022 due to the looming holiday season is

far-fetched. Having waited almost 16 months after requesting the President to institute an enquiry to issue the summons, he has offered no reason why he could not wait until the new year to do so.

Finding

[149] Having regard to the above, this Court finds that Mr Zuma instituted the private prosecution of Mr Ramaphosa for an ulterior motive. Therefore, he lacks a peculiar and substantial interest in the issue of the private prosecution instituted against Mr Ramaphosa. The charges would not lead to a conviction as they are grounded on conduct that does not constitute a criminal offence. Therefore, the private prosecution constitutes an abuse of process. Hence it stands to be declared unlawful, unconstitutional, invalid, and set aside.

THE INTERDICT

[150] It is trite that to succeed in obtaining interdictory relief, the Applicant must establish a clear right, reasonable apprehension of harm and the absence of an alternative remedy.

Clear right

[151] In his answering affidavit in Part A, Mr Zuma contended that even if the current prosecution was discontinued due to procedural irregularities, nothing would prevent him from reinstituting the private prosecution once the irregularities have been corrected. Therefore, the discontinuation of the prosecution is irreversible as no acquittal is competent at this stage. But, he misses the point. It is not only as a result of procedural irregularities that the two summons fall to be set aside. The finding that Mr Zuma's allegations against Mr Ramaphosa do not constitute a criminal offence and that the private prosecution was instituted for an ulterior motive and constitutes an abuse of process is a substantive defect in Mr Zuma's private prosecution of Mr Ramaphosa.

[152] Mr Zuma is bound by s1(c) of the Constitution to respect the rule of law and the supremacy of the Constitution. While he enjoys the right of access to the court and to have any dispute that can be resolved by the application of law decided in a fair

public hearing before a court, the content of this right does not extend to an unlawful, unconstitutional and invalid private prosecution process. If allowed, such a private prosecution would breach Mr Ramaphosa's right to human dignity, privacy and security of the person. The Applicant has established a clear right on the basis on which he has been found to enjoy standing in this application, to ensure that both Mr Ramaphosa and the office he occupies as President are protected from such constitutional breaches.

Reasonable apprehension of harm

[153] Reasonable apprehension of harm is a reasonable apprehension that the continuance of the alleged wrong will cause irreparable harm to a party.⁵¹ The loss need not necessarily be financial. It may consist of an irremediable breach of the applicant's rights.⁵²

[154] I am satisfied that the Applicant has established a reasonable apprehension of harm from the threat Mr Zuma made that he will simply correct the procedural irregularities that have been found to exist and issue a fresh summons. Mr Zuma has been able to institute an unlawful, invalid and unconstitutional private prosecution.

[155] Therefore, the President's apprehension that Mr Zuma may again institute an unlawful, invalid and unconstitutional private prosecution for the same charges and on the same allegations, thus breaching his constitutional rights, is reasonable.

Alternative remedy

[156] It is the type abuse of process that is manifest in Mr Zuma's private prosecution of Mr Ramaphosa that the Court in *Solomon, Van Deventer and Reddell* held that the Court has the power to prevent to regulate its own processes by interdicting the prosecution process. Doing so does not amount to usurping the power of any administrative official as contended on behalf of Mr Zuma.

⁵¹ *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v L F Boshoff Investments (Pty) Ltd* 1969 (2) SA 256 (C) and *Cliff v Electronic Media Network (Pty) Ltd and Another* 2016 (2) All SA 102 (GJ).

⁵² *Braham V Wood* 1956 (1) SA 651 (D) at 655B.

[157] The Registrar is an official of this Court charged with overseeing the Court's procedures. As already held, his duty in doing so does not extend to determining compliance with the applicable statutory requirements and the substantive validity of the private prosecution. That function lies with this Court. This Court has an inherent power to ensure that its processes, including those undertaken by the Registrar are not abused for an ulterior purpose and if it finds that they are, to prevent such abuse.

[158] Other than interdictory relief granted by this Court, the President lacks an effective alternative remedy. Seeking declaratory relief each time Mr Zuma institutes an unlawful, unconstitutional and invalid private prosecution process on the same charges and grounded on the same allegations would not constitute an effective alternative remedy.

[159] This Court is therefore satisfied that the President has made out a case for the relief prayed for in its amended notice of motion.

THE *AMICUS CURIAE*

[160] In its application for admission as *amicus curiae*, BKH describes itself as a non-profit organization formed to advance, support and defend constitutional principles and values. It claims an interest in the determination of the following rights that arise from the Applicant's case:

- 161.1 the principle of prosecutorial independence and the duty of the national prosecuting authority to carry out its functions without fear, favour or prejudice;
- 161.2 the right to equal protection and benefit of the law;
- 161.3 the right of access to courts, including the abuse of court process akin to a SLAPP suit as evinced by the cost order sought by the Applicant against legal representatives of a party litigating against the President.

[161] The applicant objected to the *amicus's* submissions on the basis that they bear no relevance to the issues that stand to be determined between the parties. Contrary to the *amicus's* submission, the fact that the Full Court in Part A admitted it on the agreement of the parties does not grant it a blank cheque to stray beyond the issues

between the parties. The Full Court in Part A had no opportunity to exercise its powers in terms of Uniform Rule 16(4) because when it considered the *amicus*'s admission application, the issues between the parties were yet to be defined. They were finally defined only when the Applicant filed his replying affidavit some two weeks before the hearing.

[162] Under these circumstances, it is still incumbent upon the *amicus* to stay within the confines of its role as a friend of this Court, otherwise it risks rendering its submissions irrelevant, notwithstanding its admission.

[163] This Court found the *amicus*' submissions clearly irrelevant to the present issues. Hence, it confined it to address it only on the collateral issue regarding the alleged lack of independence of the NPA.

[164] Riding on this allegation, the *amicus* warned this Court against leaving the fate of Mr Ramaphosa's private prosecution to the prosecuting authority which is intent on defending him because it has displayed clear partisanship and bias in favour of the President in the instances itemized below:

- 164.1 the prosecution authority claims to abide the court's decision yet at the same time, seeks the setting aside of the 21 November *nolle prosequi* certificate only to the extent that it is found to apply to Mr Ramaphosa;
- 164.2 one of the officials in the DPP's office issued a media statement after Mr Zuma issued the 15 December summons, offering a clarification that sought to remove Mr Ramaphosa from the reach of the private prosecution;
- 164.3 the DPP refused to prosecute her colleague, Mr Downer SC;
- 164.4 prosecution authorities are yet to make a decision in the so called Phala Phala matter almost a year after the criminal charges were laid against Mr Ramaphosa.

The statutory requirement for a nolle prosequi certificate

[165] The *amicus* was pre-empting an order the prosecuting authority seeks, declaring the *nolle prosequi certificates* on which Mr Zuma relies not to apply to Mr Ramaphosa or to be invalid to the extent they apply to him, because, if such orders were granted, in the event Mr Zuma intends re-instituting the private prosecution of Mr Ramaphosa, Mr Zuma would have to approach the DPP for a *nolle prosequi* certificate that applies to Mr Ramaphosa.

[166] The *amicus* contends that a private prosecution is a valuable constitutional safe-guard against inertia or partiality on the part of the prosecuting authority and a useful constitutional safeguard against capricious, corrupt or biased failure or refusal on those authorities to prosecute others. This is an inappropriate and reckless insinuation for the *amicus* to make. Given the important role the prosecuting authority plays in promoting the rule of law, the accusation will unduly stain the confidence of the public in the prosecuting authority and in the rule of law. Such insinuations should never be flagrantly made unsupported by the common cause facts or this Court's findings. There is no evidence that any member of the prosecuting authority acted capriciously, corruptly or to Mr Zuma's prejudice failed or refused to prosecute Mr Ramaphosa in relation to the present charges. As already found, the facts and circumstances in this case establish that Mr Zuma never pursued charges in respect of which he now seeks to privately prosecute Mr Ramaphosa.

[167] The relief the prosecuting authority seeks in these proceedings only serves to insulate the *nolle prosequi* certificates from a declaration of invalidity so that they remain valid against Mr Downer SC and any other person that they are interpreted to apply to. The prayer the DPP seeks is actually favourable to Mr Zuma because he relied on the *nolle prosequi* certificates to acquire title in his prosecution of Mr Downer SC and Ms Maughan. Nonetheless, this Court does not have to grant this relief because it was only conditional on the *nolle prosequi* certificates being interpreted to apply to Mr Ramaphosa.

The media statement

[168] It was imprudent of Mr de Kock to issue the media statement clarifying that the *nolle prosequi* certificate does not apply to Mr Ramaphosa under the circumstances. Members of the prosecuting authority should refrain from conduct manifested by Mr de Kock as it will no doubt give rise to a perception of bias on the part of the prosecuting authority, thus staining public confidence in the capacity of that institution to advance the rule of law.

[169] Mr Zuma's claim of bias in the handling of Mr Ramaphosa's private prosecution by the DPP and members of her office, on which the *amicus* rides, are not supported by this Court's findings regarding the role played by the DPP in Mr Zuma's private prosecution of Mr Ramaphosa. The DPP did not decline to prosecute Mr Ramaphosa to protect him as claimed because Mr Ramaphosa was never presented to her as a suspect. Hence, she issued no *nolle prosequi* certificate that applies to him.

[170] In the media statement, Mr de Kock expressed his opinion regarding who the *nolle prosequi* certificates apply to. His opinion bears no relevance in these proceedings. As to whether the *nolle prosequi* certificate(s) apply to Mr Ramaphosa; it was for this Court to determine, as that question is an issue in these proceedings.

Other prosecutorial decisions

[171] If the DPP or any member of the NPA conducted themselves with bias in how they dealt with the prosecutorial decisions made in relation to Mr Downer SC and Ms Maughan and in the Phala Phala matter, their conduct bears no relevance in these proceedings. The DPP has no jurisdiction over Mr Zuma's private prosecution of Mr Ramaphosa. The complaint that the DPP and officials in her office are biased in favour of Mr Downer SC and Ms Maughan ought to have been raised with the Court seized with Mr Zuma's private prosecution of these parties.

[172] The complaint regarding the Phala Phala matter is improperly made in this Court. No factual basis for it has been laid. It is not relevant to the issues at hand. It ought to be addressed following proper due process.

Finding

[173] There is no basis to find that if Mr Zuma decides to lay criminal charges against Mr Ramaphosa with the SAPS and the latter refers the docket to the DPP for a decision, the DPP will make a biased decision and decline to prosecute Mr Ramaphosa. If she ventures to do so, she is obliged by s7(2) of the CPA to issue Mr Zuma with a *nolle prosequi* certificate. But, this scenario will not arise because the DPP lack jurisdiction over the impugned private prosecution. Further, since the interdictory relief sought by the President stands to be granted for reasons set out in this judgment, Mr Zuma will not be able to charge Mr Ramaphosa on the same charges, grounded on the allegations made in the impugned private prosecution.

COSTS

[174] The Applicant had decried the independence of Mr Zuma's legal representatives. It is probably on this basis that he had sought a punitive cost order against them. He has since abandoned this relief. This is probably why the issue is not addressed in the President's heads of argument. It was also not addressed in oral argument. It in any event lacks merit. It is not a statutory requirement that the private prosecutor's legal representatives ought to be independent. They act on instructions to protect the private prosecutor's interests in these proceedings. It is the private prosecutor who ought to be independent.⁵³

[175] The Applicant and Mr Zuma essentially agree that the costs ought to follow the event. The parties who abide the Court's judgment have not petitioned this Court for a cost order in their favour.

[176] In the premises, the following order issues:

⁵³ See *Solomon* fn 17.

ORDER

1. It is declared that:

- 1.1 the *nolle prosequi* certificates issued by the second respondent to Jacob Gedleyihlekisa Zuma (“Mr Zuma”) dated 6 June and 21 November 2021 do not apply to Mr Cyril Ramaphosa (“Mr Ramaphosa”);
- 1.2 the summons Mr Zuma issued against Mr Ramaphosa out of this Court under case number 2022-059772 dated 15 and 21 December 2022 respectively (“the summons”), are unlawful, invalid and set aside;
- 1.3 Mr Zuma’s private prosecution of Mr Ramaphosa instituted under the summons is unlawful and unconstitutional and is set aside;
- 1.4 Mr Zuma’s private prosecution of Mr Ramaphosa in respect of the charges set out in the summons and grounded on the allegations set out in the summary of facts attached to the summons is interdicted;

2. Mr Zuma shall pay the costs of the applicant, the President of the Republic of South Africa, inclusive of the costs of two counsel where so employed.

ISMAIL J
JUDGE OF THE HIGH COURT
JOHANNESBURG

BAQWA J
JUDGE OF THE HIGH COURT
JOHANNESBURG

MODIBA J (She)
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

For the Applicant: N. H Maenetje SC, assisted by N Muvangua and P Sokhela (She)

Instructed by: The State Attorney

For the 1st Respondent: D Mpofu SC, assisted by L Moela, S Mamoepa (She), M Mavhungu and K Pama-Sihunu (She)

Instructed by: W N Attorneys Incorporated

For the 2nd and 3rd Respondent: TF Mathibedi SC, assisted by P Mmutle

Instructed by: The State Attorney

For the 4th Respondent: No appearance

For the *Amicus Curiae*: Vuyani Ngalwana SC, assisted by N Khooe (She), S Manganye (She) and T Makola (She)

Instructed by: Ramushu Mashile Twala Incorporated

DATE OF HEARING: 17 & 18 May 2023

DATE OF JUDGMENT: 5 July 2023

MODE OF DELIVERY: this judgment is handed down by email transmission to the parties' legal representatives, up loading on Caselines and release to SAFLII. The date and time for delivery is deemed to be 10 am. The signed judgment is archived in the court library.