IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no.: **12770/22P**

In the application for admission as *amicus curiae*:

CAMPAIGN FOR FREE EXPRESSION	First Applicant for admission
MEDIA MONITORING AFRICA TRUST	Second Applicant for admission
SOUTH AFRICAN NATIONAL EDITORS' FORUM	Third Applicant for admission
HELEN SUZMAN FOUNDATION	Fourth Applicant for admission

In the matter between:

KARYN MAUGHAN	Applicant
and	
JACOB GEDLEYIHLEKISA ZUMA	Respondent

and

Case No. **13062/22P**

WILLIAM JOHN DOWNER	Applicant
and	
JACOB GEDLEYIHLEKISA ZUMA	Respondent

ANSWERING AFFIDAVIT TO ALL APPLICANTS FOR ADMISSION AS AMICUS CURIAE

I, undersigned,

JACOB GEDLEYIHLEKISA ZUMA

do hereby make oath and state as follows:

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1. I am a former President of the Republic of South Africa and the respondent in the two applications under cases number 12770/22P and 13062/22P respectively. As such, I am authorised to depose to this affidavit to oppose the Applicants' applications for admission as amicus curiae for reasons set out below. All the four applicants do not meet the requirements for admission as friends of the Court in my criminal prosecution or the criminal prosecution of the main applicants.

2. I have considered the submissions made by the applicants in support of their applications and intend to deal with these thematically rather than on an ad para basis. I am fully appreciative of the role of these organisations and respect their rights to seek admission to court proceedings to advance whatever arguments they believe may enrich our legal culture. I understand that these organisations seek opportunities to use the courts to lobby for special interest judicial outcomes, but in this private prosecution in which I am seeking to vindicate my fair trial rights is one where those opportunities should be limited.

3. I cannot and do not seek to deal with every allegation made in the affidavits of the applicants. I deal with what I consider the essence of the applicants' arguments for admission. All of them are designed to limit my constitutional right to conduct a private prosecution for the crimes committed by the main applicants. Those issues that I do not deal with – to the extent that they are contrary to the essence of what I say in this affidavit – must be taken to be denied.

4. Before dealing with the specific issues that I have identified, I wish to make two bold factual statements that must put to bed the sinister allegations that I have an improper motive in seeking to prosecute Ms Maughan and Mr Downer for their criminal breach of section 41(6) of the NPA Act. I do not have a sinister motive as alleged by them. Ms Maughan claims to have built a major part of her journalistic career reporting on me

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– either as an accused or the President of the Republic. I, in fact, can recall that I gave her an interview on a number of issues and am now aware that some of the issues covered in that interview could have inspired her to write a book on the nuclear program that I championed while in government as President. Ms Maughan, contrary to her alarmist statements that she is exposed to any threats to her job, appears to be thriving – for since her first appearance – nothing supports the allegation of threat to her right to work as a journalist. She has reported freely and, in some instances, demonstrated her own biased views on me. She is entitled to her biased opinions, and I do not hold anything against her for those false and biased reports she makes about me and my motives in bringing this private prosecution.

5. There is no evidence that I have acted with antipathy or sought to undermine Ms Maughan's constitutional rights as alleged or to prevent or to intimidate her from performing work at peak, as a journalist. The applicants would know that I am one of South Africa's most covered personality in South Africa in the media and I am convinced that my role in South Africa is a journalistic obsession. There are terrible articles, cartoons and all sorts of social media insults that have been generated since the dawn of our constitutional democracy about me. Most writers who masquerade as journalists and some who are indeed journalists have written their books and articles with no restraint or reflection of how I or my family feels about their hurtful words. Books are written in which I am routinely insulted and portrayed as the most corrupt leader in South Africa without any evidence. Unlawful criminal investigations against me have been conducted – with the full participation of hired or embedded journalists in which I have essentially been accused of treasonous acts. All that the applicants must do is to examine the famous "*Browse Mole Report*" and the role of journalists in preparing it; the Khampepe Commission findings on the role of the media in my prosecution; the conduct of Mr Ngcuka, a former NDPP in which he enlisted the support of journalists to denigrate me. I have been the subject of extreme media attention of the most undesirable kind. I

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have litigated where I have felt that the bounds of media freedom have been exceeded and it was justified I have withdrawn such litigation or taken the litigation threats no further. I am entitled to do so and where on reflection I have felt that media freedom is more important than my hurt feelings, I have taken the matters no further. When I have done do so it is not because I have conceded the right of journalists to commit criminal offences while reporting on me.

6. There are literary millions of articles in both the electronic and print media where I am portrayed in unpleasant terms. Books have been written about me where I am called an enemy of the State – literary material that expose me to possible assassinations or even charges of treason. If I had time, I would demonstrate by reference to these articles and books how it is not true that I have a motive to frustrate media freedom when I prosecute a journalist who has committed a crime relevant to my criminal prosecution, and the protection of my rights. I have made it clear in my motivation that I do not desire to frustrate media freedom and my private prosecution is not designed to do so. What I intend by my private prosecution is to ensure that no one violates the law and my right to the confidentiality of my medical records. It is not a right of the media to publish stories about the state of my health or anyone else, obtained unlawfully from the NPA. Journalists have ethics and surely those ethics include being sensitive to the inviolability of the right to privacy and dignity in relation to – without my consent – publishing and reporting on the state of my health on the basis of leaked documents.

7. I therefore deny that I have activated the private prosecution with a motive to undermine the rights and duties of journalists to report on me. They have done so freely, and I dare say to their hearts' content. Some journalists have reserved the vilest and crudest words for me when treating me as their subject of scornful reporting. I do not believe that the media has been fair to me but I fought and dogged actual and real bullets, so journalists have the freedom of the press. I will therefore not be found amongst those who fight

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journalists for merely reporting on their affairs. I promote it but I cannot promote unethical and criminal breach of the law by a journalist or anyone. Ms Maughan has special access to the NPA and appears to have been used as an exclusive tool to perpetuate the message of the NPA that I am a criminal who is employing all sorts of measures to avoid criminal prosecution by Mr Downer. While her executive access to the NPA is not unlawful, it is a crime to obtain documents without the permission of the NDPP.

8. I would not have wanted to conduct this criminal prosecution, but the very NPA that has perpetrated and tolerated egregious criminal activities against me refuse to prosecute the individual and individuals that have committed crime in relation to my prosecution. They do so for political reasons – and to cover up the criminal activities committed against me and my prosecution. I will not let that go unchallenged irrespective of the avalanche of sponsored and hateful media reports on me. I do not believe that it is consistent with the law to seek to immunise Ms Maughan from criminal prosecution because she is a journalist.

9. So, the short answer to the allegation of motive is that I have not brought the private prosecution to threaten or intimidate or frustrate journalists from writing or making me the object of their intrigue. I have brought the criminal prosecution to ensure that the applicants are held to account for their criminal conduct which involves the leaking of my medical records, in breach of section 41(6) of the NPA.

10. The short answer to the issue of abuse is that the law provides for private and public prosecution. I have sought a public prosecution from an NPA and have been denied that prosecution. I am entitled by law to seek a private prosecution. I can state categorically that the NPA's refusal to prosecute Ms Maughan is part of its unethical strategy against me. They seek to protect her because they use her for their

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propaganda against me. When Downer, in prosecuting me, sanctioned the exclusive leaking of my medical information to Ms Maughan, a line was crossed, and I am not prepared to tolerate such a blatant disregard for the sanctity of my inherent dignity guaranteed in the Constitution. The NPA has no track record of complying with the law in relation to my criminal prosecution.

11. I now deal with the contentions of the applicants in relation to why they should be admitted as friends of the Court.

THE PRINCIPLES OF AMICUS CURIAE: ISS v BASSON IN THE CONSTITUTIONAL COURT

12. The Constitutional Court in *ISS v Basson* held that that "*judgment must be regarded as a general instruction on how to prepare an application for admission as an amicus.*" (At para 11.)

13. A friend of the Court is expected to advance arguments that are intended to assist the Court in its consideration of the main arguments by the main parties. Consent of the parties is first sought by a party wishing to act as a friend of the Court but ultimately it is the Court exercising its discretion that must decide whether a party is worthy the crown of a friend of the Court. Consent of the parties does not bind the Court and therefore Courts must decide the issue without the consent of the parties. The Constitutional Court has held that the "*footing on which the amicus is heard is that the person will make submissions on law or relevant facts which will assist the Court in a way in which the Court would otherwise not have been assisted*".

14. The Constitutional Court further states that "*in its exercise of its discretion whether or not to admit a person as an amicus this Court will have regard to the principles that govern the admission of an amicus*". These principles are:

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14.1. Whether the submissions sought to be advanced are relevant to the issues before the Court;

14.2. Whether the submissions will be useful to the court; and

14.3. Whether the submissions are different from those of the main parties to the case.

15. Friends of the Court may not raise new contentions and should not repeat any matters covered by the main parties. It is the duty of the Court to ensure that these principles are satisfied before a person can be admitted as an amicus. Where these princes are not satisfied, a person cannot be admitted as an amicus.

16. An application for admission as amicus curiae must set out the submissions to be advanced, their relevance to the proceedings, the reasons for believing that the submissions would be useful to the Court and how these submissions differ to those made by the main parties.

17. Applicants for admission as amicus curiae contend that they have an illuminating contribution to make in this application in their own and the public interest that will enhance the understanding of the constitutional right it contends is threatened by a private (or public) prosecution. The unique contribution claimed by Applicants in the matter involving Ms Maughan is allegedly aimed at preventing the risks of our courts being "*used as a tool by persons with power to stifle dissent and criticism.*"[1] In its specific words, the present matter (presumably the private prosecution) is "*a prime example of how the law, including our courts, can be rendered at risk of being used as a tool by persons with power to stifle dissent and criticism.*" It further contends that its specific interest and focus on the right of freedom of expression and the media, clothes it with

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[1] Para 23 of the application for admission.

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special and unique attributes to "*make clear any abuse of process intended to undermine the exercise of a fundamental right as wholly inimical to our constitutional framework and will not be countenanced.*"[2]

18. The applicants seek to be admitted as amicus curiae to advance three submissions. The first appears to be entirely advanced to support Ms Maughan's contentions that the private prosecution constitutes an abuse of process and that it has been triggered to intimidate, distract from and silence public criticism of me. The contention is that the private prosecution has been activated against Ms Maughan as a journalist by me as part of a purposeful strategy to stop journalists from critical or investigative reporting. A vague attempt is made to rely on some authorities for the proposition that there is a growing trend of using litigation to victimise journalists and prevent them from their work. This is what they call SLAPP litigation suits.[3]

19. The applicants contend that the private prosecution is with an ulterior motive of inducing the journalists into abandoning their reporting or an investigation freely in which journalists are targeted with vexatious litigation with the "*aim being not to win the case but to divert time and energy*".[4]

20. The applicants for admission as amicus curiae intend to focus "*in particular on how Zuma's private prosecution against Maughan similarly constitute a SLAPP suit, and how this abuse of process is intended solely at depriving Maughan – and the public more broadly – from the exercise and enjoyment of the right to freedom of freedom.*"

21. The second submission is that the applicants for admission as amicus curiae seek to advance has to do with the standard of legal protection offered to journalists. They

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[2] Para 26 of the application for admission.
[3] The Constitutional Court has recently endorsed the principle of SLAPP suite in the context of damages claim in *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others* [2022] ZACC 37.
[4] Para 32 of the application for admission.

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contend that there is evidence that the private prosecution is responsible for the threats and insults that Ms Maughan has suffered. In this regard, the applicants seek to be admitted to "*assist this Court with reliance on a range of international instruments that require state parties to take all measures necessary to protect journalists and to create a safe and favourable environment for their work.*"

22. The third submission sought to be advanced by the applicants is that section 41(6)(a) and (b) of the NPA Act 32 of 1997 is a not a reasonable limitation of the right to freedom of expression and press freedom, particularly when based on the interpretation and application contended for by me. They offer an alternative interpretation based on the principle of open justice. They do not challenge the constitutionality of section 41(6) but seek to interpret its reach to exclude the right of journalists to obtain information in violation of the law and to report on such information purportedly to advance open justice.

23. The applicants for admission as amicus curiae contend that their input to the Court is urgent.

24. These submissions sought to be advanced by the applicants for admission as amicus curiae are irrelevant to the issues raised in the application by Ms Maughan to set aside her private prosecution. However, to the extent that these submissions are made to assist Ms Maughan's application, they have no merit and been adequately raised and dealt with in her application.

ON SLAPP SUIT

25. Ms Maughan does not rely on the so-called SLAPP suit theory for her application to review and set aside the private prosecution. However, she contends that the private prosecution is an abuse of process which has been brought with the intention of

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restricting her ability to exercise her duties and constitutional right as a journalist. The SLAPP suit theory adds nothing novel to the submissions made by Ms Maughan on the abuse of process and improper motive complaints against the private prosecution. There is no void in our law for the protection of constitutional rights against abuse of judicial process which should attract our courts to embrace the SLAPP suit submissions, in criminal trials. The SLAPP suit submissions therefore add nothing to the abuse of process argument advanced by Ms Maughan. As the Constitutional Court recently held when recognising SLAPP suit type defence that the defendants relying on SLAPP suit type defence will have "*<u>to prove at trial</u> that the defamation suit brought by the plaintiffs:*

> (a) *Is an abuse of process of court;*
>
> (b) *Is not brought to vindicate a right;*
>
> (c) *Amounts to the use of the court process to achieve an improper end and to use litigation to cause the defendants financial and/or other prejudice in order to silence them; and*
>
> (d) *Violates, or is likely to violate, the right of freedom of expression entrenched in section 16 of the Constitution in a material way.*"

26. The Constitutional Court held that "*merits play a central role in a SLAPP suit defence.*" The applicants for admission do not and cannot meet the merits requirement – for it is only after the defendant has led evidence in support of the SLAPP defence to the trial may this SLAPP defence be determined by the Court.

27. But there is a more fundamental difficulty with the attempt of the applicants to seek to introduce SLAPP suit defences in criminal proceedings. In *ISS v Basson*, the Constitutional Court held that the nature of proceedings determines the standard for admission as amicus curiae. In paragraph 15 of the judgment, it held the following:

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"[15] *As a general matter, in criminal matters a court should be astute not to allow the submissions of an amicus to stack then odds against an accused person. Ordinarily, an accused in criminal matters is entitled to a well-defined case emanating from the state. If the submissions of an amicus tend to strengthen the case against the accused, this is cause for caution. This, however, is not an inflexible rule. But it is a consideration based on fairness, equality of arms, and more importantly, what is in the interests of justice.*"

28. Applied to criminal proceedings, the SLAPP suit type defences would impose an onerous burden on an accused who, has no onus to prove anything in criminal trials.

29. While the SLAPP suit submissions are now part of our law, the Constitutional Court did not extend this principle to criminal proceedings or apart from the known abuse of process law, relied on to prevent prosecutions. There is nothing in the theory of SLAPP suits that would enrich the development of our constitutional system or our common law – but more relevant- there is nothing in the submissions of applicants that remotely assists the court in its understanding of the core constitutional power to regulate proceedings in a manner that avoids abuse of judicial process in criminal proceedings.

30. Neither the applicant for admission as amicus curiae nor Ms Maughan seek to have my private prosecution declared vexatious under the Vexatious Proceedings Act 3 of 1956.

31. Finally, the doctrine of SLAPP is unhelpful in enriching the existing constitutional restraints on the state's obligations or indeed private prosecutors to conduct fair criminal trials. It is in any event unclear what the applicants contend are the elements of SLAPP suits that should be applied to criminal prosecution – whether by the state or private individuals. Given that the SLAPP suit doctrine was designed to deal with strategic litigation against public participation, it is unclear which of its known elements must be applied to promote the interests of fair criminal trials or to prevent abuse of the criminal process.

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32. The applicants for admission as amicus curiae have no basis for alleging that I am pursuing the private prosecution for improper motives and to induce a sense of great fear amongst journalists for reporting on me. The evidence is that the media's coverage of my criminal or other issues has been unfettered. No man in South African history has been so denigrated by the media to the extent that it would rightly be held that I am guilty of the charges that I face or that I have been convicted on the courts of public opinion. There is absolutely no evidence that the private prosecution of Ms Maughan has been triggered to victimise her for reporting on me for a period of over ten years. There is no evidence that when I – for the nine years that I was President of the Republic employed any sources of the power that I had access to, victimise the media or more specifically Ms Maughan.

33. Furthermore, the contention in favour of giving the media the right to commit criminal offences while reporting on any matter is inimical to the constitutional system including the rights in section 16 of the Constitution. In other words, the media does not enjoy immunity against prosecution – public or private – for committing crimes. The right in section 16 of the Constitution does not extend to protecting journalists from being prosecuted for committing criminal offenses while performing their duties as journalists.

34. In any event, it is doubtful that the submissions based on the SLAPP suit litigation theory may be raised vicariously by persons not directly affected by the litigation complained of, for example the private prosecution. The applicants for admission as amicus curiae are not accused in the private prosecution and therefore cannot invoke a principle that could be invoked by a litigant facing the allegedly abusive litigation process. There is no evidence provided by the applicants for admission as amicus curiae that I have sought or threatened to take any action against them and therefore have a right to defend themselves against such allegedly abusive litigation. The fact that they do not

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stand as accused persons in the private prosecution means that they can neither complain of abuse of process or improper motive in relation to their claimed rights.

35. Finally, the SLAPP suit litigation submissions would place unlawful restriction in the exercise of the right in section 34 of the Constitution applied as contended for by these applicants. The submissions would force an onus on a litigant in my position to prove that my private prosecution meets the test of criminal prosecutions even before leading any evidence in the criminal trial. That could effectively close the door of section 34 of the Constitution for any person wishing to use the courts to resolve a legal dispute on the basis of a presumed principle of abuse of process.

ON SECTION 41(6) OF THE NPA ACT

36. The attempt to interpret section 41(6) of the NPA Act to exempt criminal prosecution for a breach of the provision by journalist does not have any merit. Applied as contended for by the applicants, it would violate section 9(1) of the Constitution which guarantees the right of everyone to the equal protection and application of the law. It would provide unjustified immunity for persons who breach section 41(6) of the NPA Act under the principle of open justice. The open justice principle does not, in any event, sanction criminal disclosure of persons' medical records in violation of the right of that person to inherent dignity and the law. To apply the principle in the manner contended for by the applicant would undermine the law and promote anarchy.

37. In any event, section 41(6) of the NPA Act is not capable of being applied or interpreted in a manner that gives immunity for its breach by journalists. There is no conceivable basis for the approach that would give journalists immunity from criminal prosecution for a breach of section 41(6) of the NPA Act. Section 41(6) of the NPA Act requires a person to have the permission of the NDPP or a person authorised in writing by the NDPP to disclose to any other person any information which came to his or her

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knowledge in the performance of his or her functions or any other law. The applicant cannot demonstrate why such a requirement should be torpedoed by the principle of open justice. They do not contend that the requirement is unlawful and cannot be complied with or that it is an unconstitutional limitation on any rights. They do not contend that it is an unconstitutional limitation in breach of section 36 of the Constitution of the rights of journalists or that it gives to the NPA an unjustified control over information in their possession in violation of a higher right of the public.

PROTECTION OF JOURNALISTS

38. The submission sought to be made in favour of the protection of journalists is irrelevant because it is predicated on the notion that a private prosecution of a member of the media for a criminal breach of legislation is unlawful or abusive or that it violates a right of a journalist to report. The suite of international references that the applicants seek to invoke as authority for a heightened protection of journalist do not support the view that journalists are or should be immune from prosecution if they commit criminal offences in the course of their duties. The references are essentially an attempt to portray the private prosecution as an abusive attempt to violate the rights of Ms Maughan – which allegation she has aptly made against me. The submissions based on international legal instruments are therefore wholly unhelpful to answer the three related critical questions – (i) is the private prosecution lawful in our constitutional system? If yes, (ii) does international law provide a special legal requirement in terms of which a criminal breach of the law by the media should not be prosecuted – privately or by the State? The third question is whether the international legal instruments add anything in terms of the remedies sought by Ms Maughan against the private prosecution. It is clear that the Constitution and common law adequately offer legal protections for journalists and no international legal instrument provides any unique judicial remedy.

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THE AMICUS CURIAE

39. For the reasons advanced above, the application for admission as amicus curiae should be dismissed with costs. In summary, the applicants do not have a legal interest in the private prosecution other than to bolster the view that I seek to avoid my criminal prosecution by allegedly employing unjustified legal procedures. This view is wrong – for the criminal prosecution of Ms Maughan does not have any impact on whether the criminal prosecution may proceed or not. The applicants' attempt to invoke the SLAPP legal theory to bolster the abuse of process allegations takes the matter nowhere and is unhelpful in resolving the question of whether a member of the media may avoid a criminal breach of the law. The Constitution and our law have sufficient or adequate constitutional safeguards and protections against abuse of judicial process allegations. Applied as conceived by the applicants, the SLAPP litigation theory would distort our law, introduce legal concepts into our legal system which have no foundation and ultimately place an unnecessary strain on the administration of justice. It is clear that the SLAPP litigation suits theories would not distinguish between criminal or civil proceedings. Applied to prosecution by the State – the principles would undermine its role as provided for in the Constitution and open a litigation avenue that could be abused by busybodies like the applicants whose litigation is to advance ideological convictions designed to utilise the courts as platforms of advocacy for media dominance rather than use the judiciary as a constitutional institution for the resolution of legal disputes.

RESPONSE TO HELEN SUZMAN APPLICATION

The Amicus fails to meet the impartiality test

40. As a starting point, the application for admission as a friend of the Court is late and therefore brought on an urgent basis by the applicant. There has been no explanation for the lateness or attempt to provide a credible basis for burdening the hearing of this

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application at this late stage. The Court must strike off this application on the basis that it has been brought late and no attempt has been made to explain the delay in filing the application. In any event, the applicant woefully fails to meet the elementary requirements of admission as amicus curiae and for that reason it should be dismissed, alternatively the application does nothing to enrich the Court on the issues it seeks to advance which have adequately been addressed by Downer for whom the applicants makes common cause.

41. The amicus has purposely used highly inflammatory and partisan language which cannot be dismissed by this honourable court as mere rhetorical flourish. Paragraph 8 of Fritz's affidavit portrays a distorted picture of the litigation history and a case which is alleged to have been running for almost twenty years. This distorted history is clearly an unbridled attempt to minimize or understate the nature of the abuse that I have suffered, to portray my attempts to defend my constitutional rights as "*abuse of process*" and to depict the errant NPA prosecutors as victims of the alleged abuse. Nowhere in the biased portrayal is there an acknowledgement or mention of the fact that the abuse of my rights in the process were recognised by the NPA itself. the following are examples of definitive statements on how the NPA through Downer has abused the criminal process.

THE REPORT OF THE PUBLIC PROTECTOR MUSHWANA:

42. On 28 May 2004 the Public Protector submitted his special report on the investigation into my complaint against then National Director of Public Prosecutions, Ngcuka and Minister of Justice Maduna. The Public Protector made a finding that the press statement by the National Director of Public Prosecutions on 23 August 2003 unjustifiably infringed upon my constitutional right to human dignity and caused me to be improperly prejudiced, and that the press statement was unfair and improper.

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43. In the report, Public Protector Mushwana implored parliament to urgently consider his recommendations, which included among others a call for Ngcuka to account for infringing my constitutional right to dignity and violating prosecutions policy.

44. Mr Mushwana also recommended that Ngcuka and the prosecutions authority be held accountable for failing to co-operate in the investigation of the complaint I filed. He found that Ngcuka violated the prosecution guidelines and the prosecution policy, when he stated there was a prima facie case of corruption against me without disclosing my defence. He thus, treated me improperly and unfairly. "*It (Ngcuka's statement) was inappropriate and unnecessary*," says Mushwana. "*Nothing in the prosecution authority would justify a public statement regarding a person's apparent but not provable guilt.*" Mushwana has found that I was improperly prejudiced by Ngcuka's statement that there was a prima facie case of corruption with regard to allegations that I solicited a bribe in the arms deal. Ngcuka's statement was among the concerns that triggered my complaint to the public protector alleging Ngcuka had abused his powers and had set me up for trial by media instead of by a court of law.

45. Mushwana observed: "*Prosecutors cannot perform the functions of a judge or magistrate.*" "*Under the circumstances, a finding that Mr Zuma's right to human dignity was unjustifiably infringed upon by the statement by the national director (Ngcuka) that there was prima facie case of corruption against Zuma, and that he has therefore been improperly prejudiced, is unavoidable.*" In the report Mushwana details how Ngcuka and Maduna consistently thwarted his efforts to find information that would enable him to probe my claims of power abuse. Following several requests by Mushwana's to Ngcuka and Maduna to assist with information, the two did not respond. Mushwana then sought President Thabo Mbeki's intervention. Nothing materialised.

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46. To the HSF these facts are deliberately suppressed in order to portray me as an unreasonable and vexatious litigant just hell-bent on litigating against Mr Downer anytime and everywhere. This is clearly a false narrative with no grounding on the known and proven facts.

JUDGE MSIMANG'S RULING

47. My criminal prosecution of Mr Downer must further be understood in the context of evidence of unlawful prosecutorial missteps in the serial prosecutions against me. It is a matter of record that in 2006 my corruption case was struck off the roll by the Pietermaritzburg High Court after High Court Judge Herbert Msimang who made scathing remarks and said the state's case against me "*went from one disaster to another*" and had failed to follow proper procedure. "*There were clear guidelines which should have informed their decision to proceed. They ignored those guidelines at their own peril*," Msimang said. "*This is the chickens coming home to roost.*" Msimang said I had to be treated the same as any other person, irrespective of my position in the country. "*His standing in the community will not alter his position in the eyes of the law.*"

48. Judge Msimang said he had needed to take the "*spirit of the Constitution*" into account when making his judgment. He pointed out that the prosecution's case depended on the outcome of appeals against controversial search-and-seizure raids when documents were seized from my lawyers and from me. Judge Msimang said I had suffered social prejudice which "*closely resembles punishment that should only be handed to a convicted person*". He said the state's decision to prosecute was "*anchored*" on unsound principles. The state's case "*limped from one disaster to another*" and it should have investigated further before charging me. He accused the state of failing to take into account the legal challenges to the search-and-seizure raids. He opined that the state was "*taking chances that the trial court would come to their*

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rescue to admit such evidence". Judge Msimang said the state did not "*need to take chances*". Judge Msimang strengthens the claim that the state's case against me caused undue prejudice, that my case was characterised by prosecutorial incompetence and inordinate delays that infringed my rights to a fair trial. Interestingly, the irrefutable narrative about prosecutorial misconduct or incompetence started in 2003 and continued through 2009 when the then Acting NDPP Advocate Mpshe terminated my prosecution based on the abuse of process doctrine. The High Court's adverse findings serves to further underscore my claim that I have been a victim of prosecutorial abuse, incompetence, and misconduct.

49. My current litigation in general and my criminal prosecution of Mr Downer in particular are reflective of the abuse I have suffered at the hands of the NPA prosecutors. It is quiet revealing of the self-styled "*human rights defender*", the HSF, that it has treated me exactly the same way the black African majority people were treated by the brutal apartheid regime. Black people were brutalised and denied all their social, economic and political rights – when they protested and demanded their rights using peaceful means and then through armed struggle, they were labelled criminals and troublemakers who disrupted racial harmony. Sadly, both the argument advanced by the HSF and its labelling of my attempt to seek redress as "*abuse of process*" and other ugly words is reminiscent of that apartheid logic and contempt for the rights of black people seeking to assert their rights against the abuse of state power.

50. HSF has chosen to simply sanitize the NPA's long history of abusing my rights, has chosen to ignore the findings in the report of the Public Protector and court judgments. It has ignored statements from the NPA itself attesting to the unbroken history of abuse I suffered because of prosecutorial misconduct. For avoidance of doubt, I attach the evidence of the NPA on the abuse I have endured through abuse of prosecutorial power

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to the knowledge and endorsement by Downer, the affidavit of the NPA deposed to by Hofmeyr.

51. It is mind-boggling that a self-styled human rights defender such as HSF can defend grave prosecutorial misconduct and abuse by attacking the victims such as myself rather than defend me from such abuse. This leaves a bitter taste in my mouth – I have not boycotted the judicial system because I am a patriotic South Africa with an abiding faith in a judicial system and the Constitution, to provide safety from lawlessness. Despite the many setbacks and the humiliating experiences with the justice system, I am involved in litigation against state functionaries because I believe that the judicial system in a constitutional democracy should be qualitatively different from the abhorrent apartheid legal order. It is a system that should be based on respect of fundamental human rights and equal justice to all. I consider the HSF's preposterous suggestion that resorting to the courts to seek justice is "*an abuse*" to be a demonstration that they do not seek to be involved in my prosecution to vindicate a constitutional right or principle but to participate in my public lynching promoted by the NPA and its functionaries – chief amongst them being Downer.

JUDGE NICHOLSON'S JUDGMENT VINDICATED BY SPY TAPES JUDGMENT

52. The Nicholson's judgment speaks for itself and despite it being overturned on appeal, the spy tapes undermine the SCA ruling. The SCA set aside the judgment of Judge Nicholson in an unpleasant judgment based on the absence of evidence that were to be presented in the Spy Tapes case. Harms DP as he then was, said that political meddling was not an issue that had to be determined. "*Nevertheless a substantial part of his judgment dealt with this question. He changed the rules of the game, he took his eyes off the ball.*" He went further to say that Judge Nicholson's finding that he could not exclude the possibility of political meddling in the NPA's decision to re-charge me

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was "*incomprehensible*", that he erred in his judgment and that his findings were "*unwarranted*". He said Judge Nicholson had overstepped the limits of his duty as a judge. His findings ultimately led to the axing of former president Thabo Mbeki. "*The [findings] involving Dr [Penuell] Maduna, Mr Mbeki and all the other members of cabinet ... were not based on any evidence or allegations. They were instead part of the judge's own conspiracy theory and not one advanced by Mr Zuma*," said Judge Harms.

53. Suffice it only to state that with the subsequent revelations of the "*Spy Tapes*" case, political meddling is an undeniable issue that is to be determined and strongly supported by the evidence. The current prosecutor Mr Downer provided an affidavit to an opposition political party, the Democratic Alliance in which he went against the position of his superiors at the NPA and sided with the opposition.

54. A highly useful backdrop to the private prosecution against Mr Downer is that that the NDPP office is inherently conflicted – it was found guilty of misconduct and constitutional violations by the Public Protector, it was subsequently found wanting by Judge Msimang and Mpshe's decision which was overturned has contributed to the very excessive prejudicial delays Judge Msimang condemned. The same NPA has, instead of remaining impartial and objective, publicly voiced its unstinting support for Mr Downer and, not surprisingly, condemned my private prosecution of Mr Downer despite the fact that it was that same office which provided me with the "*nolle prosequi*" certificate. Under these circumstances, there is lack of appearance of impartiality on the part of the entire NPA office, the prejudice caused to me through these excessive delays is irreversible and the public and my trust in the impartiality and competence of the NPA has been permanently eroded. It is simply ludicrous for the HSF to accuse me of "*abusing*" the private prosecution system simply because it hates what I represent politically and wishes to support Downer's compromised conduct at all costs.

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55. The HSF seeks "*leave to intervene as Amicus Curiae*" in Mr Downer's "*application to set aside the summons against him and to interdict me from pursuing further private prosecutions against him.*" HSF disingenuously cites the book "*lawfare*" by Michelle Le Roux and Dennis Davis. Ironically, the HSF reference to "*lawfare*" supports rather than refute my conception of this outfit as bigoted and very superficial in its approach to the law and justice. The term "*lawfare*" first appeared in the Comaroffs' work in 2001, in an introduction to a symposium on "*colonialism, culture and the law*". JL Comaroff "**Colonialism, Culture and the Law: A Foreword**" (2001) 26 Law & Social Inquiry 305. They endorse Martin Chanock's observation about law being the "*cutting edge of colonialism*",[5] they cite a nineteenth-century historical source describing the Setswana practice of referring to the "*appurtenances*" of English colonial law as a "*mode of warfare*". *Id* at 306. This sets up their initial definition of "*lawfare*" as "*the effort to conquer and control indigenous peoples by the coercive use of legal means*". *Id.*

56. In this first usage, then, the term resonates with a long literature on the abuse of law, and the ideology of legalism in particular, during the colonial era.[6] As is all too familiar to South Africans, the rule of law has a dark side.[7]

57. The principle of law's separation from politics that undergirds this idea in liberal constitutional theory was distorted under colonial rule to justify the division of society into two spheres, one in which law indeed rules and the other in which colonised peoples are made the objects of law's repressive commands. The Comaroffs' use of the term "*lawfare*" emphasizes the violence of colonial law in a way that more benign terms like "*rule by law*" fail to do. The HSF's opportunistic use of the term "*lawfare*" adds

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[5] *Ibid* at 305, citing **M Chanock Law, Custom, and Social Order: The Colonial Experience Malawi and Zambia** (1985) 4.
[6] For example, M Chanock The Making of South African Legal Culture 1902–1936: **Fear, Favour and Prejudice** (2001); **J Meierhenrich The Legacies of Law: Long-Run Consequences of Legal Development in South Africa**, 1652–2000 (2008)(using Ernst Fraenkel's idea of the 'dual state' to analyse the bifurcation of the South African legal order before 1994).
[7] M Krygier '**The Rule of Law: An Abuser's Guide'** in Andras Sajo (ed) **Abuse: The Dark Side of Fundamental Rights** (2006) 129.

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nothing to the case; instead it portrays an organizations which claims to be the defender of human rights while it at the same time dismisses and minimizes authoritative court and Public Protector rulings in my favour and appeals to the lowest instincts in oppressive bureaucrats to justify attacks on my constitutional rights. Indeed, what stands out in Comaroff's definitions of "*lawfare*" is the way that the rule of law's positive, power-restraining overtones can sanitize and mask a more instrumentalist, abusive use of law for political purposes. This is exactly what the HSF seeks to achieve under the guise of protecting the rule of law and prosecutorial independence.

58. Another disquieting aspect of the HSF's submission is the attempt to quote out of context the book "*lawfare*" they cited in paragraph 9. In their recent, co-authored book, **M le Roux & D Davis Lawfare: Judging Politics in South Africa** (2019) the authors sound a note of alarm which has nothing to do with my cases. While acknowledging the benefits of certain types of constitutional litigation, they argue that the increased rate of such litigation may have had a debilitating impact on the quality of South Africa's democracy. They are concerned, too, about the effect of all of this on the courts, and their ability to carry out their designated functions. Central to their argument is the concept of "*lawfare*", which they borrow from expatriate South African anthropologists, Jean and John Comaroff above. Granted this term has a predominantly negative connotation, calling up as it does an idea of the law being improperly used in pursuit of political ends starting way back with colonialism. In the Comaroffs' usage in particular, the judicialisation of social and economic struggles that has allegedly followed on the adoption of the Constitution of the Republic of South Africa, 1996 is treated as a troubling development — as a form of "*fetishism*" that distracts from the true purposes and possibilities of democratic politics. Le Roux's and Davis's book, for its part, starts with a relatively clear statement of the problem, but then proceeds to a series of interesting but not obviously connected discussions of politically controversial cases. In consequence, it is not exactly clear what they are arguing. By their own admission,

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"*lawfare*" comes in both "good" and "bad" forms. That being the case, their project required them to provide a conceptual framework for distinguishing between these two manifestations of the phenomenon and at least some sense of how the problems they identify might be mitigated. They did not do so, and it is highly misleading of the would-be amicus curiae HSF to pretend that the book speaks to the slanderous and scandalous allegations they make about me.

59. In point of fact, the authors acknowledge the "*lawfare*" concept's ambiguity and use it in a bigoted and racist manner. "*lawfare*", le Roux and Davis write, "*should be understood as having a duality to it; it can be a good or a bad thing*". *Id.* at p5. Some of le Roux and Davis's examples of this phenomenon, such as their reference to Hugh Glenister's "*tireless efforts*" in the Hawks matter, are thus clearly positive. *Id.* at p8. Elsewhere, "*lawfare*" is used to describe actions and social phenomena of which le Roux and Davis clearly disapprove, such as my various attempts to challenge the prosecution's repeated violations of my rights in the prosecution of the charges of corruption. *Id.* at p7. They also cite the various respects in which South Africa's courts have allegedly "*become the site of pure political contestation because politicians seek to usurp judicial powers to achieve their objectives*". *Id.* at p5. In terms of the biased views of the authors endorsed by the HSF, Glenister a white litigant represented the "good side" of lawfare while I as a black man represents the bad side of "*lawfare*" even where the judiciary and the Public Protector ruled in my favour.

60. It is not an accident that despite their acknowledgment that "*lawfare*" is an ambiguous term le Roux and Davis do not offer us a normative theoretical framework for distinguishing between "good" and "bad" instances of the phenomenon. They also do not provide an in-depth analysis of whether there is anything that the courts or anyone else could do to mitigate lawfare's alleged harmful effects. In the absence of that, their book is not worth the paper it is printed on for this court to draw anything of value. It is

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an undeniable fact that constitutional systems that provide for judicial review require courts to decide politically controversial matters. The whole point of adopting such a system is to subject the exercise of political power to constitutional standards. Inevitably, that means that political disputes that previously would have been resolved by other means come to the courts. That this has been the consequence of the adoption of the Constitution is so unremarkable as to be almost not worth saying. HSF's attempt to prejudice this honourable Court against a litigant by citing half-baked theories from poorly conceived theoretical propositions in semi-academic books is to be deprecated and must be dismissed firmly by this Court.

61. To expose the nonsensical approach of the HSF, it cites the book for the proposition that: "[a]*buse of process and litigation undertaken not to resolve real disputes or to vindicate rights, but to avoid or delay politically unpalatable outcomes, should be discourage.*" The HSF states in conclusory terms that where the "*abuse of process and litigation are employed not only to secure improper outcomes but seeks to bring into disrepute our system of criminal justice, they must not only be discouraged. They must be stopped. This is such a case.*" I consider the said HSF submission to be outlandish and out of kilter with our constitutional values and norms. According to HSF in its bid to seek the status of amicus as a celebrity litigant can simply insinuate itself in a private prosecution and then take a crystal ball gaze into a case to determine whether the litigation seeks to "*secure improper outcomes*" which are not defined with precision.

62. HSF invokes hopelessly vague concept such as "*seeks to bring into disrepute our system of criminal justice*" to identify my case as fitting the description. In point of fact, it is HSF which seeks to manipulate the justice system in a cynical manner – it insinuates itself into a matter involving me as Zuma, a former president in order to raise its political profile and use my case for its mercenary and fund-raising purposes. It is damnable that a non-party entity championing the rights of minority interests can

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arrogate to itself the right to determine which citizens deserve the protection of section 34 which guarantees the right of access to court and which citizens do not.

63. Under our law, the argument raised by HSF is *non sequitor* and betrays the HSF's own abuse of the Court process for the following irrefutable reasons. First the very book cited, Lawfare, states that what is proscribed is "[a]*buse of process and litigation undertaken not to resolve real disputes or to vindicate rights*." There is no question that at the heart of my litigation is the need to resolve real disputes I have with Mr Downer and journalist who aided and abetted the violation of my rights. The HSF believes that that court must pre-empt the fair adjudication of my rights by adopting the HSF's demeaning and circumscribed view of my rights. I have been asked by Mr Downer to post a security bond of a R1 million. I have despite my impecunious state complied with his demands. I certainly would never have asked my friends and family to assist me to deposit such huge amount as deposit if I did not wholeheartedly believe that my private prosecution of Mr Downer will vindicate my rights.

64. Second, I am forced to surmise that the HSF betrays its own alarming knowledge of a secret the NPA has disclosed only to the privileged few when HSF states that I am litigating to "*avoid or delay politically unpalatable outcomes*." The NPA has claimed all along that my prosecution was conducted in a fair, transparent and non-discriminatory manner. Further it has persistently maintained that my prosecution was not tainted by political considerations. The HSF has not explained why there would be "*politically unpalatable outcomes*" in my prosecution which the NPA claims is above board and free of political considerations. The HSF knows from the court judgments, Public Protector findings and evidence revealed by the "*Spy Tapes*" that the NPA has been the one fighting tooth and nail to avoid a trial that will expose the undeniable political manipulation of the so-called corruption prosecution. The HSF, instead of being a "*friend of the court*" has decided to be my opponent and the propaganda mouthpiece of

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the NPA. It clearly intends to endorse the NPA's admitted criminal abuse of the criminal justice system in a manner so inconsistent with the status of a friend of court to give the inescapable impression of a partisan supporter of prosecutorial misdeeds.

65. HSF's statement that my litigation seeks to "*secure improper outcomes*" and "*seeks to bring into disrepute our system of criminal justice*" is ludicrous in the extreme and amounts to a disrespect to this Court. For starters, in 1828, legislation was enacted in South Africa to provide for the right to institute a private prosecution. Between 1828 and 1976, South African statutory law expressly provided that a victim of crime had a right to institute a private prosecution. However, this changed with the promulgation of the Criminal Procedure Act 51 of 1977. Section 7 of that Act provides for a list of people who may institute private prosecutions, but it does not expressly state that a victim of crime has such a right. Nevertheless, the courts have held that section 7 does provide for the right of a victim of crime to institute a private prosecution. As far back as colonial times in *Rex v Kupeka* 1929 OPD 65 at 66, the court gave the following two types of private prosecutions, namely "[e]*very person having the necessary interest may bring a private prosecution on obtaining a nolle prosequi from the Attorney-General, and some municipalities and other public bodies are statutorily empowered to bring private prosecutions for contraventions of their regulations without having to obtain a nolle prosequi*". Further, I am advised that the right of private prosecution for criminal offences in South Africa is apparently the creature of statute. It did not exist under Roman-Dutch law so far as I am aware.

66. I am advised that under the Criminal Procedure Act 51 of 1977, section 7 provides that:

> "*(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;*

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...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."

67. The HSF has not gainsaid the fact that the Director of Public Prosecutions has declined to prosecute Mr Downer for the alleged offence stated in the summons. Nor has the HSF alleged that I cannot prove some substantial and peculiar interest in the issue of the trial arising out of some injury which I individually suffered in consequence of the commission of the said offence by Mr Downer and his accomplices.

68. In *Nundalal v Director of Public Prosecutions KZN*, 2015 JDR 0876 (KZP), the High Court held that "[a] *person whose feelings and good name are injured has the right to prosecute privately if he actaullay [sic] suffers an injury*" and that "*a decision to deny a private prosecutor the right to prosecute should be taken cautiously not least because it implicates the right to access to the court under s 34 of the Constitution. If he meets all the requirements for a private prosecution under the CPA and the right to prosecute is not hit by the limitation in s 36, the private prosecution should be allowed to proceed*". Contrary to the nonsensical claims by HSF, apart from the fact that a private prosecution is a right, it can also be a remedy.[8] The Constitutional Court has observed, in passing, that: "*Whether a private prosecutor is exercising a governmental power is a point which need not now be decided. It may be argued that the private prosecutor is not vindicating a private right, but is invoking the power of the State to punish crime. Sections 12 and 13 of the Criminal Procedure Act 51 of 1977 reflect the State's continuing interest in a private prosecution.*" *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC) at n 88.

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[8] See *Berg River Municipality v Zelpy 2065 (Pty) Ltd* 2013 (4) SA 154 (WCC) para 47: "*One would not usually regard a criminal remedy as one which is available to the harmed individual. It is a public remedy at the discretion of the prosecuting authorities. Only if the directorate of public prosecutions declines to prosecute can the individual launch a private prosecution, and I would hesitate to call a private prosecution an 'ordinary remedy'.*"

69. Contrary to the HSF's *ad hominem* attacks upon me, I did not choose the private prosecution because it is expedient or even palatable to me as a citizen who wishes to take a well-deserved rest from public life after serving my country as I have. I have been compelled to litigate the matter on my own because I was advised that in South African law, a victim of crime does not have a right to compel a public prosecutor to institute criminal proceedings against a suspected offender. Even the Service Charter for Victims of Crime in South Africa does not provide for this right. In *Gillingham v Attorney-General*, 1909 TS 572. the court held that it could not compel the Attorney-General to prosecute. Likewise, in *Kuranda v Barnet and Assistant Landdrost of Johannesburg*, (1891-1892) 4 SAR TS 288 the court held that a public prosecutor may refuse to prosecute even if requested by a victim of crime to prosecute the suspect. Although, as a general rule in South Africa, public prosecutors have the authority and a duty to prosecute crime, *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 176, a public prosecutor may in some circumstances decline to prosecute a suspect even if there is evidence that the latter committed an offence.[9] A victim of crime who is not satisfied with the public prosecutor's decision not to prosecute has the following options: he may invoke section 179(5)(d) of the Constitution and petition the National Director of Public Prosecutions to review the decision not to prosecute; he may institute a private prosecution; or he may approach the High Court and challenge the rationality, legality or lawfulness of the decision not to prosecute.[10]

70. Contrary to the misleading and false statements of the HSF, section 13 of the CPA contains its own prophylactic remedies to deal with the abuse of process by a private prosecutor. Individuals subjected to private prosecutions retain a full panoply of

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[9] See *Freedom under Law v National Director of Public Prosecutions* 2014 (1) SACR 111 (GNP) para 121, where the court observes that "[t]*he discretion of the prosecuting authority to prosecute, not to prosecute or to discontinue criminal proceedings is a wide one. Nonetheless, as is reflected in the Prosecution Policy Directives, the prosecuting authority has a duty to prosecute, or to continue a prosecution, if there is a prima facie case and if there is no compelling reason for non- prosecution*".

[10] See, generally, *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA); *National Director of Public Prosecutions v Freedom under Law* 2014 (4) SA 298 (SCA).

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remedies. Indeed, the Court has held that "[n]*otwithstanding that the private prosecutions are not strictly speaking civil proceedings, they are indeed forms of litigation that fall within the purview of the Vexatious Proceedings Act* [3 of 1956]". *Ernst & Young v Beinash* 1999 (1) SA 1114 (W) at 1135. In addition, section 13 of the 1977 Act provides that:

> "[A DPP] *or a local public prosecutor acting on the instructions of the [DPP], may in respect of any private prosecution apply by motion to the court before which the private prosecution is pending to stop all further proceedings in the case in order that a prosecution for the offence in question may be instituted or, as the case may be, continued at the instance of the State, and the court shall make such an order.*"

71. This belies the claim by the HSF that this Court must on the basis of mere conjecture and gossamer prevent me from exercising my statutory and constitutional rights. The statute provides an effective way in which the abuse of the right to institute a private prosecution may be brought to an end through the DPP taking over the private prosecution. It is telling here that the NPA despite its unqualified support for Mr Downer has not had the gumption to take over the matter in accordance with section 13 of the Act.

72. The HSF's position is further undermined by court rulings which have dealt with the section 13 remedies. In *North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape)* 1999 (2) SACR 669 (C), the court ruled that:

> "[I]*t is open for a private individual to demand a certificate nolle prosequi from a Director and to proceed to institute a private prosecution, if he or she is aggrieved by the decision of that Director not to prosecute in any particular instance. Sections 7-15 of the Criminal Code allows therefor. The fact that these provisions of the Code were left unaffected by the legislator when it enacted the new Act indicate, in my view, that the legislator recognised that there would be instances where a prima facie case has been made out, but a*

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Director of Public Prosecutions would exercise his discretion not to prosecute. In that recognition, the legislator elected not to interfere with that discretion, leaving the necessary avenues open for citizens aggrieved by perceived misapplication of that discretion to obtain redress." Id. at 680.

73. The HSF's nimble attempt to amend the clear legislative provisions through the back door must be firmly rejected and this court must see this attempt by a political busy-body masquerading as 'amicus curiae'. It is precisely this type of conduct, not my litigation, which would bring the criminal justice system into disrepute. In the afore-going case, the court added that:

> "*I have accordingly decided to grant an order in terms of which the prosecution of the first and second applicants is permanently stayed. In coming to this decision, I am mindful of the argument...that, were a private prosecution in due course to be instituted against the applicants, the respondent would be entitled, in terms of s 13 of the Code, to intervene and to take over the prosecution. In my view, the fact that this is so should not affect my decision. The respondent would have to apply to the court in which the prosecution is instituted in order to so intervene and, no doubt, would have to show cause why he should be allowed to so intervene. The order which I intend to grant will no doubt influence that court, when and if such an application is brought by the respondent. What that court decides, in the circumstances which may then prevail, cannot be predicted by me.' Id.* at 684.

74. The above exposes the fallacy of the theory hawked by the HSF regarding the alleged violation of the independence of the NPA through my private prosecution. The NPA retains at all times readily available remedies to apply to the court in which the prosecution is instituted in order to take over the prosecution. The fact that it has not done so speaks volumes and militates strongly against and refutes the unsubstantiated assertions by the HSF. In fact, another court, *Central African Examiner (Pvt) Ltd v Howman NNO*, [1966] 2 All SA 260 (R) has held that "*the Court has no power to stop him prosecuting at the public instance if he wishes to do so, except on the basis that*

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the issue is res judicata", and that should the DPP decide to take over a private prosecution "*the Court has no discretion to refuse to allow him to do so*". *Id.* at 256.

75. Another fallacy hawked by the HSF is the notion that a court must shut its door to a private prosecution before the trial even starts. Again, there are prophylactic remedies contained in the CPA Act itself. Section 16 of the 1977 Act provides that:

> "*(1) Where in a private prosecution, other than a prosecution contemplated in section 8, the charge against the accused is dismissed or the accused is acquitted or a decision in favour of the accused is given on appeal, the court dismissing the charge or acquitting the accused or deciding in favour of the accused on appeal, may order the private prosecutor to pay to such accused the whole or any part of the costs and expenses incurred by him in connection with the prosecution or, as the case may be, the appeal. (2) Where the court is of the opinion that a private prosecution was unfounded and vexatious, it shall award to the accused at his request such costs and expenses incurred by him as it may deem fit.*"

76. What the HSF proposes to the court is an invitation to lawlessness and gross violation of the rights of citizens to exercise their rights in accordance with the Act and section 34 of the Constitution. It is clear that costs are given in private prosecutions in like manner as in civil cases. A private prosecutor runs the risk of an adverse order of costs. In *Buchanan v Voogt NO*, 1988 (2) SA 273 (N) the court held that its power under section 16(1) is discretionary, and that section 16(2) is peremptory. The court added that:

> "*A prerequisite to the application of the provisions of ss (2) is that the prosecution has been, in the opinion of the court, unfounded and in addition, vexatious. That is clearly the effect of the use of the conjunctive 'and' between 'unfounded' and 'vexatious'. Subsection (2) confers a discretion on the court as to when a prosecution is to be characterised as unfounded and vexatious but it is a judicial discretion which is subject to review.*" *Id.* at 274.

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77. Most importantly, court further held that "*the court should be slow in coming to a decision mulcting in costs under that subsection a prosecutor who bona fide seeks justice in a private prosecution.*" This means that our courts are fully equipped to deal with any frivolous private prosecutions. Where it is clear that a private prosecution was instituted when the private prosecutor knew that the prosecution was unfounded and then still went ahead with it, he opens himself not only to civil action, but may also be ordered to pay the accused's costs. To be sure, in deciding whether or not to order the private prosecutor to pay the costs and expenses incurred by the acquitted person, courts will consider the reason behind, and the circumstances surrounding, the institution of a private prosecution. This court does not need the deeply flawed and misguided advise of the applicant who show disrespect for constitutional rights to protect its processes.

78. In paragraph 11 of the application, the HSF expresses its bigotry by stating again in conclusory terms that my prosecution of "*Mr Downer is an explicit attempt to undermine the criminal justice system.*" No evidence is provided in support of this ludicrous statement. The HSF further alleges that "*Mr Zuma does not approach this court seeking adjudicative determination of the so-called criminality of Mr Downer's conduct. He comes to this court in bad faith and for an ulterior: to pursue political ends and avoid accountability.*" This outlandish accusation is not supported by any creditable citation to legal authority and admissible evidence. It reads more like a condemnatory edict in which my rights receive no consideration. In any event these matters will be explored during trial and cannot be decided at this stage based on some knee-jerk reaction of the HSF.

79. In paragraph 12 the HSF alleges that I "*seeks to achieve these improper and ulterior purposes by prosecuting the prosecutor. By prosecuting Mr Downer, Mr Zuma does no less than take aim at the National Prosecuting Authority itself – that institution which our*

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Constitution singly endows with the power to institute criminal prosecutions on behalf of the state and whose powers Mr Zuma now seeks to appropriate." The argument in this paragraph is fatally flawed for several reasons.

80. The HSF ignored the dictum in the judgment by Harms DP reversing the judgment of the High Court per Nicholson J that "*a bad motive does not destroy a good case*". A prosecution brought for an improper purpose, so said this Court in that case, is only wrongful if, in addition, reasonable and probable grounds for prosecuting are absent. In the present case, on Mr Downer's own version, the case against him is a strong one – he leaked and sanctioned the leaking of a document written "*medical confidential*" to a journalist in violation of section 41(6) the NPA Act. Once it is accepted that the motive for a prosecution is irrelevant where the merits of the case against an accused are good, the motive for the launch of the private prosecution must equally be so. The HSF appears to have deliberately overlooked the effect of the SCA judgment and uncritically adopted the "*ulterior purpose*" justification as a basis for attacking this litigation.

81. A second fallacy in HSF submission is that in prosecuting Mr Downer, I effectively "*take aim at the National Prosecuting Authority itself – that institution which our Constitution singly endows with the power to institute criminal prosecutions on behalf of the state and whose powers Mr Zuma now seeks to appropriate.*" This is nonsensical in that prosecutors are frequently the subject of recusal applications and their removal from a case can never suggest that the entire NPA is hamstrung from prosecuting cases. In *S v Zuma and Another* (CCD30/2018) [2021] ZAKZPHC 89; [2022] 1 All SA 533 (KZP); 2022 (1) SACR 575 (KZP) (26 October 2021), the Court relied on the SCA judgment of *Porritt and another v National Director of Public Prosecutions and others* [2014] ZASCA 168, 2015 (1) SACR 533 (SCA), [2015] 1 All SA 169 (SCA) paras 7 – 8 and ruled that:

> "[112] *Thus, following Porritt, if an accused believes the prosecutor assigned to their case will not exercise, carry out or perform their powers, duties and*

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> *functions in good faith, impartially and without fear, favour or prejudice, or that the prosecutor is an essential witness in the case, then the accused may bring a substantive application to the court for an order that the prosecutor be removed and replaced. What the accused cannot achieve, however, is to seek such removal by the device of entering a special plea in terms of s 106(1)(h) of the CPA."*

82. A removal and replacement of a prosecutor can never be equated with removal of the entire NPA. As stated above, the right to private prosecution is deeply rooted in the statute and in our history. It is neither a devise to usurp a power exclusively reserved to the NPA by the constitution nor is it a haphazard self-aggrandizement by a litigant. Every criminal defendant in our country has a constitutional right to a prosecutor who is unbiased, neutral and/or disinterested. In *Smyth v Ushewokunze & another* 1998 (2) BCLR 170 (ZS) the court condemned a prosecutor who had "*involved himself in a personal crusade*" against the accused and lacked the objectivity, detachment, and impartiality necessary to ensure that the State`s case was presented fairly.

83. The HSF is confused about the nature of a *prima facie* case that any prosecutor, public or private, must have to prosecute. In terms of the Constitution, prosecutors are obliged to exercise the power to prosecute "*without fear, favour or prejudice*". Sections 179(2) and (4) Constitution endorse this position. This implies pre-trial equal treatment and precludes selective prosecution or the dropping of charges in *prima facie* cases for reasons of political expediency as the NPA has done in my case. In the SCA where I contested the reopening of the case sought by the DA, the SCA distinguished between *prima facie* evidence that would merit the prosecution of an accused and discharging the onus of proof during a criminal trial. The court held that *prima facie* evidence does not need to be conclusive or irrefutable at the stage when criminal proceedings are instituted. It must have enough merit only once the criminal investigations are concluded "*in the sense of reasonable prospects of success*". *NDPP v Zuma* (SCA) paras 27, 43; see also Zeffert, Paizes and Skeen **Law of Evidence** 121- 130. Here the HSF seeks to

adjust the burden upwards in order to put me at a disadvantage. There is no heightened pleading requirement in private prosecution.

84. The rationale behind this requirement is to prevent the laying of spurious charges. Whether or not a case would actually be winnable in court is the domain of the judiciary and not the prosecutors. That decision depends on the evidence presented to the court under cross-examination, where the prosecution is required to present *prima facie* evidence of each element of the crime. Only if the prosecution can during the trial establish a *prima facie* case which is strong enough to discharge the burden of proof will the accused be required to rebut it by raising a reasonable doubt.[11] The court found that the trial court failed to comply with the basic rules of procedure when Nicholson J presumed that there was political meddling in the prosecution, even though this was allegedly not proved. *NDPP v Zuma* (SCA) paras 44-54. The court held that the motive behind a prosecution is irrelevant insofar as a crime that ought to be prosecuted had been committed. *NDPP v Zuma* (SCA) para 37. The court concluded that it was difficult to see, in the light of the Shaik judgment, how the prosecution could have failed to prosecute me. *NDPP v Zuma* (SCA) para 51. The HSF is obviously pursuing its own brand of revisionist jurisprudence but is unfortunately doing so in bad faith and in an attempt to mislead the court.

85. The bias of the HSF is further elaborated upon in paragraph 13 where it is alleged that my "*objective is not to hold Mr Downer accountable for any wrongdoing. He arrives with no actionable claim. He pursues three charges …that the NPA, itself, has declined to prosecute…Indeed, one need only look to Mr Zuma's swollen witness list and prolix summary of facts to identify the sham he intends to stage.*" Unable to contain its unrestrained and twisted contempt for my rights, the HSF concludes in paragraph 14

[11] S v Coetzee 1997 3 SA 527 (CC) para 195; Scagell v Attorney-General, Western Cape 1997 2 SA 368 (CC) para 11.

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that: "*...this court must turn Mr Zuma's abuse of its processes away at the door. Any other result would allow Mr Zuma to use the court's process for ulterior purposes and to further avoid accountability. It would also allow for the debasement of our criminal justice system.*"

HSF FAILS TO MEET THE MINIMUM TEST TO BE ADMITTED AS AMICUS CURIAE

86. The usual test is that in deciding whether to admit any party as *amicus curiae*, the court will consider whether the submissions by *amicus curiae* will give the court assistance which the court would not otherwise enjoy, whether the submissions the *amicus curiae* wish to advance are relevant and whether the issues are new and of a constitutional nature. Lastly, the amicus curiae should not introduce new contention based on fresh evidence. Moreover, impartiality on the part of *amicus curiae* is important. The unwarranted attacks, plethora of epithets and nasty adjectives used by the HSF against me clearly suggest that the HSF has no clue as to what its role in this litigation would be if it was admitted as an *amicus curiae*.

87. In the case of *NDPP v Zuma* 2012 (6) SA 223 (CC) at para 13 Moseneke DCJ states:

> "*I do not propose to revisit the ideal attributes of a party that seeks to be admitted as a friend of the court. It is sufficient to observe that an amicus must make submissions that will be useful to the court, and which differ from those of the parties. In other words, the submissions must be directed at assisting the court to arrive at a proper and just outcome in a matter which the friend of the court does not have direct or substantial interest as a party or litigant. This does not mean an amicus may not urge upon a court to reach a particular outcome. However, it may do so only in the course of assisting a court to arrive at a just outcome and not to serve or bolster a sectarian or partisan interest against any of the parties in litigation.*"

88. Clearly, as shown above, the HSF submissions in the form of its partisan attacks against me are not useful to the court and are based on obvious errors of law. They are

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essentially an additional one-sided supporting statement for Mr Downer and are not different from the arguments of Mr Downer. The submissions cannot by any stretch of the imagination be characterised as assisting the court to arrive at a proper and just outcome in a matter which the friend of the court does not have direct or substantial interest as a party or litigant. The HSF violates a very important principle that the amicus may urge upon a court to reach a particular outcome but "*it may do so only in the course of assisting a court to arrive at a just outcome and not to serve or bolster a sectarian or partisan interest against any of the parties in litigation*".

89. The statements of evidence on my alleged abuse of the private prosecution are untested and the submissions based on it threaten to open an entirely new trial before trial to determine the veracity of the epithets and adjectives the HSF has thrown at me. It is therefore inappropriate for the *amicus* to introduce the abuse of process as a new issue in the case while ignoring clear statutory prophylactic remedies available to those claiming a private prosecution is being abused. Moreover, allowing the HSF, which is clueless about the nature of the *prima facie* case in a prosecution and the said statutory remedies, to raise these new issues at the very beginning before a trial would be both disruptive and prejudicial to the parties.

90. The clearest and most succinct pronouncement on the role of amicus was made in a case related to the TAC case. In passing its judgment, the court spelt out the role of amicus curiae as follows:

> "*The role of an amicus is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The amicus must not repeat arguments already made but must raise new contentions; and generally, these new contentions must be raised on the data already before the court. Ordinarily*

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it is inappropriate for an amicus to try to introduce new contentions based on fresh evidence." In Re: Certain Amicus Curiae Applications; Minister of Health and Others v Treatment Action Campaign and Others (CCT8/02) [2002] ZACC 13 (5 July 2002) at para 5.

91. The position adopted by the HSF clearly shows that it has ignored the law regarding the position of an *amicus* which was summarised in *Hoffman v South African Airways* [2000] ZACC 17; 2001 (1) SA 1 (CC) at para [63] by Ngcobo J, as follows:

> *"The amicus also asked for an order that SAA pay its costs. An amicus curiae assists the Court by furnishing information or argument regarding questions of law or fact. An amicus is not a party to litigation, but believes that the Court's decision may affect its interest. The amicus differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An amicus joins proceedings, as its name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the Court because of its expertise on or interest in the matter before the Court. It chooses the side it wishes to join unless requested by the Court to urge a particular position. An amicus, regardless of the side it joins, is neither a loser nor a winner and is generally not entitled to be awarded costs. Whether there may be circumstances calling for departure from this rule is not necessary to decide in this case. Suffice it to say that in the present case that no such departure is warranted."*

92. A friend of the court does not vilify a party to the proceedings and insult their integrity or otherwise us demeaning terms and epithets to criticize their litigation position. Most important, it researches and familiarizes itself with applicable law and states it accurately without any underhanded attempt to mislead the court.

93. Moreover, allowing the participation of HSF as *amicus curiae* in these criminal proceedings is highly ill-advised and undesirable. In criminal cases, an additional factor is relevant to the exercise of discretion by the Court was stated as follows:

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"As a general matter, in criminal matters a court should be astute not to allow the submissions of an amicus to stack the odds against an accused person. Ordinarily, an accused in criminal matters is entitled to a well-defined case emanating from the state. If the submissions of an amicus tend to strengthen the case against the accused, this is cause for caution. This, however, is not an inflexible rule. But it is a consideration based on fairness, equality of arms, and more importantly, what is in the interests of justice." Institute for Security Studies: In re S v Basson CCT 30/03 (Unreported decision of 9 September 2005) ("Institute for Security Studies") at para 15.

94. The cause of the HSF's excitement is the political notoriety it sees in the case which involves a former President and the prosecution of a lead prosecutor in a case. HSF is anxious to continue its campaign to have me in jail no matter the circumstances. It is unconcerned about my constitutional rights. It is unconcerned whether I go to jail through an unfair trial but is actively campaigning to force a situation in which I am rendered powerless to defend myself against the abuse of state power. This spirited campaign is inimical to the status of amicus curiae and should count against its admission to that status. They are not here to help the court but to poison the atmosphere by preventing me from fighting to obtain a fair trial by removing a prosecutor who has endorsed criminal conduct in the NPA. It appears that this outfit would be happy to see me incarcerated without a fair trial and it has committed its resources to ensuring that I am deprived of any chance of using the law to resist an abusive prosecution or prosecuting an abusive prosecutor who has violated the law.

95. As argued above, the submissions of the proposed amicus should not be accepted as the HSF is biased, and its submissions are an attempt to put evidence in the record that is untrue, speculative, not subject to cross-examination, not relevant, and not material to this case. These submissions merely restate Mr Downer's legal arguments and will not aid the Court in its analysis of the issues at hand or the resolution of the legal issues and would unfairly prejudice me as the private prosecutor. Ordinarily, if the proffer

comes from an individual with a partisan, rather than an impartial view, the motion for leave to file an amicus brief is to be denied.

96. The HSF purports to be or at least appears to be an additional advocate for Mr Downer so as to support the propaganda that the NPA has acted with integrity in seeking to prosecute me, but I have employed unconstitutional means to resist prosecution by a man of alleged integrity. Mr Downer has endorsed the criminal activities deprecated by his colleagues at the NPA and offered an alternative narrative of this criminal conduct in an attempt to cover up. He has been involved in perpetrating an unconstitutional prosecution against me even by leaking documents to adverse media houses so as to inflict maximum damage on me. This is why I must prosecute him in the absence of the NPA doing so – for leaking information about me in his possession to outsiders – to the media friends – is not allowed but is a criminal offense. An *amicus* is to be a friend of the court, not a friend of a party. When the party seeking to appear as amicus curiae is perceived to be an interested party or to be an advocate of one of the parties to the litigation, leave to appear amicus curiae should be denied. As a result of its admitted bias in favour of Mr Downer, whom it portrays in endearing teams while heaping abusive insults on me, the HSF is not proper *amicus curiae*.

97. The HSF cites a litany of cases in which it was previously admitted as amicus. If that is so, the amicus must have known better that non-partisan and sectarian in the proceedings when applying for admission as a friend of the court, is important requirement. The duty to disclose any aspect that might give reasonable impression or apprehension of wanting to serve or bolster a sectarian or partisan interest against any of the parties in litigation was critical. The HSF, by stealth has attempted to smuggle itself into the private prosecution matter pretending to be independent expert with no relationship with one of the parties when in fact HSF's very decision to intervene is clearly related to the desire to assist one of the parties.

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THE HSF HAS FAILED TO IDENTIFY ANY TANGIBLE INTEREST IT HAS IN THE MATTER

98. On paragraph 21 the HSF merely states that: "*The primary basis upon which the HSF seeks to intervene implicates the foundation of the rule of law and the Constitution. In particular, the HSF seeks to intervene to address specific aspects of the abuse of court processes and how our courts protect themselves and litigants against such abuses.*" That is too slender a reed on which to hang the HSF's argument- not only is the basis for intervention vaguely worded but it is also hopelessly broad and misleading, but it is designed to allows the HSF unrestricted scope to bring irrelevant material not particularly helpful to the court.

99. In paragraph 22 the HSF invokes further conclusory terms to argue that it is "*concerned that Mr Zuma's prosecution is an abuse of the sort that this court should not countenance…The HSF concerns go to (i) the use of private prosecution to achieve a purely political objective, unrelated to the charges levelled against Downer; (ii) avoiding the spectre of private prosecutions being used to undermine prosecutorial independence; and (iii) the role that this private prosecution plays in Mr Zuma's efforts to avoid accountability in a system governed by the rule of law.*" Again, one searches in vain in the HSF's submission for clearly identified evidence that "*Mr Zuma's prosecution is an abuse of the sort that this court should not countenance.*"

100. At the risk of repetition and contrary to the HSF's false rendition of facts and law, the HSF's statement betrays a very brazen attempt to mislead the court about the role of private prosecution in our law. Private prosecution is not of recent vintage – as far back as colonial times legislation was enacted in South Africa to provide for the right to institute a private prosecution. Starting in 1828 continuing to the present, South African statutory law expressly provided that a victim of crime had a right to institute a private prosecution. Even after some changes were affected with the promulgation of the

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Criminal Procedure Act 51 of 1977. Section 7 of the court continued to hold that section 7 of the Act does provide for the right of a victim of crime to institute a private prosecution. Every person with proper standing and having the necessary interest may bring a private prosecution on obtaining a *nolle prosequi* from the Director of Public Prosecutions. The courts have affirmed that that "*a decision to deny a private prosecutor the right to prosecute should be taken cautiously not least because it implicates the right to access to the court under s 34 of the Constitution. If he meets all the requirements for a private prosecution under the CPA and the right to prosecute is not hit by the limitation in s 36, the private prosecution should be allowed to proceed*".

101. This refutes the HSF's unsubstantiated claim that it has "*concerns*" that go to "*(i) the use of private prosecution to achieve a purely political objective, unrelated to the charges leveled against Downer.*" The HSF falsely believes that a private prosecution may be circumscribed or denied upon mere allegations that the prosecution seeks to "*achieve a purely political objective, unrelated to the charges leveled against Downer.*" This aspect of the HSF's argument is a recycled version of the prosecution with ulterior or "*improper motives*" argument which was rejected by the SCA (Harms J) in the appeal against the Nicholson judgment.

102. Contrary to the nonsensical claims by HSF, apart from the fact that a private prosecution is a right, it can also be a remedy.[12] The Constitutional Court has observed, in passing, that: "*It may be argued that the private prosecutor is not vindicating a private right, but is invoking the power of the State to punish crime. Sections 12 and 13 of the Criminal*

[12] See *Berg River Municipality v Zelpy 2065 (Pty) Ltd* 2013 (4) SA 154 (WCC) para 47: "*One would not usually regard a criminal remedy as one which is available to the harmed individual. It is a public remedy at the discretion of the prosecuting authorities. Only if the directorate of public prosecutions declines to prosecute can the individual launch a private prosecution, and I would hesitate to call a private prosecution an 'ordinary remedy'.*"

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Procedure Act 51 of 1977 reflect the State's continuing interest in a private prosecution." *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC) at n88.

103. The HSF is simply wrong in evoking the phantom of private prosecutions being used to undermine prosecutorial independence. Ironically the same HSF seeks to advise us about "*avoiding the spectre of private prosecutions being used to undermine prosecutorial independence*" while it abjectly fails to recognise how a conflicted or miscreant prosecutor can undermine prosecutorial independence far more effectively than any private prosecutor can ever hope to do so.

104. In our country, the case of *General Council of the Bar of South Africa v Jiba and Others* (CCT192/18) [2019] ZACC 23; 2019 (8) BCLR 919 (CC) (27 June 2019) proves that the legal profession's disciplinary bodies can pursue disciplinary proceedings against sitting public prosecutors without undermining the so-called prosecutorial independence.

105. By the same token, the HSF's submissions about a private prosecution undermining prosecutorial independence must be rejected as false and contrived. Just as disciplinary proceedings can be pursued by the GCB against a senior prosecutor without violating prosecutorial independence, an errant prosecutor can also be subjected to private prosecution without violating prosecutorial independence. The fact that the criminal conviction of a prosecutor may have adverse career consequences to him personally and may result in her removal from office under the NPA Act does not mean that the NPA Act applies to proceedings for private prosecutions contemplated in CPA. These are separate processes, regulated by different pieces of legislation.

106. Furthermore, the HSF seems totally oblivious of the fact that in South African law, a victim of crime does not have a right to compel a public prosecutor to institute criminal proceedings against a suspected offender. A public prosecutor may in some circumstances decline to prosecute a suspect even if there is evidence that the latter

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committed an offence.[13] A victim of crime who is not satisfied with the public prosecutor's decision not to prosecute has the following options: he may invoke section 179(5)(d) of the Constitution and petition the National Director of Public Prosecutions to review the decision not to prosecute; he may institute a private prosecution; or he may approach the High Court and challenge the rationality, legality or lawfulness of the decision not to prosecute.[14] A pursuit of any of the enumerated remedies, such as a private prosecution, cannot rationally and as a matter of law be characterised as "*an abuse of process*" or undermining the independence of the NPA or prosecutorial independence.

107. Even if private prosecution of an errant prosecutor could conceivably be characterised as trenching on prosecutorial independence, section 13 of the CPA contains its own prophylactic remedies to deal with the abuse of process by a private prosecutor as discussed above. The statute provides an effective way in which the abuse of the right to institute a private prosecution may be brought to an end through the DPP taking over the private prosecution. After all, the HSF unsustainable position is refuted by the fact that even in instances where a prima facie case has been made out, the DPP retains free to exercise his almost unbridled discretion not to prosecute. In that recognition, the legislator elected not to interfere with that discretion, leaving the necessary avenues open for citizens aggrieved by perceived misapplication of that discretion to obtain redress through private prosecution. The statutory scheme is consistent with prosecutorial independence under section 179 of the Constitution. The HSF's submission is a red herring and a scam.

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[13] See *Freedom under Law v National Director of Public Prosecutions* 2014 (1) SACR 111 (GNP) para 121, where the court observes that "[t]*he discretion of the prosecuting authority to prosecute, not to prosecute or to discontinue criminal proceedings is a wide one. Nonetheless, as is reflected in the Prosecution Policy Directives, the prosecuting authority has a duty to prosecute, or to continue a prosecution, if there is a prima facie case and if there is no compelling reason for non- prosecution*".
[14] See, generally, *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA); *National Director of Public Prosecutions v Freedom under Law* 2014 (4) SA 298 (SCA).

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108. The HSF makes wild and outlandish assertions about the "*(iii) the role that this private prosecution plays in Mr Zuma's efforts to avoid accountability in a system governed by the rule of law.*" Tellingly these ruminations are not supported by any evidence and the conjectures and speculations about my efforts to "*avoid accountability*" remain exactly that – conjectures resting upon untested gossamer and based on no admissible evidence adduced by the parties. This is another contrived version of the HSF's main argument that a court must shut its door to a private prosecution before the trial even starts. Again, there are prophylactic remedies contained in the Act itself. Section 16 of CPA provides that if the charge against the accused is dismissed or the accused is acquitted or a decision in favour of the accused is given on appeal, the court dismissing the charge or acquitting the accused or deciding in favour of the accused on appeal, *may order the private prosecutor to pay to such accused the whole or any part of the costs and expenses incurred by him in connection with the prosecution* or, as the case may be, the appeal. Further where "*(2) …the court is of the opinion that a private prosecution was unfounded and vexatious, it shall award to the accused at his request such costs and expenses incurred by him as it may deem fit.*" The latter confers a discretion on the court as to when a prosecution is to be characterised as unfounded and vexatious, but it is a judicial discretion which is subject to review.

109. What the HSF proposes to the court is an invitation to lawlessness and gross violation of the rights of citizens to exercise their rights in accordance with the Act and section 34 of the Constitution. As discussed above, the courts have further held that "*the court should be slow in coming to a decision mulcting in costs under that subsection a prosecutor who bona fide seeks justice in a private prosecution*" This means that our courts are fully equipped to deal with any frivolous private prosecutions. Where it is clear that a private prosecution was instituted when the private prosecutor knew that the prosecution was unfounded and then still went ahead with it, he opens himself not only to civil action, but may also be ordered to pay the accused's costs. To be sure, in

deciding whether or not to order the private prosecutor to pay the costs and expenses incurred by the acquitted person, courts will consider the reason behind, and the circumstances surrounding, the institution of a private prosecution.

110. As a matter of law, the HSF has presented a misplaced argument based on erroneous appreciation of the law regarding alleged improper motives. The SCA has held that "*bad motive does not destroy a good case*". Once it is accepted that the motive for a prosecution is irrelevant where the merits of the case against an accused are good, the motive for the launch of the private prosecution must equally be so. The HSF appears to have deliberately overlooked the effect of the SCA Harms judgment and uncritically adopted the "*ulterior purpose*" justification as a basis for attacking my private prosecution of Downer. A disingenuous litigant cannot be of assistance to a court. Nor can they be described with a straight face as a "*friend of the court*".

111. I have refuted the HSF's false submission that in prosecuting Mr Downer, I effectively "*take aim at the National Prosecuting Authority itself – that institution which our Constitution singly endows with the power to institute criminal prosecutions on behalf of the state and whose powers Mr Zuma now seeks to appropriate*". This is nonsensical in that prosecutors are frequently the subject of recusal applications and their removal from a case can never suggest that the entire NPA is hamstrung from prosecuting cases.

112. A removal and replacement of a prosecutor can never be equated with removal of the entire NPA. It is a fallacy for the HSF to suggest that a criminal prosecution of a prosecutor even where warranted implicates prosecutorial independence. In extreme cases, such as when there are allegations of corruption, a prosecutor's conflict of interest may even become the predicate for a criminal prosecution.

113. A fair and impartial trial is a fundamental aspect of the right of accused persons not to be deprived of his freedom without due process of law. It is the obligation of the prosecutor, as well as of the court, to respect this mandate. Nor is the role of the prosecutor in this regard simply a specialised version of the duty of any attorney not to overstep the bounds of permissible advocacy. The prosecutor is a public official vested with considerable discretionary power to decide what crimes are to be charged and how they are to be prosecuted.

114. In all his activities, his duties are conditioned by the fact that he is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape, or innocence suffer.

115. Thus, not only is a judicial requirement of prosecutorial impartiality reconcilable with executive discretion in criminal cases, it is precisely because the prosecutor enjoys such broad discretion that the public he serves and those he accuses may justifiably demand that he performs his functions with the highest degree of integrity and impartiality, and with the appearance thereof.

116. It stands to reason as a matter of law that the participation of Downer in my on-going criminal prosecution for corruption would necessarily constitute a denial of due process, certainly the due process implications of prosecutorial bias form a background for our consideration of the scope of prosecutorial bias form a background for our consideration of the scope of the trial judge's power to recuse the said prosecutor.

117. It is not that this court must examined the problem of prosecutorial impartiality largely from the perspective of the accused only. Society also has an interest in both the reality

and the appearance of impartiality by its prosecuting officials. It is essential that the public have absolute confidence in the integrity and impartiality of our system of criminal justice. This requires that public officials not only in fact properly discharge their responsibilities but also that such officials avoid, as much as is possible, the appearance of impropriety.

118. Once again, the submissions of the HSF in paragraphs 22 through to 27 are noted as they reflect the HSF's own confusion about prosecutorial independence, bias and the individual litigant's right to access courts pursuant to section 34 of the Constitution.

HSF SUBMISSIONS ON PARAGRAPHS 30 – 46 ARE BASED ON DEMONSTRABLY FALSE UNDERSTANDING AND STATEMENT OF LAW

119. The HSF claims without substantiation that the "... *private prosecutor is not accountable to the prosecuting authority, there are fewer inherent structural constraints on the conduct of a private prosecution. In the absence of these institutional constraints, there is very little that stands to prevent the abuse of the prosecutorial power to achieve goals that are extraneous to the actual prosecution and the attainment of justice*". These assertions are entirely false and have no foundation in law. I have discussed the many statutory and other mechanisms that serve as prophylactic devices to prevent abuse and to constrain the power of a public prosecutor. It is simply untrue that the "... *private prosecutor is not accountable to the prosecuting authority*" as HSF suggests. In truth, the private prosecutor is not vindicating a private right, but is invoking the power of the State to punish crime. Sections 12 and 13 of the Criminal Procedure Act 51 of 1977 reflect the State's continuing interest in a private prosecution. See, *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC) at n88. observed, in passing, that: "*Whether a private prosecutor is exercising a governmental power is a point which need not now be decided. It may be argued that the private prosecutor is not vindicating a private right,*

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but is invoking the power of the State to punish crime". Sections 12 and 13 of the Criminal Procedure Act 51 of 1977 reflect the State's continuing interest in a private prosecution.

120. Equally nonsensical is the HSF's "*ulterior political motive*" theory stated in paragraphs 39 through to 66. The entire argument in this paragraph is fatally flawed in that the HSF ignored the dictum in the Zuma judgment by Harms DP that "*a bad motive does not destroy a good case*". In the present case, on Mr Downer's own version, the case against him is a strong one – he leaked a document written "*medical confidential*' to a journalist in violation of section 41 the NPA Act.

121. The rest of the HSF submission is embarrassingly incompetent – a litigant is entitled to plead his case before the court in a manner he wishes to do in accordance with the rules and cannot be forced to litigate in the manner preferred by his opponents.

122. The HSF argument regarding "*Prosecutorial independence*" in paragraphs 67 through to 76 are misplaced and have been dealt with elsewhere. Suffice it to say that the NPA retains at all times readily available remedies to apply to the court in which the private prosecution is instituted in order to take over the prosecution.

123. And finally, the HSF's submission in paragraphs 77 and 78 about the impact of private prosecution on "*the rule of law*" is tautologous and amounts to circuitous reasoning. Private prosecution proceeds according to a well-defined statutory regime and is available to a limited number of persons who meet the standing requirements. Even after the issuance of the "*nolle prosequi*" certificate by the NPA, the NPA retains at all times readily available remedies to apply to the court in which the prosecution is instituted in order to take over the prosecution. That is what the rule of law permits in our statutory scheme. The HSF's jeremiad about the prosecution being pursued for

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"*ulterior purposes*" reflects its own paranoia and not legitimate concerns about the efficacy of our criminal justice system.

CONCLUSION

124. The role of an amicus is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The HSF has failed spectacularly in that regard. The Constitutional Court has already admonished that allowing the participation of HSF as amicus curiae in these criminal proceedings is highly ill-advised and undesirable. In criminal cases, an additional factor is relevant to the exercise of discretion by the Court was stated as follows:

> "*As a general matter, in criminal matters a court should be astute not to allow the submissions of an amicus to stack the odds against an accused person. Ordinarily, an accused in criminal matters is entitled to a well-defined case emanating from the state. If the submissions of an amicus tend to strengthen the case against the accused, this is cause for caution. This, however, is not an inflexible rule. But it is a consideration based on fairness, equality of arms, and more importantly, what is in the interests of justice.*" *Institute for Security Studies: In re S v Basson CCT 30/03 (Unreported decision of 9 September 2005) ("Institute for Security Studies")* at para 15.

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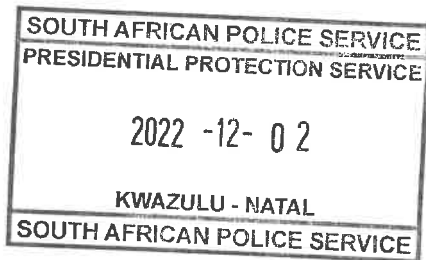
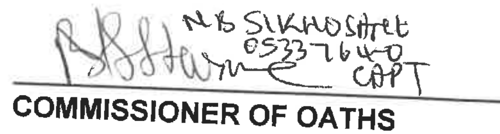
125. The NPA which retains a whole panoply of statutory and constitutional powers is fully capable of using the said powers to fulfil its duties. It does not need the guiding hand of misguided busy-bodies and celebrity litigants such as the HSF.

JACOB GEDLEYIHLEKISA ZUMA

Signed and sworn to before me at DURBAN on this 2ND day of **DECEMBER 2022** after the Deponent declared that he is familiar with the contents of this statement and regards the prescribed oath as binding on his conscience and that he has no objection against taking the said prescribed oath.





COMMISSIONER OF OATHS