

OPPOSED: 20 AND 22 MARCH 2023

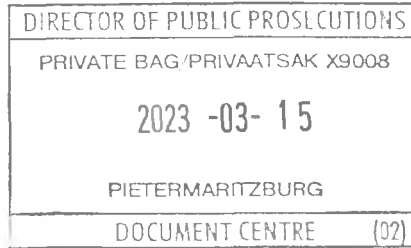
IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No.: 13062/22P

In re: the matter between:

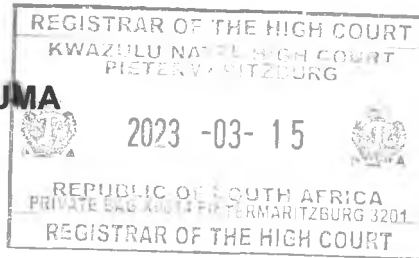
WILLIAM JOHN DOWNER



Applicant

and

JACOB GEDLEYIHLEKISA ZUMA



Respondent

and

HELEN SUZMAN FOUNDATION

Amicus curiae

AMICUS CURIAE'S FILING NOTICE

DOCUMENTS FILED: *AMICUS CURIAE'S* LONG HEADS OF ARGUMENT

SHORT HEADS OF ARGUMENT

PRACTICE NOTE

DATED AT PIETERMARITZBURG ON THIS THE 15th DAY OF MARCH 2023.

ADAMS & ADAMS

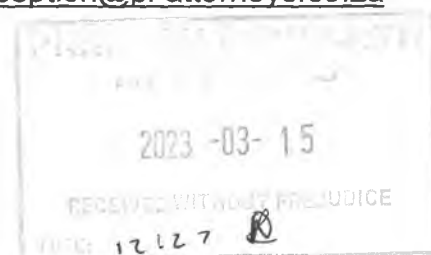
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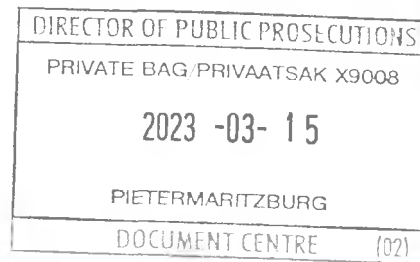
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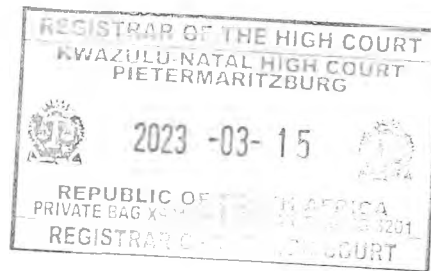
And

HELEN SUZMAN FOUNDATION



Applicant

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HELEN SUZMAN FOUNDATION'S (LONG) HEADS OF ARGUMENT

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INTRODUCTION

1 A party who uses power for a purpose for which it was not designed, commits a fraud on the power.¹

2 In this case, Mr Zuma, a criminal accused himself, has instituted a private prosecution against his prosecutor while his own criminal prosecution remains pending. His prosecutor, Mr Downer, has brought an application to set aside the summons by which the private prosecution was instituted and to interdict Mr Zuma from doing so again.²

3 Mr Downer says that the relief is warranted because the private prosecution is an abuse of the process of this Court.³ It is an abuse because it is pursued for an ulterior purpose.⁴

4 The Helen Suzman Foundation has been admitted as *amicus curiae* in the proceedings to advance two main arguments:⁵

4.1 The first is that it is evident from Mr Zuma's own conduct that he is pursuing this private prosecution for an ulterior purpose.

4.2 The second is that granting Mr Downer the relief he seeks will protect prosecutorial independence.

1 *Van Eck NO and van Rensburg NO v Etna Stores* 1947 (2) SA 984 (A) 998

2 Notice of Motion, page 1 paras 1.1 and 1.2

3 Downer heads of argument page 6 para 11

4 Downer heads of argument page 6 paras 11.1 to 11.3

5 HSF Amicus FA page 25 para 66, page 28 and 76

5 These heads of argument are structured to deal with each of these arguments in turn.

ULTERIOR PURPOSE

The law

6 Our law recognises that powers are conferred for particular purposes.⁶ When a power is used for a purpose not authorised by the law, the principle of legality is undermined.⁷

7 There are numerous examples where the courts have found conduct to be unlawful because it has involved the exercise of a power for an ulterior purpose. For example:

7.1 When a power of search and seizure was used, not for a purpose of obtaining evidence for a criminal trial, but rather to put the subject of investigation out of business, the High Court granted an interdict against the use of the search and seizure power.⁸

7.2 Where the police have used their power of arrest to intimidate, harass and punish sex workers rather than to bring them to trial, their conduct has been declared unlawful and they have been interdicted against engaging in future arrests.⁹

⁶ *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) 780G - H; *Ex parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 (3) SA 289 (CC) 305D - E

⁷ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 38

⁸ *Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order and Others* 1994 (1) SA 387 (C).

⁹ *Sex Worker Education and Advocacy Task Force v Minister of Safety and Security and Others* 2009 (6) SA 513 (WCC) paras 16 to 28 and 60

7.3 Even where a power of arrest was used for the professed purpose of bringing a person before the court, but was, in reality, being used to frighten or harass the person arrested so to induce him to act in a way desired by the arrestor, our courts have held that the arrest is illegal.¹⁰

7.4 Where the power to seize an article that may have provided evidence of a contravention of certain wartime efforts was used, not to procure evidence, but rather to advance the efforts of a food distribution scheme, the seizure was held to be illegal and the confiscated rice was required to be returned.¹¹

7.5 Where a private prosecution was instituted without any genuine intention to bring the accused to justice but rather to promote a party's business interest and to intimidate the accused – a banking institution – into giving more co-operation and recognition to the person behind the prosecution, the prosecution was interdicted from continuing.¹²

8 This jurisprudence on ulterior purpose must not be confused with cases involving bad motives.

9 Our law recognises that where there is reasonable and probable cause for the exercise of a power of arrest (or prosecution), the lawfulness of the arrest (or prosecution) will not be undermined even if the person conducting the arrest (or prosecution) is actuated by

¹⁰ *Tsose v Minister of Justice and Others* 1951 (3) SA 10 (A) 17C-D

¹¹ *Van Eck NO and van Rensburg NO v Etna Stores* 1947 (2) SA 984 (A) 1001

¹² *Nedcor Bank Ltd and Another v Gcilitshana and Others* 2004 (1) SA 232 (SE) para 38

an indirect or improper motive.¹³ Those are cases, however, where there is no question that the power, itself, is being used for its proper purpose – namely “to bring the arrested person duly to prosecution”.¹⁴

10 In those cases, where the purpose is to prosecute the person, the mere fact that the person conducting the arrest is also influenced by an additional, ulterior motive will not detract from the legality of the arrest.

11 The situation is different, however, when the power of prosecution is being used for a purpose other than to bring the accused to justice.¹⁵ In those cases, our courts have held that the use of the power for a purpose ulterior to that for which it was designed is an abuse and can be interdicted.

12 Mr Zuma opposes this application on the basis that it is “settled law” that ulterior purpose or motive is irrelevant to the validity of a prosecution.¹⁶ But that is not correct. All the case law referred to above is at odds with such a proposition.

13 Contrary to Mr Zuma’s claims, it *is* relevant what purpose Mr Zuma pursues in privately prosecuting Mr Downer because if the prosecution is pursued for a purpose other than bringing Mr Downer to justice, then the law will step in and prevent such an abuse.

¹³ *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) 140

¹⁴ *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) 140, last paragraph

¹⁵ *Solomon v Magistrate, Pretoria, and Another* 1950 (3) SA 603 (T) 607

¹⁶ Zuma AA page 237 para 45

14 Mr Downer says that this private prosecution is pursued with the ulterior purpose of delaying Mr Zuma's own trial and thwarting Mr Downer's exercise of his duties.¹⁷ The HSF does not repeat those submissions. It makes a different point. It says that the way in which Mr Zuma has, himself, conducted this private prosecution, reveals that it is not pursued with the genuine purpose of bringing Mr Downer to justice. On the contrary, it is pursued for ulterior political purposes. This is evident from the documents with which Mr Zuma commenced the private prosecution, and his subsequent conduct in the matter.

Mr Zuma's own conduct

15 Mr Zuma served four documents on the accused: the summons, the indictment, the statement of substantial facts, and the list of witnesses he intends to call.¹⁸ A simple analysis of these four documents reveals that the private prosecution is brought for an ulterior purpose because the documents with which Mr Zuma initiated the prosecution traverse matters wholly irrelevant to the charges that Mr Downer faces.

16 Given that this is an argument about relevance, it is necessary to start with the charges levelled against Mr Downer.

17 Mr Zuma accuses Mr Downer of contravening sections 41(6)(a) of the National Prosecuting Authority Act, 32 of 1998. The allegations hinge upon a breach of section 41(6) and (7) of the NPA Act. These provisions read as follows:

¹⁷ Downer heads of argument page 6 para 11

¹⁸ HSF amicus FA page 17 para 39

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

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

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

(c) the record of any evidence given at an investigation as contemplated in section 28 (1), except—

(i) for the purpose of performing his or her functions in terms of this Act or any other law; or

(ii) when required to do so by order of a court of law.

(7) Any person who contravenes subsection (6) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 15 years or to both such fine and such imprisonment.”

18 To succeed in the prosecution, Mr Zuma would have to allege and prove (beyond reasonable doubt) that:

18.1 Mr Downer disclosed the information to Mr Sole and/or Ms Maughan;

18.2 the information disclosed came to Mr Downer's attention in the exercise of his powers and functions as a prosecutor;

18.3 Mr Downer was not a person authorised by the NDPP in writing to disclose information, or the NDPP did not sanction the disclosure of such information; and

18.4 Mr Downer acted with *mens rea*.

19 Only relevant evidence is admissible. Evidence is relevant when it tends to prove or disprove an issue in dispute. The only evidence that is relevant is that which tends to prove or disprove one or more of the elements of the charge. Evidence which does not tend to prove or disprove the elements of the charge is irrelevant.¹⁹

20 The charges are narrow. Count 1 and 2 relate to the events of 9 August 2021 and General Mduywa's letter.²⁰ Count 3 relates to the conversations with Mr Sole which allegedly occurred between 4 June 2008 and 13 June 2008.²¹ Although the charges relate to two different exchanges of information, the underlying claim is the same: Mr Downer acted in breach of section 41(6) of the NPA Act when he shared information with Mr Sole in 2008 and with Ms Maughan in 2021.

21 Count 3 alleges that Mr Downer disclosed information pertaining to the pending prosecution of Mr Zuma to Mr Sam Sole, a journalist for the *Mail & Guardian*. This is alleged to have occurred between 4 and 13 June 2008. The information came to Mr Downer's knowledge in the performance of his functions as a prosecutor and accordingly the allegation is that Mr Downer was not permitted to disclose that information without the NDPP's permission and thus contravened section 41(6)(a) of the NPA Act, and is liable for criminal sanction in terms of section 41(7) of the NPA Act.

¹⁹ *R v Matthews and Others* 1960 (1) SA 752 (A) at 758A–B

²⁰ Indictment page 37 counts 1 and 2

²¹ Indictment page 38 count 3

22 However, the statement of substantial facts, which accompanied Mr Downer's indictment, is mainly concerned with facts that are wholly unrelated to charges that Mr Downer faces.

Statement of substantial facts

23 The only allegation relevant to count 3 appears in paragraphs 24 and 25 of the summary of substantial facts. These paragraphs read as follows:

"24. Between 4 and 13 June 2008, [Mr Downer] engaged in numerous telephonic discussions with [Mr Sole], a journalist for and [on] behalf of the Mail & Guardian, during which [Mr Downer] disclosed information in relation to the self-same prosecution of [Mr Zuma] which had come to his attention during the course and scope of the performance of his duties and functions as a member of the NPA, without the authority of the National Director

*25. In this regard, [Mr Downer] specifically divulged to Mr Sole sensitive and/or confidential information, acquired in his capacity as prosecutor, without a written authorisation of the National Director."*²²

24 In so far as the sharing of information with Ms Maughan is concerned, the charge alleges that Mr Downer, through Breitenbach SC, disclosed a medical report to Ms Maughan which was prepared by Brigadier General Mdutywa about Mr Zuma's medical condition. The facts relevant to this charge are set out in ten paragraphs of the statement of substantial facts. They are paragraphs 38 to 48.²³

²² Summary of substantial facts, page 49 paras 24 and 25

²³ Summary of substantial facts, pages 51 to 53

25 However, the majority of the paragraphs of the statement do not deal with facts relevant to the charges. Instead, they traverse the background leading up to Mr Zuma's first indictment on charges of corruption and to the decision not to prosecute him. These paragraphs comprise the bulk of the statement. They include paragraphs 10 to 23,²⁴ and 26 to 37.²⁵

26 However, the questions whether or not Mr Zuma was correctly indicted, whether his prosecution was pursued for a political purpose, and whether the decision not to prosecute him at a point was correctly made, are all entirely irrelevant to whether Mr Downer shared information with Mr Sole or Ms Maughan in breach of section 41(6) of the NPA Act.

27 The vast majority of the statement of substantial facts is devoted to running the well-trodden claim that there was a political conspiracy to prosecute Mr Zuma. But neither the charges against Mr Downer nor those against Ms Maughan relate to any such alleged conspiracy. Neither of them is alleged even to have taken part in a conspiracy. And yet, paragraphs and paragraphs of the statement of substantial facts are devoted to this thesis.

28 When this irrelevant material in the summary of substantial facts is considered together with Mr Zuma's witness list, the ulterior purpose behind this prosecution becomes plain.

²⁴ Summary of substantial facts, pages 47 to 49

²⁵ Summary of substantial facts, page 50 and 51

The witness list

- 29 Mr Zuma concludes the statement of substantial facts by recording that he "intends to call the witnesses indicated in the attached witness list in support of his case".²⁶
- 30 But there are people identified on the witness list who are not even referred to in the statement of substantial facts and others who, although referred to, are not linked in any way to the charges that Mr Downer faces.

The Political Figures

- 31 There are three witnesses on Mr Zuma's list who are not linked in any way to the charges against Mr Downer. The first is President Ramaphosa, who is listed as the second witness.
- 32 There is one passing reference to President Ramaphosa in the statement of substantial facts. It is in paragraph 46:

"46. As a result, the Private Prosecutor subsequently instructed his legal representatives in October 2021 to seek the NPA to remove [Mr Downer] as the prosecutor in his matter and subsequently laid a complaint with the President of the Republic in relation to the conduct of [Mr Downer] and the NPA, inter alia, in relation to the manner in which [Mr Downer] caused confidential information in relation to the Private Prosecutor as disclosed to [Ms Maughan], in violation of the Private Prosecutor's fair trial rights and in failing to maintain the requisite confidentiality." (emphasis added)

²⁶ Summary of substantial facts, page 53 para 52

33 The only reference to President Ramaphosa in the entire statement is a sentence that records that Mr Zuma laid a complaint with President Ramaphosa about Mr Downer's conduct. But that complaint has nothing whatever to do with the charges that Mr Downer faces. It is entirely irrelevant to the question whether Mr Downer breached section 41(6) of the NPA Act by sharing Brigadier General Mdutywa's medical report with Ms Maughan, that Mr Zuma lodged a complaint with the President. And yet, *President Ramaphosa is Mr Zuma's second witness.*

34 Mr Zuma also intends calling the Minister of Justice, Mr Ronald Lamola. But Minister Lamola is not mentioned anywhere in the statement of substantial facts. The statement of substantial facts provides no indication that Minister Lamola can contribute anything relevant to the charges that Mr Downer and Ms Maughan face. And yet, Mr Zuma intends to call him as a witness.

35 Thirdly, Mr Zuma intends calling the Director-General of the State Security Agency, Thembisile Majola. Again, Director-General Majola is not mentioned anywhere in the statement of substantial facts. The statement provides no indication that Director-General Majola could provide any relevant evidence in the trial. And yet, Mr Zuma intends to call her as a witness.

Old Witnesses on political interference

36 The second category of witnesses who extend beyond the relevant confines of the charges against Mr Downer and Ms Maughan are those individuals who were previously involved in Mr Zuma's criminal matter.

36.1 Mr William Andrew Hofmeyr, who is the former National Director of Public Prosecutions. The statement of substantial facts does not indicate that Mr Hofmeyr played any role in Mr Downer's sharing of information with either Mr Sole or Ms Maughan. Indeed, it does not refer to Mr Hofmeyr.

36.2 Mr Mokotedi Mpshe, who was the former Acting National Director of Public Prosecutions. According to the statement of substantial facts, Mr Mpshe decided to discontinue the prosecution against Mr Zuma pursuant to representations made by Mr Zuma in this regard.²⁷ In doing so, Mr Mpshe accepted the allegations that the prosecution was tainted by political interference. But Mr Mpshe's decision not to prosecute Mr Zuma has nothing to do with whether Mr Downer unlawfully shared information with Mr Sole in 2008 and Ms Maughan in 2021.

36.3 Mr Lawrence Mushwana, who was the former Public Protector. Mr Mushwana is mentioned in the statement of substantial facts because he commented on Mr Ngcuka's comment regarding the *prima facie* evidence against Mr Zuma as "*unusual and contentious*," because it opened the floodgates for public speculation against Mr Zuma.²⁸ However, Mr Mushwana's comment is in no way connected to the question whether Mr Downer unlawfully shared information with Mr Sole in 2008 and Ms Maughan in 2021

37 When this list of witnesses is considered alongside Mr Zuma's statement of substantial facts, the true purpose behind this prosecution is exposed. Mr Zuma wishes to rehash his claims that there was a political conspiracy against him which culminated in the

²⁷ Summary of substantial facts page 49 para 20

²⁸ Summary of substantial facts page 48 para 16

prosecution that he is now facing. He wishes to call witnesses who were previously involved in the decision to prosecute him, but that decision is entirely irrelevant to the charges against Mr Downer.

38 Mr Zuma has no meaningful answer to the allegation that the witnesses he intends to call are irrelevant to the charges that Mr Downer faces. In his first answering affidavit in this application, Mr Zuma denies that the witness list is “sensationalist” and says vaguely that “even the detail of witnesses listed therein has a contribution to make to the factual exposition of the offence”.²⁹ But this is not an adequate answer to the allegation of ulterior purpose made against Mr Zuma. The allegation is that the list of witnesses and summary of substantial facts are irrelevant to the charges that Mr Downer faces and have been included as an “abusive attempt at sensationalist publicity”.³⁰

39 To meet this criticism, the least one would expect is an account of each witness on Mr Zuma’s witness list and their link to the elements of the charge against Mr Downer. This critique could be met by simply explaining — even at a broad level — the relevance of each witness. No such explanation has been forthcoming. In fairness, Mr Zuma argues that these are matters related to the merits of the trial. In doing so, Mr Zuma misconstrues this application as an impermissible attempt to pre-litigate the private prosecution. That argument may have been valid if the relevance of the witnesses bore some relation to the allegations. But their link is not apparent.

²⁹ Zuma AA page 241 para 70

³⁰ Downer FA page 30 para 79

40 In the absence of such an explanation, the inference is inescapable that Mr Zuma has no genuine interest in bringing the accused to justice. If he did, he would focus on relevant evidence which tends to prove the charges against Mr Downer. But he does not.

41 That is because his interest in this prosecution appears to lie elsewhere, in the political battlefield. Mr Zuma wishes to call witnesses and use the processes of the court to summons them to appear (which is a power of compulsion) so that he can question them about matters entirely irrelevant to whether Mr Downer acted in breach of section 41(6) of the NPA Act.³¹

The prosecution docket

42 On 28 February 2023, Mr Downer filed a further affidavit in this application. In the affidavit, Mr Downer refers to the fact that Mr Zuma provided him with a copy of his private prosecution docket on 14 February 2023.³² The docket contains the statements on which Mr Zuma says he will rely in the prosecution of Mr Downer.³³

43 However, the docket contains no more than the statements that are already in the police docket. It contains no statements by any of Mr Zuma's proposed witnesses from his witness list. In the absence of witness statements, he cannot permissibly call the witnesses on his witness list. This drives Mr Downer to conclude that Mr Zuma has no intention of calling the witnesses on his list.³⁴

³¹ HSF Amicus FA page 25 para 66

³² Downer Supp RA page 403 para 12

³³ Downer Supp RA page 403 para 12

³⁴ Downer Supp RA page 403 para 13

- 44 If that is so, then Mr Zuma's own private prosecution docket provides further confirmation that he is not pursuing this prosecution with the genuine purpose of bringing Mr Downer to justice. A genuine private prosecutor would at least have ensured that his docket included witness statements from his intended witnesses.
- 45 Mr Zuma's failure to take even this basic step in the preparation of his private prosecution adds further support for the conclusion that he is using the power of a prosecutor for ulterior purposes. To do so is an abuse. And this Court has the power to stop the abuse by granting Mr Downer the relief he seeks.
- 46 In the next section of the heads of argument, we set out why granting the relief that Mr Downer seeks will protect prosecutorial independence.

PROSECUTORIAL INDEPENDENCE

Under South African Law

- 47 Section 179 of the Constitution establishes the prosecuting authority for the country. Section 179(4) of the Constitution entrenches the principle of prosecutorial independence. It requires national legislation to be enacted to ensure that the prosecuting authority exercises its functions “without fear, favour, or prejudice.”
- 48 The National Prosecuting Authority Act 32 of 1998 is the legislation enacted pursuant to that requirement. Section 179(1) of the Constitution and the NPA Act contemplate a single prosecution authority, arranged on a hierarchical basis,³⁵ with the National Director as its head.
- 49 The National Director exercises the constitutional power to prosecute on behalf of the Republic.³⁶ In terms of section 20(1)(a) and 20(2) of the NPA Act, the Deputy National Director exercises the power to institute and continue criminal prosecutions, subject to the control and direction of the National Director.³⁷ In turn, Directors of Public Prosecutions and their Deputies exercise powers under section 20(1) of the NPA Act in their areas of jurisdiction, and in respect of all offences, except those that have been specifically excluded from their jurisdiction.³⁸

³⁵ *Moussa v S* [2015] 2 All SA 565 (SCA)

³⁶ Section 179(1)(a) of the Constitution

³⁷ Section 20(2) of the NPA Act

³⁸ Section 20(3)(a) and (b) and section 23(1) of the NPA Act

- 50 The powers of all directors of prosecutions are subject to section 179 of the Constitution and the Act.³⁹ Individual prosecutors exercise the functions and duties conferred upon them by the National Director or any person designated by the National Director.⁴⁰
- 51 The choice of prosecutor is determined by this structure. A direct constitutional line can therefore be drawn between the constitutional power to prosecute and the identity of an appointed prosecutor.
- 52 Every prosecutor appointed under the NPA Act is required to serve “*impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.*”⁴¹ The Act also provides that no-one may improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of their powers, duties and functions.⁴²
- 53 These sections place a duty on both prosecutors and those whom they serve. Prosecutors are required to discharge their functions in good faith and without fear, favour, or prejudice. Everyone else is required to respect their independence and not improperly interfere with their functions.

39 Section 20(1) of the NPA Act

40 Section 20(5) of the NPA Act

41 Section 32(1)(a) of the NPA Act

42 Section 32(1)(b) of the NPA Act

54 Our courts are generally loathe to interfere with the appointment of a given prosecutor because this choice is an incidence of prosecutorial independence and is subject to the separation of powers.⁴³

International instruments

55 Numerous international instruments emphasise the importance of protecting prosecutors from unjustified interference with the exercise of their functions.

56 The first is the United Nations Guidelines on the Role of Prosecutors.⁴⁴ Both parties rely on the UN Guidelines in support of different propositions. Mr Zuma refers to them in the context of a prosecutor's duties to conduct a prosecution fairly and objectively.⁴⁵ Mr Downer relies upon the provisions in the UN Guidelines that authorise prosecutors to disclose matters that are necessary in the performance of their duties or when the needs of justice require such disclosure.⁴⁶

57 While both parties draw support for their arguments from the UN Guidelines, the point that HSF wishes to highlight is a different one. It is the emphasis that these instruments place on prosecutorial independence as a hallmark of a functioning criminal justice system.

⁴³ *Porritt and Another v National Director of Public Prosecutions and Others* [2015] 1 All SA 169 (SCA) at para 20

⁴⁴ Guidelines on the Role of Prosecutors adopted by the Eighth United Nations Congress of the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

⁴⁵ Summary of substantial facts, page 45 para 6

⁴⁶ Downer FA, pages 51-52, para 51

58 The UN Guidelines were formulated to “assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings...”⁴⁷ The UN Guidelines are also designed to ensure prosecution independence. Article 4 of the UN Guidelines provides as follows:

“States shall ensure that prosecutors are able to perform their professional functions without intimidation, hinderance, harassment, improper interference or unjust exposure to civil, penal or other liability.”

59 This statement is echoed in the *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* (“IAP Standards”) adopted by the International Association of Prosecutors in 1999. Article 6 of the IAP Standards states:

“In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled:

6.1 to perform their professional functions without intimidation, hinderance, harassment, improper interference or unjustified exposure to civil, penal or other liability.”

60 In 2003, the UN General Assembly adopted the United Nations Convention against Corruption.⁴⁸ Article 11 of that Convention required State Parties to take certain measures relating to the Judiciary and prosecution services.

⁴⁷ UN Guidelines, Preamble

⁴⁸ UN General Assembly Resolution 58/4 of 31 October 2003 “United Nations Convention Against Corruption”

“1. Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.

2. Measures to the same effect as those taken pursuant to paragraph 1 of this article may be introduced and applied within the prosecution service in those States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service.”

61 In 2015, the UN Office on Drugs and Crime (“UNODC”) published an *Implementation Guide and Evaluative Framework for Article 11*, which summarised the international best practices and standard for States to consider in implementing Art. 11 of the UN Convention Against Corruption.⁴⁹ In dealing with conditions of service and disciplinary procedures, the Implementation Guide says:

“153. The United Nations Guidelines and the Standards of Professional Responsibility state that prosecutors should be provided with reasonable conditions of service and adequate remuneration. Similar to members of the judiciary, prosecutors should be subject to clear and publicly available conditions of service, such as remuneration, tenure, promotional prospects and pension commensurate with their crucial role, as well as an appropriate age of retirement, governed by law. Salaries and other benefits should not be arbitrarily diminished. Given the risks sometimes associated with conducting prosecutions, States are also required to ensure that prosecutors can perform their functions without intimidation, interference, unjustified exposure to liability or risk to their safety.

⁴⁹ UNODC Implementation Guides, Introduction, para 4

154. Prosecutors should be entitled to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability. Prosecutors and their families should be physically protected by the State, at places of work and at home, when their personal safety is threatened as a result of the proper discharge of their prosecutorial functions. Prosecutors should be entitled to form and join professional associations or other organizations, in accordance with law, to represent their interests, to promote their professional training and to protect their status." (emphasis added)

62 The African Commission on Human and Peoples' Rights proclaimed the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*. Article F(a)(2) requires that "Prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability".

63 The European Union adopted similar protections in its Recommendation titled "The Role of Public Prosecution in the Criminal Justice System".⁵⁰ Article 11 provides as follows:

"11. States should take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal or other liability. However, the public prosecution should account periodically and publicly for its activities as a whole and, in particular, the way in which its priorities were carried out."

⁵⁰ Recommendation Rec(2000)19 Adopted by the Committee of Ministers for the Council of Europe on 6 October 2000.

64 The Explanatory Note to the Recommendations provides that there are two requirements for the proper functioning of public prosecution in all circumstances. They are:

- on the one hand, public prosecutors must enjoy such independence or autonomy as is necessary for the exercise of their duties, and in particular to be able to act whatever the interests at stake, "without unjustified interference" (unjustified i.e. in cases other than those provided in the law) not only from any other authority, whether executive or legislative - this being most relevant in systems where the public prosecutor is subordinate - but also from economic forces and local political authorities. Generally speaking, the law itself provides such a safeguard, indeed in some cases unjustified interference is a criminal offence. But interference can be more insidious, for example taking the form of a squeeze on the Public Prosecution's budget, thus making the service more dependent on sources of financing not originating in the State.

- on the other hand, while there must be provision for public prosecutors - given the substantial powers they enjoy and the consequences that the exercise of those powers can have on individual liberties - to be made liable at disciplinary, administrative, civil and criminal level for their personal shortcomings, such provision must be within reasonable limits in order not to encumber the system. The emphasis must therefore be on appeal to a higher level or to an ad-hoc committee and on disciplinary procedures, although individual prosecutors must, like any other individuals, be held responsible for any offences they may commit. Clearly, however, in systems where public prosecutors enjoy full independence, they carry greater responsibility."⁵¹

65 All of these instruments recognise that it is essential for maintaining prosecutorial independence that prosecutors are not unjustifiably exposed to civil, penal, and other liability. Importantly, the international standards do not require that prosecutors be

⁵¹ Explanatory Memorandum , page 23

immune from liability. They too, must be accountable. But the point is that they should not be hindered in discharging their functions by the threat of unjustified criminal liability.

Protecting independence

66 The question that confronts this Court is what to make of a private prosecution launched by a criminal accused against his prosecutor while his own prosecution is underway. In preparing these heads of argument, we have searched our own case law and those of comparative jurisdictions for any comparable case to this. We have found none.

67 So the court is confronted with a unique set of circumstances. The principle of prosecutorial independence, as it has been articulated in our own law and the international instruments, requires this Court to ask whether the prosecution of Mr Downer is being pursued in order to intimidate or hinder Mr Downer in the performance of his work as the lead prosecutor in Mr Zuma's trial.

68 Mr Downer deals with those facts in his application. They include the fact that this private prosecution is the next in a series of applications that Mr Zuma has brought over the past twenty years to delay the progress of his own corruption trial;⁵² and the fact that Mr Zuma indicated earlier this year that he will be using the fact of his private prosecution of Mr Downer to seek to have him removed as the lead prosecutor in his corruption trial.⁵³

⁵² Downer heads of argument page 11 para 29

⁵³ Downer heads of argument page 6 para 12

69 The factual context against which this private prosecution was launched and Mr Zuma's conduct since then indicate that the focus of the prosecution is not on bringing Mr Downer to justice but rather on the impact of the private prosecution for Mr Zuma's own criminal trial.

70 A private prosecution has none of the structural constraints that apply in cases of state run prosecution.⁵⁴ In state run prosecutions, the detailed hierarchical structure for the appointment of prosecutors and the reporting lines within that hierarchy all provide accountability checks on the system. A private prosecution is different. Restraint on private prosecutions must come from the courts themselves, in the exercise of their inherent power to prevent an abuse of their processes.

71 *Nedcor v Gcilitshana*,⁵⁵ was a case in which the High Court invoked this power to interdict a private prosecution from continuing. The Court explained that the rationale behind invoking the court's inherent power to stop a private prosecution is to protect the administration of justice:

"Ordinarily, the reasons and motives of a party for instituting legal proceedings are irrelevant. However, '(w)hen . . . the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse. But it is a power which has to be exercised with great caution, and only in a clear case' (per De Villiers JA in Hudson v Hudson and B Another 1927 AD 259 at 268). The learned Judge made the comment in the context of misuse of a Rule of the Court by one of the litigants, but in Solomon v Magistrate, Pretoria and Another 1950 (3) SA 603 (T),

⁵⁴ HSF amicus FA page 16 para 36.2

⁵⁵ *Nedcor Bank Ltd and Another v Gcilitshana and Others* 2004 (1) SA 232 (SE)

Roper J found the dictum to be applicable also to private prosecutions. In Van Deventer v Reichenberg and Another [1996] 1 All SA 125 (C) at 132f - g, the Court held that it has the power to interdict a private prosecution which is irregular, vexatious or an abuse of the process of the court. The power derives from the inherent jurisdiction of our superior Courts to prevent abuse of their process (Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa 4th ed edited by Dendy at 245). Although such power will be exercised with caution and only in a clear case, the courts will not hesitate to act where necessary lest the administration of justice attract disrepute. The power shall be exercised in the light of all the relevant facts and circumstances, and with due regard to the intention of the legislature as reflected in the statutory provisions, if any, pertaining to the particular proceedings."⁵⁶

- 72 The administration of justice and prosecutorial independence are closely linked. In *Basson*, the Constitutional Court emphasized that by providing for prosecutorial independence, the Constitution made it plain that effective prosecution of crime is an important constitutional imperative.⁵⁷ This Court has previously recognized that effective prosecution is necessary for the integrity of the administration of justice.⁵⁸
- 73 The administration of justice is therefore upheld when courts step in to prevent an abuse that seeks to undermine prosecutorial independence.
- 74 If this Court concludes that this private prosecution has been brought in order to intimidate or hinder Mr Downer in the performance of his duty as a prosecutor, then it will need to step in and stop the prosecution in order to vindicate the principle of prosecutorial independence and thereby protect the administration of justice.

⁵⁶ *Nedcor Bank Ltd and Another v Gcilitshana and Others* 2004 (1) SA 232 (SE) para 27

⁵⁷ *S v Basson* 2005 (1) SA 171 (CC) para 33

⁵⁸ *S v Goddard* 2018 JDR 0401 (KZP) para 18

CONCLUSION

75 The HSF was admitted as *amicus curiae* in these proceedings in order to make two main submissions.

75.1 First, it is evident from Mr Zuma's own conduct that he is pursuing this private prosecution for an ulterior purpose.

75.2 Second, granting Mr Downer the relief he seeks will protect prosecutorial independence.

76 Our courts have not hesitated in the past to step in when an attempt has been made "to use for ulterior purposes machinery devised for the better administration of justice".⁵⁹ In order to be lawful, a private prosecution must be brought for the purpose of bringing the accused to justice. That is not the purpose of Mr Zuma's private prosecution of Mr Downer. Mr Zuma's own conduct shows that he has no genuine interest in bringing Mr Downer to justice. His own summary of substantial facts is replete with irrelevant material. His witness list is bloated. His docket contains not a single statement from any of the witnesses he intends to call. And in January this year, he confirmed that he will now use this private prosecution as a basis to bring a further application to have Mr Downer removed as his prosecutor.

77 Allowing this prosecution to continue will threaten the administration of justice and the independence of the prosecution service that is one of its essential pillars. The Court should step in to prevent such an abuse.

⁵⁹ *Nedcor Bank Ltd and Another v Gcilitshana and Others* 2004 (1) SA 232 (SE) para 27

Kate Hofmeyr SC

Mabasa Sibanda

Counsel for the Helen Suzman Foundation

**Chambers, Cape Town and Sandton
15 March 2023**

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No.: 13062/22P

In re: the matter between:

WILLIAM JOHN DOWNER

Applicant

and

JACOB GEDLEYIHLEKISA ZUMA

Respondent

and

HELEN SUZMAN FOUNDATION

Amicus curiae

HELEN SUZMAN FOUNDATION'S (SHORT) HEADS OF ARGUMENT

Introduction

1 This application arises from a private prosecution that Mr Zuma has instituted against his own prosecutor, Mr Downer. Mr Downer seeks to set aside the summons by which the private prosecution was instituted and to interdict Mr Zuma from doing so again.¹

2 Mr Downer says that the relief is warranted because the private prosecution is an abuse of the process of this Court.² It is an abuse because it is pursued for an ulterior purpose.³

3 The Helen Suzman Foundation has been admitted as *amicus curiae* in the proceedings to advance two main arguments:⁴

3.1 The first is that it is evident from Mr Zuma's own conduct that he is pursuing this private prosecution for an ulterior purpose.

3.2 The second is that granting Mr Downer the relief he seeks will protect prosecutorial independence.

Ultrior purpose

4 Our law recognises that powers are conferred for particular purposes.⁵ When a power is used for a purpose not authorised by the law, the principle of legality is undermined.⁶

¹ Notice of Motion, page 1 paras 1.1 and 1.2

² Downer heads of argument page 6 para 11

³ Downer heads of argument page 6 paras 11.1 to 11.3

⁴ HSF Amicus FA page 25 para 66, page 28 and 76

5 This jurisprudence on ulterior purpose must not be confused with cases involving bad motives. Our law recognises that where there is reasonable and probable cause for the exercise of a power of arrest (or prosecution), the lawfulness of the arrest (or prosecution) will not be undermined even if the person conducting the arrest (or prosecution) is actuated by an indirect or improper motive.⁷ Those are cases, however, where there is no question that the power, itself, is being used for its proper purpose – namely “to bring the arrested person duly to prosecution”.⁸

6 In those cases, where the purpose is to prosecute the accused, the mere fact that the person conducting the arrest is also influenced by an additional, ulterior motive will not detract from the legality of the arrest.

7 The situation is different, however, when the power of prosecution is being used for a purpose other than to bring the accused to justice.⁹ In those cases, our courts have held that the use of the power for a purpose ulterior to that for which it was designed is an abuse and can be interdicted.¹⁰

⁵ *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) 780G - H; *Ex parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 (3) SA 289 (CC) 305D - E

⁶ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 38

⁷ *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) 140

⁸ *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) 140, last paragraph

⁹ *Solomon v Magistrate, Pretoria, and Another* 1950 (3) SA 603 (T) 607

¹⁰ *Nedcor Bank Ltd and Another v Gcilitshana and Others* 2004 (1) SA 232 (SE); *Tsose v Minister of Justice and Others* 1951 (3) SA 10 (A) 17C-D

8 Mr Zuma opposes this application on the basis that it is “settled law” that ulterior purpose or motive is irrelevant to the validity of a prosecution.¹¹ But that is not correct. Contrary to Mr Zuma’s claims, it *is* relevant what purpose Mr Zuma pursues in privately prosecuting Mr Downer because if the prosecution is pursued for a purpose other than bringing Mr Downer to justice, then the law will step in and prevent such an abuse.

9 Mr Downer says that this private prosecution is pursued with the ulterior purpose of delaying Mr Zuma’s own trial and thwarting Mr Downer’s exercise of his duties.¹² The HSF does not repeat those submissions. It makes a different point. It says that the way in which Mr Zuma has, himself, conducted this private prosecution, reveals that it is not pursued with the genuine purpose of bringing Mr Downer to justice. On the contrary, it is pursued for ulterior political purposes. This is evident from the documents with which Mr Zuma commenced the private prosecution, and his own subsequent conduct in the matter.

Prosecutorial Independence

10 This is an unprecedented case in which a private prosecution has been launched by a criminal accused against his prosecutor while his own prosecution is underway. The law recognises that it is essential for maintaining prosecutorial independence that prosecutors are not unjustifiably exposed to civil, penal, and other liability. Given the unique circumstances of this case, the Court will be required to ask whether the

¹¹ Zuma AA page 237 para 45

¹² Downer heads of argument page 6 para 11

prosecution of Mr Downer is being pursued in order to intimidate or hinder Mr Downer in the performance of his work as the lead prosecutor in Mr Zuma's trial.

11 The factual context against which this private prosecution was launched and Mr Zuma's own conduct since then indicate that the focus of the prosecution is not on bringing Mr Downer to justice but rather on the impact of the private prosecution for Mr Zuma's own criminal trial. Mr Zuma's own summary of substantial facts is replete with irrelevant material.¹³ His witness list is bloated.¹⁴ His docket contains not a single statement from any of the witnesses he intends to call.¹⁵ And in January this year, he confirmed that he will now use this private prosecution as a basis to bring a further application to have Mr Downer removed as his prosecutor.¹⁶

12 Allowing this prosecution to continue will threaten the administration of justice and the independence of the prosecution service that is one of its essential pillars. The Court should step in to prevent such an abuse.

Kate Hofmeyr SC

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**Chambers, Cape Town and Sandton
15 March 2023**

¹³ Summary of substantial facts, pages 44 to 53

¹⁴ Witness list, pages 56 and 57

¹⁵ Downer Supp RA, page 403 paras 12 and 13

¹⁶ Downer heads of argument page 6 para 12

IN THE HIGH COURT OF SOUTH AFRICA
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CASE NO.: 13062/22P

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and

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Respondent

and

HELEN SUZMAN FOUNDATION

Amicus curiae

THE HELEN SUZMAN FOUNDATION'S PRACTICE NOTE

DATE OF HEARING: 20 and 22 MARCH 2023

1. Case name and number

As set out above.

2. Nature of relief sought

The applicant, Mr Downer, seeks to set aside the summons by which a private prosecution against him was instituted by the respondent, Mr Zuma. Mr Downer also seeks an interdict preventing Mr Zuma from doing so again.

3. **Issues for determination**

Whether the private prosecution is pursued with an ulterior purpose and constitutes an abuse of process.

4. **Incidence of onus**

Mr Downer bears the onus to show that the private prosecution is an abuse of process.

5. **Common cause facts**

5.1 Mr Zuma initiated the private prosecution on the basis of a summary of substantial facts and witness list.

5.2 This private prosecution is the next in a series of applications that Mr Zuma has brought over the past twenty years to delay the progress of his own corruption trial.

5.3 Mr Zuma indicated earlier this year that he will be using the fact of his private prosecution of Mr Downer to seek to have him removed as the lead prosecutor in his corruption trial.

6. **Material disputes of fact**

There are no material disputes of fact on the issues that the HSF raises in its submissions.

7. Parts of the papers necessary for determination

- 7.1 All the affidavits in Mr Downer's application.
- 7.2 Those parts of the founding affidavit in the HSF's application to be admitted as *amicus curiae* that are referred to in HSF's long heads of argument.

8. Brief summary of the HSF's arguments

- 8.1 Our law recognises that powers are conferred for particular purposes.¹ When a power is used for a purpose not authorised by the law, the principle of legality is undermined.²
- 8.2 It is evident from Mr Zuma's own conduct in initiating and advancing his private prosecution of Mr Downer that he does not pursue this prosecution with the genuine purpose of bringing Mr Downer to justice but with ulterior political purposes and to intimidate and hinder Mr Downer in the performance of his duties. This fundamentally undermines prosecutorial independence.

9. List of authorities

- *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) 140
- *Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order and Others* 1994 (1) SA 387 (C).
- *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA)
- *Nedcor Bank Ltd and Another v Gcilitshana and Others* 2004 (1) SA 232 (SE)

¹ *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) 780G - H; *Ex parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 (3) SA 289 (CC) 305D - E

² *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 38

- *Van Eck NO and van Rensburg NO v Etna Stores* 1947 (2) SA 984 (A)
- *Solomon v Magistrate, Pretoria, and Another* 1950 (3) SA 603 (T)

10. **Expected duration of the matter**

2 days

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Chambers, Cape Town and Sandton
15 March 2023

Josette Manuel

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Sent: Wednesday, 15 March 2023 09:20
To: 'ManoPillay@justice.gov.za'; 'Kelvin K. Singh'
Cc: 'Thandiwe Seboletswe'; Michelle Mthembu
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2. Please find attached hereto a copy of *amicus curiae* Helen Suzman Foundation's Filing Notice together with their long and short heads of argument and practice note.
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Yours Faithfully

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RE: IN RE
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