STATE
-Versus -
JACOB GEDLEYIHLEKISA ZUMA

A LITIGATION COOKBOOK

Paul Ngobeni - B.A (magna cum laude); Juris Doctor.

Deputy Registrar Legal Services – University of Cape Town
(In personal capacity)

1. INTRODUCTION

This is a very rough draft of work in progress – it is not a research paper but an advocacy document. The inspiration for writing this "Cookbook" was the need to debunk legal myths in Mr. Jacob Zuma's case and to suggest ways of crafting a legal argument that gives Zuma a fighting chance. The purveyors of these myths are many but the most prominent amongst them are retired Chief Justice Arthur Chaskalson and famed advocate George Bizos. The latter pair, in an unusual step in the legal world, issued a signed statement to Sapa news agency about the pending Zuma trial in which they complained that "putting pressure on the courts by making serious allegations of partiality, uttering threats of massive demonstrations and expressing opinions in intemperate language are harmful to the judicial process, to our constitutional democracy and to our country's reputation."[1] They further stated that Mr. Zuma's "guilt or innocence cannot be established by rhetorical statements. The question whether Mr Zuma is guilty or innocent must be decided by the courts and not by his detractors or his supporters. So too, the question whether or not he gets a fair trial is a matter for the judiciary." They also went on to express their concerns about "the tone of the debate around the contemplated trial of Mr Jacob Zuma." They also claimed that they did not want to say anything about whether Zuma should have been charged, or the substance or lack of substance of the charges against him because "those are matters beyond our knowledge. Chaskalson and Bizos appealed to all political leaders and their supporters, opinion makers, commentators and the media to let the courts decide on these issues. They claimed that they "are confident they will do so without fear or favour. That is their constitutional duty and there is no reason to believe that it will not be discharged." Their most stentorian criticism was directed at the Congress of SA Trade Unions (Cosatu) which they accused of implying that our "judiciary as a whole lacks the independence and integrity to ensure that Mr Zuma will receive a fair trial." They took umbrage at the following statement attributed to Cosatu: "The trial against Zuma **is a politically motivated exercise..**. and **he has been subjected to trial by public opinion for the past seven years. We have been convinced for some time that he will not get a fair trial... workers will not allow the NPA (National Prosecuting Authority) and whoever is handling them to abuse its power in this matter**."

In fact, as I will explain here the argument put forth by Zuma's supporters is much more sophisticated than that- it is firmly rooted in our own constitution and finds support in the rulings of courts from around the civilized world. Contrary to these jurists' statements, there is nothing "harmful to the judicial process, South Africa's constitutional democracy and the country's reputation" in our citizens' calling for the courts to live up to their responsibility and to hold the National Prosecuting Authority accountable.

[1] The statement was sent to SAPA. See, **Zuma legal woes on NEC agenda,** 06/01/2008 **http://www.news24.com/News24/South_Africa/Politics/0,,2-7-12_2247107,00.html**

In the first part of this advocacy document (not a research paper) I shall attempt to debunk the legal myths around the Zuma case – a step I consider necessary if Zuma is to pursue a robust litigation strategy. In the second part, I will rely on the constitution and international jurisprudence to refute the arguments by Bizos and Chaskalson - based on the evidence publicly available thus far. In addition, I will discuss the potential legal argument and likely progress of the case, from here on out. This is a very rough draft and many parts of the same argument are repeated. The prolixity of the document reflects that it is research work in progress that is far from completion.

PART ONE -DEBUNKING LEGAL MYTHS IN ZUMA'S CASE

1. The myth that Zuma's Trials Are Not A Political

The use of the word "trials" is intentional and highlights the fact that Zuma has already had a trial by proxy that was sanctioned by our judiciary and the executive. As argued later on, the National Prosecuting Authority (the NPA), the executive branch of our government (the presidency) and the judiciary have all sanctioned a judicial lynching process which is contrary to our constitution and international jurisprudence. Mr. Zuma has recently been charged with various offences and has another trial scheduled for August 2008. Claims by members of the public and Zuma's supporters that his impending trial is "political" have been condemned as irresponsible demagoguery by so-called legal experts. And yet, close scrutiny of the evidence publicly available thus far squarely supports the view that Mr. Zuma will be subjected to a political trial.

Let us start with the bedrock. A definition of a political trial is that it is a "***trial that addresses political questions, involves political officials, or serves political agendas. In certain circumstances the term is used in a pejorative sense to criticize a particular trial or proceeding as unfair or unjust.***"[2] Although it is sometimes difficult to distinguish political trials from ordinary legal proceedings, political trials generally fall into one of four categories[3]. The most familiar type of political trial is a "***partisan trial, which consists of criminal legal proceedings instituted by the government to solidify its power, extinguish its opposition, or flex its muscle. Such political trials, while taking place in a courtroom, have little to do with justice. Instead, partisan trials serve to promote the ideology of those holding the***

[2] http://legal-dictionary.thefreedictionary.com/Political+Trial

[3] A second familiar type of political trial involves the prosecution of religious and political dissenters. A third common type of political trial involves nationalists who challenge a government's authority to represent them. The treason trials of Nelson Mandela in Pretoria, which took place in the late 1950s and early 1960s, similarly raised the consciousness of blacks in South Africa and focused the world's attention on the apartheid system of government. The fourth type of political trial involves the trial of entire regimes, or the leading members of a particular government. When governments are overthrown by a coup or revolution, the new regime must decide how to treat members of the old regime. In some instances members of the old regime are granted clemency, and efforts are made to assimilate them into society. In other instances members of the old regime are not only expelled from office but banished from the country and deprived of their citizenship. However, in a great number of cases the old regime is put on trial by the new regime and prosecuted for every transgression, great and small. Id.

reins of power."Id. Otto Kirchheimer's[4] study of the use of legal procedure for political ends focuses on the question of the role of courts in political trials and struggles.

Kirchheimer's three types of political trials are as follows: (1) those "involving a common crime committed for political purposes and conducted with a view to the political benefits which might ultimately accrue from successful prosecution"; (2) a "classic political trial" involving "***a regime's attempt to incriminate its foe's public behaviour with a view to evicting him from the political scene***"; and (3) "*the derivative political trial, where the weapons of defamation, perjury, and contempt are manipulated in an effort to bring disrepute upon a political foe.*" Id. at 46. A political trial under categories 2 and 3 ***"[goes] beyond the pale of constitutionalism, riding roughshod over the defendant's procedural rights, and trying to squeeze propaganda value from possible distortions of actual events."***) Id. Kirchheimer makes the provocative claim that in modern democracies engulfed in political strife sometimes the function of the courts is simply to allow states to "***eliminate a political foe of the regime according to some prearranged rules***", and the complicity of the courts to repressive programs that serve particular political aims is not rare**:**

> **In the face of drastic changes in the courts' operating conditions and, concomitantly, in the structure of national consciousness, the limits have narrowed within which courts today may decide political issues. By the same token, the possible effect of their action has widened. Beyond their power to authenticate official actions […], the courts have become a new dimension through which many types of political regimes, as well as their foes, can affirm their policies and integrate the population into their political goals.**

We all know that the law does not operate in a neutral, ahistorical fashion, or independently from the underlying power relations in society. Legal procedures can be misused to serve political agendas or for other nefarious ends. Certain kinds of ideological perspectives can also lead, unwittingly, to human rights violations and can lead people, even judges, to believe that in this country with its skyrocketing crime rate or corruption it is acceptable, even desirable to ride roughshod over citizen's rights. The courts can be galvanized under the guise of combating crime or corruption, to overlook abuses by police and to ignore misuse of legal process by the prosecuting authorities. The courts may wax lyrical about corruption in politics or business but maintain a deafening silence even when presented with evidence of prosecutorial corruption and misconduct from say, the Public Protector as in Zuma's case. South Africans must be very careful that their response to human rights violations does not serve simultaneously to dehumanize others and in turn make it possible for the authorities to violate their constitutional rights and even for other people to commit crimes against them. In these ideologies some desired endpoint – elimination of crime or combating corruption - is thought to be so compelling that highly repressive or unconstitutional means are seen as necessary for achieving those ends.

As shown below, the South African courts' actions in overlooking glaring and persistent violations of Zuma's rights raise the spectre that this country may be on the path of reviving the apartheid methods and fashioning a response based on ideas that replicate this same ends-justify-the means-logic

[4] Otto Kirchheimer, Political Justice, The Use of Legal Procedure for Political Ends, Princeton University Press, 1961,

from the apartheid years. In this environment, discussion of human rights abuses by the Scorpions inevitably gets hijacked and gets portrayed as an assault on an institution that has always been fiercely independent of the South African Police Service (SAPS) and by definition as limiting an agency that should be unleashed to deal with creeping corruption in the ANC and government.

There is also a need to expose the myth that those who misuse state organs to fight partisan political battles are doing so as knights in shining armour whose sole mission is to rid this country of rampant corruption in high places. Viewed against this background, it is not surprising that the court judgments in the Shaik corruption case (trial and appellate level) reflect the courts' view that the case was political – the court waxed longiloquent about the effects of corruption on human rights and political processes and ultimately on democracy. The SCA summed up Squires J's views as follows:

> "Squires J considered corruption in terms of the CA as *a phenomenon that can 'truly be likened to a cancer, eating away remorselessly at the fabric of corporate probity and extending its baleful effect into all aspects of administrative functions'. He stated that this manner of corruption had to be checked and prevented from becoming systemic as the effects of systemic corruption can quite readily extend to the corrosion of any confidence in the integrity of anyone who had a public duty to discharge, leading unavoidably to a disaffected populace. The learned judge had regard to the evidence of Mr Hendrik van Vuuren of the Institute of Strategic Studies, a student and qualified observer of this phenomenon. Mr Van Vuuren testified about the effects of corruption on human rights and political processes and ultimately on democracy. The court was of the view that it was a 'pervasive and insidious evil' and that the public interest required its 'rigorous' suppression.*

The SCA went on to say that Squires "*considered that this entire saga represented a subversion of the ideals to which Shaik had subscribed in his involvement in the struggle against apartheid*." The SCA quoted the following statement from the Constitutional Court in South African Association of Personal Injury Lawyers v Heath and others 2001 (1) BCLR 77 (CC) at 80E-F

> *Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State*.'

The SCA continued (paragraph 223] to state that:

> *The seriousness of the offence of corruption cannot be overemphasised. It offends against the rule of law and the principles of good governance. It lowers the moral tone of a nation and negatively affects development and the promotion of human rights. As a country we have travelled a long and tortuous road to achieve democracy. Corruption threatens our constitutional order. We must make every effort to ensure that corruption with its putrefying effects is halted. Courts must send out an unequivocal message that corruption will not be tolerated and that punishment will be appropriately severe. In our view, the trial judge was correct not only in viewing the offence of corruption as serious, but also in describing it as follows:*
> *'It is plainly a pervasive and insidious evil, and the interests of a democratic people and their government require at least its rigorous suppression, even if total eradication is something of a dream.' It is thus not an exaggeration to say that corruption of the kind in question eats away at the very fabric of our society and is the scourge of modern democracies.*

The courts have themselves provided ample testimony to the effect corruption cases are viewed as quintessential political cases. In the SABC appeal case, the Court recognized the political nature of the case by stating: "Thus far the experienced practitioner might well ask how all that distinguishes the case from any other long and demanding trial. The answer lies in those very circumstances which have aroused the public interest on which the applicant relies. The *second respondent was a loyal supporter of the ruling political party and a substantial contributor to its funds; he was a close friend and admirer of Zuma who had by the time of some of the events in issue become the country's Deputy President; there is a backdrop of foreign commercial interests jostling for political patronage in the early years of the new democracy; there is the involvement of the so-called arms deal and allegations of irregularities that beset it; and there are profound implications for the pending case against Zuma. These considerations heighten the expected tensions of what is in any event a major case.* The long and demanding trial with this unusual overlay has given rise to a long and demanding appeal with the same overlay and in which the second respondent's liberty and substantial personal estate are set to stand or fall. *In the result there is a great deal at stake on both sides in a matter which will undoubtedly be fought out in the unrelenting glare of press publicity, whether with or without the television visuals which the applicant has already been given leave to record.*" It is indeed naïve for the jurists to chastise Zuma's supporters for their statements on what is essentially a political case that all and sundry can see. After all the courts have agreed that the case would give rise to enormous public interest and such cases are political.

The courts' unwillingness to exercise supervisory powers over the NPA's handling of the Zuma prosecution is echoed in Bizos and Chaskalson's statement which gives startling insight into how political trials are viewed. At no point did these gentlemen publicly speak out about the NPA's violations of Zuma's rights. They failed to do so even after the Public Protector issued a report detailing said violations. The courts have been equally forgiving of the NPA's misconduct. At some point it became clear that the NPA strategy of not charging Shaik and Zuma together was causing serious prejudice to Zuma's right to a fair trial. And yet, the SCA only expressed mild criticism of the NPA's action and saw the issue not as a constitutional rights violation but merely as a dilemma for the NPA. Judge Howie, in his ruling on the SABC v Downer SC NO & others **[2006]** case, questioned the NPA's decision not to charge Zuma together with Shaik and stated: "***Considering next the problem of the pending Zuma trial, it is not apparent why the prosecuting authorities did not charge both accused in one case. Their present predicament could well be of their own making***." Apparently the court forgot the principle articulated in *Khoza* 1989 (3) SA 60 (T) that a prosecuting team may not proceed in a piecemeal fashion by bringing successive prosecutions on different charges in relation to one broad incident. The SCA treated the NPA's self-imposed short-cuts not as seriously flawed and unfair prosecution tactics which could potentially deprive Zuma of a fair trial but merely as a "***[t]heir present predicament …of their own making.***" An established procedure was violated and exception made in this political case.

Judge Howie and the entire court again missed altogether the prosecutorial misconduct in the case – they eschewed altogether a consideration of whether it is lawful for a prosecutor, for tactical reasons, to

conduct litigation in a piecemeal fashion, to publicly announce that he has "prima facie evidence of corruption" against a citizen, to name and shame the citizen and then proceed to have a trial by proxy in which Shaik's trial is used to try Zuma in absentia. The NPA's misleading statements to the public and the court about its future intentions regarding a Zuma prosecution all violated Zuma's constitutional rights including but not limited to due process rights. And yet the SCA simply saw the consequences as a "predicament" of the NPA's "own making."

When viewed in this context, the SCA belated and important statement about the need to protect Zuma's due process rights to a fair trial shows that the court was oblivious of its own duty not to make statements suggesting that Zuma was an unindicted co-conspirator. Its statement that "***Obviously it will not be anyone's intention in the pending criminal appeal to consider or pronounce upon Zuma's alleged guilt but again it is in the interests of justice pertinent to the pending trial to minimise, if not eradicate, the risk that popular perception will regard the crucial question in the Zuma case as having already been made***" was only directed at "***popular perception***" and not the court's own constitutional duty to avoid statements suggesting a violation of Zuma's rights to be presumed innocent. To make matters worse, the Supreme Court of Appeal itself later relied on media statements and claimed that Judge Squires ruled that a "***generally corrupt relationship***" existed between Zuma and Shaik even though Judge Squires' judgment contained no such finding. Given that even the highest courts have now compounded the problem by taking judicial notice of non-existent facts, Zuma and his supporters have a compelling argument that his chances of a fair trial have been irreparably destroyed. The point that must be overemphasized ***ad nauseum*** is this: the old apartheid legal absurdities and doctrines must be subordinated to the constitution, the supreme law of the land. Those like the courts who blindly subscribe to the notion that the prosecutor as the ***dominus litus*** *in criminal prosecutions* can do as he or she pleases with little or no oversight are likely to destroy the constitutional order for which so many sacrificed their lives and limb.

And finally, Zuma's case has all the hallmarks of what Kirchheimer calls "**the derivative political trial, where the weapons of defamation …and contempt are manipulated in an effort to bring disrepute upon a political foe.**" Unfortunately our courts and now Bizos and Chaskalson have been complicit in this process in several ways. One may recall that during a press conference on August 23, 2003, Ngcuka, then NPA director issued a statement announcing that whilst "a prima facie case of corruption" existed against Mr. Zuma, the prosecuting authority was not convinced that it had sufficient evidence against him to secure a conviction. It was accordingly announced that a decision had been taken not to prosecute Mr. Zuma. At the time Mr. Zuma was the deputy president of the Republic of South Africa and according to him a perception was created that he was guilty but that either he had covered his tracks too well or that he was too politically powerful to be prosecuted. The NPA decided for its own tactical reasons not to indict Zuma with Shaik in 2003 but Shaik's trial was effectively a trial of Zuma by proxy in the court of public opinion and during Shaik's trial. Instead, the NPA resorted to the unprecedented and illegal steps of having Zuma tarred and feathered in the press after Ngcuka's claim

that "prima facie evidence" of corruption existed in 2003. Zuma has the unenviable distinction of being the only citizen in the world who was officially and publicly accused by a prosecutor of criminal wrongdoing amidst claims by the same prosecutor that he did not have a winnable case. Zuma lodged a complaint with the public protector on 30 October 2003 as he was justifiably incensed by the NPA's statements. The Public Protector subsequently issued a damning report in which it found that Ngcuka's statements infringed on Zuma's constitutional right to dignity and caused him to be improperly prejudiced. During its investigations, the public protector experienced stone-wall tactics by the NPA and other difficulties ranging from prevarications, evasiveness and outright refusal to cooperate with the public protector. The Public Protector's finding in Zuma's favour was ignored by President Mbeki who ironically had no hesitancy in using the Squires court judgement to justify Zuma's dismissal.

The Public Protector's finding in Zuma's favour has repeatedly been ignored or treated as a non-issue by the courts, virtually all legal scholars and ironically even Zuma's own lawyers. And yet, international jurisprudence clearly establishes that the NPA's press statements and Ngcuka's actions were all in violation of Zuma's human rights. In that regard, the European Court of Human Rights (ECtHR) has noted that: "The …. presumption of innocence […] will be violated ***if a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law. It suffices, even in the absence of any formal finding, that there is some reasoning to suggest that the official regards the accused as guilty. In this regard the Court emphasizes the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of an offence.***" (emphasis added) ***Allenet De Ribemont v. France***, ECtHR judgment of 23 January 2005, para 35 and ***Daktaras v. Lithuania***, ECtHR judgment of 10 October 2000, para 41. Why have our courts acted as if the adverse findings by the public protector against the NPA do not exist? Are the courts not giving the appearance of condoning prosecutorial misconduct and endorsing same ends-justify-the means-logic? If so, why should an ordinary citizen continue to believe in the efficacy of the public protector's office. The subtle message to the public is that in political cases even the courts will ignore the Public Protector's clear and unequivocal findings in a person's favour and so will the president of the republic! The NPA director was never censored or disciplined by anyone for his unconstitutional actions; when Zuma was fired his job was given to that same prosecutor's wife, thus putting more money in the prosecutor's household.

Those who question the court's impartiality in Zuma's case have every legal justification supported by international jurisprudence. Take for example, the furore about the SCA's error in ascribing the words "a generally corrupt relationship" to Judge Hillary Squires who vehemently denied it. In the great scheme of things it should not matter whether the SCA correctly attributed the quoted language to Squires or whether the latter used "symbiotic relationship" of corruption to describe Zuma's relationship with Shaik. As shown below, human rights centred approach would easily recognize that both Judge Squires and SCA violated Zuma's constitutional rights regardless of the terminology or phrases used in the court's respective judgments. None of these courts had any right to pronounce on Zuma's alleged

guilt or make insinuations regarding the same before he had been given the opportunity to defend himself. Once again, international jurisprudence is on Zuma's side. In ***Minelli v. Switzerland***, judgment of 25 March 1983, para 37, the ECtHR deemed that the presumption of innocence would be violated by a court if: "[…] ***without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty.***" Id. [emphasis added]. The point that all parties involved have failed to grasp is that the violation lies in a series of acts and omissions by the courts including in the Shaik trial and appeal. As demonstrated below, Shaik's case should never have been allowed to degenerate into a trial of Zuma by proxy, resulting in "***a judicial decision concerning him [that] reflects an opinion that he is guilty."*** This not only violates the presumption of innocence but makes the courts participants in the constitutional violations. Accordingly, it is absolutely proper to question whether under these circumstances it is even fair to put Zuma on trial at all.

To maintain public confidence in the farness of a trial, judges must avoid even the appearance of bias against a defendant. In Kyprianou v. Cyprus, (ECtHR judgement of 15 December 2005, para 120), the ECtHR summarised its practice: "The Court has held for instance that the judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in ***order to preserve their image as impartial judges. […] Thus, where a court president publicly used expressions which implied that he had already formed an unfavourable view of the applicant's case before presiding over the court that had to decide it, his statements were such as to justify objectively the accused's fears as to his impartiality".*** Zuma's supporters have every legitimate right to question the courts' impartiality in light of not only the SCA taking judicial notice of non-existent facts but evidence that the courts might have already violated Zuma's rights.

In this regard the principal quality a judiciary must possess is "impartiality." Lord Devlin said of "judicial impartiality" that it exists in two senses-the reality of impartiality and the appearance of impartiality. He emphasized that the appearance of impartiality was the more important of the two. One shudders to think what would happen to the public confidence in our judiciary if the trial judge presiding over Zuma's prosecution now makes rulings and findings of fact which directly contradict both the SCA's findings and Judge Squires' rulings on the alleged "corrupt relationship" between Shaik and Zuma. The point that needs to be made at all times is that the admonition that a judge shall avoid impropriety and the appearance of impropriety must be taken seriously. In an over-simplified sense it means that *it is wrong to do something that is not wrong but appears wrong, as perceived by a reasonable person with knowledge of the circumstances to impair the judge's ability to carry out judicial responsibilities with independence, integrity, impartiality, and competence.* A rule that forbids judges from engaging in the appearances of impropriety promotes, in the view of the lay public, the integrity of the judges. The "judges" of this appearance of impropriety cannot be the judges in robes –they must of necessity be the lay public which

is uniquely qualified to tell the judges how they appear to the reasonable man in the street. The power to fairly criticize a judge as violating the appearances of impropriety cannot be curtailed on the spurious grounds that it serves to bring the judiciary in disrepute. It is the power that belongs to a free people. It is said that public confidence in the judiciary is based on several evaluating criteria which include the principle of independence of the judiciary; the principle of impartiality of adjudication; the principle of fairness of trial; and the principle of the integrity of the adjudicator. Our judges must be willing to ask pointedly: how does our judiciary measure today against these criteria in light of the missteps in Zuma's and Shaik's cases? Those who refuse to acknowledge the disquiet about our judiciary over its handling of these cases can only do so at the risk of further damaging our constitutional democracy. Allegations against the judiciary and the erosion of public confidence in the judiciary may be attributable to the court's seeming unwillingness to discipline the NPA for the egregious acts detailed below. This have been further complicated by the courts' own statements which clearly run afoul of the constitution. It becomes important to ask whether the obvious and egregious violations of constitution are being overlooked by the courts. Despite the presence of insurmountable obstacles for the prosecution, the corruption case is being used against Zuma, a popular leader and politician in an effort to portray him as just prone to corruption and graft, envy and jealousy, self-destructive passion and ruthless ambition as everyone else. It is a weapon to "evict" him from the political scene and accordingly a "political trial."

2. The Myth That Zuma Must Wait For A Trial On The Merits To Raise His Defences and That The Case Is Only About Guilt or Innocence

It is very unfortunate that Mr. Zuma and his legal teams have also contributed to the propagation of the myth that the only acceptable litigation strategy is the sitting duck approach that has characterised Mr. Zuma's litigation approach so far. The NPA and its propagandists aided and abetted by so-called legal experts have been very savvy and relentless in their efforts to counter well-established jurisprudence with tangential and spurious legal arguments. Their very effective tactics threaten to deny Zuma not only the public support he needs but also seeks to cower the generality of the public into silence by suggesting that calls for the courts to hold the NPA accountable are tantamount to an attack on the integrity of the courts.

Zuma has everything to gain from pursuing an aggressive litigation strategy that will help level the playing field. The key is to supply the court hearing Zuma's case with a catalogue of NPA's constitutional violations, overwhelming evidence of the NPA's egregious errors and accompanying violations of Zuma's human rights. A robust litigation strategy must be adopted as a matter of urgency. Such a robust litigation strategy is vital if Zuma is to ensure that the positive messages of what the constitution stands for does not get lost in vexatious claims of his detractors, or unduly cautious interpretations of the Bill of Rights, or case law by our courts. It is necessary to make clear the popular demand that our courts must do all they can to promote these values by holding the NPA accountable. Our constitution codifies our political will of entrenching the values of human dignity, equality, freedom, democracy, and the rule of law. A robust proactive litigation strategy will put Mr. Zuma at the forefront of declaring the benefits of

our constitutional democracy to the world and will make his supporters advocates instead of apologists for human rights. A robust litigation strategy will reinforce the public's understanding of the principles human rights stand for and will deepen the public's understanding that prosecutorial misconduct is a very serious form of corruption which must be combated at all levels.

Such an aggressive litigation strategy must have as its foundation a clear understanding of how criminal defence work is conducted in a constitutional democracy. In countries like Canada whose constitution is remarkably similar to ours, a defendant may raise a constitutional "defence" through a motion or application addressing an issue capable of leading either to the termination of the proceedings or the exclusion of evidence. For example, in unlawful search and seizure cases, the accused is entitled to argue that the search and arrest were defective and that his constitutional rights were therefore violated. If he is successful in establishing such a violation, the unlawfully obtained evidence can be excluded and the arrest may be declared unlawful. Without the suppressed evidence the prosecution cannot otherwise prove its case. The court will not put an unlawfully arrested person on trial. This sort of "defence" is not really a defence on the merits - the accused must establish it in a separate pre-trial application. Nevertheless, Canadian lawyers often refer to such applications as a "Charter defence" in reference to the Charter of Rights under the Canadian constitution. Other forms of constitutionally based Charter defence can result in the exclusion of evidence and/or the termination of the proceedings, known as a stay of proceedings. For example, if the accused is not brought to trial within a reasonable time, the proceedings must be stayed for delay by virtue of ss.11(b) and 24(1) of the Charter. Stays of proceedings can also take place in the absence of a Charter violation so long as the accused can establish that the proceedings constitute an "abuse of process" for which the usual remedy is a stay of proceedings. The point is that the accused has at his disposal motions that can be filed to dispose of a case at the pre-trial stage without waiting for an actual trial to commence. Our own constitution bears striking similarities to the Canadian constitution – it is accordingly proper to explore Zuma's constitutional defences.

Let us illustrate how this approach might work for Zuma. Consider for instance Section 9 of the Constitution which provides that "everyone is equal before the law and has the right to equal protection and benefit of the law." This means that Zuma, regardless of his standing in the community, should be treated no better and no worse than similarly situated accused persons.[5] If Zuma adroitly marshals the facts and establishes that there was unconstitutional denial of his equal protection rights, he would be entitled to a dismissal of his case not on the merits but on the basis of the NPA's unlawful acts. In the US Supreme Court decision, Yick Wo v. Hopkins, 118 U.S. 356 (1886), it was stated that discriminatory application of a valid law to similarly situated persons is an unconstitutional denial of equal protection. While prosecutorial discretion is broad and there exists a strong presumption that prosecutors have properly discharged their duties, this discretion is bound by constitutional constraints, which forbid a

[5] As a Canadian Supreme Court justice remarked in a case involving a prominent politician before that court. "*Everyone in this country, however prominent or obscure, is entitled to the equal protection of the law. As a politician of some prominence, the appellant was not entitled to be treated any better than other individuals, but nor should he have been treated worse*." Per Binnie J in S v Regan 91 C.R.R. (2d) 51 at 99.

decision to prosecute from "being based on an unjustifiable standard such as political activities, race, religion, or other arbitrary classifications." Oyler v. Boles, 368 U.S. 448, 456 (1962). Indeed, "[*n]othing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations, such as race, religion, or control over the defendant's exercise of his constitutional rights, as the basis for determining its applicability*." Id. at 456.

Such a defence has nothing to do with the merits. "***A selective prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution.***" (U.S. v. Armstrong, 1996). Related to this is the principle of equality of arms between the defendant and the prosecution which is well-established in international human rights law, Strasbourg jurisprudence as well as the Statute of the ICTY (article 20), the Statute of the ICTR (article 20) and the Statute of the ICC (article 67). This principle is violated when defendants are not allowed to challenge the evidence against them because they have not been given access to it, or when defendants are subjected to a trial by proxy, or denied access to basic facilities to prepare a defense. As the European Court of Human Rights explained in Bulut v. Austria (1996) 24 E.H.R.R. para. 47:--"The Court recalls that *under the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent. In this context, importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice.*" Viewed with this prism, the decision to try Shaik and Zuma separately and the NPA's tactics of using Shaik's trial to have Zuma tried in absentia constitute very serious violation of Zuma's constitutional rights.

Another potent and related argument that would torpedo the NPA's case against Zuma is premised on Section 34 of the constitution which guarantees access to courts. It expressly provides that "*everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.*" It is very significant that this right of access to court is under a separate provision (Section 34) of the Constitution and not merely subsumed under the section guaranteeing the right to a "fair trial" (Section 35(3)). In order to appreciate the seriousness of the NPA's violation of the right of access let us once again turn to international jurisprudence. "[T]*he right to sue and defend in the courts*," the US Supreme Court long ago said, "is the alternative of force. ***In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship.***" Chambers v. Baltimore & Ohio R.R., 207 U.S. 142, 148 (1907). If the right of access to court is "conservative of all other rights" and "is one of the highest and most essential privileges of citizenship" for Zuma, shouldn't a court show its disapproval of the misuse of its process during the period between August 2003 and June 2005 by dismissing the Zuma case? This is a period during which the NPA had announced to the whole world that Zuma was Shaik's unindicted co-conspirator and that "prima facie evidence of corruption" existed against Zuma. Obviously Zuma

vehemently disputed that and proclaimed his innocence. He complained to the Public Protector about the NPA's unconstitutional action and the Public Protector agreed with him. What other suitable remedy exists to undo the serious wrong of this kind (trial by proxy) which has been variously described and condemned by the courts as akin to "torture" "lynching" and as engendering the "***kind of prejudice is that it closely resembles the kind of punishment that ought only to be imposed on convicted persons?"***

The beauty of an argument under Section 34 of the constitution is that it avoids altogether the academic issues raised by the NPA during the fist Zuma case. The NPA argued that Section 35(3) of the constitution guaranteeing a fair trial is not engaged until a person is "charged" (which includes being officially alerted as to the likelihood of prosecution). In a disingenuous and self-serving manner, the NPA argued that the delay in charging Zuma for the period between August 2003 and June 2005 would not be a contravention of the right to a fair trial as envisaged in Section 35(3) since Zuma did not become an "accused person" until he was formally charged in June 2005. The NPA's argument has, strictly speaking, some intuitive appeal if one adopts a literal reading of the constitutional provision, Section 35(3) urged by the NPA. However, focusing the court's attention on how the NPA's action, including its decision not to charge Zuma along with Shaik prejudiced Zuma's rights allows the courts to see the unprecedented prejudice recognized by Judge Msimang in a more perfect perspective. The NPA's misuse of the courts process during the Shaik trial to put Zuma on trial by proxy as well as the prejudicial delays that followed is demonstrably egregious - it allows Zuma to urge the court to infer that there was mala fides on the part of the prosecution and to make a finding that the NPA embarked on a course of deliberately undermining Zuma's rights under the constitution. This accords with the Public Protector's findings.

At the risk of carting coal to Newcastle, Zuma must argue that while the prosecution has a discretion when to lay charges against a defendant, it does not have the right to use a co-accused's trial to put an unindicted putative defendant on trial while denying the absent defendant a forum in which to defend himself. Because the right of access to the courts is self-standing and is not subsumed under Section 35(3) which deals with "fair trial" rights, it provides a powerful platform from which to launch the argument that a denial of the right of access is not dependent on there being a "formal" indictment or charging document. This highlights the irreparable harm suffered by the prosecution's misuse of its discretionary power to file criminal charges and abuse of the legal process. It punished Zuma and left him with no remedy. After the damage was done through the abuses in the Shaik trial, the NPA now seeks to use the courts to whitewash its violations. This supports the argument that the delay in charging Zuma was oppressive and abusive; the only remedy is dismissal for abuse of process. The delay was intolerable as it was accompanied by the NPA's public identification and smearing of Jacob Zuma in press conferences, by the NPA prosecutors orchestrating nasty media campaigns, and their conducting trial by proxy in which Shaik's trial is used to try Zuma in absentia. The NPA's misleading the court about its future intentions regarding a Zuma prosecution, the NPA's dilatory actions leading to the case being struck of the roll, the presence of aggravating circumstances showing the NPA deliberately

disregarded Judge Msimang's admonitions by taking an even longer time (about 15 months) to file new 2007 charges after Judge Msimang told the NPA in no uncertain terms that its actions in the Zuma case did not comport with accepted norms of prosecutorial diligence all provide ammunition for a dismissal argument.

At the risk of painting the lilly, Zuma can stress that the NPA has taken further advantage of our judiciary's indulgence of its indolence by cavalierly flouting the rules of the Constitutional Court itself and by piling delay upon delay in its prosecution of the case against Zuma. The leaks to the press by the NPA and other speculations about Zuma's case by the same NPA continued unabated despite the SCA's admonition that concerted efforts must be made to minimize "***exhaustive reference to Zuma"*** *which* ***"may even appear to the outside observer or listener to portray him as a co-accused and even as criminally liable."*** The NPA has flouted the SCA's admonition not to pronounce upon Zuma's alleged guilt and "***in the interests of justice pertinent to the pending trial to minimise, if not eradicate, the risk that popular perception will regard the crucial question in the Zuma case as having already been made.***" The NPA's issued a series of statements which seem to have been orchestrated to coincide with the ANC December 2007 conference in Limpopo in an effort to undermine Zuma's election to the presidency of the ANC: The NPA dropped "hints" of its plans to re-indict Zuma and even leaked "draft" indictment when the ANC conference was underway in Limpopo, prompting Zuma and his supporters to voice complaints about the fairness of the trial or use of state organs to settle political differences. The NPA vociferously denied the claims and subsequently charged Zuma with additional and more severe charges shortly after his election as the ANC president and proverbially rained on his parade.

Judge Msimang decision of September 2006 throwing the first Zuma case out of court was based on the fact that the National Prosecuting Authority lollygagged, dragged its feet and could not present the court with a final indictment, despite having investigated Zuma for more than seven years. The court recognized that the NPA decided for its own tactical reasons not to indict Zuma with Shaik in 2003 although it chose to have him tarred and feathered in the press, after Ngcuka's claim that "prima facie evidence" of corruption existed. Ironically, at the time when Judge Msimang struck the case off the roll the cumulative length of the delay from the NPA's filing of charges in June 2005 was almost 15 months. Nothing illustrates the NPA's belief that it is above the law more than the dilatory tactics after an explicit warning from a High Court judge that its handling of the Zuma prosecution was characterized by the polar opposite of due diligence. It took another fifteen months after Judge Msimang's 2006 ruling for the NPA to complete a "draft indictment" for instituting yet another prosecution against Zuma at the end of 2007. It is now up to Zuma to cobble together a coherent legal argument that isolates and highlights all these factors – he should not be hamstrung by misleading calls for restraint.

3. The Myth That Challenging NPA's Litigation Tactics Would Harm Our Democracy And That Prosecutorial Misconduct Is Irrelevant to Whether Zuma Can Get A Fair Trial.

It is interesting to note that the statements from Bizos and Chaskalson about the NPA's exercise of its discretion to institute fresh criminal proceedings against Mr. Zuma is not as ideologically neutral as it

sounds. Their statements betray both British imperial legacy and its influence on our legal system and apartheid-era jurisprudence. In earlier times, prosecutorial discretion was seen as part of the prerogative of the Crown and, thus, as unreviewable by the Courts.[6] The traditional view was that the exercise of all prerogative powers was non-justiciable, on the basis that such powers involved an absolute and unlimited discretion by the King. See R v Toohey; Ex parte Northern Land Council (1981) 151 CLR 170, 218 (Mason J) ('R v Toohey'), quoting Blackstone's Commentaries (***'In the exertion therefore of those prerogatives, which the law has given him, the king is irresistible and absolute, according to the forms of the constitution***': Thus, Blackstone regarded the prerogative as ***'that special pre-eminence which the king hath, over and above all other persons, and out of the ordinary course of the common law in right of his regal dignity', and stated that the term 'can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects.'***[7] Although British attitudes changed in recent years to allow limited judicial review it is still a fact of British legal tradition that that judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy. The language of the cases shows a uniform approach: "rare in the extreme" (*R v Inland Revenue Commissioners, Ex p Mead* [1993] 1 All ER 772, 782); "sparingly exercised" (*R v Director of Public Prosecutions, Ex p C* [1995] 1 Cr App R 136, 140); "very hesitant" (*Kostuch v Attorney General of Alberta* (1995) 128 DLR (4th) 440, 449); "very rare indeed" (*R (Pepushi) v Crown Prosecution Service* [2004] EWHC 798 (Admin), [2004] Imm AR 549, para 49); "very rarely" (*R (Bermingham) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin), [2006] 3 All ER 239, para 63. In *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 371, Lord Steyn said:

> "My Lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review."

To say that the British were reluctant to grant judicial review of prosecution's exercise of discretion is not to say that they allowed the prosecution to run amuck or to violate defendants' rights without any accountability. Their courts and other courts in commonwealth countries have now come full circle to recognize one basic principle - that a decision to prosecute is ordinarily susceptible to judicial review, and surrender of what should be an independent prosecutorial discretion to political instruction (or, one could add, persuasion or pressure) is a recognised ground of review: *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712, pp 735-736; *Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20, paras 17, 21. In addition to the safeguards afforded to the defendant in a criminal trial, the court has a well-established power to restrain proceedings which are an abuse of its process, even where such abuse does not compromise the fairness of the trial itself (*R v Horseferry Road Magistrates' Court, Ex p*

[6] See Wheeler "*Judicial Review of Prerogative Power in Australia: Issues & Prospects*" (1992) 14 Sydney LR 432.
[7] William Blackstone, *Commentaries on the Laws of England (first published 1765, 3rd ed, 1768) bk I, ch 7, 239*. See generally William Wade, *Administrative Law* (8th ed, 2000) 221–2

Bennett [1994] 1 AC 42). Calls by Zuma's supporters for closer scrutiny of the prosecution's abuse of authority are based squarely on legal principles observed in major democracies.

It is true that under apartheid, the courts and lawyers were very reluctant to comment on the discretion exercised by the prosecuting authority – Richings 1977 *SACC* 143 144 or to interfere with a decision of the prosecuting authority as they considered it irregular to do so. *Dubayi* 1976 (3) SA 110 (Tk). Calls by the Democratic Alliance (of Zille, the zany zealot) and other lunatic fringe groups that a citizen like Zuma who has legal remedies and procedures readily available for dismissal of a case before trial should wait for a trial on the merits are based on old apartheid case-law and legal reasoning and are antithetical to our constitution and international jurisprudence. It was the usual apartheid approach that courts do not interfere with the prosecuting authority's *bona fide* exercise of its discretion because the prosecuting authority has the power to decide to prosecute and, once an accused is on trial, the accused will have the fullest opportunity to put his defence to the court, to cross-examine prosecution witnesses and to rely on his right not to be convicted unless the prosecution can prove his guilt beyond reasonable doubt based on admissible evidence and presented in terms of a regular procedure. This was expressed more clearly in *Attorney-General of Natal v* Johnstone *& Co Ltd* 1946 AD 256 AT 261 where the court said:

> 'Now there is no doubt that, in general where it is alleged by the Crown that a person has committed an offence, the proper way deciding on his guilt is to initiate criminal proceedings against him; and where such proceeding have already commenced, even if the stage of indictment only has been reached, it seems to me that a court which is asked to exercise its discretion by entertaining proceedings for an order expressly or in effect declaring that the accused is innocent would do well to exercise great caution before granting such an order. In most types of cases such an order would be entirely out of place.'

Accordingly, an apartheid court would not as a rule not interdict the prosecuting authority from prosecuting where it has decided to do so - *Allen v Attorney-General* 1936 CPD 302. The reason for this is obvious; there were no "Charter" defences available to anyone. Even after apartheid ended, our constitutional court itself displayed that conservative bent in *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC) where a stay of prosecution was sought on the ground that there had been an unreasonable delay. The Constitutional Court observed (at paragraph [38]) that the relief sought '***is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins - and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case - is far-reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused.***' This missed the point entirely.

Contrary to the claims by some, prosecutors in the US and the rest of the civilized world do not have a free hand in their handling press statements during the pre-trial, investigation and trial stage of the criminal prosecution. In Gentile v. State Bar of Nevada, US Supreme Court Chief Justice Rehnquist underscored the need for First Amendment rights to be balanced with criminal defendants' fair trial rights and specifically warned that: ***"[c]ollaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of***

disciplinary measures." Simply put, prosecutors are prohibited from making public statements or issuing press releases that have a substantial likelihood of prejudicing a defendant's right to a fair trial, or even affecting the imposition of a sentence.

Examples where US courts have held prosecutors accountable for irresponsible press statements are many: In **Aversa v. United States**, 99 F. 3d 1200, 1203 (1st Cir. 1996), an Assistant United States Attorney began investigating a local businessman for "structuring" bank deposits - that is, splitting deposits into smaller sums to avoid federal regulations. At a press conference, the prosecutor implied that the man was involved with money laundering and drug dealing. The businessman, however, claimed that the money was from legitimate sources, and that he had divided his deposits only to conceal them from his wife, whom he was about to divorce. Accordingly, he sued the prosecutor for defamation. The court disapproved of the prosecutor's actions and found the impugned statements were "***false, misleading, self-serving, unjust, and unprofessional***." Courts have gone even further and denied absolute immunity to prosecutors when they are being sued for their reckless press statements. See Buckley v. Fitzsimmons, 509 U.S. 259, 274 (1993) (prosecutors are entitled only to qualified good faith immunity in suits involving conduct which is not quasi judicial in nature, and this includes allegedly inflammatory statements to press.); Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980), *cert. denied*, 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981) (no absolute immunity for prosecutor in convening a news conference to announce the results of a search and seizure,) or convening a news conference to announce the return of an indictment, Stepanian v. Addis, 699 F.2d 1046, 1048 (11th Cir. 1983),, Marx v. Gumbinner, 855 F.2d 783, 791 (11th Cir.1998) (prosecutor could be civilly liable for due process violation under Civil Rights laws for conduct in issuing defamatory press release). The U.S. Supreme Court has explained why statements by prosecutors to the press do not warrant an absolute privilege:

> "***Comments to the media have no functional tie to the judicial process just because they are made by a prosecutor. At [a] press conference, [a prosecutor does] not act in 'his role as advocate for the State.' The conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions...***"

When viewed in this light it is now clear that Ngcuka's statement at the 2003 press conference were constitutionally improper and deserve censure by the courts. Equally improper have been the constant media leaks which have become a permanent feature of the NPA's conduct of the Zuma prosecution. Simply put, prosecutors in Europe, the US or any common law country would never have gotten away with what Ngcuka did. For the US, ethical rules commonly in effect in most jurisdictions constrain public comments made by a prosecutor. For instance, ABA Model Rule of Professional Conduct 3.6 prevents a prosecutor from making extrajudicial statements that he knows or reasonably should know present a "substantial likelihood of materially prejudicing an adjudicatory proceeding. The ABA states that "[t]he duty of the prosecutor is to seek justice, not merely to convict." ***ABA, Prosecution Functions Standards, 3-1.2 (c).*** The Supreme Court has noted this, emphasizing that prosecutors must use every legitimate means to bring about a just conviction. **Berger v. United States**, 295 U.S. 78 (1935).

Accordingly, a prosecutor has a duty of remaining neutral and refraining from prejudicing the criminal proceeding. ***ABA, Prosecution Functions Standards, 3-1.4 (a).*** He must not attempt to sway public opinion, by making comments to the public or otherwise. Such requirements are necessary because any pretrial publicity caused by a prosecutor that attacks the accused can be a severe form of punishment without due process of law. ***Monroe H. Freedman & Abbe Smith, Understanding Lawyers' Ethics 309*** at 323 (3d ed., LexisNexis 2004). While Rule 3.6 is directed at public statements by lawyers that may prejudice the outcome of an adjudicatory proceeding, a separate provision of the Model Rules applicable only to prosecutors prohibits extrajudicial communications that would unnecessarily disparage the accused. ABA Model Rule 3.8(f) ("***Special Responsibilities of a Prosecutor***") provides that: "*Except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose," a prosecutor in a criminal case shall "**refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused***…" And, perhaps most obviously but also most importantly, it implies that a prosecutor should not allow his professional judgment to be affected by his own political or personal interests.

Courts throughout the world have emphasized the prosecutor's duty and unique role in assuring that an accused receives "fair play and decency" in the judicial process. Let us start with the dicta of the Canadian Supreme Court in the leading Canadian case on the subject, R v. Stinchcombe [1991] 3 S.C.R 326. At page 333 Justice Sopinka states:

> "***It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction***, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. ***Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings." "I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done***." Citing Rand J. in Boucher v. the Queen [1955] S.C.R. 15.

Similar exhortations have been uttered by the United Kingdom's highest Court. The House of Lords declared: " [I]t is "axiomatic" "that a person charged with having committed a criminal offence ***should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all***." *R v Horseferry Road Magistrates' Court, Ex .p.Bennett*[1994] 1 A.C. 42 at 68.

The United States Supreme Court and other American lower courts have made similar rulings and clarified prosecutor's obligations to accord due process to criminal accused. Due process protects the accused from actions that violate "those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency." United States v. Lovasco, 431 U.S. 783, 790 (1977) (citations omitted). The requirement of "fundamental fairness" is a core value "embodied in the Due Process Clause of the Fourteenth Amendment." In Re Winship, 397 U.S. 358, 369 (1970) (Harlan J., concurring). As opposed to being "an ordinary party to a

controversy," it is the prosecutor who serves as a critical "representative" of the "sovereignty," which has the "obligation to govern impartially." Berger v. United States, 295 U.S. 78, 88 (1935). "***In a criminal prosecution," the prosecutor's role "is not that it shall win a case, but that justice shall be done***." Id. "***It is as much his [or her] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one***." Id. (emphasis added).[8]

The US Supreme Court has recognized an array of improper prosecutorial conduct as depriving a defendant of "fundamental fairness" in the criminal process. Specifically, the jurisprudence of that court prohibits the presentation of, or failure to correct, false testimony, and the presentation of improper argument by the prosecutor. See generally ***Anne Bowen Poulin, Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight***, 89 CAL. L. REV. 1423 (2001). These limitations on prosecutors demonstrate a clear recognition that "fundamental fairness" cannot be achieved when a prosecutor engages in unfair tactics, fails to abide by the constitution, fails to offer reliable evidence or makes inflammatory statements that misrepresent the truth. Prosecutors violate due process by presenting material testimony that is false, by presenting material testimony that creates a false impression, or allowing such testimony to stand uncorrected. See, e.g., Mooney v. Holohan, 294 U.S. 103 (1935) (presenting knowingly false testimony violates due process); Giglio v. United States, 405 U.S. 150 (1972) (failing to correct false testimony violates due process); Napue v. Illinois, 360 U.S. 264 (1959) (failing to correct testimony that creates a false impression, though not perjured, violates due process). This is true even where the particular prosecutor does not know that the testimony being presented is false. See Giglio v. United States, 405 U.S. 150 (1972). The reliability of a conviction and its accompanying sentence[9] cannot be assured when a prosecutor engages in conduct that is antithetical to a truthful process. The truthfulness of the process is of the utmost importance even when a specific prosecutor acts in good faith. Id. at 153.

As the US Supreme Court stated in Brady v. Maryland, 373 U.S. 83, 87 (1963), "[***s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly***." The importance of prosecutorial veracity, as a core value encompassed within due process, is also demonstrated in decisions by the US Supreme Court that hold that a prosecutor's improper argument can violate the due process rights of a defendant. Miller v. Pate, 386 U.S. 1 (1967) (finding that a deliberate misrepresentation of truth to a jury is a violation of due process); Caldwell v. Mississippi, 472 U.S. 320 (1985) (finding an uncorrected, misleading statement of law to a jury a violation of due process). Collectively, the improper argument and false testimony decisions of that Court set a clear standard for the proposition that uncorrected false statements, misleading press releases and misrepresentations about future prosecution intent by a

[8] See also United States v. Wade, 388 U.S. 218, 256 (1967) (White J., concurring) ("Law enforcement officers have the obligation to convict the guilty and make sure they do not convict the innocent.").
[9] Due process requires fairness not only for the trial phase of a case, but also for sentencing. See Green v. Georgia, 442 U.S. 95 (1979).

prosecutor create an unacceptably high risk to the integrity of the judicial process. A false statement by the prosecutor, while not evidence, can still be sufficient to violate the due process rights of the defendant. Inconsistent statements by a prosecutor falls within this same class of improprieties because it demeans the reliability of the judicial process.[10]

US and other courts have also shown disdain for prosecution tactics which violate the fundamental fairness essential to the very concept of justice. It is therefore mere casuistry for the legal experts in South Africa to claim that whether Zuma should have been charged, or the substance or lack of substance of the charges against him are matters beyond their knowledge. International jurisprudence and our constitution provide standards to make judgments about individual responsibility and even prosecutorial misconduct. Prosecution actions which reduce criminal trials to mere gamesmanship and rob them of their supposed search for the truth are totally unacceptable in any democracy. Even under apartheid, there was in theory acceptance of the foregoing principles, notwithstanding the fact that they were despicably violated in practice. It was accepted as part of South African law that a public prosecutor must display the highest degree of fairness to an accused. Mofokeng 1992 (2) SACR 261 (O) at 264C. The prosecutor was required to make disclosure of information favourable to the defence, Van Rensburg 1963 (2) SA 343 (N). It was also accepted that it is not the task of the prosecutor to seek to secure a conviction at all costs. In Jija 1991 (2) SA 52 (E) at 68A it was said that a prosecutor '*stands in a special relation to the Court. His paramount duty is not to procure a conviction but to assist the Court in ascertaining the truth*…'. In Nteeo 2004 (1) SACR 79 (NC) 81*b-g* Kgomo JP said that he embraced the following compendious pronouncements by Gubbay CJ in Smyth v Ushewokunze & another 1998 (3) SA 1125 (ZS) at 1130J-1131E (2) BCLR 170 (ZS) at 174G-175A (emphasis added):

> 'A prosecutor must dedicate himself to the achievement of justice (see *R v Banks* [1916] 2 KB 621 AT 623). He must pursue that aim impartially. He must conduct the case against the accused person with due regard to the traditional precepts of candour and absolute fairness. ***Since he represents the State, the community at large and the interests of justice in general, the task of the prosecutor is more comprehensive and demanding than that of the defending practitioner*** (see *R v Riekert* 1954 (4) SA 254 (SWA) at 261C-E). Like Caeser's wife, the prosecutor must be above any trace of suspicion. As a 'minister of the truth' he has a special duty to see that the truth emerges in court (see *R v Riekert (supra)* at 261F-G; *S v Jija and Others* 1991 (2) SA 52 (E) at 67J-68B). He must produce all relevant evidence to the court and ensure, as best he can, the veracity of such evidence (see *S v Msane* 1977 (4) SA 758 (N) at 759A; *S v N* 1988 (3) SA 450 (A) at 463E). He must state the facts dispassionately. If he knows of a point in favour of the accused, he must bring it out (see *S v Van Rensburg* 1963 (2) SA 343 (N) at 343F-G; *Phato v Attorney-General, Eastern Cape and Another* 1994 (2) SACR 734 (E) at 757*d*). If he knows of a credible witness who can speak of facts which go to show the innocence of the accused, he must himself call that witness if the accused is unrepresented; and if represented, tender the witness to the defence (see *R v Filanius* 1916 TPD 415 at 417; *S v Nassar* 1995 (1) SACR 212 (Nm) at 218*a*). If his own witness substantially departs from his proof [witness statement], he must, unless there is special and cogent reason to the contrary, draw the attention of the court to the discrepancy, or reveal the seriously contradictory passage in the statement to the defending practitioner (see *S v Hassim and Others* (2) 1971 (4) SA 492 (N) at 494B; *S v Masinda en 'n Ander* 1981 (3) SA 1157 (A) at 1162F; *S v Xaba* 1983 (3) SA 717 (A) at 728H-729A).'

---

[10] The prosecutor's duty to "seek justice" is well grounded in legal literature. ***See Bruce A. Green, Why Should Prosecutor's "Seek Justice***," 26 FORDHAM URB. L.J. 607, 612 - 619 (1999) (providing a historical outline of the prosecutor's duty to "seek justice"); Bennett L. Gershman, Id. at 612-613 (citing Thompson v. Calderon, 120 F.3d 1045, 1059 (8th Cir. 2000); quoting Drake v. Kemp, 762 F.2d 1449, 1479 (11th Cir. 1985) (Clark, J., concurring)).

Part of paragraph 3 of the *Prosecution Policy* issued by the NDPP in terms of s 21(1)(*a)* of Act 32 of 1998 provides as follows (our emphasis):

> 'Prosecutors must at all times act in the interest of the community and not necessarily in accordance with the wishes of the community… The prosecutor's *primary* function is to assist the court in arriving at a just verdict and, in the event of a conviction, a fair sentence based upon the evidence presented. At the same time, prosecutors represent the community in criminal trials. In this capacity, they should ensure that the interests of victims and witnesses are promoted, without negating their obligation to act in a balanced and honest manner… Members of the Prosecuting Authority *must act impartially and in good faith. They should not allow their judgement to be influenced by factors such as their personal views regarding the nature of the offence of the race, ethnic or national origin, sex, religious beliefs, status, political views or sexual orientation of the victim, witnesses or the offender* …Prosecutors *must be courteous and professional* when dealing with members of the public or other people working in the criminal justice system'.

The *Smyth v Ushewokunze & another* 1998 (2) BCLR 170 (ZS) there were allegations of prosecutorial misconduct. It was alleged that the prosecutor had "*involved himself in a personal crusade*" against the accused and that he lacked the objectivity, detachment and impartiality necessary to ensure that the State's case was presented fairly. The Court assessed the evidence and concluded that it revealed that the prosecutor's behaviour had fallen far short of the customary standards of fairness and detachment demanded of a prosecutor, which required him to conduct himself with due regard to the basic rights and dignity of the accused. Most important, the court established the principle that the accused's right to "**a fair hearing by an independent and impartial court**" (enshrined in s 18(2) of the Zimbabwean Constitution) embodied a constitutional value of extreme importance and had to be interpreted so as to include within its ambit not only the impartiality of the decision-making body but also the ***absolute impartiality of the prosecutor***. ***'Impartial court'*** had to be interpreted so as to embrace a requirement that the prosecution exhibit fairness and impartiality in its treatment of a person charged with a criminal offence. The case emphasized that a prosecution must be carried on with due regard for basic human rights and dignity of the accused and in such manner that all material essential for investigation of truth placed before court. Accordingly, a prosecutor who displayed vindictive and biased attitude to the accused during investigation and remand proceedings was interdicted from taking any further part in preparation or presentation at trial of charges against accused. I find it startling to say the least that Cosatu, the SACP and other supporters of Zuma have a better, sophisticated and more pellucid understanding of the concept of an independent and "impartial court" than the former Chief Justice of our constitutional court! A court in which a prosecutor is allowed to run rampant, to adopt a litigation strategy that causes a case to "limp from one disaster to another", and to conduct a trial by proxy and through the news media cannot by any stretch of the imagination be called "an impartial court" as defined in *Smyth v Ushewokunze & another* 1998 (2) BCLR 170 (ZS).

To some members of the public, the NPA seems to have become so obsessed with getting Zuma at any cost, and appears willing to do virtually anything, regardless of its unconstitutionality or legality, to convict Zuma and keep him out of the way. But perception is itself a form of reality- to the extent that any of the criticisms in some way affect the public's conception of the judiciary, and in turn the stability

of our institutions, they are deserving of our serious considerations and not just elitist knee-jerk dismissals. Prosecutorial misconduct and unconstitutional conduct during the prosecution of a case is not an easily contained evil. Once injected into the case, whether at the investigatory or trial stage, its impact on the pursuit of justice is rarely harmless. If the courts are serious about promoting a culture of respect for human rights, respect for the constitution and the rule of law, they must stop tolerating or trivializing unconstitutional acts by the NPA as was done by Bizos and Chaskalson.

The interest of bringing accused to trial or protecting the finality of criminal convictions should not outweigh the interests of eliminating unlawful acts by prosecutors and providing fair trials for persons of accused of crimes, including corruption. As evidenced by recent NPA public announcements and media leaks regarding former Limpopo Premier, Ngoako Ramatlhodi, South African prosecutors have felt emboldened to do something which is strictly forbidden in all civilized countries- announcing investigations of citizens or making statements charging these subjects of the investigation as unindicted co-conspirators in corruption while at the same time denying them a forum to vindicate themselves. Prosecutors will continue to conduct trials through the press and to violate the constitution as long as the courts continue to tolerate such practices. For those who believe passionately in a professional, non-political, non-partisan mission of the NPA- the NPA's actions towards Zuma and now Ramatlhodi are emblematic of the prosecutorial abuses that must be routed out as a matter of urgency. The prosecutors and employees of the NPA at all levels should be aware of, respect and protect the human rights and freedoms recognized by the Constitution and legislation of South Africa and international agreements. The universal principle of respecting a person's dignity and worth is compulsory for the employee of the NPA. A prosecutor who publicly announces that there is "prima facie evidence of corruption" against a citizen while at the same time refusing to initiate criminal prosecution against the person violates the provisions of our constitution mentioned above, including the right to security of the person. Such actions are not *in accordance with the principles of fundamental justice* and deprive an accused of "fundamental fairness," an essential ingredient of the due process. A prosecutor who insists on media churning of an allegation of impending investigation or existence of a "prima facie case" he is unwilling to present in court is embarking on a strategy of making the accused suffer "***overlong subjection to the vexations and vicissitudes of a pending criminal accusation***" without providing a judicial forum to vindicate himself. This deprivation is exacerbated when the same prosecutor announces that the person would not be prosecuted but then goes on to put him on trial by proxy as an unindicted co-conspirator. In Zuma's case, the egregiousness of this conduct was also heightened when the vitriolic statements made in the press during the Shaik trial and leaks to the media from the NPA office continued unabated in clear defiance of the admonitions of the Public Protector, Judge Hefer and even the Supreme Court of Appeal.

Prosecutors have a unique role in the judicial process. They represent the interests of the sovereign, and thus, have a heightened responsibility to ensure that fairness is achieved and a defendant's due process rights are protected. This cannot be accomplished when prosecutorial veracity is ignored. Both case law from around the world and even South African courts and ethical mandates provide a

measure for determining appropriate lines of fairness. As demonstrated later on Zuma easily establishes that the court's process has been improperly used for *official public smear of an individual when that individual has not been provided a forum in which to vindicate his rights*. The courts have aptly described such actions by prosecutors as misconduct subjecting victims like Zuma "***to the torture of public condemnation, loss of reputation"*** and that unrestrained vitriolic press statements and in-court statements about these uncharged persons would leave the victims "***just as defenseless as the medieval prisoner and the victim of the lynch mob***."

Despite the presence of a constitution with bill of rights, our courts are still hamstrung by apartheid jurisprudence and have not shown the ability to reign in errant prosecutors. To be sure, the courts have ruled that prosecutors must also '***purposefully take all reasonable steps to ensure maximum compliance with constitutional obligations, even under difficult circumstances***' (Jaipal v S 2005 (5) BCLR 423 (CC) at [56]. And yet, when the same constitutional obligations are shown to have been violated the courts take an "end justifies the means" approach and fail to act firmly to combat such unlawful behaviour. As discussed later on, our courts have either dropped the ball or have been entirely inconsistent in ensuring fairness for Zuma and in ensuring that his constitutional rights were respected. That is not for lack of judicial precedent. To be very specific, in *Khoza* 1989 (3) SA 60 (T) the court ruled that the prosecution, precisely because it is *dominus litus,* should formulate and consolidate all its charges, in relation to a particular set of facts, to be tried in a single case. It may therefore not proceed in a piecemeal fashion by bringing successive prosecutions on different charges in relation to one broad incident. The case was struck off the roll (that is the four accused concerned were not acquitted but the court declined to proceed with the case) because the procedure adopted by the prosecution was considered unfair. Why is it considered irresponsible or "rhetoric" for Cosatu and others to point out that the principle of the prosecutor as 'master of the case' is being abused and allowed to derail Zuma's fair trial rights?

4. The Myth That Zuma's Prosecution Has Nothing To Do With Human Rights Violations.

As South Africa gets ready for yet another spectacle involving the National Prosecuting Authority's (NPA) attempt to bring to trial Mr. Jacob Zuma, president-elect of the ruling party, the ANC, there is a need for all concerned citizens to take stock of and to critically analyze the NPA's blunders and abuse of the legal process in the Zuma case. For those who believe passionately in a professional, non-political, non-partisan mission of the NPA- that agency's persistent insistence on media churning of allegations of impending charges in a case that is in all likelihood headed for a dismissal is troubling to say the least. Careful and exhaustive review of several legal principles under international jurisprudence and South Africa's own constitution and a focus on the egregious prosecutorial misconduct in the handling of Zuma's case compels the conclusion that the entire case is headed for a dismissal and Zuma may never have his day in court that he and many citizens so vociferously clamoured for. That of course depends on the skills and legal strategies of the legal team in whose hands Zuma has reposed his

faith and fate. In order to succeed in that herculean task one has to adopt a decidedly human rights approach to the entire case from start to finish.

A human rights approach always begins with, and has as its essence a concern with individual victims of rights abuses. In a constitutional democracy with individual rights enshrined in a bill of rights, a proper analysis must necessarily start with the rights so enumerated. In Zuma's case, the key is to focus on the mosaic of evidence of violations of Zuma's other constitutional rights and then show how those violations make the unreasonable delay, violation of the presumption of innocence and violation of the right to adduce and challenge evidence particularly egregious in Zuma's.

Let me use a few examples to illustrate this point. There has been a serious violation of the presumption of innocence in Zuma's case. The approach of the common law to the presumption of innocence was memorably stated by Viscount Sankey LC in Woolmington v D.P.P. 1935 AC 462, 481 to be that "Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt. . . " In the meantime the human rights movement came into existence. The foundation of it was the Universal Declaration of Human Rights (1948), which has been the starting point of subsequent human rights texts. In article 11(1) it provided: "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law . .." Borrowing this language almost verbatim, article 6.2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) provided: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". Article 14.2 of the International Covenant on Civil and Political Rights (1966) is to the same effect. Our RSA constitution contains similar language guaranteeing the right of the accused to be presumed innocent.

Our own constitutional court judges have provided a standard by which the concept is to be understood and which has been emulated by British courts. In H M Advocate v McIntosh, P.C. (5/2/2001) Lord Bingham of Cornhill recently referred to the judgment of Sachs J of the South African Constitutional Court in State v Coetzee [1997] 2 LRC 593. It is worth setting out the eloquent explanation by Sachs J of the significance of the presumption of innocence in full [para 220 at 677]:

> "There is a paradox at the heart of all criminal procedure in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences massively outweighs the public interest in ensuring that a particular criminal is brought to book… **Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system**. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption . . . the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases".

The logic of this reasoning is inescapable. If the presumption of innocence is flagrantly violated the "public confidence in the enduring integrity of the legal system" evaporates. It is thus irresponsible for so-called legal experts to chastise members of the public who points out to the violation of this very principle as a reason for their concern that Mr. Zuma would not get a fair trial. After all, our judges are given explicit instruction in section 39(1)(a) of the constitution which reads: "*When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.*" Judges are reminded to keep these values - which crop up frequently in South Africa's constitutional law - at the front of their minds when dealing with the Bill of Rights. Our judges must be open to criticism and reminders from the public in order to develop a strong culture of human rights in our country. As part of the government they must stand by its commitment to establishing a culture of human rights by providing an example of respect for and protection of the human rights of the public.

Human rights law provides the international standards to make judgments about individual responsibility, including that of our judges. Sadly, in the highly politicised case, some legal scholars including retired constitutional court judges have uttered statements implying that there is something improper about the "tone of the debate" around the pending Zuma prosecution or that those calling for the courts to live up to their responsibility to hold the National Prosecuting Authority accountable are engaging in conduct "harmful to the judicial process, South Africa's constitutional democracy and the country's reputation". In disregard of human rights norms and legal principles observed throughout the civilized world, these experts have erroneously equated our citizens' questions about whether Zuma can ever get a fair trial under the present circumstances with wholesale condemnation that "our judiciary as a whole lacks the independence and integrity to ensure that Mr Zuma will receive a fair trial".

It is not surprising that the pseudo-internationalism and stated need to avoid harm to "the country's reputation" have been seized upon by the likes of Zille,[11] (the zany zealot) of the DA and other lunatic fringe groups in a concerted effort to force Zuma's supporters into silence. In blatant disregard of

[11] Zille, the Cape Town mayor recently led a posse of vigilantes, including the Members of the People's Anti-Drug and Liquor Action Committee (Padlac) who went to private citizen's homes to 'deliver petitions" in which unindicted citizens were accused of drug dealing without being provided a forum to defend themselves. Oblivious of the despicable and unconstitutional nature of her actions, Zille claimed "…there was nothing in the Constitution that prohibited anyone from knocking at someone else's gate." http://www.news24.com/News24/South_Africa/Politics/0,,2-7-12_2180982,00.html. When the police arrested her for her antics, a spokesman for her party, the Demonic Alliance, howled that the arrest was "apartheid-style" and jeremiad that "…a situation where the leader of the opposition party in South Africa is arrested for (participating in) a legal march against illegal drug lords shows what which way we are going in this country." http://www.news24.com/News24/South_Africa/Politics/0,,2-7-12_2180265,00.html. Not to be outdone, Zille herself told the SABC that the police were busy with a "purely political" agenda. http://www.news24.com/News24/South_Africa/Politics/0,,2-7-12_2180352,00.html. And yet her own actions clearly highlight that the zealot is clueless about the constitutional rights of South African citizens. She calumnizes the police while admitting the illegal nature of her buffoonery as follows: "At 14:00 we began a legal march to smokkelhuise (places where drugs are sold). We had the necessary permission for the protest march. "After we had visited a few smokkelhuise and handed over petitions against drug-trafficking, we arrived at another one." The police arrested a moulana (Armien Maker) without any grounds.." http://www.news24.com/News24/South_Africa/Politics/0,,2-7-12_2180360,00.html. She later claimed in her delusions of grandeur that she witnessed a "**heavy-handed police action turn a small, peaceful and altogether uneventful anti-drug march in Mitchells Plain [last] Sunday night into an international incident.**"

the principles in our constitution, including the presumption of innocence, some of these groups have stated that Zuma must step down while his case is ongoing[12].

A human rights approach will combat the elitist and classist blackmailing by showing that Zuma has the better argument when it comes to the constitutional issues in his case. Those who refer to "international" community or South Africa's "reputation" in the world without referring to the human rights instruments and international jurisprudence clearly showing a violation of Zuma's rights have an agenda which must be confronted as a matter of urgency. A decidedly human rights framework can be used to challenge, particularly in light of the attempt to portray Zuma's supporters as prone to violence, the false notion that proper legal analysis is the exclusive preserve or the monopoly of the traditional white power elite and few educated blacks, rather than radical, worker-centred groups. The legal scholar's approach also betrays the classist assumption that workers or Zuma's supporters are not as wise, insightful and 'advanced' as these experts (or those supporting the prosecution) no matter whether Zuma's position is supportable under our constitution and international jurisprudence. To adopt a human rights approach is to confront and reject the legal analytical discourse of those who advocate strategies that preclude the masses as agents in the making of our democracy and our history, and to expose as fallacious their assumptions that legitimate authority and "international" acceptance rests in the most educated privileged classes, and those who suppose that the masses and especially Black people need to be saved from themselves.

To shine the spotlight on the violations of Zuma's rights under the constitution is also a better way to confront those who devalue or denigrate the argument put forth by Zuma's supporters notwithstanding its level of sophistication and without regard to the fact that such argument has firm and sturdy roots in our own constitution. I have quoted extensively from court rulings around the civilized world to demonstrate that the argument by Zuma's supporters across the board finds support in human rights instruments and judicial decisions in major democracies. This is necessary to highlight the fact that blind deference and subordination to erroneous court decisions and NPA's actions which are inconsistent with international human rights norms is unhealthy for our democracy. I wish to take to task those who make the assumptions that only "internationally respected" few experts are the true apostles of judicial independence and integrity or agents of sophistication and mastery, while the masses that support Zuma are impulsive, irrational, unrefined, uneducated and undisciplined and even prone to violence.

Let me use other examples from the prosecution's handling of Zuma's case to illustrate the point. Under our constitution, The Public Protector is one of the independent constitutional institutions

[12] Holomisa: Zuma must step aside: News24, 07/01/2008. Holomisa is reported to have said "Jacob Zuma should step aside from the leadership of the African National Congress until his corruption case has been resolved…Mr Zuma must suspend himself or the (ANC) national executive committee should force him to take leave," Holomisa said. "**That would restore confidence in our democracy**." For Zuma to now hand over the party reins to his deputy, Kgalema Motlanthe, would signal that both he and the NEC were serious in the fight against corruption. "They have to lead by example," he said. http://www.news24.com/News24/South_Africa/Politics/0,,2-7-12_2247659,00.html. This is the same Holomisa whose perverse understanding of the presumption of innocence under our constitution is reflected in a press statement that Zuma should now be the happiest man on earth because a trial "… **will give him the opportunity to prove his innocence.**" http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=qw1119276363929B253. Since when has an accused person been required to "prove his innocence" under our constitution?

established by Chapter 9 of the Constitution, 1996, to strengthen the constitutional democracy of the Republic of South Africa. Instead of merely establishing an "ombudsman" the liberation movement sought and obtained the institution of Public Protector which has more teeth. In terms of section 182(1) of the Constitution, 1996, the Public Protector has the power to investigate any conduct in state affairs or in the public administration in any sphere of government that is alleged or suspected to be improper or to result in any impropriety or prejudice, to report on the conduct investigated and to take the appropriate remedial action. Section 6(4)(a) of the Public Protector Act, 1994 provides that the Public Protector is competent to investigate any alleged maladministration in connection with the affairs of government at any level and any alleged abuse of power or other improper conduct by a person (or an institution) performing a public function. The National Prosecuting Authority (NPA) and the Directorate: Special Operations forms part of the National Prosecuting Authority (NPA), which falls within the jurisdiction of the Public Protector.

The reader may recall that Zuma lodged a complaint with the public protector on 30 October 2003 as he was justifiably incensed by the NPA's press statements that a "prima facie case" of corruption existed against him. The Public Protector subsequently issued a damning report in which it found that Ngcuka's statements infringed on Zuma's constitutional right to dignity and caused him to be improperly prejudiced. During its investigations, the public protector experienced stone-wall tactics by the NPA and other difficulties ranging from prevarications, evasiveness and outright refusal to cooperate with the public protector. Why have our courts acted as if the adverse findings by the public protector against the NPA do not exist? Are the courts not giving the appearance of condoning prosecutorial misconduct? If so, why should an ordinary citizen continue to believe in the efficacy of the public protector's office and even the courts if these institutions can ignore each other's rulings or findings? It is downright perverse to suggest that the looming crisis of confidence in our judiciary is attributable to Mr. Zuma and his supporters - the finger of blame must be pointed directly at the NPA and even the courts themselves. The NPA director was never censored or disciplined by anyone and when Zuma was fired as a result of a trial by proxy and by the press, his job was given to the prosecutor's wife, thus putting more money in the prosecutor's household.

Interestingly, our court's reticence in disciplining the prosecution or reluctance to tolerate robust public criticism also reflects South Africa's colonial legacy and British imperialist influence. The British recognized an offence of "scandalising the court", an offence consisting of the making or publishing of remarks which have the effect of bringing a judge or court into contempt.[13] In English law, the very definition of the offence of alleging partiality on the part of the judiciary reflects its anti-democratic nature. In the seminal case of R v. Almon, (1765) Wilm. 243; 97 E.R 94. Cf. Fox, "The King v. Almon," 24 L.Q.R. (1908) pp. 184-198, pp. 266-278, Wilmot J succinctly defined the offence as follows:

[13] Scandalising the court involves either a scurrilous abuse of the judiciary, or allegations of partiality**. Borrie and Lowe, The Law of Contempt** (1973) pp. 152-174.

> The arraignment of the justice of the Judges, is **arraigning the King's justice; it is an impeachment of his wisdom and goodness in his choice of his Judges**, **and excites, in the minds of the people a general dissatisfaction with all judicial determination, and indisposes their minds to obey them; and whenever men's allegiance to the law is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice** …

Silencing the public and forcing everyone to eschew public criticism of judges was the most effective way for the feudal British monarchy to maintain its stranglehold on the populace. It is certainly not surprising that the foregoing perversion of the law was used by the South African courts to silence opponents of apartheid. In S. Van Niekerk (1970) 3 S.A 655 a judge found as "contempt" the following statement by a legal scholar: " …a considerable number of replying advocates, almost 50 percent…believe that justice regards capital punishment is meted out on a differential basis to the different races, and that 41 per cent, who so believe are also of the opinion that such differentiation is conscious and deliberate." Judge Claasen not only condemned the statement about racial discrimination in imposing the death penalty as contempt but he went on to state that "…a reasonable person reading the article in question would understand that advocates are persons having an intimate knowledge of the way justice is meted out and their opinions are entitled to great respect, and **if the reader accepted the views set out he could possibly hold the judges and the administration of justice in low esteem**…**On that basis the paragraph referred to could possibly be an attack that goes to the very root of our criminal procedure and judicial determinations …**" Id. at 658.

British colonial rule ended a long time ago and our judges must be conscious of the fundamental difference between judges appointed under our democratic constitution and judges who were appointed to further the interests of and to protect the undemocratic British monarchy. Our judges owe their allegiance only to the constitution and are not beholden to the president or officials who appointed them. Proper means of earning and inspiring the public's public confidence in the administration of justice and in a democracy were eloquently described as follows:

> **Respect for courts is not inspired by shielding them from criticism. This is a responsibility of the judge, acquired over the years by the spirit in which he approaches the judicial process, his ability to humanise the law and square it with reason, the level of his thinking, the consistency of his adherence to right and justice, and the degree to which he holds himself aloof from blocs, groups, and techniques that would sacrifice justice for expediency**.
>
> Pennenkamp v. Florida, 22 So. Ed. 875 at 884.

One may be forced to question whether the South African phenomenon of retired judges coming out of retirement to make partisan speeches or injecting themselves in public controversies is actually health for our democracy. Be that as it may, the point is that if our Courts had adopted a human rights centered approach in dealing with Zuma's situation from the onset, their response would certainly not have been based on ideas that replicate the same ends-justify-the means-logic adopted by the NPA. A human rights approach will always remind prosecutors and our courts to be especially vigilant about attempts to violate basic rights of criminal defendants and even unindicted third persons (whose names

are being bandied about in court proceedings without being afforded a fair hearing) all in the name of the struggle against corruption. The judiciary has the heavy responsibility for earning the public confidence and for building the confidence of our citizenry and world public opinion that public servants and people accused of corruption in our country would receive a fair and impartial trial consistent with international norms. Our commitment to civil liberties and rule of law is an essential part of our new identity as a nascent democracy in the post-apartheid era and should not be squandered by some of the short sighted policies and practices of the NPA.

The high-sounding principles emanating from the courts about corruption must also be put in the right or proper perspective. Prosecutorial misconduct is the highest form of corruption, far more insidious than the local businessman who pays a bribe to get a liquor licence from some administrative agency. It represents a subversion of the entire constitution and the rule of law itself. The Public Protector has already found the NPA to be guilty of violating Zuma's human rights. To paraphrase the SCA itself, the NPA's actions undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State. It is thus not an exaggeration to say that corruption of the kind in question eats away at the very fabric of our society and is the scourge of modern democracies.

5. The Doctrine of Abuse of Process In A Human Rights Context.

It is well settled that the court has a power, developed under the common law, to intervene and safeguard the accused from oppression and to prevent prosecution when it would be unjust to permit the prosecution to proceed.[14] This jurisdiction can be exercised in a wide range of circumstances although from the authorities, three principal situations emerge. (a) The first is where by reason of some circumstance the defendant would be denied a fair trial. (b) The second is where because of some circumstance it would be unfair to try the defendant. (c) The third is where the state has engaged in human rights violations or abuses in its treatment of the accused.

The first situation is more frequently encountered as for example where due to delay or the absence of important evidence the defence is prejudiced and the defendant would thereby be denied a fair trial. In the second category it is well recognized that where there has been such grave misconduct on the part of the police, executive, or prosecution which undermines or threatens the rule of law, the court may and sometimes should intervene even where a fair trial can take place. In the third category are situations

[14] See, Connelly v. DPP [1964] A.C. 1254, where Lord Reid, at 1296, stated the court had "*a residual discretion to prevent anything which savours of abuse of process*", and Lord Devlin, at 1354, stated the courts have "*an inescapable duty to secure fair treatment for those who come or are brought before them*".
Since the implementation of the Human Rights Act 1998, direct regard should also be had to Article 6 of the European Convention for the Protection of Human Rights and the related Strasbourg jurisprudence.

where the constitutional rights of the accused have been violated by the state. Not surprisingly and as demonstrated later, Zuma can claim his entitlement to a dismissal of the NPA's case under all of the foregoing categories.

The most eloquent statement regarding the court's inherent authority to dismiss a case for abuse of process came from the Canadian Supreme Court's *Amato v The Queen* (1982) 69 CCC (2d) 31, 74, where Estey J said:

> "The repugnance which must be experienced by a court on being implicated in a process so outrageous and shameful on the part of the State cannot be dissipated by the registration of a conviction and the imposition afterwards of even a minimum sentence. *To participate in such injustice up to and including a finding of guilt and then to attempt to undo the harm by the imposition of a lighter sentence, so far from restoring confidence in the fair administration of justice, would contribute to the opposite result*."

These views accorded with much of what was said by Frankfurter J in his dissenting judgment in Sherman v United States (1958) 356 US 369. As Mr. Justice Brandeis stated in Casey v. United States, 276 U. S. 425: "This prosecution should be stopped not because some right of Casey's has been denied, but in order to protect the Government. To protect it from illegal conduct of its officers. ***To preserve the purity of its courts.***" Cf. Olmstead v. United States, 277 U. S. 438, 470 (1928) (Holmes, J., dissenting); id. at 277 U. S. 485 (Brandeis, J., dissenting). They were subsequently elaborated by Lamer J, speaking for the unanimous Supreme Court of Canada, in *R v Mack* (1988) 44 CCC (3d) 513. A stay should be granted not because the accused was not guilty or because he could not receive a fair trial or to discipline the police but to protect the integrity of the criminal justice system.[15] See also, Lord Justice Neil's statement in R. v. Beckford [1996] 1 Cr. App. R. 94 at 100F, that "the constitutional principle which underlies the jurisdiction to stay proceedings is that *the courts have the power and the duty to protect the law by protecting its own purposes and functions*".

The influential court decision from the UK dealing with this subject ironically involved acts of misconduct by, (you've guessed it) apartheid South African police. In R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42, the appellant claimed that, having taken a decision not to make use of the extradition process to secure his return to England from South Africa, the English police colluded with the South African police to have him arrested or "kidnapped" in South Africa and forcibly removed to England against his will. The House of Lords decided that a criminal court had power to inquire into allegations that the accused had been kidnapped abroad by authorities acting in collusion with the UK police and, if it found them proved, had a discretionary jurisdiction to stay the proceedings. Lord Griffiths said that the jurisdiction was necessary to enable the courts to refuse to countenance behaviour ***which threatened basic human rights or the rule of law***. The stay is sometimes said to be on the ground that the proceedings are an abuse of process, but Lord Griffiths described the jurisdiction more broadly as a

[15] See, also, Mills v. Cooper [1967] 2 Q.B. 459 where Lord Parker C.J., at 467, stated that "***every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and abuse of process of the court***".

jurisdiction to prevent abuse of executive power. It was on the authority of Bennett's case that the House decided in R v Latif [1996] 1 WLR 104 that in principle a stay could be granted on the grounds of entrapment. Lord Steyn said, at p 112, that the court should exercise the jurisdiction when "[w]eighing countervailing considerations of policy and justice", the judge considers that the bringing of the prosecution "***amounts to an affront to the public conscience.***" In the case of R v Horseferry Road Magistrates' Court, ex p Bennett [1994] 1 AC 42. Lord Griffiths said (at 61–62):

> 'As one would hope, the number of reported cases in which a court has had to exercise a jurisdiction to prevent abuse of process are comparatively rare. They *are usually confined to cases in which the conduct of the prosecution has been such as to prevent a fair trial of the accused* … There have, however, also been *cases in which although the fairness of the trial itself was not in question the courts have regarded it as so unfair to try the accused for the offence that it amounted to an abuse of process* … Your Lordships are now invited to extend the concept of abuse of process a stage further. In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition proceedings. *If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action* and ***to refuse to countenance behaviour that threatens either basic human rights or the rule of law.*** My Lords, ***I have no doubt that the judiciary should accept this responsibility in the field of criminal law***.'

In the same case Lord Lowry said (at 74)—

> '… I consider that a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) *because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.*'

It is to be noted that Lord Lowry's formulation of the circumstances in which a stay for abuse of process (other than where a fair trial was impossible) is more widely drawn than that of Lord Griffiths who considered that 'judicial intervention' should occur when executive action ***'threaten[ed] basic human rights or the rule of law'***. But Lord Lowry was careful to point out that this was a power which should only exceptionally be exercised. He said (at 74):

> 'I agree that prima facie it is the duty of a court to try a person who is charged before it with an offence which the court has power to try and therefore that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons.' "

The House of Lords in Bennett was not required to consider whether the abuse complained of was calculated to cause disadvantage to an accused - it need not be shown that the executive action was deliberately aimed at the accused. The courts t the jurisdiction to restrain a prosecution was to be sparingly exercised, and only if the misconduct in the proceedings was shown to be so serious that *to allow the prosecution to proceed would be tantamount to endorsing behaviour which undermined or degraded the rule of law or because the court's process was being manipulated in a manner which caused serious prejudice to the accused.* The rationale behind this approach is that the court should act so as to show its disapproval and that it will neither tolerate such conduct nor appear to endorse it. Where the

court is satisfied that there has been very grave misconduct the court may and sometimes should move to show its disapproval and grant a stay; see ***R v Schlesinger and others*** 1995 Crim. LR. 137. The authorities on this aspect of the jurisdiction to stay proceedings were reviewed by Kerr J in ***R v McComish*** 1996 NI 466. At Pages 473-474 he said:

> "Before considering these arguments it is appropriate to say something about the concept of abuse of process and the circumstances in which criminal proceedings should be stayed on account of it. In an article entitled '***Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited***' [1995] Crim LR 864, Choo suggests that the use of the term 'abuse of process' may be regarded as unfortunate since the discretion to stay criminal proceedings extends well beyond the power to stay prosecutions which constitute a misuse of the legal process. Choo states (see p 865):
> 'The stay of a criminal prosecution is justified if there is a sufficient danger either that the accused will be convicted even if innocent, or that the continuation of the proceedings *will undermine the moral integrity of the criminal process.*'

An interesting question arises when we apply the foregoing principles to the Zuma case. Given that the Public Protector has already found the NPA's violation of Zuma's human rights under our constitution, why should our courts wallow in the mud created by the NPA by allowing prosecution to continue? Further, given Judge Msimang's findings against the NPA and affirmative proof of prejudice to Zuma flowing from the NPA's manipulation of court's process, would it *not offend the court's sense of justice and propriety to be asked to try Zuma under the circumstances detailed below?*

It is irrelevant whether a fair trial for Zuma is still possible given because of the supposed stellar reputation of our judiciary as urged by Bizos and Chaskalson. In ***Attorney General's reference (No. 2 of 2001***) [2003] UKHL 68 the House of Lords recognized a category of cases where a fair trial is possible but a degree of unfairness to the defendant renders a stay appropriate. At para 25 Lord Bingham said:

> "25. The category of cases in which it may be unfair to try a defendant of course includes cases of bad faith, unlawfulness and executive manipulation of the kind classically illustrated by ***R v Horseferry Road Magistrates' Court, ex p Bennett*** [1994] 1 AC 42, but Mr. Emmerson contended that the category should not be confined to such cases. That principle may be broadly accepted. There may well be cases (of which ***Darmalingum v The State*** [2000] 1 WLR 2303 is an example) where the delay is of such an order, or where a prosecutor's breach of professional duty is such (***Martin v Tauranga District Court*** [1995] 2 NZLR 419 may be an example), as to make it unfair that the proceedings against a defendant should continue. It would be unwise to attempt to describe such cases in advance. They will be recognisable when they appear."

As the English cases make clear, (from the foregoing portion of Lord Bingham's speech) there exists a category of cases where the bad faith, unlawful conduct or executive manipulation towards the defendant is so grievous that a stay is appropriate notwithstanding that a fair trial can be achieved. Second, that it is unhelpful to attempt to define these cases in advance. They will stand out and be recognisable when encountered because they will be very exceptional. Third, that a stay will not be justified if an alternative lesser remedy exists. The question is now whether Zuma can articulate his case

in a manner that puts it squarely within the category of those cases requiring a dismissal for abuse of process.

Another interesting twist here is whether the NPA's undeniable violation of Zuma's constitutional rights as detailed below can be relied upon as proof of the requisite misconduct and prejudice to Zuma. That should be easy to do if our courts adopt the general description formulated by Lord Lowry in Hui Chi-Ming v. The Queen [1992] 1 A.C. 34, 57 where he said: "**something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all respects a regular proceeding.**" An abuse may occur through the actions of the prosecution, as by misusing or manipulating the process of the court. But it may also occur independently of any acts or omissions of the prosecution in the conduct of the trial itself. Indeed the very holding of the trial may constitute an abuse. The courts have recognized such a scenario where the taking of a prosecution in breach of a promise not to prosecute was held in Reg. v. Croydon Justices, Ex parte Dean [1993] Q.B. 769 to constitute an abuse of process. Another example is Reg. v. Horseferry Road Magistrates' Court, Ex parte Bennett [1994] 1 A.C. 42. In that case there was no reason to suppose that the eventual conduct of the trial would be other than fair in itself but the breach of extradition procedures whereby the accused had come to be within the jurisdiction of the court was such as to amount to a gross abuse of power.

In my view, a simplistic definition of the abuse of process concept is the court's refusal to wallow in the mud created by the state. There is no all-encompassing definition of it and just like pornography, you will recognize it when you see it. In referring to the cases, it is important to note that staying a prosecution is a discretionary remedy. Each case will depend on its own facts and the courts have discouraged an overly strict application of precedent or the excessive citing of previous authorities: R v Sheffield Stipendiary Magistrate ex parte Stephens (1992) 156 J.P. 555; R v Newham Justices ex parte C [1993] Crim. L.R. 130. One can only draw from numerous case-law examples for illustration purposes.

Cases have been dismissed where there was a violation of attorney-client privilege (a police officer deliberately eavesdropping and listening in on a conversation between defence lawyers and a witness), see, *The Queen-v-Emma Louise Jamison,* no. [2007] NICC 38 (Judgment: approved by the Court for handing down Delivered: 18/10/07). Cases have been dismissed for excessive delay, see, R v Dunlop [2006] E.W.C.A. Crim. 1354, [2007] 1 Cr. App. R. 8: ("The passage of time is, of itself, no impediment to the fairness of a retrial." Delay per se will not necessarily lead to proceedings being stayed without trial, particularly if there is no evidence of bad faith or manipulation on the part of the prosecution, and/or the defendant has caused or substantially contributed to the period of delay. Reference to the case law on delay reveals that courts are less concerned with the period of time that has elapsed than the effect that delay can be said to have had on the ability of the defendant to mount an effective case.), and R v Gateshead Justices ex parte Smith (1985) 149 J.P. 681, the Divisional Court warned that courts should be careful not to create an artificial limitation period for bringing summary cases to trial when no such period had been prescribed by Parliament. A stay would only be appropriate if (a) there had

been inordinate or unconscionable delay due to the prosecution's inefficiency and (b) prejudice to the defence could either be proved or inferred.

The principle has also been applied in circumstances where excessive and adverse media reporting may make a fair trial impossible and thus lead the court to stay proceedings: R v McCann and Others (1991) 92 Cr. App. R. 239. The defendant's application was successful in R v Stone [2001] Crim. L.R. 465, where a witness at trial had retracted his evidence subsequent to the jury returning its verdict and had later informed journalists that the evidence he had given was false. There have also been applied where the prosecution's failed to disclose material favourable to a defendant and the defendant can show that he or she would suffer such prejudice that a fair trial would not be possible. Likewise, where a defendant has been deprived of an opportunity to examine evidence and as a result the defendant would suffer serious prejudice to the extent that a fair trial could not take place. R (Ebrahim) v Feltham Magistrates' Court; Mouat v DPP [2001] 2 Cr. App. R. 23. See, also, the European Court of Human Rights ruling in Sofris v S [2004] Crim. L.R. 846 where the Court held that Article 6 of the ECHR (the right to a fair trial) would only be violated as a result of the destruction of evidence where the loss of evidence put the defendant at a disadvantage compared with the prosecution. In a similar vein, the defence's inability to question prosecution witnesses can also result in a successful stay of proceedings on the grounds of abuse of process: R v J.A.K. (1992) Crim. L.R. 30. Other cases of stays where it would be unfair to try the defendant because there has been a misuse of the court's process are as follows: Unfairness may arise where proceedings are commenced or continued in breach of a promise not to prosecute:

R v Croydon Justices ex parte Dean [1993] Q.B. 769, In R v Bloomfield [1997] 1 Cr. App. R. 135, it was held to have been an abuse of process to proceed with a prosecution where, at a previous plea and directions hearing, prosecuting counsel had indicated informally to defence counsel that the prosecutor proposed to offer no evidence against the defendant. This proposal had been repeated before the judge in his chambers, and the matter had then, at the prosecution's request, been adjourned to another day for no evidence to be offered. In these exceptional circumstances, it was an abuse of process to proceed with the prosecution. They have also been applied in cases of entrapment. In R v Looseley; Attorney General's Reference (No 3 of 2000) [2002] 1 Cr. App. R. 29, the House of Lords held that: it is not acceptable for the state to lure its citizens into committing illegal acts and then to seek to prosecute them for doing so; the courts can use their inherent power to stay proceedings in order to ensure that executive agents of the state do not misuse the coercive law enforcement functions of the court. What is clear is that where the court is faced with illegal conduct by police or prosecutors, so grave as to threaten to undermine the rule of law or to violate human rights, the court is likely to regard itself as bound to stop the case: R v Grant [2005] 2 Cr. App. R. 28.

Interestingly, for the Zuma case where the pleas of autrefois acquit and autrefois convict are not available, the abuse of process doctrine can still be invoked to dismiss the new indictment on the grounds that Judge Msimang's decision striking the earlier case from the roll amidst express finding of prejudicial delays and prejudice to Zuma should prevent the prosecution from having another bite of the apple at

Zuma's expense. The court has already made findings of fact (adverse to the NPA) which are binding on the parties. Ironically, the prosecution's own misconduct caused the discontinuation of the earlier case which had only been pending for about 13 months (from official charge in June 2005 until the striking off the roll in September 2006). It took the prosecution more than 15 months to bring the new charges against Zuma. At least since the decision of the House of Lords in DPP v Humphrys [1977] A.C. 1, the courts have recognised a close relationship between the pleas of autrefois acquit and autrefois convict (which operate as a bar to subsequent trial) and stays based on an abuse of process. Where a plea of autrefois acquit or convict has been entered but rejected by the court, the defendant may still seek to argue that to allow the prosecution to continue in the particular circumstances of the case would amount to an abuse of process. If persuaded by the defence argument, it is open to the court to stay the proceedings, notwithstanding its earlier rejection of the plea in bar: R v Horsham Justices ex parte Reeves 75 Cr. App. R. 236; R v Beedie (1997) 2 Cr. App. R. 167; but contrast R v Willesden Justices ex parte Clemmings 87 Cr. App. R. 280. I will develop and refine this argument in another part of this document.

What is important throughout these discussions is that the exercise of the power to stay proceedings as affirmed in R v Latif [1996] 1 WLR 104 is sufficient to satisfy the right to a fair trial under Article 6 of the Convention. It is clear from the decisions of the European Court of Human Rights, that the right is not confined to a fair determination of the question of guilt[16]. It is also a right not to be tried at all in circumstances in which this would amount to an abuse of state power.

I find most interesting the Canadian cases which have applied the doctrine in the context of a constitutional democracy, a written constitution having remarkable similarity to South Africa's own constitution. These appear to be very helpful to Zuma. In other words courts have evaluated claims of abuse of process in the context of alleged violations of constitutional rights and have ordered a stay of proceedings based on a breach of rights under the Canadian Charter of Rights and Freedoms. The Canadians adopt a similar view that a court has the authority to stay proceedings based on an abuse of process. In R. v.Jewitt (1985), 21 C.C.C. (3d) 7 at p. 14, the Supreme Court adopted and approved the following statement of the Ontario Court of Appeal in R. v. Young (1984), 13,C.C.C. (3d) at p.; 31:... there is *a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings.*

In R. v. Regan (2002) 161 C.C.C.(3d) 97 (S.C.C.) at paras. 49 to 51 the court reviewed the law on abuse of process in light of the Charter and referred to the subsummation of the common law doctrine into the principles of the Charter, as outlined by Justice L'Heureux-Dubé in R. v. O'Connor 103 C.C.C.

[16] This appears most clearly from the decision in Teixeira de Castro v Portugal (1998) 28 EHRR 101 in which the court decided that "*right from the outset, the accused was definitively deprived of a fair trial*" (see p 116, para 39 of the judgment) because his conviction was for a drugs offence which had been "instigated" by two police officers. This is the situation of entrapment in which, in an appropriate case, an English court would order a stay of proceedings under the principle in Latif case.

(3d) 1 at para 63. ***"[I]t seems to me that conducting a prosecution in a manner that contravenes the community's basic sense of decency and fair play and thereby calls into question the integrity of the system is also an affront of constitutional magnitude to the rights of the individual accused."*** L'Heureux-Dubé J. went even further and also acknowledged the existence of a residual category of abuse of process in which the individual's right to a fair trial is not implicated. She described this category, as follows in O'Connor, at para. 73: "***This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the Charter, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness and vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.***" Importantly, L'Heureux-Dubé J. thus held that now, when the courts are asked to consider whether the judicial process has been abused, the analysis under the common law and the Charter will dovetail (see O'Connor, at para. 71). In this manner, while it acknowledged that the focus of the Charter had traditionally been the protection of individual right, the O'Connor decision reflected and accommodated the earlier concepts of abuse of process, described at common law as proceedings "***unfair to the point that they are contrary to the interest of justice***" (R. v. Power, [1994] 1 S.C.R. 601 at p.616, 89 C.C.C. (3d) 1), and as "***oppressive treatment***" (R. v. Conway, [1989]1 S.C.R. 1659 at p. 1667, 49 C.C.C. (3d) 289). In an earlier judgment, McLachlin J. (as she then was) expressed it this way: "...abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice. I add that I would read these criteria cumulatively. [R.v.Scott, [1990] 3. S.C.R. 979at p. 1007, 61 C.C.C. (3d) 300.]. Under the Charter, the violation of specific fair trial rights may also constitute an abuse of process, as will a breach of the more general right to fundamental justice (see O'Connor, at para. 73). As pointed out in Regan, the doctrine of abuse of process evokes the public interest in a fair and just trial process and in the proper administration of justice."

In the Zuma situation, given the effect of the findings by the Public Protector and Judge Msimang, it would be open to another judge to determine it would be an abuse of process for the NPA to continue to prosecute Zuma when its actions have already been found to be a violation of Zuma's constitutional rights. In fashioning a remedy for the trial court to adopt, the Canadian approach makes it highly likely that Zuma will prevail. In Regan, the court emphasized that a stay of proceedings is only one remedy for an abuse of process and the most drastic one because the remedy of a stay is ***designed to prevent the perpetration of a past wrong***. The court stated a stay is only appropriate when: (1) the prejudice caused by the abuse in question will ***be manifested, perpetuated or aggravated through the conduct of the trial***, or by its outcome; and (2)no other remedy is reasonably capable of removing that prejudice.[O'Connor, at para. 75.] (Regan, para. 54).The Regan court continued at paras 56 and 57:

> 56. *Any likelihood of abuse which will continue to manifest itself if the proceedings continue then must be considered in relation to possible remedies less drastic than a stay. Once it is determined that the abuse will continue to plague the judicial process, and that no remedy other than a stay can rectify the problem, a judge may exercise her or his discretion to grant a stay*.
>
> 57. Finally, however, this Court in Tobiass instructed that there may still be cases where uncertainty persists about whether the abuse is sufficient to warrant the drastic remedy of a stay. In such cases, a third criterion is considered. This is the stage where a traditional balancing of interests is done: "it will be appropriate to balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits". In these cases, "***an egregious act of misconduct could [never] be overtaken by some passing public concerns[although]... a compelling societal interest in having a full hearing could tip the scales in favour of proceeding***" (*Tobiass* at para 92)

As shown below, a stay of proceedings is appropriate in the Zuma case because the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, and the administration of justice is best served by staying the proceedings. This is one of the clearest of cases where a stay should be entered by the court, to avoid an abuse of its own process. One cannot accept Judge Msimang's ruling which found clear fault with the NPA and then argue that the same NPA should be given another chance to finally get it right.

The advantage to Zuma in pressing this argument at the High Court level is two-fold: First, he has a compelling argument that the case should be assigned to Judge Msimang to avoid an appearance of judge-shopping by the NPA. The policy rationale for this is of course obvious: If the courts were to allow a lackadaisical prosecution team which caused the case to be struck off the roll to now go to another judge other than Judge Msimang that would give an incentive for the NPA to deliberately pile delay upon delay in cases (particularly where they are facing a no-nonsense judge) with the knowledge that getting the case struck off the roll would improve the NPA's chance of getting a different judge the next time around. Second, if the court sticks to its findings it made when striking the case off the roll Zuma wins. Even if the NPA was to appeal that loss, the standard of review on appeal would be an insurmountable obstacle for the prosecution team. The standard was outlined by the court in Regan as follows:

> 117 The decision to grant a stay is a discretionary one, which should not be lightly interfered with: "an appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge ***misdirects himself or if his decision is so clearly wrong as to amount to an injustice***"(Tobiass, supra, at para. 87; Elsom v. Elsom, [1989] 1 S.C.R. 1367 at p.1375, 59 D.L.R. (4th) 591). Furthermore, where a trial judge exercises her or his discretion, ***that decision cannot be replaced simply because the appellate court has a different assessment of the facts.*** (Stein v. The Ship "Kathy K", [1976] 2 S.C.R. 802, 62 D.L.R. (3d) 1; see also R. v. Oickle,[2000] 2 S.C.R. 3, 2000 SCC 38, 147 C.C.C.(3d) 321, 190 D.L.R. (4th) 257;R. v. Van der Peet, [1996] 2 S.C.R. 507, 109 C.C.C.(3d).[30]

A fair reading of the facts outlined here and those stated in Judge Msimang and the public Protector's report makes it clear that the constitutional abuses visited upon Zuma would be continued by proceeding to trial in his case. Having found that Zuma suffered the "***kind of prejudice … that … closely***

resembles the kind of punishment that ought only to be imposed on convicted persons and is therefore inimical to the right to be presumed to be innocent enshrined in the Constitution" how can Judge Msimang or any other judge of the High Court for that matter rule that a stay is not the only appropriate remedy in Zuma's case? The key is to isolate every constitutional violation visited upon Zuma and emphasize how the continuation of the criminal prosecution would contravene fundamental notions of justice especially those enshrined in the supreme law of the land, the constitution, and thus undermines the integrity of the judicial process. What follows is my attempt to highlight these issues and analysis of how these violations constitute the mosaic of evidence required to establish Zuma's entitlement to a permanent stay. It is important to bear in mind that when an application is made for proceedings to be stayed, consideration should be given to the process by which the defendant was brought to court, including, inter alia, the time delay involved, the disclosure and destruction of evidence, any surrounding publicity, the rule of law, and the methods used to investigate and prosecute the offence.

The categories of abuse already established are not exhaustive, as Neill L.J. observed in R. v. Bow Street Stipendiary Magistrate, ex p. DPP (1992) 95 Cr. App. R. 9, at 16, "***the law in this field is still at the stage of development***". In R. v. Martin (Alan) [1998] 2 W.L.R. 1, at 6, Lord Lloyd stated: "***the categories of abuse of process like the categories of negligence are never closed"***. In Zuma's case, a prudent approach is one that highlights specific constitutional violations by the prosecution team while at the same time articulating prejudicial effect on Zuma.

PART TWO - LEGAL ARGUMENT AND PLAN FOR DISMISSING ZUMA'S INDICTMENT

The most eloquent statement of the abuse of process principle can be found in R. v. Derby Crown Court, ex p. Brooks, 80 Cr. App. R. 164. Lord Roger Ormrod C.J., at 168 stated: "The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either (a) the prosecution have *manipulated* or *misused the process* of the court so as to *deprive the defendant of a protection provided by law* or *to take unfair advantage of a technicality*, **or** (b) on the balance of probability the *defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable*… The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution".

The courts must make a distinction between cases falling under the first category, that is those involving manipulation, or misuse of the process of the court so as to deprive the defendant of a protection provided by law or to take advantage of a technicality on the one hand and those involving prejudicial delay on the part of the prosecution which is unjustifiable on the other. A stay may be ordered in cases under the first category even if a fair trial is still possible. On the other hand, a decision to stay proceedings as an abuse of process because of delay is a judgment call, an exercise in judicial assessment based on judgment, rather than on any conclusion as to facts based on evidence. It is incorrect to use

terms such as 'burden of proof' and 'standard of proof' in this regard as these terms have the potential to mislead. Further, as noted above, the categories of abuse of process already established are not exhaustive, as Neill L.J. observed in R. v. Bow Street Stipendiary Magistrate, ex p. DPP (1992) 95 Cr. App. R. 9, at 16, "*the law in this field is still at the stage of development*". In R. v. Martin (Alan) [1998] 2 W.L.R. 1, at 6, Lord Lloyd stated: "*the categories of abuse of process like the categories of negligence are never closed*".

I would further argue that an abuse of process might arise in the context of unique legal system, culture, politics in a particular country and it is up to the individual judge deciding this question to be attuned to these matters. Accordingly, a judge in our post-apartheid socio-political environment cannot, in a knee-jerk fashion, dismiss allegations that institutions such as the NPA and agencies such as the Scorpions have been used for partisan political ends to affect the outcome of party elections. While it is not my intention to reiterate in this section the constitutional arguments stated earlier, it is sometimes inevitable that some of these issues will be discussed or considered in determining whether the same unconstitutional actions constituted a manipulation or misuse of the court's process and whether the same acts are examples of the prosecution taking unfair advantage of a technicality. In all events, what is imperative is that the NPA's conduct of the case must come under a microscope and any abuses must be isolated and defined for the court in a crystal clear manner. Although my research in this area is still ongoing and is not completed, I have set forth below areas in which I believe the NPA's has *manipulated* or *misused the process* of the court so as to *deprive Mr. Zuma of a protection provided by law* **or** *to take unfair advantage of a technicality.*

2.1 Violation of Zuma's Rights Under Sections 9 of the Constitution As Abuse of Process

Most people will agree that our law enforcement authorities must not be allowed to subject one person to the possibility of a greater punishment than another who has allegedly committed an identical act. This would do violence to the equal protection clauses of our constitution and violate basic human rights principles observed in the civilized world. Section 9 of the Constitution provides that "everyone is equal before the law and has the right to equal protection and benefit of the law." This means that Zuma, regardless of his standing in the community, should be treated no better and no worse than similarly situated accused persons.[17] If Zuma adroitly marshals the facts and establishes that there was unconstitutional denial of his equal protection rights during the prosecution of Shaik, he would be entitled to a dismissal of his case not on the merits but on the basis of the NPA's unlawful unconstitutional acts. The United States Supreme Court stated as follows: "***A selective prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution.***" (U.S. v. Armstrong, 517 U.S. 456 (1996)).

[17] As a Canadian Supreme Court justice remarked in a case involving a prominent politician before that court. "*Everyone in this country, however prominent or obscure, is entitled to the equal protection of the law. As a politician of some prominence, the appellant was not entitled to be treated any better than other individuals, but nor should he have been treated worse.*" Per Binnie J in S v Regan 91 C.R.R. (2d) 51 at 99.

The US Supreme Court established a long time ago in Yick Wo v. Hopkins, 118 U.S. 356 (1886), that discriminatory application of a valid law to similarly situated persons is an unconstitutional denial of equal protection. A selective prosecution claim may be advanced by a defendant who can establish the following two essential elements. First, that the defendant has been singled out for and charged while others similarly situated have not been prosecuted. Second, that there exists some evidence of improper motivation in deciding to prosecute. United States v. Armstrong, 517 U.S. 456 (1996). The first prong is established, not so much as by a showing that inordinate numbers of persons of the same racial, gender, ethnic or whatever group have been prosecuted under a particular statute, but rather that "**similarly situated individuals of a different race [**gender, ethnic or protected class] **were not prosecuted**." Armstrong at 465. Moreover, said claims should be judged "according to ordinary equal protection standards." Wayte v. United States, 470 U.S. 598, at 608. (See also, United States v. Bourgeous, 964 F. 2d 935 (9th Cir. 1992).)

In United States v. Berrios, 501 F. 2d 1207, 1211 (2d Cir 1974), the Court described the second prong as requiring a showing that "**the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion or the desire to prevent his exercise of constitutional rights**." While prosecutorial discretion is broad and there exists a strong presumption that prosecutors have properly discharged their duties, this discretion is bound by constitutional constraints, which forbids a decision to prosecute from being based on an unjustifiable standard such as political activities, race, religion, or other arbitrary classifications." Oyler v. Boles, 368 U.S. 448, 456 (1962). Indeed, "[*n]othing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations, such as race, religion, or control over the defendant's exercise of his constitutional rights, as the basis for determining its applicability*." Id. at 456.

In an ironic sense, the Section 9 equal protection argument would have come in handy even for Shabir Shaik - unfortunately his lawyers simply failed to pick it up. I wish to digress to address the Shaik equal protection issue at length given its enormous strategic importance for Zuma in the forthcoming trial. First, the Honourable Justice Msimang in his judgement, recognized the unique set of circumstances showing that Zuma was not treated equally even in relation to the NPA's handling of the Shaik prosecution. Judge Msimang recognized that Zuma was in fact publicly accused as an unindicted co-conspirator in 2003 even though the prosecution decided for its own tactical reasons not to indict him. The judge made specific reference to the 23 August 2003 press statement by former National Director of Public Prosecutions Bulelani Ngcuka in which he announced that the investigations against Jacob Zuma and Shaik had been finalised, that the state would prosecute only Shaik on various counts of corruption, fraud, theft of company assets, tax evasion and reckless trading. Ngcuka expressly informed all present that, though the investigating team had recommended that Jacob Zuma should also be prosecuted, after careful and dispassionate consideration of the evidence and the facts of the case, it was concluded that, whilst there was a "***prima facie case***" of corruption against Zuma, the prospects of success in a

prosecution were not strong enough and that it was not certain that the case against him was a winnable one. Accordingly, the National Director concluded, a decision had been made not to prosecute Zuma. In the tactics employed by the NPA through Ngcuka, an individual citizen could be indentified as an unindicted co-conspirator, an unindicted guilty crook walking or a criminal against whom good "prima facie evidence of corruption" existed while the NPA assiduously avoided the indictment of that citizen.

The NPA's decision had enormous strategic implications which Shaik failed to grab; the term "prima facie" evidence is not simply a term of art- it is precise lawyer's lingo which has certain clear legal connotations and consequences. From a practical standpoint, this meant that the NPA had identified Zuma as having committed a comparable or similar act to that being charged against Shaik but the NPA was consciously embarking on a prosecution strategy that carried the inherent risk of subjecting only Shaik to the burden of a criminal prosecution and the possibility of a greater punishment than Zuma who had allegedly committed an identical act, that is corruption through bribery (as an alleged recipient of bribes.) Even with a viable equal protection argument staring him squarely in the face, Shaik fail to grab the legal advantage that was his for the asking - he failed to ask a basic pertinent question of why in an alleged corruption and bribery case only the offeror of the bribe was being prosecuted while the case against the offeree and putative recipient of the same bribe was deemed "unwinnable" despite the existence of a "prima facie evidence" of the alleged wrongdoing. Had Shaik filed a motion to dismiss on equal protection grounds, the NPA would have had a tough time justifying its decision and would have been required by the court to clarify once and for all whether Zuma would be charged at all.

Sadly, the NPA's actions did not stop there. The Hefer Commission heard testimony that Bulelani Ngcuka used a confidential meeting with black editors for the "***vitriolic character assassination***"[18] of several subjects of Scorpions investigations, including Deputy President Jacob Zuma and Shaik. One of the witnesses, Mona, told the commission the following: Ngcuka said "***he would wash his hands off Zuma and leave him in the court of public opinion***". Ngcuka allegedly said that Zuma had landed in trouble because he "***surrounded himself with Indians***". For good measure, Ngcuka allegedly called former transport minister Mac Maharaj a "***straight-faced liar.***" Mona sent copies of his notes about the meeting with Ngcuka to the chief justice, the public protector and Justice Minister Penuell Maduna.

Whatever one's assessment of Mona's credibility may be, several facts are undeniable, the racially exclusive meeting did take place, it was a meeting to which only black editors were invited and was indicative of the approach by the National Prosecutions Authority to have a well-orchestrated and vituperative press campaign in which the comradely relationship between Zuma and Shaik from the dark days of the struggle would be portrayed in racist terms as the case of an unsophisticated black African man being manipulated by a mercenary Indian with a high IQ. In short, this suggests or has the appearance that the NPA wanted to lower Zuma in the esteem of his followers by invoking a racist stereotype of alleged manipulation of African politicians by money-hungry exploitative Indians. Now, imagine what the outcome of Shaik's prosecution would have been if he had pressed the issue and argued

[18] The Star on November 27, 2003, page 3.

for an outright dismissal of the NPA's case on selective prosecution grounds. He would have clearly satisfied the first prong of the equal protection argument by showing that an allegedly "**similarly situated"** individual of a different race, ethnic background and political status was not prosecuted even though the NPA claimed to have "prima facie evidence of corruption" in regard to that person. In other words, he could have used Ngcuka's own words against the NPA. He could easily have satisfied the second prong as well by showing disparate treatment in that "*the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion or the desire to prevent his exercise of constitutional rights*." United States v. Berrios, 501 F. 2d 1207, 1211 (2d Cir 1974). This argument would have elevated the issue to the appropriate constitutional level and would have sensitized the courts at all levels to the very issues that Shaik belatedly attempted to press at the appellate level.

Viewed with this prism, the SCA would have been forced to see the broader constitutional dimension of the NPA's decision not to charge Zuma and Shaik together. Instead of simply wondering "***why the prosecuting authorities did not charge both accused in one case"*** and seeing the NPA's decision not to charge Zuma together with Shaik as a "***predicament … of their own making***" both the trial judge and the SCA would have been forced to confront head-on the clear case of prosecutorial abuse and the related violation of the equal protection principle. From a strategic standpoint, such a challenge posed at an early stage of the Shaik case would at least have forced the prosecution to lay bare its entire theory of the case; the court would have imposed an exacting standard and required the NPA to distinguish the Shaik case from the "prima facie case of corruption" against Zuma which the prosecution deemed unwinnable. Needless to state that even if the court would have ultimately denied the motion to dismiss, a defendant in Shaik's position would have gained enormous insights into the prosecution's entire theory of the case and accompanying supporting evidence and would certainly have been better prepared to fight on a level playing field. Most important, such a challenge would have sensitized the trial judge to the apparent constitutional issues lurking in the background of the decision to prosecute only Shaik for an alleged bribery crime where Zuma was to be portrayed as equally guilty.

The flip-side of the same theory could have and should now work for Zuma. Arguably, while Shaik was subjected to a selective prosecution in violation of his rights under Section 9 of the Constitution, Zuma was similarly subjected both to a **selective persecution** and trial by proxy during Shaik's trial as well as "in the court of public opinion" as Ngcuka allegedly promised the select group of black editors. In the alternative, and to allay the unfounded fears of those who might be quick to condemn this approach as invoking race to make a case for dismissal, Zuma can rely on the related principle of equality of arms between the defendant and the prosecution which is well-established in international human rights law, Strasbourg jurisprudence as well as the Statute of the ICTY (article 20), the Statute of the ICTR (article 20) and the Statute of the ICC (article 67). Simply stated, this principle is violated when defendants are not allowed to challenge the evidence against them because they have not been given access to it, or when defendants are subjected to a trial by proxy, or denied access to basic

facilities to prepare a defense. As the European Court of Human Rights explained in Bulut v. Austria (1996) 24 E.H.R.R. para. 47:--"The Court recalls that *under the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent. In this context, importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice.*"

When a group of people are charged with participating in the same crime, they ordinarily are tried together even if the evidence is stronger against one or some than against others. Most court rules allow charging in the same indictment two or more offenders if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. In the Shaik case, the NPA ignored this basic rule of practice and created a risk that Zuma would suffer prejudice because of the manner in which Shaik's trial was conducted. This issue is explored at length in the section dealing with prejudicial delay suffered by Zuma during the period 2003 through 2005. I argue that the pre-indictment delay not only caused Zuma actual, substantial prejudice, but also that the prosecution orchestrated the delay to gain a tactical advantage over him in violation of the principle of equality of arms.

In the media Zuma was tarred and feathered as a criminal suspect but he could never disprove that label as he was never formally brought before a court of law until 2005 or told what evidence exists to justify the label. This is harkening to the dark days of apartheid where anti-apartheid activists in South Africa could be labelled communists, placed under house arrest or suffer other indignities based on the say-so of a government minister. Zuma, an individual citizen could be stigmatised and punished on the basis of suspicion - that suspicion backed only by secret "information" or alleged "prima facie" evidence the NPA was unwilling or unable to reveal to Zuma in 2003. As case-law from around the world shows, the violations of Zuma's rights are very serious and would never have been countenanced in any democracy.

A question may be asked; if the NPA had made a decision not to prosecute Zuma what was the point of the prosecution regaling the public with stories about "prima facie evidence" of corruption by Zuma? Obviously, since these statements "have no functional tie to the judicial process just because they are made by a prosecutor" and the "conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions", the statements seemed to have been geared at provoking public condemnation of Zuma and were a gratuitous humiliation that serves no societal purpose at all. Worst of all, they were designed to mislead the public in a fundamental way- no context is given, no elaborate facts are stated to give the listeners independent means of evaluating the strength of the so-called "prima facie evidence." Furthermore, at the time they were uttered the admissibility of the evidentiary material and documents on which the NPA was relying had not even been tested in court or properly admitted in accordance with the usual rules of procedure.

A naming and shaming punishment is one in which a ***convicted criminal*** is subjected to embarrassment as part of a sentence. A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Courts in other countries have not hesitated to condemn tactics similar to those employed by Ngcuka in the Zuma case. As argued elsewhere in this document, the US Supreme Court has described the prosecutor as "an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense." Ngcuka should have been aware that press statements by prosecutors – particularly while criminal investigations and trials are ongoing – pose several significant dangers. He knew that this was a case where intense media interests in the criminal proceedings involving allegations of corruption and bribery against a sitting Deputy President would inevitably follow. He allegedly held secret briefings with a few handpicked editors to ensure that the carefully crafted NPA's message of savaging Zuma was spread far and wide. He knew that a prosecutor's extrajudicial comments can jeopardize a defendant's rights to a fair trial by implanting suggestions of guilt in the minds of the public before the charges can be fully and fairly exposed in a court of law, thus undercutting the presumption of innocence to which all defendants are entitled. In fact when Zuma raised this very issue, the NPA derisively and arrogantly told him to "sue us" if he so pleased. As evidenced by Zuma's case and his unceremonious sacking as a Deputy President, NPA statements to the media and the latter's erroneous attribution of statements to Judge Squires irreparably destroyed Zuma's reputation and affected his ability to earn a livelihood or continue public service. Even if Zuma is subsequently acquitted of the pending charges, the taint left by the government's accusations of wrongdoing may never wash entirely clean.

Finally, media coverage of the prosecutor's allegations was calculated to interfere with Zuma's constitutional right to remain silent. If the government's theory of its case is widely broadcast, a defendant may feel compelled to respond rather than remain silent and put the government to its burden of proof. For each of these reasons, some curtailment of a prosecutor's comments to the media may be necessary to safeguard the fairness and accuracy of adjudicative proceedings. Zuma must emphasize the prejudicial media manipulation, leaks from the NPA and trial by proxy to highlight the egregious nature of the violations.

2.2 Violation of Zuma's Rights Under Sections 10, 12, and 14 of the Constitution As Abuse of Process

Section 10 of the constitution states that "*everyone has inherent dignity and the right to have their dignity respected and protected*." As demonstrated later on Zuma easily establishes that the court's process has been improperly used for *official public smear of an individual when that individual has not been provided a forum in which to vindicate his rights*. The courts have aptly described such actions by prosecutors as misconduct subjecting victims like Zuma "***to the torture of public condemnation, loss of reputation"*** See, In re Smith, 656 F.2d1101, 1106-07 (5th Cir. 1981); United States v. Briggs, 514 F.2d

794 (5th Cir. 1975). In a similar vein, courts have opined that unrestrained vitriolic press statements and in-court statements about these uncharged persons would leave the victims "***just as defenseless as the medieval prisoner and the victim of the lynch mob***." Id. Our own Honourable Justice Msimang captured the essence of the prejudice and violation of the right to dignity already suffered by Zuma as follows: "We ***cannot imagine any case in recent times which has triggered as much negative publicity in the media as the present one…*** However, as it was pointed out in the ***Sanderson case***, the problem with ***this kind of prejudice is that it closely resembles the kind of punishment that ought only to be imposed on convicted persons and is therefore inimical to the right to be presumed to be innocent enshrined in the Constitution***. Much as such prejudice is inevitable in our criminal justice system, the accused's right to a trial within a reasonable time demands that the ***tension between the presumption of innocence and the publicity of trial be mitigated***."

Section 10 should be read together with Sections 12 and 14 of the constitution. Section 12 provides as follows: "Everyone has the right to freedom and *security of the person*, which includes the right- not to be deprived of freedom arbitrarily or without just cause; *not to be tortured in any way*; and *not to be treated or punished in a cruel, inhuman or degrading way."* Section 14 states that "Everyone has the right to privacy." The Supreme Court of Canada has held in numerous decisions interpreting provisions similar to Section 12 of South African constitution, Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519 and *Blencoe v. British Columbia (Human Rights Commission*),[2000] 2 S.C.R. 307, being but two examples, that "security of the person" in this context protects both the physical and the psychological integrity of the individual. State interference with bodily integrity and serious state imposed psychological stress constitutes a breach of an individual's security of the person. Respect for a person's reputation, like respect for dignity of the person, is a value that underlies the Constitution. As one justice of the Canadian Supreme court (Lamer J.) remarked in Mills (1986), the combination of loss of privacy, stigma, and disruption of family life engaged an individual's security of the person in the context of s. 11(b) of the Canadian Charter. Security of the person is not restricted to physical integrity; rather, it encompasses protection against "***overlong subjection to the vexations and vicissitudes of a pending criminal accusation***" These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction. Id. Lamer J. emphasized in Mills (1986), supra, that the need for protecting the individual in such cases arises "from the nature of the criminal justice system and of our society" (p. 920). He described the criminal justice process as "adversarial and conflictual" and states that the very nature of the criminal process will heighten the stress and anxiety that results from a criminal charge. To be sure, in criminal proceedings, the accusation alone may engage a security interest because of the grave social and personal consequences to the accused – including potential loss of physical liberty, subjection to social stigma and ostracism from the community – which are the unavoidable consequences of an open and adversarial judicial system. However, there

the accusations, media leaks and other statements are a calculated prosecution strategy later termed disastrous by a court, such tactics clearly qualify as abuse of process.

There is no question that Zuma's life and that of his family have been terribly affected by the allegations of corruption against him. His political career was adversely affected and at one point appeared to be virtually finished. The unrelenting media coverage, prejudicial delay in prosecuting him, the stigma attached to the charges of corruption against him, court decisions which purport to find him guilty of wrongdoing even though he was never given the opportunity to defend himself in a fair public trial, outrageous media leaks orchestrated by or at least emanating from the NPA's office have been traumatic. These have all obviously impacted his life and point to a violation of his rights under Sections 12 and 14 of the constitution. The state has directly intruded into a private and intimate sphere of Zuma's life and that interference amounts to a violation of Zuma's security of the person. Undeniably, the human dignity of a person is closely tied to a person's reputation and privacy interests. Indeed, much of the harm which has been suffered by Mr. Zuma in this case has been the damage which has been done to his reputation. The good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the rights enumerated in the Bill of Rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society. The egregiousness of the violation in Zuma's case was that the NPA announced the existence of so-called prima facie evidence of corruption against Zuma and then declared its intention to use Shaik's trial to embarrass Zuma, to put him on trial by proxy in Squire's court and in the court of public opinion.

2.3 Violation of Zuma's Rights Under Sections 18 and 19 of the Constitution As Abuse of Process

Section 18 of the constitution states that "everyone has the right to freedom of association" and Section 19 states that "every citizen is free to make political choices, which includes the right- to participate in the activities of, or recruit members for, a political party; and to campaign for a political party or cause." It goes on to state that "every adult citizen has the right- ***to stand for public office and, if elected, to hold office.***" While the evidence of alleged political machinations in the NPA's handling of the prosecution against Zuma may not be as strong or compelling, it is very important to put the issue in a broader political context. As demonstrated later on, courts from around the world have had no difficulty detecting political gamesmanship especially where the state uses the media and the courts to tar and feather individual citizens while at the same time denying them a forum in which to defendant themselves. When viewed against the background of President Mbeki's own political ambitions which included seeking a third term as ANC president the picture does not look good.

The United States v. Briggs, case cited above involved a scenario analogous to the Zuma case. There the US government targeted anti-war group and named some of the activists as "unindicted co-conspirators." Nine of the ten persons named in the indictment were active in the Vietnam Veterans Against the War, an anti-war group. The court stated ".... ***There is at least a strong suspicion that the***

stigmatization of appellants was part of an overall governmental tactic directed against disfavored persons and groups. Visiting opprobrium on persons by officially charging them with crimes while denying them a forum to vindicate their names, undertaken as extra-judicial punishment or to chill their expressions and associations, is not a governmental interest that we can accept or consider. It would circumvent the adversary process which is at the heart of our criminal justice system and of the relation between government and citizen under our constitutional system. It would be intolerable to our society." Id. at 805 (emphasis added). This is precisely what happened to Zuma when Ngcuka announced that he had evidence of Zuma's criminal wrongdoing while at the same time stating that he would not prosecute Zuma. He visited opprobrium on Zuma by officially and publicly accusing him of corruption while denying him a forum to vindicate his name. As Judge Msimang recognized this was a form of extra-judicial punishment which violated the presumption of innocence and was a circumvention of the adversary process which is at the heart of our criminal justice system and of the relation between government and citizen under our constitutional system. One must bear in mind that the NPA dropped "hints" of its plans to re-indict Zuma and even leaked "draft" indictment when the ANC conference was underway in Limpopo, prompting Zuma and his supporters to voice complaints about the fairness of the trial or use of state organs to settle political differences. The NPA subsequently charged Zuma with additional and more severe charges shortly after his election as the ANC president. In a proverbial sense it rained on his victory parade.

Unfortunately for our democracy, it is imperative that Zuma's legal eagles challenge the NPA and indeed the executive branch of our government on one fundamental issue, namely, the right of every adult citizen "***to stand for public office and, if elected, to hold office***." Let us start with a bedrock - every criminal defendant in our country has a constitutional right to a prosecutor who is unbiased, neutral and/or disinterested. See, *Smyth v Ushewokunze & another* 1998 (2) BCLR 170 (ZS) where 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. The Court assessed the evidence and concluded that it revealed that the prosecutor's behaviour had fallen far short of the customary standards of fairness and detachment demanded of a prosecutor, which required him to conduct himself with due regard to the basic rights and dignity of the accused. Most important, the court stated that the accused's right to "*a fair hearing by an independent and impartial court*" embodied a constitutional value of extreme importance and had to be interpreted so as to include within its ambit not only the impartiality of the decision-making body but also the ***absolute impartiality of the prosecutor***. ***'Impartial court'*** had to be interpreted so as to embrace a requirement that the prosecution exhibit fairness and impartiality in its treatment of a person charged with a criminal offence. Accordingly, the prosecutor who displayed vindictive and biased attitude to the accused during investigation and remand proceedings was interdicted from taking any further part in preparation or presentation at trial of charges against accused. Other branches of the government must also avoid even the appearance of partiality or conflict of interest on the part of the prosecutor. Viewed with this prism, the president should have

thought long and hard before firing Zuma and immediately giving Zuma's job to the prosecutor's wife. This statement is by no means intended to cast aspersion on the deputy president who is by all accounts a highly competent and respected hero from our liberation struggle. It is simply to highlight the president's deplorable lack of judgment.

The issue is whether there was an appearance of bias where the prosecutor's wife is given Zuma's job after the latter's sacking and where the President makes a spurious claim that a "court judgment" exists to justify his dismissal of Zuma without disclosing that he would be campaigning against Zuma for the presidency of the ANC. The test to be applied in relation to apparent bias has been redefined by the House of Lords in Porter v Magill [2002] 1 All ER 465. Having considered the test formulated by the House of Lords in R v Gough [1993] 2 All ER 724, and the more objective approach taken in Scotland and some Commonwealth countries and in the Strasbourg jurisprudence, Lord Hope suggested what he described as a modest adjustment of the test in R v Gough. Accordingly the Court must first ascertain all the circumstances that have a bearing on the suggestion that the decision maker was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the decision-maker was biased. As stated by Lord Hope in Porter v Magill at paragraph 103 - "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the [decision-maker] was biased." As was stated in R v Sussex Justices ex parte McCarthy [1924] 1 KB 256 (Lord Hewart CJ): "……it is not merely of some importance but is a fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." These two earlier cases of McCarthy and Pearce were discussed in R v Gough. The former was described by Lord Goff as leading to a tendency for courts to invoke a test requiring no more than a suspicion of bias and the latter as rejecting such an approach and relying on the approach of real likelihood of bias (page 664A-C). The issue of bias was further considered by the House of Lord in Lawal v Northern Spirit Limited [2004] 1 All ER 187. Referring to the modified approach to apparent bias outlined by the House of Lords in Porter v Magill Lord Steyn stated, at paragraph 14, that – "The small but important shift approved in Porter's case has at its core the need for 'the confidence which much be inspired by the courts in a democratic society'……..

Public perception of the possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer." It was stated, at paragraph 21, that the principle to be applied was whether a fair-minded and informed observer, having considered the given facts, would conclude that there was a real possibility that the tribunal was biased. At paragraph 22 Lord Steyn stated – "***What the public was content to accept many years ago is not necessarily acceptable in the world of today. The indispensable requirement of public confidence in the administration of justice requires higher standards today than was the case even a decade or two ago. The informed observer of today can perhaps 'be expected to be aware of the legal tradition and culture of this jurisdiction.'… But he may not be wholly uncritical of this culture***."

International jurisprudence also agrees with the foregoing. In Wright v. United States, 732 F.2d 1048 (2d Cir. 1984), the court established that a defendant has a constitutional right to a "disinterested prosecutor" and that a prosecutor "is not disinterested if he has, or is under the influence of others who have, an axe to grind against the defendant. ..." Id. at 1055. Whatever President Mbeki's reading of his prerogative powers to sack Zuma from cabinet, the appearance of lack of impartiality in the entire Zuma prosecution was created when Zuma was dismissed on the basis of statements made by a trial judge in a case where Zuma was being tried by proxy and in violation of his constitutional rights. This is not to mention that the President selectively relied on a "judgment" of the Squires court but failed to counter-balance that against the Public Protector's finding which clearly put everyone on notice that the NPA's conduct of the prosecution was in violation of Zuma's rights. He simply wanted to evict Zuma from the political scene and the so-called court judgment provided him with a convenient excuse.

Despite the protestations of impartiality, the subsequent actions of the prosecutors who later assumed the task of prosecuting Zuma raise the disturbing appearance that the new NPA team was still being used as a "stalking horse" against Zuma and was in no way disinterested. The NPA's actions directly contributed to a violation of Zuma's right, as an adult South African citizen, "***to stand for public office and, if elected, to hold office***" because the prosecutors were given a blank check to tar and feather an elected deputy president of this country by conducting a trial by proxy and unleashing hostile or negative media publicity. Oblivious of the apparent unconstitutional nature of the NPA's actions, the President used the same outcome of the kangaroo proxy trial to justify Zuma's dismissal. Given the President's own political ambitions to contest the ANC presidential elections in 2007 and to seek a third term in that capacity, the damage to our democratic institutions and prejudice to Zuma cannot be overstated. The whole saga gives the appearance that the outcome of the Shaik trial was conveniently seized upon to get rid of Zuma who presented a credible threat of thwarting the incumbent president's own political ambitions. At least the appearance is there even if the president claims that his motives were pure.

The question now is can this constitutional "right to stand for election and to hold office if elected" be violated if a President dismisses a member of cabinet on the basis of a court judgement in which the individual was not given an opportunity to defend himself. As a corollary and despite Mbeki's public statements professing his belief in Zuma's constitutional rights, was the firing of the deputy president amidst allegations that a "court judgment exists" which implicates Zuma in criminal wrongdoing a violation of the principle of presumption of innocence by president Mbeki himself? Once again, international jurisprudence answers in the affirmative. See, ***Allenet De Ribemont v. France***, ECtHR judgment of 23 January 2005, para 35 where the European Court of Human Right made it clear that the principle of presumption of innocence must be scrupulously observed by the executive branch of the government. Allenet de Ribemont v France, concerned statements at a press conference. There the French Interior Minister (FIM) mentioned that Ribemont had jointly taken out a bank loan with a person who was being investigated for the murder of a French MP. In the FIM's presence, the director of

criminal investigation then said: "Mr. de Varga-Hirsh and his acolyte Mr. Allenet de Ribemont were the instigators of the murder..." Ribemont was later arrested and charged with aiding and abetting the murder of the MP. Upon acquittal, he sued the French Government for violating his right to be presumed innocent until proven guilty under art.6(2) of the European Convention on Human Rights (ECHR). The European Commission found that, in the circumstances, Ribemont "***could legitimately have believed that he had been held up in public, by the highest authorities of the State, as a person guilty of complicity in murder***". Accordingly, there had been a violation of art.6(2). Mbeki's reference to the so-called court judgment about Zuma at the time when he knew or should have known that a trial by proxy was unlawful is no different than Ribemont's case.

The European Court of Human Rights ("the Court") held that the presumption of innocence in Article 6(2) is one of the elements necessary to ensure a fair trial, as required by Article 6(1). The Court further stated that while freedom of expression, as guaranteed by Article 10, includes a right for public authorities to inform the public about criminal investigations in progress, it requires them to do so with caution if the presumption of innocence is to be respected. The Court held that the declaration of the applicant's guilt had firstly encouraged the public to regard him as guilty and, secondly, prejudiced the assessment of the facts by the judicial authority. There had, therefore, been a breach of Article 6(2). The Court said:

> "The presumption of innocence...will be violated if a judicial decision concerning a person charged with a criminal offence ***reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court regards the accused as guilty... Moreover, the Court reiterates that the Convention must be interpreted in such a way as to guarantee rights which are practical and effective as opposed to theoretical and illusory... The Court considers that the presumption of innocence may be infringed not only by a judge or court but also by other public authorities.***"

The ECtHR has in fact deemed the presumption of innocence so important that it has ruled it inappropriate even for the executive to make statements implying that an individual is guilty of a crime before the guilt had been established in a due process hearing. In this regard, it is mere casuistry for president Mbeki to state that he fired Zuma because a "court judgment exists" which had to be respected while at the same time paying lip service to the principle of presumption of innocence.

2.4. The NPA's Unlawful Actions In Naming Zuma As Shaik's Unindicted Co-Conspirator, Its Choice of Trial By Proxy for Zuma and other Due Process Violations Constitute An Abuse of Process Mandating A Dismissal with Prejudice

One of the elements of the right to a fair trial enshrined in the South African constitution is the right identified in s 35(3)(d) of every accused person "***to have their trial begin and conclude without unreasonable delay.***" The right of an accused to be tried without undue delay is a fundamental aspect of the umbrella right to a fair trial. As the Constitutional Court put it in S v Jaipal 2005 (4) SA 581 (CC)

para 29: "*The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.*" This raises two fundamental questions that must be answered in order to resolve Zuma's case. When does a person become an "accused" in our constitutional scheme of things and does the label include formal accusations as well as informal accusations? A resolution of this question is of vital importance and could be dispositive of the entire Zuma case. It requires a well-crafted argument that focuses on the circumstances of Zuma's case including the NPA's unreasonable delay in filing charges against a person who was publicly accused albeit "informally." It requires the court to focus on the unlawful trial by proxy of a person who was named by the NPA as Shaik's unindicted co-conspirator when the same NPA refused to provide Zuma with a forum in which to vindicate his rights. Cumulatively these violations constitute a due process violation (procedural and substantive) warranting a dismissal of the entire Zuma case. It is simply unacceptable to subject a citizen to successive prosecutions and to give the state chances to get its act together at the expense of the accused.

Before proceeding to the answers, several observations are worth reiterating here: First, the argument in this section focuses on the period between August 2003 and June 2005 when the NPA finally decided to file charges against Zuma. It is related to but different from the argument presented later on about whether Zuma is entitled to a dismissal of his case for undue delay for the entire period from the alleged commission of the offences to the present. Second, Zuma and his legal team failed to pose several legally relevant challenges to the NPA's absurd and self-serving interpretation of the language of Section 35(3)(d) of the constitution. Third, when the issue of prosecutorial misconduct and abuse of process by the NPA during this time period is fully canvassed and forcefully argued, it makes Zuma's subsequent argument about undue prejudicial delay after the formal filing of charges even more compelling and makes his entitlement to a dismissal even more crystal clear. And finally, the NPA has consistently advanced a theory of unbridled prosecutorial discretion and has relied on a plethora of excuses to explain away the undue prejudice Zuma suffered because of the prosecuting authorities' failure to charge Zuma together with Shaik and at the time when it was determined that a "prima facie" evidence of corruption" existed. All of the foregoing issues are presented to enable the reader to determine whether Zuma's rights to a fair trial have been irredeemably lost or severely compromised in such a manner that it would be an abuse of the process of the courts to put Zuma on trial.

As stated above, when the NPA was challenged on the issue of unreasonable delay and prejudice suffered by Zuma for the period prior to the NPA's decision to formally file criminal charges against Zuma, the NPA countered by essentially arguing that the period before the filing of formal charges is irrelevant and cannot be considered in calculating the unreasonable length of the delay. The state seized on the language of Section 35(3)(d) to argue that under the constitution "…*time began to run only when someone was charged. No guarantee was given against unreasonable delay before the commencement of proceedings. The section only provided a guarantee against unreasonable delay once proceedings had*

been instituted." The NPA urged the court to reject the idea that the Constitution extends the constitutional guarantee against unreasonable delay to the whole period before and after the institution of proceedings, that is, from the commission of the crime until the finalisation of the prosecution. Under the prosecution's theory, the right vested in every accused person, is a right "*to have their trial begin and conclude"* without unreasonable delay. "*It is clearly confined to the conduct of pending prosecutions. They must be brought to trial and the trial must finish without unreasonable delay. It does not vest anyone with a right to be charged without unreasonable delay or at all*." According to the NPA's absurd legal reasoning, the prosecution can perpetually suspend a citizen's life in legal limbo, make public but "informal" accusations that "prima facie evidence of corruption" exists against a citizen, label a person as a guilty unindicted crook walking and engage in other acts which tarnish his good name, reputation and dignity in the press so long as criminal proceedings are not pending against "the accused."

Although the courts have recognized that these "***are substantial and legally cognizable interests entitled to constitutional protection against official governmental action that debases them***" the NPA believes that our constitution offers no protection to persons the NPA has accused but not deigned to indict formally. Although the courts have stated that certain actions against the accused by the prosecution are the analytical equivalent of "***subjecting a person to the torture of public condemnation, loss of reputation, and blacklisting in their chosen profession"*** and have stated that a person so condemned by the NPA but denied a forum to vindicate his rights is "***just as defenseless as the medieval prisoner and the victim of the lynch mob..***." the NPA has argued that persons in the legal twilight zone forced upon Zuma for the period 2003 and 2005 cannot claim to be suffering a violation of any cognizable legal unless and until such persons have been officially indicted in a court of law. The NPA's argument suffers from a plethora of infirmities which are dealt with below.

As a point of departure, we are not starting from a pristine page – international jurisprudence and rulings from South African courts have already addressed these issues. It is appropriate to start with South African law. In Coetzee v Attorney-General, KZN 1997 (8) BCLR 989 (D) 999 to 1004, [19] Judge Thirion held that, "***there is, to my mind, no virtue in trying to formulate a rule for determining a point in time from which the delay in commencing a trial has to be reckoned for the purpose of deciding whether the delay has been unreasonable. Delay which occurs before an accused is arrested or served with a summons may be more prejudicial to the accused than the delay which occurs thereafter."***[20]*(emphasis added).* The SCA also considered the question in Zanner v DPP, Johannesburg 2006 (2) SACR 45 (SCA). The accused was involved in an incident at work which led to the death of a colleague in March 1992. He was charged with culpable homicide in April 1993. He made representations to the DPP to have the charges withdrawn. Pursuant to his representations, the charges against him were withdrawn in January 1994. In April 2004 the accused was again indicted but this time

[19] This judgment was referred to with approval in Feedmill Development v The Attorney-General of KZN 1998 (2) SACR 539 (N) 548 and in DPP KZN v Regional Magistrate 2001 (2) SACR 463 (N) 467

[20] Coetzee v Attorney-General, KZN 1997 (8) BCLR 989 (D) 1004A-B

for the murder of his colleague. He applied for a permanent stay of prosecution on the basis that more than ten years had elapsed from the date on which he had first been charged. The trial court dismissed the application for a permanent stay on the basis that the accused had failed to establish prejudice as a result of the delay. The SCA unanimously held that the appeal should be dismissed. Two judgments were delivered in the SCA. The majority judgment was given by Maya AJA with whom Scott JA and Van Heerden JA agreed. She said that counsel were agreed that the delay in the prosecution of the case had to be calculated from August 1993 when the accused was first charged. She accordingly assumed in favour of the accused, but without deciding, that the delay had commenced in August 1993.

Nugent AJ with whom Cachalia AJA agreed, gave a separate concurring judgment. He found it necessary to decide the issue left open by Maya AJA. He ruled that: "*(T)he right to be brought to trial without unreasonable delay is a right that protects the integrity of the prosecution process: it accrues to an accused person and endures* ***for only so long as he or she stands accused.***" Para. 29. Judge Nugent rejected a formalistic definition of an "accused" by stating that ***"[i]t is not necessary to decide in this case precisely when a person can be said to be an 'accused person' for purposes of s 35(3)(d) and I do not suggest that that requires that he must have been formally charged."*** However, on the facts before him, Judge Nugent found that the appellant was not *an 'accused person'* after "*the formal accusation that had been made against him had been withdrawn without any intimation to him that it might be renewed nor any intention that it would be. There is also no suggestion that the withdrawal of the charge was in some way improper or merely a device*".[21] He concluded by stating that "***In its terms, the right that is encompassed in section 35(3)(d) is a right to be tried reasonably promptly while a person stands accused of an offence.***"[22]

Clearly, Judge Nugent realized that a person can under circumstances similar to Zuma's be "an accused" without being formally charged in a court of law. He would reject as constitutionally unacceptable a scenario where the prosecution's circumvents the citizen's right to a public trial by publicly accusing the person of criminal wrongdoing (without the formality of official charges being filed) while at the same time eschewing a formal criminal indictment for that person to enable the person to defendant himself in court. In a similar vein, he would consider it absolutely absurd that our courts should countenance a prosecution's reliance on its own failure to initiate formal criminal prosecution against an accused under these circumstances to define the nature and extent of an accused's rights under Section 35(3)(d). The prejudice an accused (formal or informal) may suffer as a result of unreasonable delay, is broadly of two kinds. The first is trial-related prejudice or the complete denial of a trial especially where the trial of an alleged co-conspirator who has been formally charged is transmogrified into a trial by proxy of another alleged unindicted co-conspirator (who has been named as such but not formally charged). If the accused is informally accused but completely denied a forum in which to vindicate his rights he is more severely prejudiced than an accused who has the benefit of being formally charged even if the prosecution engages in deliberate procrastination at some point. As case law from around

---

21 Para 30

22 Para 31

the world shows below, a delay in the context of an unindicted alleged co-conspirator is more appropriately analogized to a "lynching" or a medieval torture and is uniquely devastating to such an "informally" accused person particularly his due process right to defend the charges in an authoritative forum and his right to security of the person caused by stress, anxiety, financial prejudice and the like.

We must also reject as untenable the NPA's implicit argument the only prejudice that the constitution concerns itself with under Section 35(3)(d) is only where a person "suffers trial-related prejudice" in his ability to defend himself in the criminal prosecution brought by the NPA in that person's own name. This shows that the NPA simply does not get it - the real issue in Zuma's case is not the academic debate about whether Section 35 of the constitution is "concerned with the conduct of pending trial proceedings after they have been set in motion" by the NPA or whether the right is or is not triggered until formal proceedings are actually pending. Zuma's legal team must ask the pertinent question whether under the circumstances where the NPA brandished the Shaik indictment and loudly proclaimed that it had "prima facie evidence of corruption" against Zuma, that agency was **under a constitutional duty to provide Zuma with a forum in which to vindicate his rights.** When these issues are presented in this manner, the NPA's loud protestations that requiring the prosecution to comply with the constitution by respecting the rights of persons the NPA has investigated for crimes but is unwilling to charge "*would impose an undue fetter on the state's capacity to discharge its constitutional duty to prosecute crime"* ring hollow. The NPA does not define the human or constitutional rights of South African citizens – prosecutorial discretion is not an unbridled license to publicly lob accusations of a criminal offense against citizens in a manner that so damages his name, reputation and economic interests contrary to constitution's due process protection discussed above. In our constitutional democracy, there is absolutely no legitimate governmental interest that can conceivably be served by an official public smear of an individual when that individual has not been provided a forum in which to vindicate his rights.

International jurisprudence firmly establishes that the issue in Zuma's case involves more than the so-called unfettered exercise of prosecutorial discretion – the NPA's actions and statements constituted an egregious violation of the presumption of innocence principle discussed in full elsewhere. The right to be presumed innocent applies not only to treatment in court and the evaluation of evidence, but also to treatment before trial. It applies to suspects, before criminal charges are filed prior to trial, and carries through until a conviction is confirmed following a final appeal. The right to the presumption of innocence requires that prosecutors, judges and juries refrain from prejudging any case. It also *applies to all other public officials, including the executive and legislative branches of government* **.** The principle of presumption of innocence is, above all else, a procedural safeguard in criminal proceedings. However, its scope is more extensive in that it imposes obligations not only on criminal courts determining criminal charges but also on other authorities including prosecutors and police officers involved in the particular case. This means that public authorities, particularly prosecutors and police, should not make statements about the guilt or innocence of an accused

before the outcome of the trial. [***Human Rights Committee General Comment*** 13, para. 7][23]. It also means that the authorities **have a duty to prevent the news media or other powerful social groups from influencing the outcome of a case by pronouncing on its merits. (Amnesty International Fair Trial Manuals).**

International jurisprudence makes it pellucid that the presumption of innocence may be infringed not only by a judge or court but also by other prosecuting authorities' actions, including press releases, grandstanding, and premature announcement to the public that "prima facie evidence of corruption" exists against alleged unindicted co-conspirators the government was unwilling to indict.

The NPA's press statements that there existed "prima facie evidence of corruption" implicating Zuma in criminal acts, its choice of trial by proxy for Zuma and accompanying statement during the Shaik trial that there existed a generally corrupt relationship between Shaik and Zuma and the NPA's continued press releases alluding to "court decisions" showing Zuma's guilt are all the analytical equivalent of a phenomenon widely condemned around the civilized world- the underhanded act of a prosecutor publicly naming a citizen as an unindicted co-conspirator during pre-trial proceedings without giving the maligned person a forum in which to clear their name. Courts in the US have not hesitated to find that publicly naming a citizen as an unindicted co-conspirator during pre-trial proceedings without giving them a forum in which to clear their name is a violation of the Fifth Amendment due process rights.[24] The courts have unequivocally held that the public naming of unindicted co-conspirators in pre-trial proceedings violates the due process rights of the uncharged parties. The courts have gone even further and adopted a plethora of protective measures to ensure that the constitutional rights of the uncharged parties are fully protected and that the court's process is not being improperly used for ***official public smear of an individual when that individual has not been provided a forum in which to vindicate his rights***. The courts have aptly described such actions by prosecutors as misconduct subjecting victims like Zuma "***to the torture of public condemnation, loss of reputation"*** and that unrestrained vitriolic press statements and in-court statements about these uncharged persons would leave the victims "***just as defenseless as the medieval prisoner and the victim of the lynch mob***." See, In re Smith, 656 F.2d1101, 1106-07 (5th Cir. 1981); United States v. Briggs, 514 F.2d 794 (5th Cir. 1975); United States v. Smith, 776 F.2d 1104, 1112-13 (3d Cir. 1985); United States v. Anderson, 55 F.Supp.2d1163 (D. Kan. 1999).

The seminal case on the issue of publicly naming and shaming a suspect the prosecutor has chosen not to indict is United States v. Briggs, above. In Briggs, the Fifth Circuit found that the public naming of unindicted co-conspirators in an indictment by a grand jury violated the unindicted co-conspirators' Fifth

[23] I also note the following observation on Article 14(2) of ICCPR, which can be found in Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 14 (1994):
"7. The Committee has noted a lack of information regarding article 14, paragraph 2 and, in some cases, has even observed that the presumption of innocence, which is fundamental to the protection of human rights, is expressed in very ambiguous terms or entails conditions which render it ineffective. By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial."

[24] Just like our own constitution, the Fifth Amendment guarantees that ***"[n]o person shall ... be deprived of life, liberty, or property, without due process of law...."*** U.S. Const. amend. V.

Amendment due process rights. 514 F.2d at 796. The Briggs court employed a balancing test, weighing the government's interest in a grand jury's publicly naming the unindicted co-conspirators versus the unindicted co-conspirator's liberty and property interest in their privacy and reputation. Id. at 806. The court held that:

> having balanced the governmental interest in the grand jury's functions and the harm caused thereby to individuals ... the grand jury acted beyond its historically authorized role, and we are shown no substantial interest served by its doing so. ***The balance tips wholly in favor of the adversely affected appellants. The scope of due process afforded them was not sufficient***. Id.

Interestingly, the court saw through a devious prosecutorial tactic of naming political opponents as criminal while at the same time refusing to file charges. In Briggs, a grand jury issued an indictment charging a conspiracy to violate various federal statutes regarding a group's political demonstrations and disruptions at the Republican Party National Convention in 1972. Id. at 796. The indictment named seven defendants but also specifically named three unindicted co-conspirators. Id. Two of the three unindicted co-conspirators filed a petition with the trial court to have their names expunged from the indictment, claiming "*injury to their good names and reputations and impairment of their ability to obtain employment.*" Id. at 797. The trial court denied the petition, finding that since the unindicted co-conspirators were not defendants, they did not have standing to object to their inclusion in the indictment. Id. After the trial and the acquittal of the defendants on the charges, the unindicted co-conspirators appealed the district court's decision to the Fifth Circuit. The Fifth Circuit found that *a person's good name, reputation and ability to obtain employment* "***are substantial and legally cognizable interests entitled to constitutional protection against official governmental action that debases them***." Id. (citing Wisconsin v. Constantineau, 400 U.S. 433 (1971)). The Court continued that "***a person's good name, reputation, honor, or integrity"*** *are protected and that* ***"[i]t would be naive" not to find that official acts that negatively characterize an individual "will expose him to public embarrassment and ridicule." Id. 797-98 (****quoting Constantineau****, 400 U.S. at 435-36****).*** Furthermore, accusing one publicly of being a criminal is "***a stigma, an official branding of a person, the imposition of a degrading and unsavory label***."[25] Id. at 798 (quoting Constantineau, 400 U.S. at 437). In the context of Briggs, the Court found that the unindicted co-conspirators had a strong, cognizable interest in the:

> ***protect[ion of] their reputations ... against the opprobrium resulting from being publicly and officially charged by an investigatory body of high dignity with having committed serious crimes. In addition to being serious, the offenses charged were given wide notoriety and were peculiarly offensive. An alleged conspiracy to disrupt the national***

[25] The Fifth Circuit also invokes other precedent in finding that a person's good name and reputation is a liberty interest protected by the Fifth Amendment. The Fifth Circuit discussed Boards of Regents v. Roth, 408 U.S.564 (1972), where "a teacher's interest in liberty would be adversely affected in the state, in declining to rehire him, made any charge against him that might seriously damages his standing and associations in his community." Briggs,514 F.2d at 798. The Fifth Circuit also references how the labeling of someone as an unindicted co-conspirator is similar to the body of law regarding defamation in which "[a***] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third person from associating or dealing with him.***" Id. at 798n.5 (citation omitted). The Fifth Circuit also found that the public naming of persons as unindicted co-conspirators has economic effects and that the "right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference... [is] within the 'liberty and 'property' concepts of the Fifth Amendment...*It would be unrealistic to deny that an accusation, even if unfounded, that one has committed a serious felony may impinge upon employment opportunities.*" Id

> ***nominating convention of a major political party strikes at the core of democratic institutions.*** [26] Id. at 799.

Furthermore, the Court likened such cases where the reputation and dignity of a person is impinged by the public naming as an unindicted co-conspirator, to barbaric "***medieval torture***" and being a victim of a "***lynch mob***." Accordingly, it held that a person so affected deserves due process as ***"[a person] should not be subject to a quasi-official accusation of misconduct which he cannot answer in any authoritative forum***." Id. at 802. The Court then continues in analogy that:

> [t]he medieval practice of subjecting a person suspected of a crime to the rack and other forms of torture is universally condemned; and ***we see little difference in subjecting a person to the torture of public condemnation, loss of reputation, and blacklisting in their chosen profession,*** in the manner here attempted by the grand jury. ***The person so condemned is just as defenseless as the medieval prisoner and the victim of the lynch mob..***." Id. at 803.

While the Court finds a strong, cognizable interest in the uncharged third-persons in their reputation, good-name, and economic interests, the Court finds that the government has no legitimate interest in the public naming of unindicted co-conspirators in an indictment. The Court holds that there are no "*legitimate interests of the government that are served by stigmatizing private citizens as criminals while not naming them as defendants or affording in this case, indeed, affirmatively opposing access to any forum for vindication. The Department of Justice suggests nothing that rises to the dignity of a substantial interest.*" Id. at 804. The Fifth Circuit finds as unconvincing the implication by the government that the naming of the unindicted co-conspirators was needed to forward the evidentiary goal of the co-conspirator hearsay exception.[27] The court explains that: "If the prosecutorial goal is to expose the named defendants to the broadest possible attribution of the acts of others, it can be attained without actually naming non-defendants as unindicted conspirators. The government may introduce evidence at trial of a person's participation in a conspiracy and thereby ascribe his acts and statements to the co-conspirators even if that person is not named in the indictment." Id. at 805 (citing Cooper v. United States, 256 F.2d 500, 501 (5th Cir. 1958) and Heflin v. UnitedStates, 132 F.2d 907, 909 (5th Cir. 1943)).

Finally, extremely relevant to the political machinations in Zuma's case, the Fifth Circuit puts the public naming of the anti-war activists as unindicted co-conspirators in a broader political context. The Court explains that:

> [***n]ine of the ten persons named in the indictment were active in the Vietnam Veterans Against the War, an anti-war group.... There is at least a strong suspicion that the stigmatization of appellants was part of an overall governmental tactic directed against disfavored persons and groups. Visiting opprobrium on persons by officially charging them with crimes while denying them a forum to vindicate their names, undertaken as***

---

[26] The Fifth Circuit "reject[ed] ***as frivolous the contention that if appellants have suffered injury it is at the hands of only the news media*** to whom they should repair for relief." Id. at 799.

[27] The Fifth Circuit also holds that there is no legitimate governmental interest in inducing a person to testify through their public 'outing' in the indictment. "If the implied governmental interest of necessity to prove the conspiracy relates to inducing persons to testify as prosecution witnesses, the government has available other and less injurious means than those employed in this case." Id. at 805.

> ***extra-judicial punishment or to chill their expressions and associations, is not a governmental interest that we can accept or consider. It would circumvent the adversary process which is at the heart of our criminal justice system and of the relation between government and citizen under our constitutional system. It would be intolerable to our society.***" Id. at 805 (emphasis added).

In another case, In re Smith, 656 F.2d 1101 (5th Cir. 1981), the Fifth Circuit expanded the holding in Briggs beyond indictments and paid close attention to misuse of court proceedings through prosecutors making allegations of (you guessed it) bribery and corruption against uncharged third parties. The Court found that the inclusion of the petitioner's name in the factual resumes during the plea colloquy was "*a violation of his liberty and property rights guaranteed by the Constitution*" and that the motion to strike his name and seal the document should have been granted. Id. at 1107.

In that case, Smith was the head of an agency under investigation for a bribery conspiracy and his name appeared in the factual resumes filed in connection with the guilty pleas of the two defendants. Id. at 1101. During the plea hearing, the Assistant United States Attorney "read in open court and filed in the criminal case a factual resume prepared by her for the purposes of the plea hearing.... the resume... state[d] that [the defendant] had paid sums to other unnamed ...employees, but also specifically named [Smith]." Id. at 1102. Following the plea hearing, the media widely reported the story of the "***bribery scandal, and, as was to be expected when any person in position of responsibility and power is implicated in such a scandal, the news media reported that, as a matter of public and official courtroom record, Mr. Smith had been paid bribe monies.***..." Id. at 1104. Smith filed motions in the criminal case seeking for the court to strike his name from the factual resumes. Id. The district court denied the motions, and the Fifth Circuit overturned the district court's decision. Id.

The Fifth Circuit employed the balancing test under Briggs and expressly rejected the notion that merely because an unindicted person is implicated in criminal trial proceedings the prosecution is free to sully his reputation. The Court stated that:

> The case involves the struggle between society's interests in bringing those guilty of violating the law to justice and an individual's interest in preserving his personal reputation. Although our Constitution provides for both interests to exist, oftentimes the judiciary is called upon to balance those interests when a conflict arises between them. Today, after balancing the interests, we find the scales of constitutional liberty tip in favour of the individual. Id. at 1102.

Smith claimed "that the ***accusations of a criminal offense, by inclusion of his name in the factual resume, has so damaged his name, reputation and economic interests that the government's actions have violated his liberty and property interests contrary to [the Fifth Amendment's due process protection]***." Id at 1105. The Fifth Circuit agreed. The government in this case could not articulate a legitimate interest in naming Smith in the factual resume, but instead argued that Briggs only forbids the naming of unindicted co-conspirators by a federal grand jury in an indictment as opposed to prosecutor in the court-room. The Court rejected this argument, holding that:

> [t]he point made in the Briggs decision is that ***no legitimate governmental interest is served by an official public smear of an individual when that individual has not been provided a forum in which to vindicate his rights***. ***We can think of no reason to distinguish between an official defamation originating from a federal grand jury or an Assistant United States Attorney***. The ***Briggs decision would be rendered meaningless if it could be so easily circumvented by actions of an Assistant United States Attorney***. Id. at 1106.

The Fifth Circuit then further finds that ***"no possible legitimate purpose could have been served by these official condemnations."*** Id. The Court continues:

> Certainly the purposes of Rule 11 were not advanced by the attack on the Petitioner's good name. *Regardless of what criminal charges may have been contemplated by the Assistant United States Attorney against the Petitioner for the future, we completely fail to perceive how the interests of criminal justice were advanced at the time of the plea hearings by such an attack on the Petitioner's character.* ***The presumption of innocence, to which every criminal defendant is entitled, was forgotten by the Assistant United States Attorney in drafting and reading aloud in open court the factual resumes which implicated the Petitioner in criminal conduct without affording him a forum for vindication.*** Id. at 1106-07.

Therefore, the Fifth Circuit's holding in In re Smith makes clear that a public smearing of a person's reputation by the government without affording that person any chance to clear his name is a violation of the Fifth Amendment due process guarantees, no matter if it occurs in an indictment or in any other official government filing. Furthermore, In re Smith buttresses Briggs in averring that there can be no legitimate governmental interest in an official smear campaign.

The case of United States v. Anderson, 55 F.Supp.2d 1163 (D. Kan. 1999), also provides a revealing insight into how the courts grapple with the sensitive issue of public trial of criminal case and the form of the public disclosure of the unindicted co-conspirators. In Anderson, the unindicted co-conspirators, who were "[w]idely known and highly respected health care lawyers," moved the court to expunge their names from a pre-trial memorandum and from the trial transcripts. Id. at 1163. The District Court of Kansas held that there was no due process violation stemming from the government's identification of them at trial, but the pretrial public identification of the lawyers as unindicted co-conspirators violated their due process rights and entitled them to expungement of their names from the pretrial memorandum. Id. In Anderson, while the bill of particulars which identified all co-conspirators was filed under seal, three of the unindicted co-conspirators were identified in a memorandum of support filed by the government. Id. at 1165. After the filing, ***"[t]he government's identification of the movants as co-conspirators was notoriously reported in the legal and healthcare community.***" Id.at 1165-66. Following the precedent of Briggs and In re Smith, the court undertook "a due process balancing inquiry, balancing the interests of the government in naming unindicted co-conspirators against the individual harm that stems from being accused without having a forum in which to obtain vindication." Id. at 1167. The court found that the movants suffered serious injury as "***there were numerous press reports affecting the movant's good names and reputations.*** It is undisputed that the movants here are widely known and

highly respected health care lawyers, and the government has not tried to refute their claim that being labelled as criminal co-conspirators injured their reputations." Id. at 1168.

The court continues in finding no legitimate governmental interest that:

> ***the movants suffered a violation of due process when the government publicly named them in its moving papers on the conflict of interest issue.... [T]he court can find no reason why the government might have 'forgotten' the presumption of innocence in such a public pleading which would 'rise to the dignity of a substantial interest.' The very real stigmatization suffered by the movants from this government action far outweighs the nonexistent government interest in publicly naming them as coconspirators***.

Id. (citing Briggs, 514 F.2d at 804 and In re Smith, 656 F.2d at 1107).

Furthermore, while the government insinuated that the identification of the co-conspirators was part of an effort to illustrate the admissibility of the evidence it intended to enter under the co-conspirator hearsay exception, the court finds that "the government ***provides no explanation for why its moving papers were not submitted under seal.***" Id. at 1168n.5. The government also tried to argue that the identification of the unindicted co-conspirators was inevitable, as the government would have to identify the co-conspirators at trial in order to demonstrate the admissibility of their statements under Fed. R. Evid. 801(d)(2)(E). Id. at 1169. The court found that there was no due process violation in the identification of the unindicted co-conspirators at trial.[28] Id. The court then immediately counters that:

> [t]he mere fact that the *government eventually needed legitimately to let the cat out of the bag at trial, however, does not alter the court's conclusion that the movants' pretrial public identification was a violation of due process because there is an important distinction between being unqualifiedly identified in a pretrial document as an 'unindicted coconspirator' and being identified as a coconspirator at trial for purposes* of 801(d)(2)(E).

Id. at 1169. See also United States v. Smith, 776 F.2d 1104, 1114n.5 (3d. Cir. 1985) (finding that while the court recognizes that names must be disclosed during trial, "***this does not mean, however, that the court was required to condone unnecessary risk of serious injury to third parties***").

The Fifth Circuit continues that while:

> the government's identification of the movants as 801(d)(2)(E) coconspirators at trial does not allow for the reasonable inference that they are criminals ... ***the government's unqualified identification of the movants as unindicted coconspirators in its pretrial moving papers allows for the reasonable inference that they have been labelled criminals.*** *Id. at 1169-70. Therefore, "****the movants suffered a due process violation.***"* Id. at 1170.

---

[28] The court found that "[t]he government clearly had a substantial interest in identifying these coconspirators for 801(d)(2)(E) purposes. The governmental interest outweighed the movants' private injuries because their private injuries, while important, must yield to the proper administration of criminal justice under these circumstances. Id. (citing United States v. Durland, 575 F.2d 1306, 1310 (10th Cir. 1978)).

8The court further explains that "[p]ursuant to the court's ruling, and 801(d)(2)(E) conspirator is not necessarily a criminal." This is because:[a]ll that is required is that he or she be a 'joint venturer' in a common plan. In fact, at the government's request, the court found at trial that Ms. Kaiser and Mr. Holden were 'coconspirators' for purposes of Rule801(d)(2)(E) in the sense that they were participants of a common plan to put together and facilitate and operate and carry out the relationship between [two health care organizations] for the continuum of care. They participated in a joint venture, if you will, for the purposes of 801(d)(2)(E). And whether there was criminal intent on the part of any or all of those individuals [was not reached]. Id. at 1169.

In order to fully appreciate the compelling argument for a dismissal of the NPA's case against Zuma, it is important to dispel certain myths and to highlight enormous prejudice to Zuma. The issues of adverse pretrial publicity in the Zuma case have been presented in a distorted and self-serving manner by Zuma's detractors who claim that the privacy and reputational interests of Zuma, an alleged unindicted co-conspirator in corruption, should never outweigh the public's right of access to court records and information. Having presented the issues in this simplistic manner, it does not take them long to argue that adverse pre-trial publicity in a criminal case "'***comes with the territory***" (as Bill Downer claimed in argument before Judge Msimang) and that it is one of the many inevitable burdens of citizenship tolerable in an open and democratic society. In hawking these falsehoods, Zuma's detractors point to countries like the US where the media seemingly has almost total freedom in coverage of criminal trials to argue that unrestrained media coverage of court trials should be allowed to trump the constitutional rights of accused persons to a fair trial. That is easily refuted and the US cases cited here just illustrate the point.

First, as shown by the court decisions cited here, the courts, in regulating criminal trials and safeguarding the integrity of the judicial process, are very much attuned to the competing interests of the accused, the prosecution representing the state/the public and the media. A court may employ a gag order to restrain trial participants from making extrajudicial statements when there is a reasonable likelihood that prejudicial publicity may prevent a fair trial. By issuing a gag order, a trial court may prohibit lawyers, witnesses, jurors, court personnel, and others directly involved with the trial from making any harmful extrajudicial statements outside the courtroom setting. In 1966, in Sheppard v. Maxwell, 384 U.S. 333, 361 (1966) the United States Supreme Court stated that the trial court should have proscribed extrajudicial statements by trial participants due to the intense media scrutiny surrounding the case. There, Dr. Sam Sheppard, accused of murdering his pregnant wife, was subject to extensive media scrutiny from the beginning of the ordeal. See id. at 338–39. First, the media reported Sheppard's refusal to take a lie detector test. See Sheppard, 384 U.S. at 339. In addition, the local coroner questioned Sheppard in the presence of television, radio, and newspaper reporters, as well as several hundred spectators. See id. When Sheppard's counsel tried to participate in this questioning, which was broadcast live, he was forcibly ejected by the coroner, who received cheers from the crowd. Id. at 340. Moreover, the police arrested Sheppard and charged him with murder just hours after a front-page editorial appeared asking, "Why Isn't Sam Sheppard in Jail?" See Sheppard, 384 U.S. at 341. This intense media scrutiny continued throughout the trial, exposing potential jurors to the coverage. See id. at 345. When jurors viewed the murder scene, they were accompanied by hundreds of reporter, onlookers, and a helicopter from which reporters took pictures. Stephen, supra note 29, at 1072–73. During sequestered deliberations, photographers took pictures of jurors for a local newspaper. Id. at 1073. Sheppard was subsequently convicted of second-degree murder. Id. The Court held that the *trial court's failure to protect Sheppard from the prejudicial publicity denied him his right to a fair trial in violation of due process*. See Sheppard, 384 U.S. at 335. Furthermore, the Court asserted that the trial *court should have controlled the release of information to the media.* See id. at 361–62. The Court stated that it would

permit a trial judge to issue a gag order to prevent trial participants from frustrating the proper functioning of court proceedings in circumstances where pretrial publicity would threaten a defendant's constitutional right to a fair trial. See id. at 361.

The issue about media coverage and hostility to Zuma is presented in this simplistic manner, the issue is reduced to the public's right to know. The deliberate public branding of Zuma as a guilty crook walking or as a criminal against whom "prima facie evidence of corruption" existed is even more serious when one considers that all along the NPA had plans to charge Zuma as soon as Shaik's trial was over. It embarked on a cloak and dagger litigation strategy while at the same time deriving maximum propaganda damage from press conferences and leaks to the media. Perhaps an acquittal of Shaik would have drastically affected the NPA's plans but maximum political damage would still have occurred to Zuma. Regardless of outcome, the NPA was determined to use the Shaik trial to embarrass Zuma politically, to put him on trial by proxy in the court of public opinion and in Judge Squires' courthouse. This is simply unacceptable in any democracy. The cases surveyed above have overwhelmingly held that the privacy and reputation of unindicted co-conspirators are compelling governmental interests that override the right of the press to access court records. The courts have refused to subordinate criminal defendants' due process rights to private parties' rights to sell newspapers.

In United States v. Smith, 776 F.2d 1104 (3d Cir. 1985), the Third Circuit found that "the need to protect individual privacy rights may, in some circumstances, rise to the level of a compelling governmental interest and defeat First Amendment right of access claims." Id. at 1112. In this case, the press sought access to the list of unindicted co-conspirators that was attached to the bill of particulars and was sealed by the court, through the request of the government. Id. at 1106. The district court had found that disclosure of the list of unindicted co-conspirators:

> would subject the unindicted co-conspirators to publicity stigmatizing them as having been named by the United States Attorney as alleged participants in the conspiracy alleged in the indictment ***at a time when they have not been charged and would have no judicial forum in which to defend against the accusations***. ***The publicity generated from release of the names to the media would probably subject the persons named therein to embarrassment, annoyance, ridicule, scorn, traduction, and loss or repetition in the community.*** Id. at 1106-07.

The Third Circuit, using language similar to Briggs, In re Smith, and Anderson found that:

> [i]f published, the sealed list will ***communicate to the general public that the named individuals in the opinion of the chief federal law enforcement official of the District, are guilty, or may be guilty, of a felony involving breaches of the public trust. This broadbrush assertion will be unaccompanied by any facts providing context for evaluating the basis for the United States Attorney's opinion with respect to any given individual....Finally,... the named individuals have not been indicted and, accordingly, will not have an opportunity to prove their innocence at a trial. This means that the clearly predictable injuries to the reputations of the named individuals is likely to be irreparable***. The individuals on the sealed list ***are faced with more than embarrassment. It is no exaggeration to suggest that publication of the list might be career ending for some.*** **Clearly,** ***it will inflict serious injury on the reputations of all.*** Id. at 1113-14.

Based on this reasoning, the Third Circuit held that "[i]n these circumstances, we have no hesitancy in holding that the trial court had a compelling governmental interest in *making sure its own process was not utilized to unnecessarily jeopardize the privacy and reputational interests of the named individuals.*" Id. at 1114.

Similar questions should have been asked of the Squires court when Zuma was put on trial by proxy. The Third Circuit in the Smith case speaks directly about the issues involved in Zuma's case. The NPA Director gave his opinion that some high-ranking advocates opined that Zuma should be indicted but the prosecution decided not to prosecute although there was "prima facie evidence" of Zuma's criminal wrong-doing. Just as Smith, this suggested he was *guilty, or may be guilty, of a felony involving breaches of the public trust.* In a similar vein, Ngcuka's broadbrush assertion was unaccompanied by any facts providing context for evaluating the basis for his opinion with respect to the evidence and any acts of commission or omission on Zuma's part. Just as the Smith court predicted, "***this means that the clearly predictable injuries to the reputations of the named individuals is likely to be irreparable***." Zuma was "***faced with more than embarrassment.***" His right to be heard in his defense during the Shaik trial is lost forever. *It is no exaggeration to suggest that damning allegations against him were career ending in that he lost his position as the Deputy President of the country precisely based on the machinations of the prosecution.*

A number of other cases also held that protection of an unindicted co-conspirator's privacy rights is a compelling governmental interest that overrides the press' right to access. See United States v. Anderson, 799 F.2d 1438, 1442 (11th Cir. 1986) ("A request for a list of 'unindicted co-conspirators'... is a discovery request that is not a matter of public record."); In re Capital Cities, 913 F.2d 89, 90 (3d Cir. 1990) (recognizing that "the government can assert individual privacy interests in attempting to meet its burden of demonstrating the compelling interest that justifies denial of a media organization's First Amendment right to access to court records"); Matter of Search Warrants Issued on June 11, 1988, for the Premises of Three Buildings at Unisys, Inc., 710 F. Supp. 701, 704 (D. Minn. 1989) ("Privacy interests may be compelling enough to overcome the public's first amendment interest in disclosure.").

2.5 The NPA'S Violation Of Zuma's Constitutional Right Of Access To Court And Zuma's Right To A Fair Public Trial Mandates A Dismissal With Prejudice For Abuse Of Process

It is well-established that our courts are now bound under our constitution, to interpret and apply the constellation of rules relating to criminal proceedings in a manner which promotes the spirit, purport and object of Zuma's right to have a dispute decided in a fair hearing before a court. This right is vested by section 34 of the Constitution which provides as follows:

> "**Access to courts** – Everyone has the right to have ***any dispute*** that can be resolved by the application of law decided in a *fair public hearing before a court* or, where appropriate another independent and impartial tribunal or forum"

Zuma's right of access binds the judiciary when the High Court exercises its inherent power to regulate its own process in the exercise of the court's power to grant a dismissal for abuse of process. The argument in this section requires a great deal more patience from the reader but I believe, if Zuma's team adroitly marshals the fact and distils the legal points on the denial of Zuma's right of access to the courts occasioned by the NPA's failure and refusal to file charges against Zuma in August 2003, this issue can be a winner. It is very significant that this right of access to court is under a separate provision (Section 34) of the Constitution and not merely subsumed under the section guaranteeing the right to a "fair trial" (Section 35(3)). For the purpose of articulating the legal argument on the denial of access to court, the focus must always be on the NPA's public accusation of Zuma during 2003 press conference and its subsequent failure (for a period of 22 months period) to file charges against Zuma. The potency of this argument here lies in the fact that we start from the premise that the "prima facie evidence" statement triggered a dispute between Zuma and the NPA. The NPA had a monopoly and held the key to the criminal court-house door and that was exclusively in the hands of the prosecution. It simply abused and exploited its monopoly power to prejudice Zuma's rights.

As the discussion regarding the unindicted con-conspirator case has shown, the courts, the constitution and common sense would require that a prosecutor act expeditiously to provide a forum for criminal litigation (by filing charges) in court once a prosecutor has declared to the whole world that a citizen is guilty of wrongdoing or that he has legally sufficient "prima facie evidence" of the same. This is especially crucial when the prosecutor has tarred and feathered an individual citizen in the press. This makes perfect sense since under our system of justice, the prosecutor (public or private) usually hold the key to the court house. An individual who is being falsely accused by a prosecutor has very few options to vindicate his rights. The prejudice to the defendant which would be caused by a public stigmatization at this stage remains incalculable. The interest of the plaintiff in a criminal trial and access to a public forum to vindicate his rights becomes even greater. The public interest in the expedition of the conclusion of any criminal trial and the court's interest in adjudicating the rights of the accused (indicted and unindicted co-conspirators) all militate strongly in favour of recognizing the defendant's right of access.

The beauty of an argument under Section 34 of the constitution is that it avoids altogether the academic issues by the NPA that Section 35(3) is not engaged until a person is "charged" (which includes being officially alerted as to the likelihood of prosecution) and that delay in charging Zuma for the period between August 2003 and June 2005 would not be a contravention of the right to a fair trial as envisaged in Section 35(3). The NPA argued in Zuma's earlier case that Zuma did not become an "accused person" until he was formally charged in June 2005. However, focusing on how the NPA's action, including its decision not to charge Zuma along with Shaik prejudiced Zuma's rights allows the courts to see the unprecedented prejudice recognized by Judge Msimang in a more perfect perspective. The NPA's misuse of the courts process during the Shaik trial to put Zuma on trial by proxy as well as the prejudicial delays that followed allow Zuma to argue the court must infer that there was mala fides on the part of the

prosecution and that the NPA embarked on a course of deliberately undermining Zuma's rights under the constitution.

At the risk of carting coal to Newcastle, Zuma must argue that while the prosecution has a discretion when to lay charges against a defendant, it does not have the right to use the court's process improperly ***official public smear of an individual when that individual has not been provided a forum in which to vindicate his rights***. The courts have aptly described such actions by prosecutors as misconduct subjecting victims like Zuma "***to the torture of public condemnation, loss of reputation" which assumes egregious proportions when such*** person is denied an authoritative judicial forum in which to defend himself. Because the right of access to the courts is self-standing and is not subsumed under Section 35(3) which deals with "fair trial" rights, it provides a powerful platform from which to launch the argument that a denial of the right of access is not dependent on there being a "formal" accusation or indictment. It would be the highest form of hypocrisy for our courts to allow a prosecution of Zuma more than five years after he was subjected to the torture of public condemnation and after he suffered irreparable harm due to the prosecution's misuse of its discretionary power to file criminal charges. During Shaik's trial, the NPA publicly refrained from filing charges against Zuma but continued its flurry of rhetoric and media churning of allegations against Zuma in a manner showing clear abuse of the legal process. It punished Zuma and left him with no remedy. After the damage was done through the abuses in the Shaik trial, the NPA now seeks to use the courts to whitewash its violations. Even if a fair trial was still possible but that the delay in charging was oppressive Zuma has a remedy of dismissal for abuse of process. In this way the so-called balancing test will be irrelevant. It is a violation ***per se*** and Zuma wins on this issue. The NPA's grandstanding and media circus was at Zuma's expense. The fact that the NPA refused to cooperate during the investigation by the Public Protector and the fact that the prosecution ignored all the Public Protector's admonitions is an aggravating factor. Any contrary argument by the NPA simply fails to accommodate the right of the defendant, in terms of section 34 of the Constitution, to have a dispute that can be resolved by the application of law decided in a fair public hearing before an impartial court. This argument also provides additional ammunition when arguing the issue of prejudicial delay later in this paper.

The right of access to a court is not limited to the right to institute proceedings but includes the right to obtain a determination of the dispute by a court. This is why the courts have scrutinized legislative provision which purported to limit litigants' rights to judicial forums (Azapo case) or had hindered the applicants' right to have their civil claims for damages decided by a court or prevented plaintiffs from pursuing their claims.

In order to appreciate the seriousness of the NPA's violation of the right of access let us once again turn to international jurisprudence. "[T]*he right to sue and defend in the courts*," the US Supreme Court long ago said, "is the alternative of force. ***In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship.***" Chambers v. Baltimore & Ohio R.R., 207 U.S. 142, 148 (1907). The

right not only protects the ability to get into court, see, e.g., Ex parte Hull, 312 U.S. 546 (1941) (striking down a prison regulation prohibiting prisoners from filing petitions for habeas corpus unless they are found "properly drawn" by a state official), but also ensures that such access be "adequate, effective, and meaningful." Bounds v. Smith, 430 U.S. 817, 822 (1977). If the right of access to court is "conservative of all other rights" and "is one of the highest and most essential privileges of citizenship" for Zuma, shouldn't a court show its disapproval of the misuse of its process during the period between August 2003 and June 2005 by dismissing the Zuma case for abuse of the process. What other suitable remedy could be there to undo the serious wrong of this kind which has been variously described by the courts as akin to "torture" "lynching" and as engendering the "***kind of prejudice is that it closely resembles the kind of punishment that ought only to be imposed on convicted persons."***? I am actually echoing the words of our own Honourable Justice Msimang. In his well-reasoned decision striking the NPA's first case against Zuma from the roll, he detailed the unacceptably high level of prejudice Zuma had already experienced due to the NPA's actions and suggests an approach that might just work for Zuma. He stated the following:

> ***Something must also be said about social prejudice in this matter, namely, that prejudice associated with embarrassment and pain accused persons suffer as a result of negative publicity engendered by the nature of the charges. During argument the prosecution conceded that, as a result of the charges, the accused in this matter did and still suffer from this type of prejudice. Not that the prosecution had any choice. We cannot imagine any case in recent times which has triggered as much negative publicity in the media as the present one. Having made that concession the prosecution hastened to add that such prejudice is unavoidable and constitutes an unintended consequence of our criminal justice system. It comes with the territory.***
> ***That may well be so. However, as it was pointed out in the Sanderson case, the problem with this kind of prejudice is that it closely resembles the kind of punishment that ought only to be imposed on convicted persons and is therefore inimical to the right to be presumed to be innocent enshrined in the Constitution. Much as such prejudice is inevitable in our criminal justice system, the accused's right to a trial within a reasonable time demands that the tension between the presumption of innocence and the publicity of trial be mitigated.***

The courts have scrutinized all kinds of manipulations during investigations and pretrial stages of cases to find denial of access to courts in a variety of circumstances, including civil case where the stakes were much less than Zuma's case. For instance, several courts have found that government cover-ups and manipulations can infringe the right of access to courts. In Bell, 746 F.2d 1205, for example, city police officers planted evidence and contrived a false story to make their killing of an unarmed man whom they shot in the back seem an act of self-defense. The victim's father filed a wrongful death action against both the officer and the city, but the case settled for an amount so small that the father never cashed the check. When the true facts of the killing emerged twenty years later, the victim's survivors sued the police, alleging that the conspiracy to conceal the facts had interfered with their ability to seek legal redress. Sustaining a jury verdict for plaintiffs, the Seventh Circuit found that "[t]hough [Bell's father] filed a wrongful death claim in state court soon after the killing, ***the cover-up and resistance of the investigating police officers rendered hollow his right to seek redress.***..." Id. at 1261.

The Fifth Circuit reached a similar result in Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983), recognizing a potential denial of the right of access when an alleged cover-up delayed release of the facts of a murder for *eleven months*. Noting that ***"[d]elay haunts the administration of justice***," the court held that the victim's parents could state a denial of access claim since *"[t]he defendants' actions could have prejudiced [their] chances of recovery in state court because the resulting delay would cause stale evidence and the fading of material facts in the minds of potential witnesses*." Id. at 974, 975; see also Swekel v. City of River Rouge, 119 F.3d 1259, 1263-64 (6th Cir. 1997) (plaintiff must "[show] that the defendants' actions foreclosed her from filing suit in state court or rendered ineffective any state court remedy she previously may have had"); Delew v. Wagner, 143 F.3d 1219, 1222 (9th Cir. 1998) (same); Vasquez v. Hernandez, 60 F.3d 325, 329 (7th Cir. 1995) (plaintiffs must allege either that they have "been prevented from pursuing a tort action in state court or that the value of such an action has been reduced by the cover-up"); cf. Barrett v. United States, 798 F.2d 565, 575 (2d Cir. 1986) ("Unconstitutional deprivation of a cause of action occurs when government officials thwart vindication of a claim by violating basic principles that enable civil claimants to assert their rights effectively.").

Although Zuma will not be making an allegation of "nefarious conduct," such as manufacturing false evidence or destroying or refusing to collect evidence necessary to pursue a civil claim, he will successfully maintain both that the NPA prosecutors violated an affirmative duty to provide him with access to a forum to dispute their claims about his criminal wrongdoing and that they affirmatively misled him about their plans to prosecute him. Furthermore, the NPA misled him precisely because they feared that if they gave him accurate information about their future plans to charge him, he might have asked the court for protection and thus have limited the damage the NPA sought to inflict in the first place. As will be shown here, Zuma has already established his entitlement to a dismissal of his case with prejudice. After all, Zuma's first corruption case, ***S v Zuma & others***[2006] JOL 18331 (N), was thrown out of court because the National Prosecuting Authority could not present the Durban High Court with a final indictment, despite having investigated Zuma for more than seven years. This argument must be refined but it has the potential to be a winner.

2.6 The NPA'S Violation Of Zuma's Constitutional Rights To Due Process, To A Fair Public Trial And Right To A Presumption of Innocence Mandates A Dismissal With Prejudice For Abuse Of Process

Everyone has the right to be presumed innocent, and treated as innocent, until and unless they are convicted according to law in the course of proceedings which meet at least the minimum prescribed requirements of fairness. Article 11 of the Universal Declaration[29], Article 14(2) of the ICCPR[30],

[29] Article 11 of the Universal Declaration of Human Rights declares that "**everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence**."

[30] Article 14 of the International Covenant on Civil and Political Rights continues in the same vein: "**Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law**."

Principle 36(1) of the Body of Principles, Article 7(1)(b) of the African Charter, Paragraph 2(D) of the African Commission Resolution, Article XXVI of the American Declaration, Article 8(2) of the American Convention, Article 6(2) of the European Convention[31], Article 21(3) of the Yugoslavia Statute, Article 20(3) of the Rwanda Statute, Article 66 of the ICC Statute. This principle has firm and sturdy roots in South Africa's own constitution and has been readily accepted and applied by our courts.

The right to be presumed innocent applies not only to treatment in court and the evaluation of evidence, but also to treatment before trial. It applies to suspects, before criminal charges are filed prior to trial, and carries through until a conviction is confirmed following a final appeal. This right undergirds all other "fair trial rights" including the presumption of release pending trial; the right to trial within a reasonable time or to release from detention; the right not to be compelled to testify against oneself or confess guilt and the related right of silence are rooted in the presumption of innocence. The right to the presumption of innocence requires that judges and juries refrain from prejudging any case. It also ***applies to all other public officials, including the prosecution authorities and even the presidency.***

International jurisprudence makes it pellucid that the presumption of innocence may be infringed not only by a judge or court but also by other prosecuting authorities actions, including press releases, grandstanding, etc. The ECtHR deemed the presumption of innocence so important that it ruled that this presumption should be respected not only by the judges, but by all public officials. In that regard, the ECtHR has noted: "The Court recalls that the presumption of innocence […] will be violated if *a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law. It suffices, even in the absence of any formal finding, that there is some reasoning to suggest that the official regards the accused as guilty. In this regard the Court emphasizes the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of an offence*." (emphasis added) ***Allenet De Ribemont v. France***, ECtHR judgment of 23 January 2005, para 35 and ***Daktaras v. Lithuania***, ECtHR judgment of 10 October 2000, para 41. See also, *General Comment on Article 14 of the ICCPR*, 13/21,& 7; the Committee stressed the duty on all public authorities to refrain from prejudging the outcome of a trial. It suffices, as in the Zuma case, in the absence of a formal finding, that the NPA's "prima facie evidence of corruption" or generally "corrupt relationship" comments suggest that the accused is guilty. Such a premature expression by either the NPA or the court itself of such an opinion will inevitably run foul of the said presumption (see, among other authorities, Deweer v. Belgium, judgment of 27 February 1980, Series A no. 35, p. 30, § 56, Minelli v. Switzerland, judgment of 25 March 1983, Series A no. 62, §§ 27, 30 and 37, Allenet de Ribemont v. France, judgment of 10 February 1995, Series A no. 308, p. 16, §§ 35-36 and Karakaş and Yeşilırmak v. Turkey, no. 43925/985, § 49, 28 June 2005).

[31] And Article 6.2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms similarly mandates that "**everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.**"

It is necessary to disabuse our fellow citizens of the illusion that a prosecutor under the guise of representing the "public interest" or the state has a free hand in savaging the reputational interests of citizens simply because the concerned persons happen to be celebrities. Contrary to the claims by some, prosecutors in the US and the rest of the civilized world do not have a free hand in their handling press statements during the pre-trial, investigation and trial stage of the criminal prosecution. In Gentile v. State Bar of Nevada, and Allenet de Ribemont v France discussed above.

The ECtHR has in fact deemed the presumption of innocence so important that it has ruled it inappropriate even for the police to make statements implying that an individual is guilty of a crime before the guilt had been established in a due process. Another case, the Daktaras v. Lithuania involved a complaint by an applicant who had been "portrayed in the Lithuanian media as a Mafia leader." He was found guilty on two counts of obtaining property by threats of force and inducing another to pervert the course of justice, sentenced to seven years and six months' imprisonment and his property was confiscated. The applicant further complained under Section 6 § 2 of the Convention that the prosecutor had commented that his guilt had been proved before the trial had started, thereby breaching the presumption of innocence. The Court reiterated its case-law that impartiality within the meaning of this provision meant an absence of bias and outside influence on the judges deciding the case. It further recalled that, under the objective test of impartiality under Article 6 §1, appearances were of importance. The court concluded the applicant's doubts as to the impartiality of the Supreme Court could be said to be objectively justified. Consequently, there had been a breach of Article 6 §1. Regarding the argument under Article 6§2, the Court observed that the presumption of innocence required public officials *to be very careful in choosing their language in regard to criminal proceedings where the accused's guilt had not been established by a competent court*. Nonetheless, not only the actual words of a public authority, but also the context in which that statement had been made were to be taken into account in assessing compliance with Article 6§2. Significantly, the Court noted that the impugned statements had been made by a prosecutor ***not in a context independent of the criminal proceedings themselves, as for instance at a press conference,*** but in the course of a reasoned decision at a preliminary stage of those proceedings. The Court held that, in asserting that the applicant's guilt had been "proved" by the evidence in the case-file, the prosecutor had used the same terminology as the applicant in his request to discontinue the case. The Court considered that, while the use of the term "proved" was unfortunate, both the applicant and the prosecutor were actually referring not to the question whether the applicant's guilt had been established by the evidence, but to the question whether the case-file had disclosed sufficient evidence of the applicant's guilt to justify proceeding to trial. Viewed with this prism, the Court found no breach of Article 6§2 although it awarded the applicant money for legal fees and expenses for a breach of Article 6§1.

In Zuma's case, the impugned statements by Ngcuka were actually made ***in a context independent of the criminal proceedings themselves-they were made at a press conference and were therefore clearly in violation of Zuma's constitutional rights.*** These were not *statements that were*

*necessary to inform the public of the nature and extent of the prosecutor's action and they served no legitimate law enforcement purpose. A prosecutor in a criminal case shall "**refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused**…"* At this point the reader is entitled to ask: how else could the NPA (through Ngcuka) inform the public of the nature of the corruption charges against Shaik or explain their decision not to charge Zuma in 2003 without laying bare the allegations and evidence in the prosecuting authorities files even if it meant extensive reference to Zuma's alleged role? After all in a bribery or corruption case it usually takes two to tango! The answer follows.

First, I have already canvassed much of the case law showing that a prosecutor's extrajudicial comments, especially at ***press conferences***, that have a substantial likelihood of heightening public condemnation of the accused do not shield the prosecutor from the consequences of his actions including civil liability. It would pleonastic to rehearse the principles here. Suffices it only to state the bottom line: at potential liability for prosecutors has been upheld by the courts in matters involving allegedly inflammatory statements to press, actions in convening a news conference to announce the results of a search and seizure, or convening a news conference to announce the return of an indictment, and for conduct in issuing defamatory press release.

Second, from time immemorial most common law legal systems have observed the convention that the hallowed principle of presumption of innocence must be safeguarded even during the investigatory stages of a case. In mature democracies such as the US and Canada, the investigatory stage of a case may be shrouded in the secrecy of the grand jury proceedings[32] geared to protect those who are in the public limelight from defamation of character by the investigation. The US system works like this - federal grand juries listen to "a recitation of charges by a government witness" in determining whether to formally charge the accused with a crime.[33] The prosecutor presents the case to the grand jury in the form of testimony and other evidence and may answer questions that members of the grand jury have concerning the law. The proceedings are secret investigations, witnesses are not allowed to reveal what they testified to in front of the grand jury, and thus the media is often unaware that an investigation is even happening, or the details surrounding it. The federal grand jury functions as both a sword and a shield; it performs its "shielding" function by issuing presentments and indictments.[34] Many courts have refused to recognize any authority for a grand jury to accuse a person of a crime without indicting that

[32] The Fifth Amendment to the United States Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

[33] Fred A. Bernstein, Note, Behind the Gray Door: Williams, Secrecy, and the Federal Grand Jury, 69 N.Y.U. L. Rev. 563, 623 (1994).

[34] See, Renee B. Lettow, Reviving Federal Grand Jury Presentments, 103 Yale L.J. 1333 (1994) (describing presentments as charges that the grand jury brings on its own initiative, whereas an indictment is almost always initially drawn up by a prosecutor and then submitted to the grand jury for approval). The act of signing a presentment transforms it into an indictment. Id. Lettow argues that, although a presentment is capable of serving as a formal charging indictment, its main function is to publicize. Id. Similar to problems associated with naming unindicted persons in a formal indictment, those named in a presentment lack the opportunity to answer the accusation in a judicial forum. See id. at 1359 (quoting Chief Judge Finesilver in People v. McCabe, 266 N.Y.S. 363, 367 (Sup. Ct. 1933), as stating that "[t]he injury it may unjustly inflict may never be healed")..

person. See, United States v. Briggs, 514 F.2d 794, 803 (5th Cir. 1975) (discussing the grand jury's shielding function and holding that, if charges are baseless, the accused person should not be subjected to public branding; on the other hand, if the charges are supported by probable cause, the accused should be provided a forum to plead his case). ("***We have found no reported opinion or scholarly commentary***, and the government suggests none, contending that ***a federal grand jury is empowered to accuse a named private person of crime by means of an indictment which does not make him a defendant.***"). Briggs, 514 F.2d at 801.

Although one of the grand jury's responsibilities is to accuse wrongdoers, its primary function is to shield the innocent from ill-conceived or malicious allegations.[35] Safeguarding grand jury secrecy protects innocent targets from public knowledge that they were even under investigation. As the US Supreme Court stated in Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979) "…***by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.***" Most importantly, the grand jury serves as a buffer between government and the people and is designed to protect citizens from "overzealous and vindictive prosecutors." In this way, citizens including politicians and public officials often investigated through grand juries are spared the type of outrageous violations visited upon Zuma. The system is carefully designed to give meaning to the presumption of innocence- the grand jury process often precludes the glare of media attention on witnesses, as well as the subjects of the investigation. The process is fair, in part, because an ongoing grand jury investigation does not mean someone will necessary be indicted for a crime. Thus, if there is insufficient evidence for an indictment, a person's name and reputation may be preserved without the taint of a public criminal investigation picked apart by the media. Contrast this to the NPA's action against Zuma and lately Ngoako Ramatlhodi.

The US courts have recognized that constitutional problems faced by an unindicted, but named, co-conspirator are legion. Whereas a criminal defendant is presumed innocent until proven guilty (and has a Sixth Amendment right to a speedy trial), there are rarely procedural mechanisms in place to protect an individual who is identified as an unindicted co-conspirator. A person named by a federal grand jury as an unindicted co-conspirator does not become a party to the attendant criminal trial, and the Federal Rules of Criminal Procedure grant that individual no right to intervene in order to clear his or her name. Moreover, acquittal of indicted conspirators will neither vindicate the unindicted conspirator nor bar his or her subsequent indictment. Many courts have held that these consequences deny the unindicted person the due process of law to which he or she is entitled by the Fifth Amendment and violate the grand jury's traditional shielding function. E.g., In re Smith, 656 F.2d 1101 (5th Cir. 1981); Briggs, 514 F.2d at 803; United States v. Anderson, 55 F. Supp. 2d 1163 (D. Kan. 1999). Thus, the Zuma case demonstrates that a

[35] See Andrew D. Leipold, Why Grand Juries Do Not (and Cannot) Protect the Accused, 80 Cornell L. Rev. 260, 270 (1995) (describing the "shielding" function as a grand jury's "raison d'être"); see generally Phillip E. Hassman, Authority of Federal Grand Jury to Issue Indictment or Report Charging Unindicted Person with Crime or Misconduct, 28 A.L.R. Fed. 851, 857 (1976); see also Roots, supra note 25, at 821 (arguing that, theoretically, the grand jury should act as a check on the government, serving as a watchdog against arbitrary and malevolent prosecutions). For a general description of the grand jury's operation and purpose, see United States v. Calandra, 414 U.S. 338, 343 (1974); Wood v. Georgia, 370 U.S. 375, 390 (1962).

named unindicted co-conspirator may be labelled a criminal in the eyes of the public, regardless of whether the defendants are found guilty. In other words, the unindicted co-conspirators may be in a worse position than the indicted defendants.

Most prosecution offices including the US Department of Justice have long maintained strong policies against identifying suspects in pending investigations. For instance, the United States Attorneys' Manual[36]generally recommends against naming unindicted co-conspirators in a grand jury indictment:

> Ordinarily, there is no need to name a person as an unindicted co-conspirator in an indictment in order to fulfill any legitimate prosecutorial interest or duty. For purposes of indictment itself, it is sufficient . . . to allege that the defendant conspired with 'another person or persons known.' The identity of the person can be supplied, upon request, in a bill of particulars. . . . With respect to the trial, the person's identity or status as a co-conspirator can be established, for evidentiary purposes, through the introduction of proof sufficient to invoke the co-conspirator hearsay exception without subjecting the person to the burden of a formal accusation by a grand jury.
> In the absence of some significant justification, federal prosecutors generally should not identify unindicted co-conspirators in conspiracy indictments. Id. at 9-11.130.

Similar to the guidance for federal prosecutors generally, the Manual counsels grand juries to avoid naming unindicted co-conspirators in formal indictments in all but the most unusual circumstances. See id. at 9-27.760 ("[I]n the absence of some significant justification, ***it is not appropriate to identify . . . a third-party wrongdoer unless that party has been officially charged with the misconduct at issue***. In the unusual instance where identification of an uncharged third-party wrongdoer during a plea or sentencing hearing is justified, the express approval of the United States Attorney or his designee should be obtained prior to the hearing absent exigent circumstances."). One major reason for this policy is lots of "suspects" turn out to be perfectly innocent - yet the stigma of the "suspect" label may linger after they are publicly exonerated.

There were virtually no safeguards against adverse publicity and no restraints on Ngcuka during the investigatory stage of the Zuma case. The cult of celebrity prosecutor asserted itself and the NPA violated the most basic principles observed by prosecutors throughout the civilized world. What happened to Zuma would never have happened to any citizen in a civilized country where the presumption of innocence is accepted as a constitutional principle. South Africa must design effective mechanisms to prevent publication of unwarranted charges against an innocent target of an investigation whom the prosecutor may ultimately decide not to indict. In our country, just like in other mature democracies human dignity is a basic constitutional value and every person is presumed to be innocent until he or she is proven guilty in a court of law. The National Prosecuting Authority handling of the Zuma case was deplorable and was dogged by numerous unauthorized leaks to the media and some

[36] See Department of Justice, United States Attorneys Manual 1-1.100 (1997), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title1/1mdoj.htm (last visited Oct. 12, 2003) [hereinafter USAM] (explaining that the USAM is a reference guide on policies and procedures for United States Attorneys, Assistant United States Attorneys, and Department attorneys in charge of prosecuting federal law violations). The Manual is for internal Department of Justice advising only and does not "create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." Id.

persons in that office kept flouting the prohibition against the disclosure of information – this continued even until this day. The incalculable damage to the credibility of our justice system- The NPA added it was well aware of allegations that it (the NPA) was being used by certain individuals to advance a political agenda. Zuma's case has the unique distinction of being the only case where a state prosecutor publicly accused a citizen of criminal wrongdoing while at the same time maintaining that he had "prima facie evidence" of corruption but did not have a winnable case.

2.7 *The Courts By Allowing NPA's Conduct of Trial By Proxy and Public Branding of Zuma As Shabir Shaik's Inindicted Co-Conspirator Without Affording Zuma A Forum In Which to Vindicate his Rights Violated Zuma's Constitutional Rights (Sections 9, 10, 12 and 14, 34), His Right to Due Process, the Right to A Presumption of Innocence And As Such Constitutes Abuse of Process.*

In considering the circumstances relevant to the Zuma case, the aggravating factors of demonstrable prosecutorial misconduct and violation of Zuma's constitutional rights make the case for dismissal even more compelling. It seems that the prosecuting authorities and the courts took the laissez faire approach that allegations of Zuma's criminal wrongdoing could be fully ventilated during Shaik's trial without regard to Zuma's constitutional rights. So long as Zuma was not publicly charged or indicted, he was not considered an "accused" and as such had no standing worthy of recognition. In addition, since the trial was taking place in a court-room open to the public and members of the media, so the logic went, everything was fair game and press freedom had to be allowed to trump the unindicted co-conspirator's constitutional rights. Unfortunately, the problem with this approach is that the intense media coverage seemed to have overwhelmed the courts and the prosecution to a point where all participants suffered a collective amnesia about our constitution. Besides the gross prosecutorial missteps at the press conference, the conduct of the trial by proxy was carefully designed to produce the type of prejudice that Zuma suffered here.

As the US courts make clear, the same balancing test occurs no matter if the unindicted co-conspirators' names appear in the indictment, the bill of particulars, any other pretrial filings, or in sentencing filings. The operative problem that triggers the balancing test enunciated in Briggs is the situation where a person or entity has been singled out and identified as a participant in criminal activity, but that person or entity does not have a forum to attempt to vindicate themselves from that allegation. The particular filing where this labelling occurs is not relevant. For instance, courts have engaged in a balancing of the uncharged third parties' privacy and reputational interests where the government publicly named them in the indictment, see Briggs, 514 F.2d 794, in a factual resume during the plea colloquy, see In reSmith, 656 F.2d 1101, and in a pretrial memorandum of support, see Anderson, 55 F.Supp.2d1163, in an attachment to a bill of particulars, see Smith, 776 F.2d 1104. But see United States v. Crompton Corp., 399 F.Supp.2d 1047 (N.D. Cal. 2005) (finding that a plea agreement is not criminal, but contractual in nature, and that the inclusion of a person's name in the plea agreement to indicate that the

person does not have non-prosecution protection does not allege any criminal activity on the part of that person, thus not impinging any due process rights). [37]

In the case at bar, the violation is even more egregious because he was tarred and feathered at a press conference held for the ostensible purpose of announcing the prosecution's decision not to indict him. Unlike in Anderson, where court found the government might have 'forgotten' the presumption of innocence by identifying unindicted third parties in a pretrial memorandum "a public pleading", the NPA in Zuma's case used the media precisely for the purpose of inflicting reputational damage on Zuma. Having done so, it then orchestrated even the media coverage of the trial ensuring that every negative or damaging testimony about Zuma is given notoriety. However, no matter the form that the NPA chose to publicly identify the Zuma, the public identification of an alleged unindicted co-conspirator clearly implicates his privacy, reputational and economic interests. The NPA's strategy of charging Shabir Shaik alone and then using his trial as a trial by proxy for Zuma has already been questioned by several judges of our highest courts but it now needs to be brought as part of an argument on a motion to dismiss.

In this case, the public smear accomplished by the public naming of Zuma and announcing the sufficiency of the evidence of his criminality at a press conference was even more heinous. In Briggs and the other cases, the branding that was accomplished by publicly naming the unindicted co-conspirators was that of 'criminal.' The Briggs Court found that the unindicted co-conspirators had a due process right to "protect their reputations ... against the opprobrium resulting from being publicly and officially charged by an investigatory body of high dignity with having committed a serious crime." Briggs, 514 F.2d at 799. In In re Smith, the Fifth Circuit was again concerned with the public naming of the petitioner which "implicated [him] in criminal conduct without affording him a forum for vindication. 656 F.2d at 1106-07. Furthermore, in Anderson, the court was concerned with the unindicted co-conspirators damaged reputations from "being labeled as criminal co-conspirators." 55 F.Supp.2d at 1168. In this case, however, the damage to the reputation of Jacob Zuma as unindicted corrupt politician is two-fold. First, as stated in the aforementioned cases, the unindicted person is branded as "criminal" with all the accompanying damage to his reputation. Also, however, because of the nature of this case, the unindicted co-conspirators is labeled as "corrupt politician" who takes bribes and ethnic stereotypes such as "being controlled by Indians" were invoked, thus multiplying any damage done to Zuma's reputation and good names. The naming of the Zuma, a liberation struggle hero, as a corrupt politician who accepts bribes is a huge stigma, and "*an official branding of a person*" of the most "*degrading and unsavory label.*" See Briggs, 514 F.2d at 798. Even though the stigmatization in Briggs pales in comparison to Zuma, the court in that case remarked that "*the offenses charged... were peculiarly offensive*" as *"[a]n alleged conspiracy to disrupt the national nominating convention of a major political party strikes at the core of democratic institutions.*" In Zuma's unique case which takes place in country still marked by extreme poverty and

[37] That case also strongly holds that "[d]istrict courts cannot refuse to expunge the name of an unindicted coconspirator from an indictment because no government interest is sufficient to justify 'stigmatizing private citizens as criminal' without affording them 'access to any forum for vindication.'" Crompton Corp., 399 F.Supp.2d at 1049(quoting Briggs, 514 F.2d at 804).

deprivations for the majority of its black citizens, a liberation struggle hero being accused or raking in millions in corrupt deals and self-enrichment scheme is 'peculiarly offensive,' striking at the core of our nascent democracy. See id. at 799. Furthermore, the Zuma case specifically has gained wide notoriety through many media outlets, thus increasing the damage done to the alleged unindicted co-conspirator's privacy, reputations and economic well-being. See id. (finding widespread coverage of the trial increased the damage done to the reputation of the unindicted co-conspirators). As in In re Smith, where "*the news media carried many accounts concerning the ... bribery scandal, and,... [where] the news media reported that, as a matter of public and official courtroom record*," the defendant was involved in the scandal, here the mainstream media have misled even the courts to adopt the same terminology in describing Zuma as having a "generally corrupt relationship" with Shaik. This has even caused a major embarrassment to our judicial system in a manner that underscores the irreparable nature of the harm visited upon Zuma.

It should be noted that while the Fifth Circuit and other courts have employed a balancing test of the interests involved in determining if there has been a Fifth Amendment violation, the courts have found that there is unequivocally no legitimate governmental interest in publicizing the names of unindicted co-conspirators during pretrial proceedings. The Fifth Circuit has held that there are not any "legitimate interests of the government that are served by stigmatizing private citizens as criminals while not naming them as defendants or affording ... affirmatively opposing access to any forum for vindication." Briggs, 514 F.2d at 804 (finding that "[t]he Department of Justice suggests nothing that rises to the dignity of a substantial interest"). See also In re Smith, 656 F.2d at 1106 (finding that no "legitimate purpose could have been served by these official condemnations"); Crompton Corp., 399 F.Supp.2d at 1049 ("[N]o government interest is sufficient to justify stigmatizing private citizens as criminals without affording them access to any forum for vindication."). In Anderson, the court found that "the very real stigmatization suffered by the movants from this government action far outweighs the nonexistent government interest in publicly naming them as coconspirators." 55 F.Supp.2d at1168 (emphasis added).

Therefore, as in those above cases, there is nothing that the NPA can offer in Zuma's case that would "rise to the dignity of a substantial interest." See Briggs, 514F.2d at 804. The question, remains, however of what the NPA's real motive was in publicizing the "prima facie evidence" and its decision not to indict Zuma. It is clearly evident that the public smearing of Zuma, as an unindicted co-conspirator and as having a criminal a "generally corrupt relationship" with a person convicted of corruption and bribery has severely damaged Zuma's reputation, good name, and dignity. It is true that Judge President Craig Howie's qualified statement during the Shaik appeal that**: "*Even if Mr Zuma was unaware of the request or had not agreed to accept the bribe there was nevertheless proof of commission by Mr Shaik of all the necessary elements of the offence charged.*"** However, a member of the public can read the judgment by the appeal court as implying that then ANC Deputy President Jacob Zuma was on trial when in fact was denied that opportunity and had never appeared in court on the matter when Judge Hillary Squires issued his verdict in 2005 on the Shaik trial.

Furthermore, the overall effect of Zuma's stigmatization of being branded a criminal and a corrupt politician even by our courts and without any pretence of a due process hearing has been quite severe and has been nothing short of perverse. Politicians from most major political parties (such as DA's Zille, the zany zealot) and the media have completely forgotten South Africa has a constitution which is the supreme law of the land. They have essentially called for Zuma to waive his procedural due process rights and to "prove his innocence" at a public trial. The perversion of our justice system and undermining of the rule of law by these elements is directly attributable to the failure of our judicial system to reign in the errant prosecutors when the first signs of unconstitutional conduct manifested themselves.

As stated above in the Fifth Amendment section, the government does not even have a mere legitimate interest in the pretrial publication of the names of the unindicted co-conspirators, much less a compelling interest. While demonstrating the admissibility of the co-conspirator statements may rise to a compelling interest if it was done under seal, the public naming of the unindicted co-conspirators invalidates any government interest. Publication of the names of the co-conspirators only serves to smear and stigmatize the names of uncharged parties, and there are no "legitimate interests of the government that are served by stigmatizing private citizens as criminals while not naming them as defendants." See Briggs, 514 F.2d at 804. I have argued below that the courts have rendered a fair trial for Zuma impossible.

2.8 The NPA's Trial Tactics including Zuma's Trial By Proxy, and The Trial Courts' Failure to Employ Prophylactic Measures During All Stages of the Shaik Trial Are All in Violation of International Norms and our Constitution and Have Irreparably Damaged Zuma's Chance of A Fair and Impartial Trial.

There is absolutely no doubt that international jurisprudence would regard the process of trial of Zuma by proxy in the court of world opinion and in a court of law during the Shaik trial as totally inimical to due process and inconsistent with civilized norms. At a minimum, and as international jurisprudence shows, our courts may not sit idly by like potted plants when faced with potential egregious violations where a trial the constitutional rights of uncharged third parties would be jeopardized by having them identified by name during the course of criminal proceedings which amount to trial by proxy.

As the Briggs court stated:

> ***"Visiting opprobrium on persons by officially charging them with crimes while denying them a forum to vindicate their names… is not a governmental interest that we can accept or consider. It would circumvent the adversary process which is at the heart of our criminal justice system and of the relation between government and citizen under our constitutional system. It would be intolerable to our society.***"
> Id. at 805 (emphasis added).

As another US court, In re Smith, succinctly stated, ***"no possible legitimate purpose could have been served by these official condemnations."*** To paraphrase again, regardless of what criminal charges may have been contemplated by the NPA against Zuma for the future, we completely fail to perceive how

the interests of criminal justice were advanced at the time of the Shaik hearings by such an attack on Zuma's character and the claims about alleged "corrupt relationship." When that happened, the court in In re Smith reminds us, the *"presumption of innocence, to which every criminal defendant is entitled, was forgotten"* by those who uttered statements which implicated Zuma *" in criminal conduct without affording him a forum for vindication"*. Id. at 1106-07. Make no mistake about it- the prejudice to Zuma was far more than the "*drafting and reading aloud in open court the factual resumes which implicated the Petitioner in criminal conduct"* condemned by the court in In re Smith. It certainly involved conduct more egregious than the "the public naming of unindicted co-conspirators in an indictment by a grand jury" disapproved in United States v. Briggs.

These cases also teach us that it is the non-delegable duty of our judiciary during trials to be alert and to be sensitive to the interests of unindicted third parties who may eventually be prosecuted before the courts. The trial court had a non-delegable duty and a compelling governmental interest in making sure its own process was not utilized to unnecessarily jeopardize the privacy and reputational interests of the named individuals. As shown above, a number of other cases also held that protection of an unindicted co-conspirator's privacy rights is a compelling governmental interest that overrides the press' right to access. Their admonitions go even further – they teach us that a public smearing of a person's reputation by the government without affording that person any chance to clear his name is a violation of due process guarantees, no matter if it occurs in an indictment or in any other official government filing, in the course of a court-room trial or even in an appeal to the highest court in the land.

In Zuma's case, there is an even more compelling reason for the court to show its strong disapproval of the NPA's actions. Had the prosecution team been more candid and forthright with Judge Squares about their future intentions to prosecute Zuma, the judge would probably have put in place some prophylactic measures designed in "***the interests of justice pertinent to the pending trial to minimise, if not eradicate, the risk that popular perception will regard the crucial question in the Zuma case as having already been made"*** as the SCA observed. The NPA's cloak and dagger strategy deceived all involved. The NPA falsely stated to Zuma that he would not be prosecuted and prevented him from asserting his extremely limited "rights" during the Shaik trial. Further, the NPA deceived Shaik's team and rendered Zuma useless as a witness to Shaik during that trial. Absent an unequivocal grant of immunity by the NPA to Zuma it would have been ill-conceived and highly risky for Zuma to testify for Shaik without waiving his constitutional rights, including rights to silence and against self-incrimination. Most egregious it deceived the trial judge. It is highly unlikely that Judge Squires would have failed to take appropriate measures to protect Zuma's rights to a fair trial if the NPA had been candid about its future intentions to prosecute Zuma upon the conclusion of the Shaik trial. The fact is that the trial court did not do so because the NPA failed to level with Judge Squires. To complicate the matter even further, Shaik has now been rendered useless as a witness for Zuma and his allegedly deteriorating health makes it unlikely that he would be available as a witness during a Zuma trial.

Even assuming arguendo, that mentioning Zuma's name in the court-room itself was somehow justified, that would not justify a wholesale trial by proxy and virtual pronouncement or finding of guilt on Zuma's part without even affording him a hearing. That certainly would not obviate the court's duty to employ prophylactic measures to protect Zuma's interests including a right to privacy, presumption of innocence and fair trial. An appropriate court order could have included call for restraints on the media, and the court's immediate, firm and unequivocal repudiation of the statements attributed to it by the media. This would have required proactive action by Judge Squires to immediately set the record of his judgment straight as opposed to waiting until after the SCA had erroneously attributed the generally corrupt relationship comment to him months later.[38]

It is also a matter of record that the trial court was prevented by the NPA's strategy from taking appropriate measures during Shaik's trial to balance the interests of the NPA in naming and putting Zuma on trial in absentia as an unindicted coconspirators against the individual harm to Zuma that stems from being accused without having a forum in which to obtain vindication. The court could have done what was done in United States v. Anderson, 55 F.Supp.2d 1163 (D. Kan. 1999), where after the filing of a bill of particulars naming the third parties, "[t]he *government's identification of the movants as coconspirators was notoriously reported in the legal and healthcare community*." Id.at 1165-66. Following the precedent of Briggs and In re Smith, the court undertook a due process balancing inquiry and found that the movants suffered serious injury as "*there were numerous press reports affecting the movant's good names and reputations*. It is undisputed that the movants here are widely known and highly respected health care lawyers, and the government has not tried to refute their claim that being labeled as criminal coconspirators injured their reputations." Id. at 1168. The court ordered the unindicted coconspirators' names expunged from a pretrial memorandum and from the trial transcripts. Furthermore, while the government insinuated that the identification of the co-conspirators was part of an effort to illustrate the admissibility of the evidence it intended to enter under the co-conspirator hearsay exception, the court finds that "the government ***provides no explanation for why its moving papers were not submitted under seal.***" Id. at 1168n.5. In the Shaik case, the court ignored an unacceptably high risk that the NPA strategy would subject Zuma "***to the torture of public condemnation, loss of reputation"*** and that unrestrained vitriolic press statements and in-court statements would leave Zuma "***just as defenseless as the medieval prisoner and the victim of the lynch mob***." See Briggs, 514 F.2d at 803. The finger of blame must inevitably point to the NPA which failed to play fair and in strict adherence with the rules. The mere fact that the NPA's employed a cloak and dagger strategy and concealed from the court its future intentions to prosecute Zuma is certainly a compelling reason to find an abuse of the process of the court.

[38] This Rip van Winkle approach also caused further damage to our political institutions as President Mbeki relied on the alleged court findings about Zuma in firing him. As made clear by international jurisprudence, Mbeki's statements implying that a "court judgment" has found evidence of impropriety or guilt on Zuma's part were a direct outcome of trial of Zuma by proxy and in total disregard of the presumption of innocence principle.

To be sure, incalculable harm to our criminal justice system was caused by the NPA's unusual and bizarre decision not to charge Shaik and Zuma together while it maintained that they were co-conspirators. In this regard, the Supreme Court of Appeal has made certain observations that are likely to be valuable to Zuma in arguing for a dismissal. Judge Howie in the **SABC v Downer SC NO & others [2006]** case made certain observations which are very helpful to Zuma for the purpose of framing his argument for a motion to dismiss. First, the judge questioned the NPA's decision not to charge Zuma together with Shaik and stated "*Considering next the problem of the pending Zuma trial, it is not apparent why the prosecuting authorities did not charge both accused in one case. Their present predicament could well be of their own making*." Second, it is standard practice in most legal systems that, where practically possible, alleged co-conspirators must be prosecuted together in the same trial. A reason for the alleged co-conspirators being tried together is that it is in the interests of justice that all evidence that may be adduced by the different accused be presented to the court when it decides the question of guilt. It is for this reason that the practice of joint trials is widely accepted in most legal systems. Judge Howie then went on to say that "***although Zuma's alleged guilt is not in issue in the pending criminal appeal discussion and consideration of the case against the second respondent will necessarily involve exhaustive reference to Zuma and may even appear to the outside observer or listener to portray him as a co-accused and even as criminally liable. Obviously it will not be anyone's intention in the pending criminal appeal to consider or pronounce upon Zuma's alleged guilt but again it is in the interests of justice pertinent to the pending trial to minimise, if not eradicate, the risk that popular perception will regard the crucial question in the Zuma case as having already been made.***" Unfortunately the court's observation was too little and too late. The damage had already been done. The phrase "generally corrupt relationship" was coined by the media and later adopted by the SCA which then attributed it to Judge Squires who was in turn forced to publicly deny it.

An unindicted person who has been openly accused by the government of criminal activity not only has a constitutional right to the presumption of innocence but he also has strong liberty and security of person interests which include his reputations, good names and economic well-being. Furthermore, the NPA knew or should have known that the court records did not support the comments erroneously attributed to Judge Squires by the press and later by the SCA. The NPA's failure to issue a public statement setting the record straight is an additional aggravating factor that militates strongly in favour of a finding of abuse of process.

As the Smyth v. Ushewokunze case unequivocally states, the duty to maintain an "***impartial court***" must be construed so as to embrace a requirement that not only the adjudicating body but also the prosecution exhibit fairness and impartiality in its treatment of an accused person. The prosecutor as an officer of the court forms an indispensable part of the judicial process – he is duty-bound to correct false media statements about the court in which he participated especially statements having serious implications for the integrity of the court itself. The NPA could not cavalierly sit back with deafening silence in order to derive maximum propaganda benefit from erroneous media statements which subjected

Zuma "***to the torture of public condemnation, loss of reputation."*** When viewed in light of the fact that the "generally corrupt relationship" statement emanated from the NPA and the fact that the NPA never shied away from media spotlight and was never short on press releases, the NPA's failure to promptly correct the false media statements appears to have been aimed at inflicting maximum damage on Zuma. After all, the statement if attributed to a judge gives judicial imprimatur to the NPA's action and vindicates its strategy even if it involved foul blows!

Without question, our justice system can only function properly if those charged with upholding its integrity are dissuaded from cloak and dagger activities through a firm and unequivocal message emanating from our courts. The constitutional implications and the damage done to our judiciary by the Shaik and Zuma cases will linger for some time to come. The Zuma case involved unrestrained use of the media and adverse publicity by government agencies against a citizen and the failure of our courts to implement effective controls or measures to stop its abuse. This was a sustained and relentless adverse publicity which imposed a deprivation on a citizen without the due processes of law normally associated with government action. Appeals, judicial review and even press statements by the presiding judge Squires cannot undo the widespread effects of the violations of Zuma's right to a fair trial. As Judge Msimang correctly observed, the treatment Zuma received was an aberration and should not be accepted by our courts. He stated: "the problem with ***this kind of prejudice is that it closely resembles the kind of punishment that ought only to be imposed on convicted persons and is therefore inimical to the right to be presumed to be innocent enshrined in the Constitution***. Much as such prejudice is inevitable in our criminal justice system, the accused's right to a trial within a reasonable time demands that the ***tension between the presumption of innocence and the publicity of trial be mitigated***."

To make matters worse, Judge Squires was later put in an embarrassing situation and took the unprecedented step of having to issue a press statement distancing himself from statements in official SCA court decisions erroneously attributed to him even by the SCA itself. Imagine the catastrophic crisis of confidence in our judiciary if the following scenario occurs in the envisaged Zuma trial: Suppose the Zuma case results in a dismissal or an outright acquittal, which means that the presumption of innocence is never rebutted. There would therefore be no problem in the court in which the trial takes place. Suppose all the evidence and arguments on the merits in the Zuma case clearly and convincingly show that there was no "corrupt relationship" between Zuma and Shaik at any time. And suppose that the trial court makes that finding on the facts and the law. The only blemish on Zuma's character would be the Supreme Court of Appeal decision (which gives the unfortunate impression that the SCA itself later relied on media statements) claiming that Judge Squires ruled that a "generally corrupt relationship" existed between Zuma and Shaik even though Judge Squires' judgment contained no such finding. Would anyone alive be able to fathom the damage to the integrity of our judicial system at that point. Given that even the highest courts have now compounded the problem by taking judicial notice of non-existent facts, why should Zuma and his supporters not believe that his goose is already cooked even before trial starts? As a corollary, why would an acquittal in Zuma's case not call into question the integrity of the Shaik

trial or vice-versa? Even if the SCA belatedly corrects its records and strike references to Zuma, the indelible impression on the public imagination has been created. The point is that international jurisprudence makes it abundantly clear that even the SCA itself has already violated Zuma's right to the presumption of innocence such that his forthcoming trial cannot by any stretch of the imagination be deemed fair. Let me deal with the SCA statement and its ramifications next.

2.9 International Jurisprudence and Section 35 (3) of the South African Constitution Fully Support A Dismissal of Zuma's Case Because of the Ruling By Judge Squires and the SCA's Statement - All In Violation of the Presumption of Innocence.

I start with a bedrock principle- many of the international acts or treaties to which South Africa is a party include language providing for the presumption of innocence, and these acts constitute an inalienable part of South Africa's body of legislation. The supreme law of our land, the constitution, could not be clearer in that regard. Section 35 (3) provides **a right to a fair trial which obviously includes the right to presumption of innocence.**

Accordingly, it is imperative that we examine international jurisprudence to see how other courts have dealt with similar issues under comparable circumstances. In this section, I am not concerned with the majority of the US, UK, Canadian and New Zealand cases surveyed which suggest that the primary focus of the courts considering application for a stay or motions to dismiss on the grounds of adverse pre-trial publicity were mainly concerned with securing a jury pool unpolluted by outside influences. I am dealing with the court's own statements suggesting a violation of the presumption of innocence by the judges and their constitutional implications. The pivotal question is this: Given that South Africa has no jury trials and adverse pre-trial publicity can be presumed not to affect judicial fact-finding and given that the SCA in its decision on a matter involving Shaik seems to have adopted the lexicon used by the media to label an unindicted would-be defendant as having a "generally corrupt relationship" with a convicted alleged co-conspirator, have Zuma's constitutional rights to a fair trial been violated by the NPA, the trial court and the SCA itself? If so what are the implications for Zuma's forthcoming trial and as a corollary what are Zuma's remedies?

The answer to the puzzle lies in Strasbourg jurisprudence (the decisions of the European Court of Human Rights) and is limited to the judge's statements during trial or appeal (not jury verdicts). As a general rule, the presumption of innocence will be violated if, without the accused's having previously been proven guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, **a judicial decision** concerning him reflects an opinion that he is guilty. ***This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty.*** The question is whether the judgment of Squires and the SCA on the Zuma matter suggest that the courts regard Zuma as guilty? The answer again is unfortunately in the affirmative.

The decision of the European Court of Human Rights in Minelli v. Switzerland (1983) 5 EHRR 554 makes this concept perfectly clear. Minelli, a Swiss journalist, wrote an article in a Basel newspaper alleging fraud against a company and a director of that company. The company and that director brought a private prosecution against Minelli. But it was terminated before trial by reason of the expiry of a statutory limitation period. The domestic court decision reflected an opinion that he was guilty: "*the incidence of costs and expenses should depend on the judgment that would have been delivered*", the newspaper article complained of would "*very probably have led to conviction*". The appeal court judgment did not alter the meaning or scope of the first-instance court's reasoning. On their view of the probable outcome of the prosecution if it had proceeded to trial, the Swiss courts ordered Minelli to pay part of the court costs and part of the private prosecutors' costs. All this came to a total of 1,574.65 Sfrs. Minelli took Switzerland to the European Court of Human Rights, and succeeded there. After examining the evidence, the European Court of Human Rights concluded:

> "37. ***In the Court's judgment, the presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty***.
>
> 38. … In this way the Chamber of the Assize Court showed that it was satisfied of the guilt of Mr. Minelli, an accused who, as the Government acknowledged, had not had the benefit of the guarantees contained in paragraphs 1 and 3 of Article 6. *Notwithstanding the absence of a formal finding and despite the use of certain cautious phraseology* ('***in all probability'***, '***very probably***'), the Chamber proceeded to ***make appraisals that were incompatible with respect for the presumption of innocence***."

Accordingly, the court held that there had been a violation of the presumption of innocence conferred by art. 6(2) of the European Convention on Human Rights. Minelli was awarded 8,688.65 Sfrs against Switzerland by way of reimbursement, costs and expenses in Strasbourg. This reasoning applies with equal force to Zuma's case and shows clearly that the SCA statements about Zuma's "generally corrupt relationship" with a convicted Shaik is a clear violation of Zuma's constitutional rights. The entirety of the High Court and SCA judgments reflect factual findings which unmistakeably suggest that Zuma was equally guilty of corruption. Any future so-called trial for Zuma can never be fair under the circumstances.

Another decision to similar effect is Böhmer v Germany [2004] 38 EHRR 19, where the court said:

> "54. **The *presumption of innocence will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court or the official regards the accused as guilty.***"

I gather from these authorities that the presumption of innocence would be infringed if a statement or conduct of a relevant authority states or ***implies*** that the person, who has been charged with an offence, is guilty of the offence. I wholeheartedly subscribe to the view that Section 35 (3) of the constitution must be interpreted in such a way as to guarantee rights which are practical and effective as opposed to theoretical and illusory. But the presumption of innocence is not a new concept. It lies at the heart of the common law. No doubt, the constitution gave it a higher normative value. It is above all a procedural safeguard in criminal proceedings. Its scope is more extensive, but one must not lose sight of the context in which the presumption of innocence arose. I am of the opinion, the test formulated by the European Court of Human Rights has given adequate recognition to this important presumption. It is true that the Swiss courts did more than deprive Minelli of costs and actually ordered him to pay costs. But the former as well as the latter can violate the presumption of innocence.

A defendant's right to be presumed innocent is one of the cornerstones of the right to a fair trial guaranteed under our constitution. The requirement that the accused be presumed innocent unless and until proved guilty in the course of a trial which meets all guarantees of fairness has enormous impact at a criminal trial. It means that the prosecution has to prove an accused person's guilt. If there is reasonable doubt, the accused must not be found guilty. Article 66(3) of the ICC Statute provides: "In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt." The conduct of the trial must be based on the presumption of innocence. Judges must conduct trials without previously having formed an opinion on the guilt or innocence of the accused and must ensure that the conduct of the trial conforms to this. (***The right to be tried by an impartial tribunal***.). In Zuma's case, the trial will commence with the public, the court and even Zuma having the full knowledge that Zuma was deemed by the highest courts to have a "generally corrupt relationship" with a co-conspirator who has already been convicted on the very charges being preferred against Zuma. Cosatu and the South African Communist Party (SACP) have correctly seen the violations of Zuma's rights from the very beginning.

The European Court of Human Rights (the ECtHR) has examined a number of alleged violations of the presumption of innocence and consequently established standards for the practical application of this presumption. By stressing its crucial role within the right to a fair trial, the ECtHR has clearly spelled out that the presumption of innocence "requires, inter alia, that *when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged;* the burden of proof is on the prosecution, and any doubt should benefit the accused." Barbera, Massegue and Iabardo v. Spain, ECtHR judgment of 6 December 1988, para. 77. The presumption of innocence applies throughout criminal proceedings, regardless of their stage. If the presumption of innocence is violated, in particular by an officer of the court or the judges themselves, the entire notion of a fair trial becomes devoid of meaning – end of story.

The statements in Minelli V. Switzerland, constituted a violation of the presumption of innocence because the decision of the national Court concluded that in the absence of statutory limitations the case

would "very probably have led to the conviction" of the applicant. ***Minelli v. Switzerland***, ECtHR judgment of 25 March 1983, para 37. The ECtHR deemed that the presumption of innocence would be violated if: "[…] *without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty*." Id. [emphasis added].

Zuma's case cried out for extra caution - It suffices, in the absence of a formal finding, that there is some reasoning suggesting that the court or the official in question regards the accused as guilty, while a premature expression by the tribunal itself of such an opinion will inevitably run foul of the said presumption (see, among other authorities, Deweer v. Belgium, judgment of 27 February 1980, Series A no. 35, p. 30, § 56, Minelli v. Switzerland, judgment of 25 March 1983, Series A no. 62, §§ 27, 30 and 37, Allenet de Ribemont v. France, judgment of 10 February 1995, Series A no. 308, p. 16, §§ 35-36 and Karakaş and Yeşilırmak v. Turkey, no. 43925/985, § 49, 28 June 2005). Article 6 § 2 governs criminal proceedings in their entirety, "irrespective of the outcome of the prosecution" (see Minelli v. Switzerland, cited above, § 30).

As regards possible NPA argument that the impugned wording of the SCA was an obvious mistake, or an imprecise formulation, or erroneous attribution, the answer must be clear and unambiguous. There is a fundamental distinction to be made between a statement that someone is merely suspected of having committed a crime and a clear judicial declaration, in the absence of a trial or final conviction, that the individual has committed the crime in question. Every kindergartener would understand the implication of the SCA statement: if Shaik was convicted for corruption on the basis of a "generally corrupt relationship" with Zuma, then it follows that Zuma must, at least in the court's opinion, be guilty of corruption as well. The fact that the Shaik was ultimately found guilty and sentenced to 15 years in prison cannot vacate Zuma's initial right to be presumed innocent until proven guilty according to law, especially because he was denied the chance to be a participant by the NPA's own litigation strategy. As noted repeatedly in the Strasbourg jurisprudence, Article 6§2 governs criminal proceedings in their entirety, "irrespective of the outcome of the prosecution." See, Minelli.

The actions of judges are, however, of particular importance since, in addition to their obligation to observe the presumption of innocence, they are also under an obligation to preserve the appearance of impartiality. To maintain public confidence in the farness of a trial, judges must avoid even the appearance of bias against a defendant. In Kyprianou v. Cyprus, (ECtHR judgement of 15 December 2005, para 120), the ECtHR summarised its practice: "The Court has held for instance that the judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. […] Thus, where a court president publicly ***used expressions which implied that he had already formed an unfavourable view of the applicant's case before presiding over the court that had to decide it, his statements were such as to justify objectively***

the accused's fears as to his impartiality (see Buscemi v. Italy, cited above, § 68). On the other hand, in another case, where a judge engaged in public criticism of the defence and publicly expressed surprise that the accused had pleaded not guilty, the Court approached the matter on the basis of the subjective test (***Lavents v. Latvia, no. 58442/00***, §§118 and 119, 28 November 2002)."

The misguided and misconceived opinions by others that Zuma must wait for a trial on the merits in order to have his name cleared must be rejected categorically. In this respect, the jurisprudence of the European Court is squarely on point. If a person is acquitted of a criminal offence (even if on 'technicalities") by final judgment of a court, the judgment is binding on all state authorities. Therefore, the public authorities, particularly prosecutors and the police, should refrain from implying that the person may have been guilty, so as not to undermine the presumption of innocence, respect for the judgments of a court and the rule of law. The European Court of Human Rights found that the presumption of innocence had been violated when, after an accused was acquitted, Austrian courts voiced suspicions about his innocence when explaining a decision to refuse compensation for pre-trial detention. [***Sekanina v. Austria,*** 25 August 1993, 266-A Ser. A]. The European Commission found that the presumption of innocence had been violated when a Swiss court ordered the accused to pay part of the investigation and court costs on the ground that the court considered the accused had committed offences, even though criminal proceedings were discontinued because the prosecution had not been completed within the required time limit. [***I. and C. v. Switzerland***, (10107/82), 4 December 1985, 48 DR 35].

2.10 Calculated Pre-indictment Statements That A Prima Facie Evidence Existed Against And Failure To Charge Zuma Until After The Conclusion of Shaik's Case As Abuse of Process.

Courts have under various circumstances rule that a delay in informing the defendant of the possibility of prosecution can amount to an abuse (R. v. Bow Street Stipendiary Magistrate, ex p. DPP and Cherry (1990) 91 Cr. App. R. 283 and Chief Constable of Merseyside, ex p. Merrill [1989] 1 W.L.R.1077)[39]. The flip side of this coin in Zuma's case is: what if instead of merely delaying informing the defendant of the possibility of prosecution, the NPA actively misleads the defendant and actually announces to the entire world that it would not prosecute a defendant notwithstanding the existence of a "prima facie evidence of corruption"? What if instead of clarifying the seemingly contradictory statement or charging the defendant together with the person who allegedly offered him bribes and kickbacks, the prosecuting authority invites the defendant to watch the trial of the putative co-conspirator to figure out what the "prima facie evidence of corruption" as applied to defendant actually meant?

[39] Lord Donaldson of Lymington M.R. in Regina v. Chief Constable of the Merseyside Police ex parte Merrill [1989] 1 WLR 1077 at 1088 ruled that allegation of a failure to meet the standards set out in the Code of Conduct or a public complaint made against a police officer should be quickly and impartially investigated, and the officer informed of the allegation/complaint as soon as practicable. Referring to English regulations which required public complaints against police to be dealt with expeditiously he observed as follows:-"The public interest in complaints against police officers being fully investigated and adjudicated is undoubted, but it must be done speedily." In that particular case heard by the English Court of Appeal, Lord Donaldson, delivering the judgment of the court with which Woolf LJ (as he then was) and Sir Denys Buckley concurred, found on the facts that there was excessive delay and held that the disciplinary proceedings should be quashed, notwithstanding the view which he took that the time limits were all directory rather than mandatory.

As the case-law makes clear, pre-indictment delay and abuse of process cases are not simply limited to prejudice of the sort that impairs one's defense at trial. As explained earlier, the NPA's statements, its conduct of the Shaik trial and its handling of Zuma's case was unprecedented and the genesis of the phenomenon where its case limped from one disaster to another. The reason for the lack of case-law precedent in this area is because the manner in which the NPA has treated Mr. Zuma is unprecedented. Pre-indictment delay cases involving alleged co-conspirators, as a rule, do not involve public pronouncements about the quantum or quality of evidence that allegedly exists against a person the government expressly disavows the intention to charge. They certainly do not involve lengthy periods of pre-indictment sustained negative media campaign, statements from the NPA and "leaks" aimed at nothing more than increasing public condemnation of the accused as was done in Zuma's case. They certainly do not involve bizarre situations where a government announces to the world that one is an unindicted guilty crook walking for a lengthy period of time without having charges brought against him. As such, Zuma has suffered a prejudice never endured by another defendant in the history of our new democracy. The fact that Mr. Zuma has been singled out for worse treatment than any other defendant before him should not deprive him of the opportunity to claim prejudice that is readily apparent. But that is not all. The NPA's statement (through Ngwema) amounted to an acknowledgement that Shaik was being used as a guinea pig to put Zuma on trial by proxy. It also amounted to taking an unfair advantage of a technicality in that the NPA teased the public and aroused its curiosity about the so-called prima facie evidence of corruption and then invited all and sundry to watch Shaik's trial in order to appreciate the nature and extent of Zuma's criminal wrong-doing, that is, the "prima facie evidence of corruption" statement. Not surprisingly, when Shaik's trial ended with a conviction, the public was left with the indelible impression that judgment about Zuma's guilty has already been made by the courts. Even the president of our republic cited the existence of a "judgement of the court" as justification for firing Zuma and giving Zuma's job to the prosecutor's wife. There is therefore no question that a strategy of putting Zuma on trial by proxy was conceived and implemented by the NPA from the onset and that the Shaik's trial was, for all intents and purposes, a manipulation and misuse of the court's process to put Zuma on trial when he was not in a position to effectively mount a defense. This is confirmed by the alacrity with which the NPA filed charges against Zuma within a very short period after Shaik's conviction. This is a matter that Zuma must vigorously pursue to determine when the NPA made a decision to prosecute Zuma and what steps if any the agency took to inform Zuma of its decision and to protect his rights to a fair trial in the contemplated proceedings.[40]

[40] There is case law suggesting that tactical decision to delay an indictment may undercertain circumstances amount to a manipulation of the court's process. Unfairness may arise where prosecutors deliberately manipulate court procedures. In R v Rotherham Justices ex parte Brough [1991] C.O.D. 89, the prosecution had deliberately taken steps to ensure that a defendant who was charged with an offence that would be triable only on indictment in the case of an adult did not appear before the court until he had reached the age where the justices ceased to have a discretion whether or not to deal with him themselves. On the facts of the case, this was held not to amount to an abuse of process because the conduct of the prosecution showed, at most, a lack of judgment rather than misconduct or bad faith. Furthermore, there was no prejudice to the defendant because the justices would probably have committed the case to the Crown Court anyway, and in the event of conviction the judge would take account of the defendant's age at the time of the offence and the circumstances of his committal.

The NPA gained manifold advantages from the delay in indicting Mr. Zuma. By delaying the indictment of Zuma for an inordinate amount of time between 2003 and 2005 the government gained the greatest advantage of all: it had a trial of Zuma by proxy and had him essentially tried in absentia during the Shaik trial. Worst of all, it incapacitated Mr. Zuma without him being able to challenge the allegations against him and without the NPA having to expose itself to the risk and expense of a public adversary process. Trial by proxy is the quintessential abuse of the process of the court and an egregious constitutional violation which has variously been equated by some courts with a "lynching," "torture" and punishment.

Even if the court was to rule that prejudice does not need to be demonstrated in Zuma's case, it is absolutely crucial for Zuma to marshal all the facts pointing to such prejudice. After all, demonstrating that he has suffered prejudice, would be highly relevant to the overall issue of whether or not there had been a breach of his entitlement to a hearing within a reasonable time. Having demonstrated that Zuma has a very strong likelihood of demonstrating a breach of the right to trial within a reasonable time under the Strasbourg criterion, we must next consider whether or not that breach would entitle the defendant to secure a remedy of a stay of proceedings.

The starting point therefore for Zuma in the present case was August 2003 when he was publicly named and shamed by Ngcuka. In the circumstances, Zuma can rightfully complain that he has had the shadow of proceedings hanging over him for an unreasonable time and can rely on Judge Msimang's earlier ruling to support his claim that the NPA's lackadaisical approach has prejudiced him and destroyed his chances for a fair trial. Further, he can justifiably claim that a delay of 8 years between the alleged commission of the corruption offence and the lodging of the information against him in December 2007 is an unreasonable one.

Given the reported stories that the NPA boss vowed to have Zuma tried in the court of "public opinion" and Zuma's awareness of such stories, it cannot be said that the inordinate delay in lodging the initial case or in re-filing the new case after Judge Msimang's ruling was not due to strategic choice or inaction of the NPA. Zuma must contest every point raised by the NPA in this regard: He must stand firm on the argument (supported by the Strasbourg jurisprudence and Section 35(3) of our constitution) that being accused is not limited to being formally "charged" and that the term includes being officially alerted as to the likelihood of prosecution. He must challenge the NPA's argument that delay in charging him was a reasonable exercise of prosecutorial discretion. A reasonable prosecutor would not announce the existence of a prima facie case of corruption by a country's deputy president while at the same time stating he would not prosecute. A reasonable prosecutor would have known that accused persons charged with the same crimes are normally tried together, particularly in complex fraud or corruption cases, so as to avoid undue waste of time and resources. All the more so in bribery or conspiracy cases. In a bribery case, the prosecution was not entitled to misuse the Shaik trial to conduct trial by proxy for Zuma. In fact, it was obligated to deploy its resources with a view to getting these alleged co-conspirators tried

together. There was clear mala fides on the part of the prosecution accompanied by demonstrable and deliberate undermining of Zuma's constitutional rights as shown above. One cannot disregard the fact that investigation of the alleged criminal activities had commenced by 2000. It was almost six years before Zuma was formally charged and brought before a court. In determining the issue of undue delay, the court must be urged to take into consideration the time taken by the investigation process. The time span, from investigation in 2000 until the scheduled trial of this case in August 2008 must, by any stretch of the imagination, be characterized as undue delay. The prosecution has a discretion when to lay charges against a defendant. But a defendant is not left without a remedy. If a stale charge is laid, it could be stayed, if, for example, as a result of the delay a fair trial was no longer possible. That is possible either at common law or under Section 35(3) of the constitution. Even in a case where a fair trial was still possible but that the delay in charging was oppressive the defendant has his remedy at common law, including a permanent stay for abuse of process. This is exactly what Zuma's case is all about.

2.11 The NPA's Deals With Thetard and Thint Companies As Abuse of Process.

Another matter that may substantially impair Zuma's ability to conduct his defense is the most hotly contested issue in the Shaik trial, the "encrypted fax"[41] in Zuma's case. I am dwelling on the Thetard matter to make one point pellucid - Zuma's chance of a fair trial and the prejudice to him as a result of the state's handling of its case is enormous. The NPA's deceptive strategies of announcing that it would not prosecute Zuma despite the existence of a so-called "prima facie case' and then following that public announcement up with a strategy of charging only Shaik could have lulled Zuma into a false sense of security and prejudiced his rights in many incalculable ways. For instance, as a non-party to the proceedings, Zuma had no standing to call Thetard as a witness, to timeously challenge the deal between Thetard and the NPA, to take steps to preserve the evidence or Thetard's testimony or even to apply for evidence to be taken on commission as later suggested by the SCA or trial court later.

To put the genesis of the NPA's messy deal with Thetard in proper perspective, one is reminded that at the time when there was an outstanding warrant for Thetard's arrest, the NPA essentially struck a deal with Thetard and offered him some form of immunity, essentially a bribe which relieved him from the obligation to attend trial and to testify in South Africa. This was at the time when Thetard was a fugitive from South African justice but arguably at the time when the prosecution was in the best position to ensure his availability for trial, even if only as a witness. I am fully aware that France has a law against extraditing its own citizens but the NPA was not entirely without remedies. Instead of simply

[41] The state alleged that during September 1999 and at Durban, Shaik, acting for himself and the corporate appellants, met Alain Thétard, a Thomson executive, and that a suggestion was made that in return for payment by Thomson to Zuma of R500 000 per year, until dividends from ADS became payable to Shaik, Zuma would shield Thomson from the anticipated enquiry and thereafter support and promote Thomson's business interests in South Africa. The State alleged that the suggestion was then approved by Thomson's head office in Paris and that a seal was set on this arrangement at a meeting in Durban during March 2000 involving Thétard, Shaik and Zuma. This led to a document described in the evidence as "the encrypted fax" being sent by Thétard from Pretoria to Thomson's head office. An important issue is the admissibility of Thétard's original hand written draft of the faxed communication which the State alleges is a record of the conspiracy to corruption involving Thomson, Zuma and Shaik, which is central to this count.

withdrawing the arrest warrant, it could have offered the withdrawal subject to (a) Thetard being granted immunity to come and testify in South Africa and then (b) the arrest warrant being withdrawn only after he had testified. Most important, the NPA had a greater leverage over Thetard because it could still have asked France to prosecute him for his alleged corrupt activities in South Africa which is allowed under French law.

In an ironic twist, the NPA took advantage of its own self-imposed short-cuts and took advantage of a technicality - it put Thetard beyond the reach of Shaik and then argued that its hearsay evidence in the form of the infamous "encrypted fax" authored by Thetard should be admitted, get this, "***in the interest of justice***" because Thetard ***"refused to come to South Africa to testify."*** This blatantly misleading statement was never challenged by Shaik. He unfortunately failed to capitalize on this prosecutorial misconduct and instead based his objection simply on the fact that the "encrypted fax" was unreliable hearsay. Both the trial court and SCA swallowed the prosecution's proffered excuses hook line and sinker and short-shrifted Shaik's argument. The SCA eventually ruled that the encrypted fax was admissible "***in the interest of justice***" and noted that the "***evidence was tendered by the State to prove the offence in terms of the main charge under count 3 and was of vital importance to the State's case.***" The court went on to endorse the prosecution's fallacious claim by saying:

> "*the evidence was not given by Thétard* ***because he refused to come to South Africa to testify and because it was clear that he would deny that the fax correctly reflected his understanding of what happened at the meeting which, according to the fax, took place on 11 March 1999****. The appellants submitted that Thétard or Thomson could have been charged with them or that Thétard's evidence could have been obtained on commission or in some other way. In our view it is highly unlikely that the evidence of Thétard or his presence as a co-accused would have strengthened the appellants' case. As stated above the appellants themselves submitted in respect of the admissibility of the fax, albeit in the context of the probative value of the fax, that Thétard had been shown to be a dishonest person.* One illustration of such dishonesty is contained in a letter by him to Perrier dated 26 June 2003. ***In the letter he confirmed that he had met Zuma in Durban during the first quarter of 2000 at his official residence together with Shaik and stated that they only dealt with general matters regarding Thomson's Durban establishment. He added that he could not recall having written the fax. Subsequently, in an affidavit, he admitted that he was the author of the fax but stated that a bribe had not been discussed with Shaik and Zuma****; that the document was merely a rough draft of a document in which he intended to record his thoughts on separate issues in a manner which was not only disjointed but also lacked circumspection; that he crumpled it up after he had written it and threw it in the waste paper basket; that he never gave instructions that the document be typed; and that the amount of R500 000 related to a request for funds by Shaik unrelated to any bribe to Shaik or Zuma. Although he said that he did not agree with the construction placed on the fax he did not suggest any other than the obvious one. The appellants were likewise unable to suggest an interpretation inconsistent with a bribe; Delique testified that Thétard instructed her to type the document and to fax it in encrypted form; and the appellants admitted that the creases which appear on the original document were not caused by the document having been crumpled up in a ball as alleged by Thétard. In the circumstances, quite apart from the fact that Thétard indicated that he was not prepared to come to South Africa to testify,* ***the State could not have been expected to call him as a witness or to apply for his evidence to be taken on commission.*** **It**

> ***was open to the appellants to do so if they thought that his evidence would advance their case."***

And finally the court stated:

> "the appellants, however, contended that they were prejudiced by the admission of the fax ***because they had not had an opportunity to cross-examine Thétard.*** However, it could only be found that the appellants would be prejudiced in this respect if there appeared to be a reasonable possibility that cross-examination of Thétard would strengthen the appellants' case. In the light of what has been said in the preceding paragraph it is highly unlikely that cross-examination of Thétard would have rendered positive results for the appellants. All the indications were that cross-examination of Thétard would have served no other purpose than to reinforce the impression that he is dishonest and unreliable. In the circumstances the risk that the appellants would be prejudiced by not being given an opportunity to cross-examine Thétard was very slim."

To be fair, Shaik vigorously argued the issue of the denial of his right to cross-examine Thetard, and the SCA could only address arguments made by the parties. Typically, the question one asks in litigation usually determines the answer one gets. Imagine the outcome if the issues had been presented as follows: ***Shaik could have highlighted the prosecutorial actions of cutting an immunity deal with a co-accused or a material witness who is a fugitive from justice in a manner that made that witness forever unavailable in the criminal trial.*** He could then have asked the court, on the basis of established jurisprudence from around the world, whether it was consistent with the '***interest of justice***" for the prosecutor to manipulate the process and abuse its immunity granting powers the way it did. The court's answer would probably have been a resounding no. Instead, the lack of a robust approach and focus on the NPA's selective and self-serving use of its immunity-granting powers allowed the trial court and the SCA to side-step the issues altogether. The SCA went so far as to suggest that the burden of securing Thetard's attendance at trial fell on the defendant's shoulders and stated that the avenue of calling Thetard "***as a witness or to apply for his evidence to be taken on commission… was open to the appellants to do so if they thought that his evidence would advance their case."*** Shabir Shaik never made the argument that he should have been made, that is the NPA's case was alleging a conspiracy between Shaik, Thetard and Zuma but had openly stated it would not prosecute Zuma from the very beginning. That NPA decision itself raised constitutional equal protection issues which were not seized upon by Shaik. The NPA initially purported to charge the Thint companies but later withdrew the charges in exchange for an affidavit from Thales executive, Thetard and effectively granted him immunity from prosecution. The fact that the NPA had pulled the rug from under Shaik's feet and effectively denied him use of witnesses was never the subject of pre-trial motions to dismiss etc. I see the same lame-duck litigation approach lurking at the surface of the current Zuma case and one can only hope that we would not experience the disastrous outcome similar to Shabir Shaik.

Zuma has a compelling case and must highlight that the delay coupled with prosecutorial manipulations on the Thetard issue prejudiced him and violated his constitutional rights. Although

prosecutors have considerable discretion to request or deny immunity for witnesses previously charged in, but dismissed from, defendant's indictment, some courts have refused to countenance over-reaching tactics by prosecutors in analogous circumstances. US Courts have held that under certain compelling circumstances the rights to due process and compulsory process under the federal constitution require the granting of immunity to a defense witness to secure his/her presence at trial. The federal Circuit Courts of Appeals have developed two theories pursuant to which the due process and compulsory process clauses entitle defense witnesses to a grant of immunity. They are the ‘‘ ‘effective defense’ ’’ theory,[42] and the ‘‘ ‘prosecutorial misconduct’ ’’ theory. See, United States v. Angiulo , 897 F.2d 1169, 1190 (1st Cir.), cert. denied , 498 U.S. 845 (1990). Accordingly, the courts have agreed that in certain extreme cases of prosecutorial misconduct, the government's refusal to grant immunity or the granting of immunity in a one-sided discriminatory fashion could justify a court's refusal to allow the prosecution to proceed. Id. Indeed, Angiulo and other cases it collects, see id. at 1192, go beyond affirmative misconduct and suggest that the government could not withhold immunity solely in order to keep exculpatory evidence from the defendant and the fact-finder (judge or jury).

In the Zuma case, there is indication of affirmative government misconduct in that the NPA’s immunity granting powers were converted into an instrument to undermine the truth-finding process. Zuma must attack this issue very hard. Just as in the “overall corrupt relationship” comment by the SCA, it is embarrassing to read a court decision which implies that hearsay evidence by a fugitive and witness who was deliberately kept away from the court’s jurisdiction by the NPA’s self-serving grant of immunity is admissible **“in the interest of justice”** because the witness “**refused to come to South Africa**” pursuant to that very immunity deal cavalierly granted by the NPA. It is even more alarming to read the SCA’s decision justifying Thetard’s unavailability on the basis that Thetard would have offered exculpatory testimony by denying that ***“… the fax correctly reflected his understanding of what happened at the meeting***.”

The SCA court added a further odd twist in the Shaik case by endorsing the NPA’s theory that Thetard would have lied even if he had been immunized and produced as a witness at Shaik’s trial. But that is precisely why the right of cross-examination was even more important. Accordingly, the SCA’s statements that “***it is highly unlikely that the evidence of Thétard or his presence as a co-accused would have strengthened [Shaik’s] case” that “Thétard had been shown to be a dishonest person***” are all besides the point. The court’s failure to appreciate the constitutional magnitude of how the NPA’s deal derailed the presentation of exculpatory testimony or evidence availability of witness is shown as follows. As one illustration of Thetard’s alleged “dishonesty” the court cited a letter by him to Perrier dated 26 June 2003 in which he “…***he confirmed that he had met Zuma in Durban during the first quarter of 2000 at his official residence together with Shaik and stated that they only dealt with general matters***

[42] The "effective defense theory," posits that a strong need for exculpatory testimony can override even legitimate, good faith objections by the prosecutor to a grant of immunity. See, Government of the Virgin Islands v. Smith , 615 F.2d 964, 974 (3d Cir. 1980).

regarding Thomson's Durban establishment. He added that he could not recall having written the fax. Subsequently, in an affidavit, he admitted that he was the author of the fax but stated that a bribe had not been discussed with Shaik and Zuma." Even more troubling is the SCA's seeming endorsement of a radical theory at odds with our constitutional principles. Its statement and acceptance of the NPA's lame theory that Thetard's evidence was not given in person **"**because it was clear that he would deny that the fax correctly reflected his understanding of what happened at the meeting which, according to the fax, took place on 11 March 1999" raises profoundly disturbing questions about the court's interpretation of the prosecution's duty under our constitution. It suggests that the SCA thinks it is all right for the NPA to make immunity deals that would keep witnesses with exculpatory evidence away from the defendants and our courts. Whatever happened to the maxim accepted even under apartheid that a prosecutor serves as a 'minister of the truth' and that he has a special duty to see that the truth emerges in court without regard to which side it favors (see *R v Riekert (supra)* at 261F-G; *S v Jija and Others* 1991 (2) SA 52 (E) at 67J-68B)? Whatever happened to the adage that a prosecutor must produce all relevant evidence to the court and ensure, as best he can, the veracity of such evidence (see *S v Msane* 1977 (4) SA 758 (N) at 759A; *S v N* 1988 (3) SA 450 (A) at 463E) and the corollary duty to state the facts dispassionately? Whatever happened to the adage that if a prosecutor knows of a point in favour of the accused, he must bring it out (see *S v Van Rensburg* 1963 (2) SA 343 (N) at 343F-G; *Phato v Attorney-General, Eastern Cape and Another* 1994 (2) SACR 734 (E) at 757*d*) and that if he knows of a credible witness who can speak of facts which go to show the innocence of the accused, he must himself call that witness if the accused is unrepresented; and if represented, tender the witness to the defence (see *R v Filanius* 1916 TPD 415 at 417; *S v Nassar* 1995 (1) SACR 212 (Nm) at 218*a*).

The SCA's ruling that a prosecutor is justified in making immunity deals that keep away potential a witness who would offer exculpatory evidence by denying ***"****that the fax correctly reflected his understanding of what happened at the meeting which, according to the fax, took place on 11 March 1999"* suggests that criminal defendants under our constitution have lesser rights than they had under the odious apartheid regime. The NPA's belief that Thetard would have lied or offered testimony helpful to Shaik or Zuma if called to testify would obviously be pertinent if it were considering whether to immunize witness testimony to present only as part of the prosecution's case. See United States v. Agurs, 427 U.S. 97, 103 (1976). But one might think that it was a matter for the trial court judge, not the prosecutor, to decide (after a fair hearing and actual testimony by the witness) whether testimony seemingly helpful to the defendant was actually false. Surely this would be so if the question were one of disclosing exculpatory evidence under Brady v. Maryland , 373 U.S. 83, 87 (1963). In a similar vein, the SCA missed the point and short-shrifted Shaik's claims of constitutional violations suffered because he was denied the right to confront and cross examine Thetard. The SCA stated "…it is highly unlikely that cross-examination of Thétard would have rendered positive results for the appellants. All the indications were that cross-examination of Thétard would have served no other purpose than to reinforce the impression that he is dishonest and unreliable. In the circumstances the risk that the appellants would be

prejudiced by not being given an opportunity to cross-examine Thétard was very slim." The point being missed once again is that if the "encrypted fax" is being offered as evidence "***in the interest of justice***" then the defence is fully entitled to cross-examine the author and to delve into the circumstances regarding the creation, sending and receipt of that document. Any doubt as to the circumstances surrounding the writing and sending of the document must inevitably inure to the benefit of the accused. That is the law. It is no answer to the defence argument to state that the absent witness has been shown to be "***dishonest***" and would, if called to testify, contradict his prior statements and disown his alleged writings. To make matters worse, the SCA downplayed the importance of the right to cross-examination by relying on its speculation or conjecture that Thetard could not have lied about the matters referred to in the "encrypted fax" because of the sensitive nature of the matter discussed and because he was reporting to his superiors. And yet, the other documents, including a letter to Perrier and the affidavit he produced for the NPA denying bribes to Zuma were also written for his superiors. The tool of cross-examination was devised precisely for these types of contradictions and a court should not ignore the importance thereof.

In all events, Zuma has a better and compelling argument for excluding the so-called "encrypted fax" from being admitted as evidence in his case as well as arguing that the NPA's dealing with the matter constituted an abuse or manipulation of process. Ironically, his argument for prejudicial delay was actually strengthened by the SCA ruling in the Shaik appeal. The court opined that Shaik and his co-defendants could have called Thetard "***as a witness or to apply for his evidence to be taken on commission" if they "thought that his evidence would advance their case."*** The NPA had the opportunity to charge Zuma and Shaik together but it frittered the time away - telling Zuma now and almost five years later to call Thetard as a witness and/or to apply for his evidence to be "**taken on commission**" is too little and too late. This is admittedly an evidentiary issue but it must be highlighted during the argument on the abuse of process and prejudicial delay issues. Further, the admissibility of the encrypted fax against Zuma is even more questionable because the allegations are that Shaik and Thétard met in Durban on 30 September 1999 and Zuma was not present at that meeting. It is alleged that Zuma met Shaik and Thetard on March 11, 2000 and Thetard's "encrypted" fax to his superiors (not to Zuma) memorialized the "bribe" agreement. But Thetard has stuck to a different story as summarized by the SCA- "h***e confirmed that he had met Zuma in Durban during the first quarter of 2000 at his official residence together with Shaik and stated that they only dealt with general matters regarding Thomson's Durban establishment. He added that he could not recall having written the fax. Subsequently, in an affidavit, he admitted that he was the author of the fax but stated that a bribe had not been discussed with Shaik and Zuma."*** Faced with these conflicting theories, the court may not simply pick the NPA's theory on the basis that the encrypted fax is somehow admissible "**in the interest of justice.**"

The fact of the matter is that Zuma's ability to use the compulsory process of the courts or any leverage to secure Thetard's presence at his trial is gone for ever precisely because of the NPA

manipulations highlighted above. This also creates a high risk that NPA's manipulation of the judicial system may well be perceived as tainted by a bias towards resolving the proceedings in a specific way, preferable to the government but not the accused, thus jeopardising their right to a fair trial. Under the circumstances of Zuma's case the prosecutor has only a trivial interest in withholding immunity to Thetard- the fact that he could potentially torpedo the NPA's case by offering testimony exonerating Zuma is insufficient ground to keep him away from the trial. To avoid a complete miscarriage of justice Zuma has an overwhelming need for specific exculpatory evidence from Thetard that can be secured in no way other than through the grant of immunity.

Against this backdrop, Zuma must argue that the current charges against Thint and the re-issuance of the arrest warrant for Thetard compounds the initial prosecutorial misconduct in the refusal to seek immunity; and impacts his ability to present an "effective defense. Zuma can at least show that Thetard's testimony is clearly exculpatory, or essential to the defense, or being withheld without good reason. Compare U.S. v. St. Michael's Credit Union, 880 F.2d 579, 598 (lst Cir. 1989) (if defendant makes substantial showing prosecutor abused her discretion, courts will not defer to prosecutor's immunization decision); U.S. v. Burns, 684 F.2d 1066, 1077-78 (2d Cir. 1982) (showing discriminatory use of immunity to gain tactical advantage or to force witness to invoke Fifth Amendment privilege, may override prosecutor's discretion in granting statutory immunity to defense witness); U.S. v. Angiulo, 897 F.2d 1169, 1191-92 (lst Cir. 1990) (court may order prosecutor to grant immunity or face judgment of acquittal when prosecutor's intimidation tactics cause potential witness to invoke Fifth Amendment and withhold exculpatory testimony).[43]

2.12 The Trial of Zuma By Proxy and NPA's Deals With Thetard and Thint Companies As Violation of "Equality of Arms" Principle And Abuse of Process

The principle of equality of arms between the defendant and the prosecution well-established in international human rights law, Strasbourg jurisprudence as well as the Statute of the ICTY (article 20), the Statute of the ICTR (article 20) and the Statute of the ICC (article 67) is violated when the defendants are not allowed to challenge the evidence against them because they have not been given access to it, or when defendants are subjected to a trial by proxy, or access basic facilities to prepare a defense.

To cinch the matter, Zuma has another compelling argument on his trial by proxy during the Shaik trial and NPA's handling of the Thetard issue – he is entitled to argue that the NPA's actions constitutes a violation of the "equality of arms" principle. In Bulut v. Austria (1996) 24 E.H.R.R. para. 47, the ECHR observed:--"The Court recalls that *under the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case*

[43] See also, United States v. Diaz, 176 F.3d 52, 115 (2d Cir. 1999) (court must find that ''the government, through its own over-reaching, has forced the witness to invoke the Fifth Amendment or, that the government has engaged in[the] discriminatory use of grants of immunity to gaina tactical advantage; second, the witness' testimony must be material, exculpatory and not cumulative; and third, the defendant has no other source to obtain theevidence''); Curtis v. Duval, 124 F.3d 1, 9 (1st Cir. 1997)(defendant must show that prosecution has intentionally distorted fact-finding process by harassing or intimidating potential witnesses or deliberately withholding immunity for purpose of hiding exculpatory evidencefrom jury).

under conditions that do not place him at a disadvantage vis-à-vis his opponent. In this context, importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice." One essential criterion of a fair hearing is the principle of "equality of arms" between the parties in a case. Equality of arms, which must be observed throughout the trial process, means that both parties are treated in a manner ensuring that they have a procedurally equal position during the course of the trial, and are in an equal position to make their case.

As stated earlier, the deliberate procrastination by the NPA in filing charges against Zuma, using the Shaik trial essentially as a trial of Zuma by proxy and the NPA's manipulation of witness availability through its immunity deals with Thetard have gained the state many tactical advantages. It would be almost impossible to overstate the disparity in resources between the NPA and Zuma at this moment. The state continues to exploit and flaunt some of these advantages through the so-called Letters of Request to the authorities in Mauritius. As far back as 2001, the NPA prosecutors obtained copies of documents including alleged diaries of Thetard from Mauritius under dubious circumstances. Zuma has opposed their belated efforts by the NPA to obtain authorization from the South African courts to obtain the original documents from Mauritius.

The SCA erroneously ruled that Zuma has no standing to challenge the NPA's efforts and thus ignored the obvious. In criminal trials, where the prosecution has all the machinery of the state behind it, the principle of equality of arms is an essential guarantee of the right to defend oneself. The principle of equality of arms ensures that the defence has a reasonable opportunity to prepare and present its case on a footing equal to that of the prosecution. Its requirements include the right to adequate time and facilities to prepare a defence, including disclosure by the prosecution of material information. See Foucher v. France, 25 Eur. H.R. Rep. 234 para. 34, at 242 (1998).[44] Its requirements also include the right to legal counsel, the right to call and examine witnesses and the right to be present at the trial. This principle would be violated, for example, if the accused was not given access to information necessary for the preparation of the defence, if the accused was denied access to expert witnesses, or if the accused was, as in the Thetard case, put at a severe disadvantage by the NPA's grant of an immunity deal to a material witness.

The principle of equality of arms provides a lens through which the requisite procedural fairness in any criminal proceeding can be ascertained. This requires procedural equality between the accused and the police and prosecution. [45] Violations of the equality of arms principle per se are sufficient grounds for finding an infringement of Article 6. De Haes v. Belgium, 25 Eur. H.R. Rep. 1 para. 58, at 58 (1998).

---

[44] In Foucher v. France, the prosecution denied the petitioner an opportunity to access his case file and copy relevant documents contained therein. Foucher, 25 Eur. H.R. Rep. para. 8, at 236. A violation of equality of arms and Article 6 was found by the ECtHR. Id. para. 36, at 247. Foucher illustrates the interplay and overlap between the equality of arms and adequate facilities concepts. Without defence access to the case file, this being a form of prosecution disclosure common in civil law systems, the accused was denied adequate facilities for the preparation of an effective defence, and thus was placed in a position of procedural and evidential inequality vis-a-vis the prosecution. Id. para. 34, at 247.

[45] Jasper v. United Kingdom, 30 Eur. H.R. Rep. 441 para. 51, at 471 (2000). The ECtHR stated that "**it is a fundamental aspect of a right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between prosecution and defence**." Id.

Importantly, the equality of arms principle must be respected at each stage of a criminal proceeding where Article 6 is found to be applicable. To illustrate its application, in Borgers v. Belgium, the ECtHR held the principle to have been breached where the appellant, before the Court of Cassation, was unable to respond in open court to an opinion given by the Procureur General as to whether the appeal should be allowed. Borgers v. Belgium, 15 Eur. H.R. Rep. 92 para. 60, at 105 (1991). The Procureur General also was permitted to retire to the judge's chambers and participate in the court's discussion of the case, though he could not vote. Id. para. 54, at 104. The ECtHR considered that, once the Procureur General expressed an opinion on the merits of the case, he became an adversary to which the appellant should have had a procedural opportunity to respond. In the absence of such an opportunity, the proceeding was found to violate Article 6. Id. paras. 54-60, at 104-05.

Consider in this context Ngcuka's statements about a "prima facie" case of corruption WHEN Zuma could not adequately respond, the trial by proxy and findings by Judge Squires about "symbiotic relationship" of corruption in a trial where Zuma was not a defendant, Zuma's subsequent dismissal from the position of Deputy President following court proceedings from which he had been purposely excluded, the SCA's pronouncement about a "generally corrupt relationship" between Zuma and a convicted third party even though that same court claimed not to have made any pronouncements on Zuma's guilt or innocence point to serious problems in the entire Zuma prosecution. The equality of arms principle was grossly violated by both the NPA and the courts in a manner that has brought the administration of justice into disrepute. See, Bulut v. Austria, where the equality of arms principle was violated as the Attorney General submitted observations to the Supreme Court opposing the appeal in question, without having served the defence with the same observations. Bulut v. Austria, 24 Eur. H.R. Rep. 84, paras. 49-50, at 104 (1994). The defence therefore had no procedural opportunity to respond to the Attorney General's submissions. The resulting procedural imbalance offended the equality of arms principle. Id. para. 50, at 104. Similarly, Belziuk v. Poland, the petitioner was denied an opportunity to be present at an appeal hearing at which the public prosecutor gave oral arguments opposing the petitioner's appeal. Belziuk v. Poland, 30 Eur. H.R. Rep. 614, paras. 6-13, at 617-18 (1998). The denial of the right to appear at the hearing deprived the petitioner of a procedural opportunity to contest his conviction and adduce evidence of his innocence. Id. para. 4, at 616. The ECtHR found a violation of the equality of arms principle and thus Article 6 generally. Id. paras. 37-39, at 622-23, para. 48, at 624.

The point that must be emphasized *ad nauseum* is that neither the courts nor the NPA had any right to make statements about Zuma's alleged wrongdoing without giving him an opportunity to respond in a meaningful manner. This finding is supported by the many incongruities during the course of the Shaik trial, such as the fact that: 1) the prosecution was allowed to present witnesses and evidence of Zuma's alleged wrongdoing while Zuma had no "standing" to intervene or call any witness to rebut the allegations about him; 2) Zuma as a non-party to the Shaik case could not have availed himself of the opportunity to refute the stories about the alleged corrupt relationship and he was effectively prevented from challenging the admission of hearsay evidence including the "encypted fax." On the issue of

examination of witnesses, the European Court of Human Rights held that: "As a general rule, paragraphs 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him..." Sadak and Others v. Turkey (no. 1) (App. Nos. 29900/96, 29901/96, 29902/96 and 29903/96), p. 15. The Court added, "...where a conviction is based solely or to a decisive degree on **depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined**, **whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6**." Id. The fact that, in Zuma's case, he was prevented from effectively challenging the documentary evidence in the form of the "encrypted fax" and other evidence of the witnesses brought by the prosecution reveals that the defence was not given "an adequate and proper opportunity to challenge and question a witness". No matter what anyone does now, it cannot be gainsaid that Zuma has been denied a "reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent" De Haes and Gijsels v Belgium (1997) 25 EHRR 1, para 53.

As argued earlier, the violation of the equality of arms principle was compounded by the egregious violation of Zuma's right to be presumed innocent. This right requires that all public officials of the state prosecuting an individual must not make statements expressly stating or implying that guilt of a person who has not yet been convicted. Allenet de Ribemont v. France, ECHR, Ser. A, No. 308, at p. 16, para. 35 (10 February 1995). This principle has been interpreted as a fundamental principle, which protects everybody against being treated by public officials as if they were guilty of an offence even before such guilt is established by a competent court. Minnelli v. Switzerland, ECHR, Appl. No. 8660/79 (1983). It cannot be gainsaid that the so-called evidence linking Zuma to the alleged corruption and bribery was the "encypted fax" which the SCA later claimed could be admitted "in the interest of justice."

Case-law from the UK provides some support for Zuma's argument on the handling of the Thetard matter as abuse of process. In an important UK case, R.v. Schlesinger [1995] Crim. L.R. 137, CA—defendants were on trial for illegal export of arms to Iraq. The defence wished to call witnesses from two embassies. Assurances were given that witnesses from the embassies would confirm specific facts relevant to the defence in court. Subsequently, senior officers from the Foreign and Commonwealth Office, at the behest of Customs & Excise, visited the embassies and successfully urged them to claim diplomatic immunity in order to prevent them from testifying. The defendants were thereby deprived of the witnesses whom they wished to call. Their non-availability was the operative factor in the defendants' pleading guilty to exporting arms to Iraq. The Court of Appeal condemned the government's conduct and ruled that such conduct would most likely have caused the trial judge to stay the proceedings if he had been aware of the situation. Accordingly, the guilty pleas were vacated, the convictions were quashed and defendants were set free. The defendants had not had a fair trial as they were effectively precluded from calling witnesses whom they believed were necessary for their defence. It was for the jury, not an Assistant Chief Investigation Office of Customs & Excise, to decide whether the defence account was

credible. As one commentator, Professor John Smith states in the Criminal Law Review, even though the witnesses would probably have been unhelpful to the defence **case it is the defence's prerogative to decide how to conduct their defence without interference from the Prosecution**. One-sided immunity deals which make a witness unavailable are not condoned in civilized countries. This is a point missed by the SCA in its longiloquent discussion of Thetard's alleged lack of honesty or whether cross-examination of such a "dishonest" witness would have yielded any positive results for Shaik.

2.13 The NPA Strategy of Concealing Its Plans To Charge Zuma As Abuse of Court Process.

Another matter helpful to Zuma on the prejudicial delay is the impact of the decision to charge him and Shaik separately, conduct of litigation in a piecemeal fashion and misleading the courts about the NPA's future plans to bring charges against Zuma. Because the NPA has tendered the excuse that it had a need to investigate the matter further, it is crucial for Zuma to debunk the myth that courts have treated the investigation stage of a case as deserving less scrutiny or have left criminal defendants without protection during that stage. For instance, in the US, the courts have made it clear that due process under the Fifth Amendment encompasses both procedural and substantive protections.[46] Under procedural due process (and other constitutional protections in the Bill of Rights) defendants are guaranteed fairness throughout the criminal process. Included in this guarantee is a defendant's general right to control his or her own defense without government interference, which in turn includes the right to choose defense counsel and the right to offer and to challenge evidence. Further, as a general matter, prosecutors are required to conduct themselves fairly in every aspect of their dealings with defendants. United States v. Stringer, 408 F. Supp.2d 1083, 1089 (D. Or. 2006) (government may not use a civil proceeding to deceive defendants into incriminating themselves in a civil proceeding when "activities of an obvious criminal nature are under investigation"); see also United States v. Lovasco, 431 U.S. 783, 795 n.17 (1977) (prosecutors may not intentionally delay an indictment to prejudice the defendant); United States v. Gonzales, 164 F.3d 1285, 1292 (10th Cir. 1999) (prosecutors may not obstruct a defendant's access to a potential witness); Briscoe v. LaHue, 460 U.S. 325, 327 n.1 (1983) (prosecutors may not knowingly offer false evidence).

The courts have restrained government's deceptive tactics even where the conduct in issue was not strictly speaking, "illegal." See, SEC v. First Fin. Group of Tex, Inc., 659 F.2d 660, 666-67 (5th Cir. 1981) ("[t]here is no general federal constitutional, statutory, or common law rule barring the simultaneous prosecution of separate civil and criminal actions by different federal agencies against the same defendant involving the same transactions. . . . The simultaneous prosecution of civil and criminal actions is generally unobjectionable because the federal government is entitled to vindicate the different interests promoted by different regulatory provisions even though it attempts to vindicate several interests simultaneously in different forums."). But see United States v. Parrott, 248 F. Supp. 196, 201-02 (D.D.C.

[46] To be protected under substantive due process, a right must be "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty . . . ." See, e.g., Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

1965) (the "[g]overnment may not bring a parallel civil proceeding and avail itself of civil discovery devices to obtain evidence for subsequent criminal prosecution").

The courts have recognized and dealt with tactics similar to those used by the NPA in its handling of the Shaik prosecution and Zuma matter. In United States v. Stringer, the court took the dramatic step of dismissing the DoJ's securities fraud and conspiracy indictments rather than simply suppressing evidence improperly gathered during a SEC investigation. 408 F. Supp.2d at 1089 ("[*d]ismissal of an indictment is warranted if the alleged governmental misconduct is so grossly shocking and so outrageous as to violate the universal sense of justice. The conduct involved in this case meets that standard.*") (internal quotations and citations omitted). Early on in its investigation, the USAO met with the SEC's staff which gave the USAO five notebooks of documents and a detailed memorandum setting forth the SEC's legal and factual analyses of the case. Id. at 1085. Ten days after that meeting, in October 2000, the Assistant U.S. Attorney heading up the criminal investigation wrote a memo in which he noted that the case "warrants prosecution" and the "probability of [criminal] prosecution is very high."Id. At no time between October 2000 and the eventual disclosure of the existence of a criminal investigation in February 2003 were the defendants notified that they were the targets of a criminal investigation. Id. at 1086-87. Moreover, the SEC's staff met regularly with the criminal prosecutors to discuss the SEC's investigation as it progressed. Id. at 1086. At each of these meetings the criminal prosecutors affirmatively made the decision to allow the SEC's staff to continue handling the case and to continue to rely on the work product the staff generated.Id. One Assistant U.S. Attorney noted in writing that the strategy had "provided good investigative results, at little cost to us" and that the "SEC's investigation continues to suggest that this case will produce a criminal prosecution." Id. Further, the USAO formulated a plan to create a record based on the SEC's investigative materials to support a future perjury case. Id.

In light of the prosecutors' conduct, the Stringer defendants moved to dismiss their criminal indictments or, in the alternative, to suppress the statements made to the SEC. Id. at 1084. The defendants argued that the SEC and USAO worked together on a single investigation, with the latter hiding behind the SEC in order to deprive the defendants of their Fourth and Fifth Amendment rights. Id. at 1084-85, 1087. According to the defendants, if they had been notified of the possibility of the criminal prosecution they would have sought a stay of the civil proceedings, would not have produced documents and would have considered exercising their Fifth Amendment right not to incriminate themselves. Id. The court agreed, concluding that the investigations were not "parallel" at all, but rather closely coordinated, with the USAO intentionally hiding its intentions "behind the guise of a civil prosecution" and "resorting to subterfuge to maintain the secrecy of its involvement." Id. at 1088. The court also noted that

> The USAO identified potential criminal liability and a few targets in the beginning of the investigation, and elected to gather information through the SEC instead of conducting its own investigation. The government was concerned that the presence of a criminal investigation

> would halt the successful discovery by the SEC, witnesses would be less cooperative and more likely to invoke their constitutional rights, and that the rules of criminal discovery would be invoked . . . . **The delay by the USAO was not for the purpose of reviewing evidence gathered by the SEC to make an informed decision as to whether the case warranted prosecution. From the beginning, the USAO consistently held the position that a criminal prosecution was likely . . . . The strategy to conceal the criminal investigation from defendants was an abuse of the investigative process.** Id. at 1087-88.

This abuse violated the defendants' rights in two ways. First, the prosecutors violated the defendants' due process rights when the SEC and USAO failed to inform defendants that they had been identified as "targets" of the criminal investigation and failed to alert them to the possibility of criminal exposure beyond the warnings provided in the SEC's standard Form 1662. Id. at 1088. The court concluded that, in light of the USAO's active role in the investigation, a cursory reference to the possibility of information sharing between agencies provided insufficient warning and "[could] not have much significance where the defendant was, so to speak, then within the sight of the government and did not receive an explanation of the import of the inquiry." Id. (internal quotations and alterations omitted). Second, the court determined, "it *is a due process violation if government agents make affirmative representations as to the nature or existence of parallel proceedings or otherwise use trickery or deceit.*" Id. at 1089. Ultimately, the court concluded that "[a] *government agency may not develop a criminal investigation under the auspices of a civil investigation [because] it would be a flagrant disregard of individuals' rights to deliberately deceive or lull someone into incriminating themselves in a civil context when activities of an obvious criminal nature are under investigation*." Id. (internal quotations omitted). The NPA's affirmative representation that Zuma would not be prosecuted despite the existence of a "prima facie" case and its about turn after Shaik was convicted arguably constitute trickery and deceit or cloak and dagger methods which prejudiced Zuma's rights.

2.14 The NPA'S Violation Of Zuma's Constitutional Rights Under Section 35(3) To A Fair Public Trial Without Unreasonable Delay And Zuma's Right To Due Process Mandates A Dismissal Of This Case For Abuse Of Process

The right of an accused to have criminal proceedings started and concluded without undue delay or within a reasonable time is established in Article 14(3)(c) of the ICCPR, Article 7(1)(d) of the African Charter, Article 8(1) of the American Convention, Article 6(1) of the European Convention, Article 21(4)(c) of the Yugoslavia Statute, Article 20(4)(c) of the Rwanda Statute, Article 67(1)(c) of the ICC Statute. Our very own constitution, Section 35 (3) states that every accused person has a right to a fair trial, which includes the right- to a public trial before an ordinary court; to have their trial begin and conclude without unreasonable delay. Courts from around the world including, the United States, Canada, New Zealand, the International Criminal Tribunal of Rwanda, International Criminal Tribunal for the Former Yugoslavia, the European Court of Human Rights have generated a large amount of jurisprudence on the right of an accused to be tried without undue or unreasonable delay and in a fair trial. This right obliges the authorities to ensure that all proceedings, from pre-trial stages to final appeal, are

completed and judgments issued within a reasonable time. First, an analysis of the right to trial without unreasonable delay in both common law and entrenched Bill of Rights jurisprudence. The evolution of this right to trial without undue delay can be traced from the days of **Magna Carta** through the development of the common law to its refinement in human rights legislation in many common law jurisdictions including our own.

Strictly speaking, our constitution with its entrenched bill of rights did not create the right to trial without undue delay, nor indeed did its older and more illustrious cousins the American Constitution or the Canadian Charter. The concept of due process of law is centuries old and owes its pedigree or origin to the Magna Carta (1215). In an effort, for his own reasons, to encapsulate the sanctity of the fundamental rights and freedoms of his subjects within the statute Magna Carta, King John promised inter alia that: "**No free man shall be taken or imprisoned or deprived of his freehold or his liberties or free customs or outlawed or exiled or in any manner destroyed, nor shall we come upon him or send against him, except by legal judgment of his peers and by the law of the land**." And again in the fortieth article: "**To none will we sell, to none will we deny, or delay, right or justice**." Due process of law protects against any attempt to undermine the criminal law in either its procedural or substantive roles, the concept being embodied in the common law and in many of the national constitutions, including those of the United States and Canada, and South Africa, for example, in relation to every accused person's right to a fair trial, which includes the right- to a public trial before an ordinary court; to have their trial begin and conclude without unreasonable delay; to be present when being tried; to be presumed innocent, to adduce and challenge evidence. That due process includes proper despatch received early support from Coke in his commentary on Magna Carta: "... **the common lawes of the realme should by no meanes be delayed, for the law is the surest sanctuary, that a man can take, and the strongest fortresse to protect the weakest of all; ...** (Coke, 11 Institutes of the Laws of England - P.55).

The guarantee of prompt trial in criminal proceedings is tied to the right to liberty, security of the person, the presumption of innocence and the right to defend oneself. It aims to ensure that an accused person's fate is determined without undue delay. It is aimed at ensuring that a person's defence is not undermined by the passage of inordinate amounts of time, during which witnesses' memories may fade or become distorted, witnesses may become unavailable, and other evidence may be destroyed or disappear. It is also aimed at ensuring that the uncertainty which an accused person faces and the stigma which attaches to a person charged with a criminal offence, despite the presumption of innocence, are not protracted. The right to be tried promptly encapsulates the maxim that justice delayed is justice denied.

It is fair to state that Zuma's rights to a fair trial without undue or unreasonable delay has firm and sturdy roots in our own constitution and finds support in the common law, human right instruments and the rulings of courts from around the civilized world. It is therefore illogical and legally incorrect to assert that those who rely on international law and our own constitution to highlight possible violation of Zuma's rights through the NPA's inexcusable seven year tardiness are somehow harming the reputation of our judiciary.

To be sure, the issue of unreasonable delay in the entire Zuma prosecution is the NPA's Achilles' heel - more than any single legal theory it has the potential to torpedo the NPA's case. Accordingly, it has many interesting possibilities and is likely to be the most hotly contested issue in the coming months. The opposing parties have already given us a sneak preview of this coming attraction; they have articulated their respective arguments and have staked out clearly defined positions which makes it easy for armchair critics like this author to evaluate and render a verdict thereon. The lawyers have disagreed on everything ranging from such basic issues as (a) when exactly did Mr. Zuma become "an accused person"[47] or "charged" for the purpose of calculating prejudicial delay, (b) did Mr. Zuma suffer any cognizable pre-indictment delay or even a violation of his due process rights prior to him being officially charged by the NPA in June 2005, and (c) were Mr. Zuma's rights to be tried without unreasonable delay violated at any time and if so, what should be the remedy.

To state the NPA's argument on these issues is to refute it at the same time. Simply put, the NPA knows it is in serious trouble on the unreasonable delay issue; assuming Mr. Zuma and his legal team utilize some of the strategies and argument contained in this Cookbook, the NPA's case is doomed and no amount of casuistry or intellectual gyrations and gymnastics can rescue the state's case. We have already canvassed the case law and legal principles answering the NPA's argument that Zuma did not become an accused until he was formally charged in 2005, Zanner v DPP, Johannesburg 2006 (2) SACR 45 (SCA), Coetzee v Attorney-General, KZN 1997 (8) BCLR 989 (D) 999 to 1004[48] - it would indeed be pleonastic to rehearse these principles here. It suffices to focus on the argument advanced by the NPA in its Heads of Argument previously filed with the High Court in which it disputed Zuma's entitlement to a permanent stay. In its previous argument to the Court, the NPA undertook heroic efforts to argue against reality and the record - it marshalled the facts in a forgiving albeit self-serving manner, emphasized that the issue revolved around its "constitutional duty" to prosecute crimes, and argued that the key to the puzzle is the express language of Section 35(3)(d) which applies only to *a person who can truly be said to be an 'accused person' for purposes of s 35(3)(d).* It asseverated that delays which occur before an accused is arrested or served with a summons are simply irrelevant even if prejudicial to the accused than the delay which occurs thereafter. Predictably, the NPA does not address the "prima facie evidence of corruption" comments or the period between August 2003 and August 2005 when Shaik's trial was used to put Zuma on trial in absentia. In a nimble attempt to sidestep this reality and in desperation, the NPA invokes the "exercise of prosecutorial discretion" excuse and claims that its actions in not charging Zuma with Shaik may not be impugned as such charging decisions are not subject to judicial review. Unfortunately for the

---

[47] Nugent AJ with whom Cachalia AJA agreed, ruled that: "*(T)he right to be brought to trial without unreasonable delay is a right that protects the integrity of the prosecution process: it accrues to an accused person and endures for only so long as he or she stands accused."* Para. 29. Judge Nugent rejected a formalistic definition of an "accused" by stating that ***"[i]t is not necessary to decide in this case precisely when a person can be said to be an 'accused person' for purposes of s 35(3)(d) and I do not suggest that that requires that he must have been formally charged."***

[48] Where Judge Thirion held that, "***there is, to my mind, no virtue in trying to formulate a rule for determining a point in time from which the delay in commencing a trial has to be reckoned for the purpose of deciding whether the delay has been unreasonable. Delay which occurs before an accused is arrested or served with a summons may be more prejudicial to the accused than the delay which occurs thereafter.*** *" (emphasis added).*

NPA, this Herculean effort is woefully inadequate and suffers from no less than four infirmities. The first and most obvious is the dismal failure to appreciate the explicit instructions given to our judges in section 39(1)(a) of the constitution which reads: "*When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.*" It would be nothing short of perverse for any judge to engage in a hypertechincal reading of the constitution in a manner that suggests that being accused requires that Mr. Zuma must have been formally charged. Such a restrictive interpretation would ignore both the obvious and international jurisprudence; it would be an abdication of the court's role to ensure that constitutional rights of the uncharged parties (who are only "informally accused") are fully protected and that the court's process is not being improperly used for ***official public smear of an individual when that individual has not been provided a forum in which to vindicate his rights***. It would indeed be incongruous for the courts which have aptly described such actions by prosecutors as misconduct subjecting victims like Mr. Zuma "***to the torture of public condemnation, loss of reputation"*** and "***just as defenseless as the medieval prisoner and the victim of the lynch mob***" to rule that victims of such same misconduct can be left in perpetual legal limbo, without recourse and at the mercy of the NPA until the agency decides to formally file charges.

The second frailty in the NPA's argument is that a mere comparison of the language of our constitution with its Canadian, New Zealand and European counterparts reveal the shallowness of the NPA's analysis. The language in Article 6(1) of the European convention is as follows: "***In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an impartial tribunal established by law"***. In a similar vein, s11(b) of the Canadian Charter uses a specific term for one "charged" with an offence "to be tried within a reasonable time." Likewise, Section 25(b) of the New Zealand Bill of Rights Act states that: "Everyone who is charged with an offence has, in relation to the determination of the charge, the right to be tried without undue delay."

Arguably, our constitution which simply uses the word "accused person" gives our courts greater leeway to find that both the officially accused and the unindicted (but "informally") accused persons are entitled to a hearing without unreasonable delay. For instance, the jurisprudence of the ECtHR indicates that the relevant Article 6 guarantees are applicable to pre-trial investigations generally and significantly the key term "charge" has been interpreted by the ECtHR to mean "when officially notified by a competent authority of an allegation of a criminal offence." **Corigliano v. Italy, 5 Eur. H.R. Rep. 334, para. 34, at 341 (1982).** The European Commission adopted the view that a person becomes "charged" for Article 6 purposes at the point when he is "substantially affected" by the proceedings taken against him. **Deweer v. Belgium, 2 Eur. H.R. Rep. 439, para. 46, at 190 (1980).** Even better, the courts in those countries where the statutes specify persons "charged" with an offense have specifically rejected the narrow interpretation urged by the NPA in Mr. Zuma's case. This will be explored at length later - it

suffices here to state without any fear of contradiction that the NPA's entire argument on the unreasonable delay claim can and will be destroyed.

The third and most obvious frailty is the NPA's inability to appreciate that even if the courts were to accept the absurd argument that pre-charge delay is not relevant to the determination of the length of the "unreasonable" delay referred to in Section 35(3) of our constitution, it is certainly relevant to an assessment of the fairness of the proceedings required by this section of the constitution and the doctrine of abuse of process. Under the circumstances of Mr. Zuma's case, the pre-charge delay would certainly have an influence on the overall determination as to whether post charge delay is unreasonable. This is so even if a court was somehow inclined to rule that the pre-charge delay of itself is not counted in determining the length of the delay. That pre-charge delay is relevant under Section 35(3) of our constitution even if a court subscribes to the view that it is not the length of the delay which matters but rather the effect of the delay upon the fairness of the trial. Pre-charge delay is as relevant as any other form of pre-charge or post-charge conduct which has a bearing upon the fairness of the trial. After all, in Mr. Zuma's case the "pre-charge" period was one during which the NPA improperly used the press and the court's process in Shaik's trial for ***official public smear of an individual when that individual has not been provided a forum in which to vindicate his rights***. It is precisely that kind of prosecutorial misconduct which calls into question whether it is even fair to put Mr. Zuma on trial this time around.

Fourth and most important, the NPA's incantation of "prosecutorial discretion" is more like whistling past a graveyard. Judge Msimang has already told the prosecuting authorities in English and in no uncertain terms what he thought of the NPA's litigation strategy and overall performance in handling Mr. Zuma's case. We need not paint the lilly.

What follows is my attempt to discuss at length a key strategy to winning the argument for Mr. Zuma on the Section 35(3)(d) unreasonable delay issue. By focusing on the other violations and highlighting the mosaic of evidence of violations of Mr. Zuma's other constitutional rights one can easily succeed in showing how those violations make the unreasonable delay, violation of the presumption of innocence and violation of the right to adduce and challenge evidence particularly egregious in the circumstances of this case. This is not to say that one should lose sight of the fact that South African courts are still steeped in common law and "executive-minded" apartheid legal traditions which make them intuitively resistant to dismissing a case for alleged prosecutorial misconduct. A properly presented motion should be amply supported by international jurisprudence and a gentle reminder to the courts that reclaiming South Africa's proper place in the international community after many years of isolation requires a commitment to developing a human rights culture. As stated earlier the common law jurisdictions of countries such as England and Australia, neither of which has a Bill or Charter of Rights, have recognised the inherent power of their courts to protect due process against abuse and to see to it that the Court's process is used fairly and conveniently by both sides (per Lord Devlin in Connelly v. DPP 1964 48 Cr.App. R. 183 at 259). Indeed as was stated by Watkins, L.J. giving the judgment of the English Court of Appeal in R. v. Norwich Crown Court exp. Belsham (1992) 1 WLR 54 at p.65: "**There**

is ample authority to show that a court ... has at common law an inherent jurisdiction or power to control its process and a duty to prevent abuse of it." "The fairness of the process is held to include that it be concluded without undue delay. It was put succinctly by Sir Roger Ormrod when he said:-"The question however is whether he has been so prejudiced by this delay that justice cannot now be done. Put in another way, it is whether this prosecution has become an abuse of the process of the court." And again later:-"It may be an abuse of the process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable; .. (R. v. Derbv Crown Court Ex P. Brooks 1985 80 Cr.App.R. 164 at 168). Along the same line, the court (Watkins L.J.) in R. v. Bow Street Stipendiarv Magistrate 1990 91 Cr.App.R. 283 at 296 was in no doubt that delay of due process was abuse of the process:- "Delay is nowadays quite often in our view too often a feature in both civil and criminal proceedings. It has been considered by Courts high and low countless times. Mr Lawson has drawn our attention to a number of cases which show that in the Commonwealth and in the United States of America the attitude adopted in their courts to delay in much the same as ours. We see no warrant for not following ample precedent, now well set, for the proposition that **mere delay which gives rise to prejudice and unfairness may by itself amount to an abuse of the process**."

Even in common law countries, the purpose of the existence and exercise of this discretionary power to dismiss cases for abuse of process is to ensure that there should be a fair trial according to law: cf. R. v. Derby Crown Court, ex parte Brooks (supra) at p.169." As explained by the High Court of Australia in Jago v.The District of New South Wales and others 1989 168 CLR 23, even in a common law country without constitutionally guaranteed right to a speedy trial (separate from the right to a fair trial), if "…**circumstances exist in which it can be seen in advance that the effect of prolonged and unjustifiable delay is that any trial must necessarily be an unfair one, the continuation of the proceedings to the stage of trial against the wishes of the accused will constitute an abuse of that curial process**." (per Deane, J. p.59). An available remedy at common law for such an abuse of the process is a stay of the proceedings where it appears that the effect of the unreasonable delay is in all the circumstances that any subsequent trial will necessarily be an unfair one or that the continuation of the proceedings would be so unfairly oppressive.

As shown below, the label used is not particularly important. US courts have, under certain circumstances, been willing to swing the hammer of dismissal to dispose of cases where a violation of constitutional due process rights has occurred without even mentioning the abuse of process rationale. Just like in common law countries mentioned above, they have done so where the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take advantage of a technicality. A dismissal is justifiable if on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the

part of the prosecution which is unjustifiable, or if, even though the prosecution are in no way responsible for the delay, the delay has produced genuine prejudice and unfairness for the defendant.

To be sure, there has been a diversity of approaches by the courts in US, Canada, UK, the EU and New Zealand on what remedies are appropriate for undue delays. It is fair to state that the courts in various countries have differed in defining what is unreasonable delay. In all these countries- extensive consideration of how this is to be approached have evolved, not necessarily all consistent, but with remarkable similarities. A cursory survey of the cases shows that courts have been willing to dismiss cases where the prosecution's conduct was accompanied by other violations of the accused's right to a fair trial without unreasonable delay. Thus, merely to state the right to be tried without unreasonable delay and then to point to delay is not sufficient to justify a grant of a remedy. In the UK, In *Dyer v Watson* [2002] 3 WLR 1488, the Judicial Committee of the Privy Council gave general guidance as to the application of the reasonable time guarantee. There was held to be no requirement to demonstrate specific prejudice: *Porter v Magill*; *Weeks v Magill* [2002] AC 357. This is to be contrasted with the US, for example, where in *Barker v Wingo* 407 US 514 (1972), the US Supreme Court held that a relevant factor was whether the accused had been prejudiced. For the foregoing reasons, I will consider each country's approach separately and at every turn pose the question of how Mr. Zuma's case would be decided in each jurisdiction. This is the only sensible or manageable way in which to make a clear case for a dismissal and at the same time to expose the hypocrisy and fallacy of the argument of those who claim that calling for Mr. Zuma's case to be dismissed for abuse of process and challenging the fairness of his impending trial would "harm the country's reputation." We need not tarry.

2.14(a) United States Courts' Approach to Constitutional Right To A Fair Public Trial Without Unreasonable Delay

American courts recognize two types of claims relating to alleged violations of right to a trial without unreasonable delay. A defendant might raise a pre-indictment claim that he was denied a speedy trial because he was not indicted until after a very long period after the date of the offense. United States v. Marion, 404 U.S. 307 (1971); United States v. Beszborn, 21 F.3d 62, 66 (1994); United States v. Harrison, 918 F.2d 469, 473 (5th Cir. 1990). As the US cases discussed above have shown, the US courts take a decidedly jaundiced view of prosecution actions which purport to impute criminal wrongdoing to an individual citizen without charging him or providing him with a forum in which to clear his name. That discussion should debunk the myth that U.S. courts have treated the investigation or preindictment stage of a case as unrelated to or irrelevant to due process protections and fair trial. My concern here is to analyze Mr. Zuma's case as if it were presented in a US court.

The United States Supreme Court has addressed the issue of due process violations from preindictment delay on two occasions. United States v. Lovasco, 431 U.S. 783 (1977); United States v. Marion, 404 U.S. 307 (1971). In the pre-charge delay, Mr. Zuma's most compelling assertion would be that his due process rights were violated by the nearly seven-year pre-indictment delay between the

commission of the alleged offence and the indictment. Regarding pre-indictment delay, the United States Supreme Court, in United States v. Marion, 404 U.S. 307 (1971), explained as follows:

> [T]he Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the preindictment delay in this case caused substantial prejudice to the [defendant's] right to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.

404 U.S. at 324.

In Mr. Zuma's case, the NPA indicted him within the statute of limitations period, so Mr. Zuma has the burden of proving both intentional tactical delay by prosecutors and actual prejudice. To prove that pre-indictment delay violated his due process rights, a defendant must demonstrate that the prosecutor intentionally delayed the indictment to gain a tactical advantage and that the defendant incurred actual prejudice as a result of the delay. United States v. Neal, 27 F.3d 1035 (5th Cir. 1994); Beszborn, 21 F.3d at 66. The reason the defendant bears the burden of proof in a case of preindictment delay is because the applicable statutes of limitation provide the primary guarantee against overly stale criminal charges. Harrison, 918 F.2d at 473. The Due Process Clause requires the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the State's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense. Thus, although the US Supreme Court has made clear that some additional showing of governmental misconduct is necessary, it has not yet explicitly decided whether the misconduct need be intentional. Compare United States v. Gouveia, 467 U.S. 180, 192 (1984) (dictum) (dismissal of indictment required if defendant can prove that government's delay in bringing indictment was "a deliberate device to gain an advantage over him"), with United States v. $8,850, 461 U.S. 555, 563 (1983) (dictum) (due process challenge to preindictment delay can prevail upon a showing of government's "reckless disregard of (delay's) probable prejudicial impact"), and Lovasco[49], 431 U.S. at 795 n.17 (noting government's concession that due process violation might be established on basis of showing of government's reckless disregard of risk of prejudice to defense, but finding "no evidence of recklessness here").

In Marion, the Court declined to state a bright-line rule, but concluded that in cases of preindictment delay involving due process claims, "a fair trial will necessarily involve a delicate judgment based on the circumstances of each case." 404 U.S. at 325. The Lovasco Court interpreted this

[49] In Lovasco, a trial for mail fraud and weapons charges, more than eighteen months elapsed between the commission of the offenses and indictment. Lovasco, 431 U.S. at 784. During that time, two witnesses the appellant claimed were material to his defense died. Id. at 785. Despite the apparent setback for the defense in Lovasco, this is an area of the law where the government is given much latitude in deciding the speed at which it prosecutes a case. In denying the appellant's Fifth Amendment challenge to the charges, the Supreme Court held that judges, in defining due process, are not allowed to substitute their own "personal and private notions of fairness" for the "prosecutor's judgment as to when to seek an indictment." The Court looked at the case as a whole and decided that the extent of prejudice to the appellant's case, notwithstanding his assertions about the materiality of the two witnesses, was not very severe. The Court also saw no bad faith on the part of the government and refused to craft a rule that required the government to proceed to trial as soon as it had enough evidence to establish probable cause. In Lovasco, the Court discussed many valid reasons why the government might wait before formally bringing charges even though it possessed enough information to establish probable cause. Several of these reasons would benefit the accused. While the government could have, and should have, moved at a quicker pace, there was no evidence it stalled the investigative progress to gain some tactical advantage over the appellant.

statement as requiring a consideration of "the reasons for the delay as well as the prejudice to the accused." 431 U.S. at 790. The courts have made it clear that due process under the Fifth Amendment encompasses both procedural and substantive protections. Under procedural due process (and other constitutional protections in the Bill of Rights) defendants are guaranteed fairness throughout the criminal process. It is true that, as a general rule, delay in conducting an investigation of a complaint or between conclusion of the investigation and the laying of charges would not normally be considered to be prejudicial to an accused – or, as one Justice of the United States Supreme Court put it, ***"[t]here is no constitutional right to be arrested.***" Hoffa v United States 385 US 293, 310 (1966). However, the courts have been sensitive to prosecution's manipulations at various stages of the criminal proceedings and have drawn the line as appropriate. As Douglas J noted in United States v Marion: 404 US 307, 330-331 (1971):

> At least some of [the] values served by the right to a speedy trial **are not unique to any particular stage of the criminal proceeding**... **Undue delay may be as offensive to the right to a speedy trial before as after an indictment of information**. The *anxiety and public concern may weigh more heavily upon an individual who has not yet been formally indicted or arrested for*, to him, exoneration by a jury of his peers may be only a vague possibility lurking in the distant future. Indeed **the right to a speedy trial may be denied when a citizen is damned by clandestine innuendo and never given the chance to properly defend himself in a court of law**... To be sure, '[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends on circumstances.'(emphasis added).

In evaluating a Fifth Amendment pre-indictment delay claim, some courts have observed that extreme delays may be presumed prejudicial to the defendant. A delay of say seven years between the commission of a crime and the arrest or indictment of a defendant, his location and identification having been known throughout the period, is presumptively prejudicial to the defendant and violates his right to due process of law. The presumption is rebuttable by the government. Rebutting such a presumption would be a daunting uphill battle for a prosecutor who knew of the defendant's location and identification at all times and even claimed to have a "prima facie evidence of corruption" on the part of the defendant during a major part of that period.

Speedy trial claims are considered under the Sixth Amendment. In considering the issue of undue delay, the US courts apply the balancing test for speedy trial claims developed by the United States Supreme Court in the sixth amendment context in Barker v. Wingo, 407 U.S. 514, 530 (1972). This test requires a balancing of four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice to the defendant caused by the delay. The US Supreme court typically has required defendants to demonstrate actual prejudice from a delay to prevail on a speedy trial claim. However, such a showing is not required where the State was negligent in apprehending a defendant or in initiating proceedings against him. In that scenario prejudice should be conclusively presumed from the length of the delay.

The United States Supreme Court's decision in Doggett v. United States, 505 U.S. 647 (1992), illustrates this principle that a defendant is not required to demonstrate with perfect clarity how he was prejudiced by the delay. In that case, Marc Doggett was indicted in February 1980 for conspiracy to import and distribute cocaine. Id. at 648. Unaware of the charges pending against him, Doggett left the country for Colombia before he could be apprehended. See id. at 648-49. After learning that Doggett had been imprisoned in Panama, the Federal Drug Enforcement Administration requested his expulsion to the United States in September 1981. See id. at 649. Panamanian authorities apparently freed Doggett in July 1982, and he entered the United States unhindered in September 1982, settling in Virginia, married, earned a college degree, and lived openly under his own name. During most of that period, the government erroneously believed that Doggett was living abroad, but it took no steps to test that assumption or otherwise seek to locate him either abroad or in the United States. For a variety of reasons, Doggett "remained lost to the American criminal justice system" until September 1988, when a credit check revealed his whereabouts. Id. at 650. He was arrested in September 1988, eight and a half years after his indictment. See id. Doggett moved to dismiss the indictment, arguing that the government had violated his right to a speedy trial. The federal district court denied the motion; the court accepted a magistrate's recommendation that Doggett had not demonstrated particular prejudice to his case under the fourth factor of the Barker analysis. See id. The United States Court of Appeals for the Eleventh Circuit affirmed, ruling that notwithstanding the government's "***negligence***" in attempting to apprehend Doggett, see United States v. Doggett, 906 F.2d 573, 579 (11th Cir. 1990), he could not "show either that the first three Barker factors weigh heavily in his favour or actual prejudice," id. at 582. The US Supreme Court reversed.

A majority of the Court was satisfied that the first three factors of the Barker analysis weighed in Doggett's favor: the length of the delay was presumptively prejudicial; the government's negligence accounted for the delay; and Doggett could not be faulted for failing to assert his right to a speedy trial given his ignorance of the charges. See Doggett, 505 U.S. at 652-54. In evaluating the fourth factor of the Barker analysis -- whether the accused suffered prejudice from the delay -- the majority observed that "***consideration of prejudice is not limited to the specifically demonstrable,***" and "***affirmative proof of particularized prejudice is not essential to every speedy trial claim.***" Id. at 655. The majority concluded that in view of the finding of negligence on the government's part and the presumptive prejudice attending a delay of more than eight years between indictment and trial, Doggett was entitled to relief. See id. at 657-58. Although the court stated that no one factor is controlling, it noted that the length of the delay is a particularly important factor: “The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.”

The Barker court specifically rejected setting a fixed approach to speedy-trial analysis[50], finding that there could be no constitutional basis for specifying a set number of days or months. Id. at 523. But the Supreme Court later noted that courts hold generally that a post accusation delay **is presumptively prejudicial as it approaches one year**. Doggett v. United States (1992), 505 U.S. 647, 652, 112 S.Ct. 2686, fn. 1. Significantly, in Doggett, the Supreme Court found that the eight and one-half-year delay was excessive and dismissed the indictment, holding that "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other Barker [v. Wingo, 407 US 514, 33 L Ed 2d 101, 92 S Ct 2182 (1972)] criteria, * * * it is part of the mix of relevant facts, and its importance increases with the length of delay." 505 US at 655-56.

Having concluded that the delay of eight and one-half years was presumptively prejudicial, the court then went on to consider the concept of presumptive prejudice in relationship to the reasons or cause of the delay:

> "Barker made it clear that 'different weights [are to be] assigned to different reasons' for delay. Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness, cf. Arizona v. Youngblood, 488 US 51, 102 L Ed 2d 281, 109 S Ct 333 (1988), and its consequent threat to the fairness of the accused's trial. Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority. The Government, indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction the harder it will try to get it.
>
> "To be sure, to warrant granting relief, *negligence unaccompanied by particularized trial prejudice must have lasted longer than negligence demonstrably causing such prejudice. But even so, the Government's egregious persistence in failing to prosecute Doggett is clearly sufficient.* The lag between Doggett's indictment and arrest was 8½ years, and he would have faced trial 6 years earlier than he did but for the Government's inexcusable oversights. The portion of the delay attributable to the Government's negligence far exceeds the threshold needed to state a speedy trial claim; indeed, we have called shorter delays 'extraordinary.' When the Government's negligence thus causes delay six times as long as that generally sufficient to trigger judicial review, * * * and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, nor persuasively rebutted, the defendant is entitled to relief." Doggett, 507 US at 657-58 (brackets in original; some citations omitted; footnote omitted).

[50] In Barker v Wingo (1972) 407 U.S 514 (a judgment of the Supreme Court of the USA) it was held that: "the right to a speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate…The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that the defendant who may be guilty of a serious crime will go free, without having been tried".

In my view, the US courts set a relatively higher burden of proof insofar as unreasonable delay is concerned. However, they are very clear that the only remedy that is considered to be available for an infringement of the right to a speedy trial is outright dismissal, in other words, a stay of the proceedings. This was confirmed in the case of Strunk v. United States 412 US 434 L Ed 2d 56 in which Chief Justice Burger giving the judgment of the Supreme Court said at p.61:-"**In light of the policies which underlie the right to a speedy trial, dismissal must remain, as Barker noted, 'the only possible remedy**.'"

I now consider the first Barker factor, that is the length of the delay in Zuma's case. To trigger a speedy trial analysis in the first instance, a defendant must show that the length of the delay between indictment and arrest was "presumptively prejudicial." Doggett v. United States, 505 U.S. 647, 651-52 , 112 S.Ct. 2686, 2690-91, 120 L.Ed.2d 520 (1992). Only if this threshold point is satisfied may the court proceed with the final three factors in the Barker analysis. Id. Since **delays exceeding one year are generally found to be "presumptively prejudicial**," id. at 652 n. 1, 112 S.Ct. at 2691 n. 1, we must conclude either the 22 months delay between August 2003 and June 2005, the almost three years delay between 2005 and 2007 or both is sufficient to entitle Zuma to a presumption of prejudice. Although he is entitled to such a presumption, however, he retains the burden of proving the remaining factors in the speedy trial inquiry under Barker.

Regarding the second factor, the reasons for the delay I propose to separate the two periods, August 2003 to June 2005 on the one hand and June 2005 to December 2007 on the other. The NPA's failure to understand the legal consequences of publicly naming a person as a guilty crook walking and then denying a forum for vindication cannot be considered excusable neglect. In fact under the US caselaw already canvassed above, it would be an aggravating factor mandating a dismissal if the "pre-charge" period was one during which the NPA improperly used the press and the court's process in Shaik's trial for ***official public smear of an individual when that individual has not been provided a forum in which to vindicate his rights***. Even worse, unlike Doggett, in which the delay apparently resulted solely from the government's negligence, see id. at 652-53, the prosecution in Zuma's case reflected that the delay was intentionally brought about by the government for the purpose of gaining some tactical advantage over the accused in the contemplated prosecution or for some other bad faith purpose.

Some state courts in the US have taken the above US Supreme court precedents a step further and recognized that the constitutional guarantees of a speedy trial are applicable to unjustifiable delays in commencing prosecution, as well as to unjustifiable delays after indictment.. See, Ohio Supreme Court decision,. State v. Meeker (1971), 26 Ohio St.2d 9, 268 N.E.2d 589, paragraph three of the syllabus. In another case, State v. Selvage, (1997), 80 Ohio St.3d 465, 468, 687 N.E.2d 333, the Ohio Supreme Court held that ***a ten-month delay from the filing of a criminal complaint to the indictment of the accused was presumptively prejudicial.*** In State v. Sears, 166 Ohio App.3d 166, 2005, the Ohio Court of Appeals was confronted with a case where there was a nine-month delay from the filing of the criminal complaint until Sears was arrested during an unrelated traffic stop. It stated "*we are convinced that this nine-month delay*

was presumptively prejudicial to Sears in light of the holdings of Selvage and Doggett, 505 U.S. at 652. This delay thus acted as a "trigger mechanism" to weigh the other Barker factors in determining whether Sears's constitutional right to a speedy trial was infringed." New York courts have agreed. See, **http://findarticles.com/p/articles/mi_qn4180/is_20020415/ai_n10067577** discussing a case where unreasonable delay in commencing a prosecution led to a dismissal of a case.

The New York judge held that: "Moreover, ***'unjustifiable delay in commencing a prosecution may require dismissal even where no actual prejudice to defendant is shown***' (People v. McNeil, 204 AD2d 975; see also, People v. Vernace, supra, at 781; People v. Lesiuk, supra, at 490; People v. Fuller, 57 NY2d 152. 159; People v. Singer, supra at 253-254; and People v. Staley, 41 NY2d at 791)." The judge ruled that the defendant was denied his right to prompt prosecution because there was a period of 20 months which elapsed between the time the case was initially referred to law enforcement officials for prosecution, and the date of the indictment. Judge Affronti found. "As noted, slightly more than three months of that time period is attributable to the defendant's request for additional time to consider a possible agreement. However, no excuse is proffered by the People for a delay of over 13 months immediately preceding commencement of the criminal action." As a result, the judge determined that the delay was "unreasonable and not based upon 'a determination made in good faith to defer commencement of the prosecution for further investigation or for other sufficient reason' (People v. Leisuk, supra at 490, quoting People v. Singer, supra at 254; see also People v. Lush, 234 AD2d 991)." Judge Afrronti granted the defendant's motion to dismiss.[51]

Any potential argument by the NPA that its delays were justified by the need for further investigation has been conclusively rebutted by its own actions as follows. The NPA's abject failure to prosecute Zuma from 2003 until June 2005 was accompanied by unprecedented press statements or leaks which purported to show alleged damning evidence of Zuma's criminal wrong-doing. During the entire duration of the delay, the NPA admittedly had "prima facie" evidence of Zuma's corruption including alleged acceptance of bribes and the prosecuting authority even successfully prosecuted Shaik, an alleged co-conspirator and the offeror of the alleged bribes. Mr. Zuma was gainfully employed as the Deputy President of the Republic and his whereabouts were known to the NPA. There is no evidence that he attempted to elude the authorities in any way, nor that he did anything to interfere with the NPA's formulation of criminal charges or its issuance of an indictment. The prosecution team had the alleged "prima facie evidence" throughout this entire period and it appears clear that Zuma was well within the considerable reach of the NPA during the entire 22-month period between the NPA's announcement of its evidence and eventual charges in June 2005.

In short, the Government's failure to indict Zuma was entirely due to either (a) intentional tactical decision to delay charging Zuma until Shaik was convicted or (b) gross negligence in that the NPA failed

[51] For other state court decisions holding that due process protection applies to pre-charging delays, State v. Wilson, 149 Wis. 2d 878, 904, 440 N.W.2d 878 (1989); the right to a speedy trial commences when the defendant is officially accused of the charges, State v. Borhegyi, 222 Wis. 2d 506, 511, 588 N.W.2d 89 (Ct. App. 1998)

to appreciate that a prima facie evidence would require the prosecution to initiate criminal prosecution. In any event, the NPA's public announcement obligated the said agency to bring Zuma to court, that is, provide him with a forum in which to vindicate his rights. The NPA's conclusions to the contrary or its erroneous assessment of the facts and the law is no excuse. As shown above, the courts have already criticised the NPA's tactical decisions on several occasions and are not likely to find the same impugned decisions to be legitimate reasons for the delay. There is nothing in the record to indicate that the NPA's actions were other than intentional - the fact still remains that it failed to act with appropriate diligence in pursuing Mr. Zuma.

Another point that bears repeating for the purpose of analyzing is that the prosecution's decision to charge Shaik separately from Mr. Zuma reflected deliberate government strategy which prejudiced Zuma. At least the government has implicitly admitted that much as evidenced by the following: On August 23, 2003 Sipho Ngwema, spokesperson for director Bulelani Ngcuka, hinted that on reasons why the national director of public prosecutions said there was a prima facie case of corruption against Zuma and other details of the case *were contained in the charge sheet against Shabir Shaik*, Mr. Zuma's financial advisor, who was implicated in alleged corruption around the government's arms procurement process. Responding to Zuma's comments, Ngwema said "***It is unfortunate that we cannot release the basis of our assertion that there is a prima facie case of corruption. 'Those things will come out in court in the matter against Shaik' "However those things will come out in court in the matter against Shabir Shaik,***" Ngwema said. That is a clear admission that a tactical decision was made to use the Shaik trial to establish a case against Zuma. That is a gross constitutional violation of the highest order for the person who is named as an unindicted co-conspirator but is denied an authoritative forum for vindication.

The NPA's reasons for delay in the post June 2005 period is easily disposed of as follows: Judge Msimang's adverse findings are clearly binding on the NPA and the parties and Zuma can rely on these findings of fact to argue that there were no legitimate reasons for the NPA's dilatory actions during this entire period. What is also clear is that the NPA's handling of the Zuma prosecution has been characterized by the polar opposite of due diligence. There are even media reports that the Honorable Chief Justice Langa has sternly reprimanded the NPA for tardiness and for cavalierly flouting the rules of the constitutional court. This is an ominous sign for a prosecution team that has procrastinated for a better part of seven years during the investigation of Zuma case, dragged its feet and lollygagged for months following Judge Msimang's throwing their case out of court. The fact of the matter is that it took another fifteen months after Judge Msimang's ruling for the NPA to complete a "draft indictment" for instituting yet another prosecution against Zuma. The NPA's entire litigation strategy from at least 2003 will not withstand scrutiny – it is just too much display of arrogance, incompetence and constitutes a gross abuse of the judicial system in a manner that has irreparably destroyed Zuma's chance of getting a fair trial. In all events, the NPA is precluded by the doctrine of collateral estoppel amongst others, from having a retrial of the issues already decided by the court in dismissing the first Zuma case. Although the

court in the initial proceedings did not determine guilt or innocence the dismissal was granted because of undue delay and prosecutorial misconduct. Mr. Zuma is entitled to demand finality, claiming that prosecutorial misconduct bars a second trial. If the conduct of the prosecuting attorneys could not be condoned 18 months ago what court would find such delay justifiable now? Moreover, the NPA is bound by its factual admissions that Zuma was prejudiced by the delay in spite of its efforts to qualify such statements by claiming that such prejudice "…comes with the territory."

The third Barker factor to consider is the accused's assertion of the right to a speedy trial. It is clear that a defendant who fails to demand a speedy trial does not forever waive his right. However it can be a factor to be taken into account if the right is asserted only at a late stage. The more serious the deprivation, the more likely a defendant is to complain and his assertion of that right is entitled to strong evidentiary weight in determining whether he is being deprived of the right. There is nothing in the record to suggest that Zuma who was not a party to the Shaik criminal proceedings could have effectively intervened to demand a forum in which to vindicate his rights. In fact, he loudly protested in a manner that was an equivalent of banging on the court-house doors- he complained to the public protector and issued public statements vehemently protesting the violation of his rights. Just as the defendant in Doggett did not assert the right until after his arrest, Zuma should not be punished for failing to assert this right in a criminal court any sooner—he could not have as the NPA has a monopoly in instituting criminal proceedings. Zuma asserted his right at the earliest moment possible due to the prosecution's exclusive control of the process. Furthermore, it is not without significance that Zuma complained to the Public Protector's office and the public protector has already made findings based on Zuma's complaints and these findings are entitled to weight. Further, Zuma's repeated famous "***take me to court***" statements unequivocally prove that Zuma did not sleep on his rights – he loudly protested the NPA's dilatory actions and engaged in the analytical equivalent of loudly banging on the court-house doors. An aggravating factor in this instance is the NPA's wilful disregard of the Public Protector's finding in Zuma's favour during this period. You may recall that Zuma lodged a complaint with the public protector on 30 October 2003 as he was justifiably incensed by the NPA's statements. The Public Protector subsequently issued a damning report in which it found that Ngcuka's statements infringed on Zuma's constitutional right to dignity and caused him to be improperly prejudiced. During its investigations, the public protector experienced stone-wall tactics by the NPA and other difficulties ranging from prevarications, evasiveness and outright refusal to cooperate with the public protector. At no time did the NPA heed the Public Protector's admonitions or re-evaluate its increasingly questionable assumption that its "prima facie evidence of corruption" did not entitle it to prosecute Zuma. Even the Public Protector and Judge Hefer's recommendations regarding the damaging leaks from the NPA's office were blatantly ignored. To this day, that agency has not revised its clearly unconstitutional policies of issuing statements to the press about ongoing investigations of certain prominent citizens. What matters is that Zuma duly asserted his right to a speedy trial as soon as he learned he had been publicly accused of criminal wrongdoing by Ngcuka. A prosecutor cannot publicly accuse a defendant of criminal

wrongdoing and then cavalierly ignore that person's demand for a speedy trial.[52] He also successfully opposed the NPA's request for continuance precisely on the grounds of prejudicial delay going back to the inception of the investigation against him; he cannot be faulted for contributing to the delay of which he was a victim not the author. Thus, this factor weighs heavily in Zuma's favor.

The state has previously argued that that Zuma failed to make out a speedy-trial claim because he did not show prejudice. But the court in Doggett noted that "[o]nce triggered by ***arrest, indictment, or other official accusation***, however, the speedy trial enquiry must weigh the effect of delay on the accused's defense just as it has to weigh any other form of prejudice that Barker recognized." Doggett, 505 U.S at 655. The court went on to say that the "impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.' " Id. Therefore, a court will easily hold that Mr. Zuma's defense was prejudiced by the delay of almost five years from August 2003 to the present. When, as here, the state has made an ***official accusation***, but fails to use any reasonable diligence to bring the accused person to court, prejudice is presumed. See, discussion regarding unindicted co-conspirators. The delay in commencing the prosecution in this case, the state's failure to attempt to bring Mr. Zuma to court, was constitutionally unreasonable.

We conclude that the Court's analysis in Doggett would compel dismissal of the indictment in Mr. Zuma's case. We are also persuaded that, under Section 35(3) (d) of the Constitution, the five-year delay between the initial public accusation and the filing of charges in December 2007 was excessive in the extreme and is sufficient to give rise to presumptive prejudice. Unlike in Doggett, where the cause of the eight-year delay here was the state's indifference or negligence in failing to take even the most basic steps to locate defendant in order to pursue the prosecution against him, the NPA has already been found by a court of law(Honorable Justice Msimang) to have essentially engaged in reckless acts which caused severe prejudice to Mr. Zuma. Certainly, Mr. Zuma did not acquiesce in the delay - at first he vehemently protested Ngcuka's action in 2003 and obtained a favourable ruling from the public protector and he successfully opposed the NPA's request for postponement actually. The case was struck from the roll because of NPA's misconduct , and the state has not rebutted the presumption of prejudice arising at least from the five-year delay.

As to the fourth factor of the Barker analysis, Mr. Zuma, relying on established court record (the trial court decision of Honorable Justice Msimang), easily demonstrates actual prejudice, the "irreparable harm" that the adverse publicity and accompanying delay caused him. When a defendant does not -- or cannot -- articulate the particular harm caused by delay, we inquire whether the length and reason for the delay weigh so heavily in the defendant's favor that prejudice need not be specifically demonstrated. See Doggett, 505 U.S. at 657-58; see also Nelson v. Hargett, 989 F.2d 847, 853 (5th Cir. 1993). Not only is

[52] In Smith v. Hooey, 393 U. S. 374, 383 (89 SC 575, 21 LE2d 607) (1969), the Supreme Court of the United States held that, even though an accused is in federal custody, his constitutional right to a speedy trial is violated if he demands to be tried on a pending state charge and the prosecution thereafter fails "to make a diligent, good-faith effort to bring him before the ... court for trial."

the delay in Zuma's case presumptively prejudicial, see Doggett, 505 U.S. at 652 n.1, the delay in this instance was accompanied by adverse media publicity generated and manipulated in part by the NPA itself. It cannot be denied that the State was solely responsible for the delay. In these circumstances, Zuma's failure to show particular prejudice to his case is not fatal to his speedy trial claim.

Regarding the prejudice factor, we now must determine whether Zuma should be required to demonstrate actual prejudice resulting from the delay. This requires us to revisit the reasons for and the extent of the delay. See id. at 657-58, 112 S.Ct. at 2693-94. In the absence of proof of particularized prejudice, government negligence and a substantial delay will compel relief unless the presumption of prejudice is either "extenuated, as by the defendant's acquiescence, [ ]or persuasively rebutted" by the Government. Id. at 658, 112 S.Ct. at 2694. In cases of government negligence or bad faith, the reasons for the delay are critical and must be examined closely. See id. at 656-57, 112 S.Ct. at 2693. Deliberate intent to delay a trial in order to impair the defense is weighted more heavily against the Government than delay resulting from mere negligence. Barker, 407 U.S. at 531 , 92 S.Ct. at 2192. That is, where the Government engages in bad-faith delay, the court's concerns regarding the length of the delay and substantiating prejudice are much reduced, thereby bolstering a defendant's chance for relief. The NPA's incomprehensible strategy seems to have been to make statements about Zuma intended for public consumption but it was found wanting when it came to proceeding to trial with expedition. The Honorable Justice Herbert Msimang saw through this strategy and aptly described it as one where the "…***state's case limped from one disaster to another.***" Even when faced with that criticism, the NPA through Wim Trengrove, the prosecutor, informed the court that it was "***not in a position to continue with the trial***". Accordingly the matter was struck from the roll for reasons not attributable to Zuma or his counsel – it was based on demonstrable deliberate delay by the NPA. The Honorable Judge Msimang also took notice of an admission by the NPA's Bill Downer that the NPA "takes chances every day" in court effectively admitting that the NPA engages in justice by lottery. It was a case where the NPA thought it permissible to "**gamble with the interests of criminal suspects assigned a low prosecutorial priority.**" Doggett, 505 U.S. at 657. The NPA clearly failed the public's interest in the timely prosecution of allegedly serious criminal offenses that go to the very heart of our democratic system.

Even if the NPA's actions were somehow characterized as "negligence" as opposed to intentional strategy, that would still be a viable basis for dismissing Zuma's case. In cases of government negligence, the court's concern for substantiating prejudice decreases as the period of delay increases. Doggett, 505 U.S. at 657 -58, 112 S.Ct. at 2693-94. Indeed, in Doggett, an 81/2-year delay caused solely by government negligence was considered by the Supreme Court to be long enough that affirmative proof of particularized prejudice was not essential. Id. at 655, 657-58, 112 S.Ct. at 2692, 2694. The US Supreme Court noted in Doggett that the toleration of negligence varies inversely with the length of the delay caused by that negligence. Doggett, 505 U.S. at 657 , 112 S.Ct. at 2693. There is no hard and fast rule to apply here, and each case must be decided on its own facts.

Even if the court was to require that Zuma show actual prejudice resulting from the delay, he will easily meet that threshold as well. Actual prejudice can be shown in three ways: (1) oppressive pretrial incarceration, (2) anxiety and concern of the accused, and (3) possibility that the accused's defense will be impaired. Doggett, 505 U.S. at 654 , 112 S.Ct. at 2692. Since Zuma was not in custody the first form of prejudice is clearly inapplicable to him. Thus, only the second and third form of prejudice identified in Doggett are applicable. Zuma was clearly subject to public suspicion and hostility as the NPA made public its infamous statements essentially implying that Zuma was an unindicted guilty crook walking. See Barker, 407 U.S.at 533 ("[E]ven if an accused is not incarcerated prior to trial, *he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility*."). Once again, the Honorable Judge Msimang captured the essence of the prejudice already suffered by Zuma as follows: "We ***cannot imagine any case in recent times which has triggered as much negative publicity in the media as the present one…***However, as it was pointed out in the ***Sanderson case***, the problem with ***this kind of prejudice is that it closely resembles the kind of punishment that ought only to be imposed on convicted persons and is therefore inimical to the right to be presumed to be innocent enshrined in the Constitution***. Much as such prejudice is inevitable in our criminal justice system, the accused's right to a trial within a reasonable time demands that the ***tension between the presumption of innocence and the publicity of trial be mitigated***." In a not so veiled effort to influence the outcome of the hotly contested ANC elections, the NPA kept issuing media statements about Zuma's pending charges while the ANC conference was underway in Limpopo. It went so far as to publicize its "draft indictment" of Zuma and followed it up with the present indictment. The NPA's arrogance is demonstrated by the fact that it ignored direct rulings by Judge Msimang and even hints from the highest courts and established legal principles in a gadarene rush to bring charges against Zuma. Why did the NPA not take this admonition to heart and avoid unnecessary publicity and media leaks in Zuma's case after Judge Msimang's ruling and the SCA's judgment in the SABC appeal case?

This takes us to the third form of prejudice—possible impairment of the defendant's case—which the US Supreme Court has described as " '***the most serious . . . because the inability of a defendant adequately to prepare his case skews the fairness of the entire system***.' "Id. (quoting Barker, 407 U.S. at 532). Shabir Shaik's "availability" as a witness for Zuma is questionable in light of media reports suggesting deterioration of his health, including a mild stroke he suffered four months ago. Judge Howie, in his ruling on the **SABC v Downer SC NO & others [2006]** case, questioned the NPA's decision not to charge Zuma together with Shaik and stated "*Considering next the problem of the pending Zuma trial, it is not apparent why the prosecuting authorities did not charge both accused in one case. Their present predicament could well be of their own making*." Shaik's health problems may render him unavailable to Zuma as a potential key witness and thus derail Zuma's right to a fair trial. Generally, the loss of witnesses, evidence and the general dimming of memories that is attendant to the lengthy delay present in a case may substantially impair an accused's ability to defend himself and is an appropriate basis for a dismissal of the case. In this regard ponder three critical issues: Thetard has already been let off the hook

by the deal the NPA struck with him and will obviously never be available to testify in the case. Shabir Shaik's inability to testify may add another layer of prejudice and complication to the case and may render the trial of Jacob Zuma even more farcical. Even Zuma's own ability to recall in minute details meetings, conversations and events that allegedly occurred over a ten year period from 1995 to 2003 cannot reasonably be expected to be assured.

In conclusion, Zuma would win hands down if he were litigating his case in a US court-room. A court would regard Zuma's treatment between 2003 and June 2005 to be so highly prejudicial that it may consider it unnecessary to address the delay issue. Using a court process to subject a citizen to "torture" or lynching process and then two years later following up with a proper indictment would be considered totally unacceptable. I have simply addressed this issue and analyzed it under the applicable case-law/precedent to refute completely the nonsensical claims by some that Zuma is receiving all the due process protections recognized in civilized countries. Suffice it to state that Judge Msimang's findings and the NPA's actions prior to and subsequent to the decision striking the case off the roll give Zuma plenty of room to make a winning argument. It is simply an argument he cannot lose. We must next examine how Zuma's case would be viewed or dealt with if the Canadian approach is followed.

2.14(b) Canadian Courts' Approach to Constitutional Right To A Fair Public Trial Without Unreasonable Delay As Abuse of Process

The Supreme Court of Canada in R.v. Askov (1990) 79 CR (3d) 273 interpreted the right under s11(b) of the Canadian Charter for one "charged" with an offence "to be tried within a reasonable time". Cory, J., giving the judgment of the majority, took four factors into account when determining whether there had been unreasonable delay: (1) Length of the delay, (2) The explanation for the delay, (3) Waiver, and (4) Prejudice to the accused. The factors he took into account are little different from those suggested by Powell, J. in Barker v.Wingo and he also recognised the need to engage in a balancing exercise. The aim of this test is to provide a method based upon the underlying purposes of s11(b) which will permit courts to balance the applicable substantive factors in a consistent manner. Later on in Morin (1992) 12 CR (4th) 1, another case dealing with undue delay in prosecution of cases or applications under Section 11(b) of the Charter, Supreme Court of Canada the court emphasised discretion and the need to establish prejudice. Morin is the leading. The factors that are to be considered in analysing how long is too long are: The length of the delay; waiver of time periods; the reasons for the delay which include inherent time requirements of the case, actions of the accused, actions of the Crown, limits on institutional resources, and other reasons for delay; and finally, prejudice to the accused.

Contrary to the NPA's argument that Section 35(3) of our constitution is limited solely to post-charge delay, the circumstances of the pre-charge delay should be considered when assessing the reasonableness of the post-charge delay. The pre-charge is a factor that has an influence in identifying a principle of fundamental justice, but that factor does not by itself imply a breach of fundamental justice. The equivalent section in the Canadian Charter uses the expression "Any" person charged with an offence

..." (Section 11). The Canadian court in Mills v. R. 1986 26 CCC (3d) p.481 at p.558, (Lamer J.) dealt with the question of the length of the delay and articulated a rationale very helpful to Zuma:- "*I agree, rather, with the view that the time frame to be considered in computing trial within a reasonable time only runs from the moment a person is charged. Pre-charge delay will in no way impair those interests with which s.11(b) is concerned. Prior to the charge, the individual will not normally be subject to restraint* ***nor will he or she stand accused before the community of committing a crime. Thus, those aspects of the liberty as security of the person protected by s.11(b) will not be placed in jeopardy prior to the institution of judicial proceedings against the individual by mean of the charge.***" The Canadian court was not being naïve in the foregoing statement – it was merely stating a truism accepted in all civilized countries that a person cannot "***stand accused before the community of committing a crime"*** without being charged and ***"prior to the institution of judicial proceedings against the individual by mean of the charge.***" Obviously, the Canadians could never have fathomed a situation where Mr. Zuma or any citizen could, prior to the charge, "stand accused before the community of committing a crime" or have their security of person violated by "***overlong subjection to the vexations and vicissitudes of a pending criminal accusation***" without being provided a forum in which to defend themselves. As Judge Lamer later elaborated on this issue when delivering a dissenting judgment in R. v. Kalanj and Pion (1989) 48000 (3rd) 459, at p.473: "Generally speaking a charge begins with an information. Unless the accused is present at the time the information is laid, which very seldom occurs, the justice or judge issues a warrant or a summons to get the accused before him to answer the charge. ... *Indeed, until the process is executed or until the accused has knowledge of its existence, the "impairment of the accused's interest" has not really begun*. ... This is why I chose, as a starting point, service of the summons, execution of the warrant, *but sometimes earlier, that is if the accused is informed of the existence of the charge by the authorities.*" Once again, the judge could not have imagined a Kafkaesque scenario experienced by Zuma – the NPA announces the completion of its investigation at a press conference and tops that off by stating that there exists "a prima facie evidence of corruption" against a citizen the state has chosen not to prosecute. Significantly, Judge Lamer also states that the impairment of the accused's interest for the purpose of calculating the period of delay may be "*sometimes earlier, that is if the accused is informed of the existence of the charge by the authorities."* Clearly Mr. Zuma was informed and publicly accused as a guilty crook walking back in August 2003.

In the same case, R. v. Kalanj, McIntyre J. addressed the issue of the length of the investigatory period at paragraph 19 by stating that:

> *The length of the pre-information or investigatory period is wholly unpredictable. No reasonable assessment of what is, or is not, a reasonable time can be readily made.* ***Circumstances will differ from case to case and much information gathered in an investigation must, by its very nature, be confidential.*** *A court will rarely, if ever, be able to fix in any realistic manner a time limit for the investigation of a given offence. It is notable that the law save for some limited statutory exceptions has never recognized a time limitation for the institution of criminal proceedings.* ***Where, however, the investigation reveals evidence that would justify the swearing of an information, then for the first time the assessment of a***

> ***reasonable period for the conclusion of the matter by trial becomes possible.*** *It is for that reason that s. 11 limits its operation to the post-information period.* ***Prior to the charge the rights of the accused are protected by general law and guaranteed by ss. 7, 8, 9 and 10 of the Charter****.*

The court's statement that "**much information gathered in an investigation must, by its very nature, be confidential. A court will rarely, if ever, be able to fix in any realistic manner a time limit for the investigation of a given offence**" stands in sharp contrast to the NPA's actions in the handling of Zuma's case. Instead of keeping the investigation and evidence collected during the investigation confidential, the NPA convened a press conference and announces to the whole world that "prima facie evidence of corruption" exists against Mr. Jacob Zuma. This is precisely the point at which Justice McIntyre contemplated that the evidence could permit a court to assess ***when charges could have been laid, or as he put it, the swearing of an information, and what constitutes a reasonable period of time for the conclusion of the matter by trial.*** As of August 23, 2003 the NPA announced to the entire world that its investigation of Zuma was completed. The period of 23 August 2003 to June 2005 appears to be a period of time that falls within reasonable parameters for the commencement of prosecution based on the NPA's own admissions. Its failure to do so would be considered totally inexcusable by these Canadian judges.

From the foregoing it is very clear that the Canadian courts have not treated the pre-indictment stage of a case as totally irrelevant to the speedy trial analysis. In Zuma's case, the words used by the South African constitution is "the accused" and not merely one who has been formally "charged." The word "accused" should be given a liberal construction, and, in line with the Canadian and European authorities, should relate to the time at which an individual is officially advised by a competent authority that he is suspected of having committed a criminal offence, for it is surely at least from that time that a suspect, who eventually goes to trial, begins to feel the pressure and strain that is experienced by all those who face the wait for trial on criminal charges, and his personal, family, social and business circumstances begin to be affected. It would certainly eviscerate the provisions of our constitution for the courts to allow the NPA to argue that Zuma was "technically not accused" until the prosecuting authorities chose to file formal charges against him in June 2005. In any event, any determination of the issue of fairness of trial must involve consideration of all factors which might be relevant to that issue, including the length of time that has elapsed since the events occurred and the effect that might have on e.g. the availability or capacity of witnesses, or on the person awaiting trial.

Even if the courts were to accept the absurd argument that pre-charge delay is not relevant to the determination of the length of the "unreasonable" delay referred to in Section 35(3) of our constitution, it is certainly relevant to an assessment of the fairness of the proceedings required by this section of the constitution and the doctrine of abuse of process. In Morin, Justice Sepinka, delivering the majority decision, spoke of pre-charge delay at p.15: "***Pre-charge delay may in certain circumstances have an influence on the overall determination as to whether post charge delay is unreasonable but of itself is it not counted in determining the length of the delay.***" In Mills at p.558 Lamer, J. had this to say on the

same topic:-"***Pre-charge delay is relevant, however, to the right to a fair trial protected by ss.7 and 11(d) of the Charter.... Pre-charge delay is relevant under ss.7 and 11(d) because it is not the length of the delay which matters but rather the effect of the delay upon the fairness of the trial. Pre-charge delay is as relevant as any other form of pre-charge or post-charge conduct which has a bearing upon the fairness of the trial.***" At the risk of repetition ad nauseum, the Canadian court was obviously not dealing with egregious violations of confidentiality similar to that which occurred in Mr. Zuma's case. An announcement by the prosecutor that a "prima facie case" of corruption existed was in fact a public accusation, an announcement that the NPA investigation had revealed "evidence that would justify the swearing of an information" as stated in R. Kalanj. Accordingly, the clock starts ticking from August 23, 2003 since the assessment of a reasonable period for the conclusion of the matter by trial became possible. The information gathered during the investigation was no longer "confidential" or shrouded in secrecy. Zuma's right to a speedy trial was denied because he was "**damned by clandestine innuendo and never given the chance to properly defend himself in a court of law**..."

The Supreme Court of Canada have also given these factors careful consideration as well as considering the competing issues that underlie such cases – as McLachlin J said in R v Morin: "[S]imply listing factors does not resolve the dilemma... What is important is how those factors interact and what weight is to be accorded to each... The interest of society in bringing those charged with criminal offences to trial is of constant importance. The interest of the accused, on the other hand... varies with the circumstances. It is usually measured by the... prejudice to the *accused's interests in security and a fair trial.*" The court gave consideration to the best method of approach for courts to take when dealing with such cases: "[T]he task... may usefully be regarded as falling into two segments. The first step is to determine whether a prima facie or threshold case for unreasonable delay has been made out. Here such matters as length of delay, waiver and the reasons for the delay fall to be considered... If this threshold or prima facie case is made out, the court must proceed to a closer consideration of the right of the accused to a trial within a reasonable time, and the question of whether it outweighs the conflicting interest of society in bringing a person charged with a criminal offence to trial."

To sum up, the issues can be properly stated as follows: The public naming of Zuma as a person against whom evidence of criminal wrongdoing existed triggered the prosecution's duty to initiate proceedings or to provide a forum in which Zuma could have a name-clearing hearing or trial. Given some courts' condemnation of prosecution's actions of "**stigmatizing private citizens as criminals while not naming them as defendants or affording ... affirmatively opposing access to any forum for vindication**" Briggs, 514 F.2d at 804, a South African court must certainly take the period between August 2003 and June 2005 into consideration.

2.14(c) New Zealand Courts' Approach to Constitutional Right To A Fair Public Trial Without Unreasonable Delay As Abuse of Process

Section 25(b) of the New Zealand Bill of Rights Act is as follows: "Everyone who is charged with an offence has, in relation to the determination of the charge, the right to be tried without undue delay." The right to be tried without undue delay seeks to protect interests other than the right to a fair trial, including the liberty interest of the accused, the preservation of public confidence in the administration of justice, and to prevent unnecessarily prolonged detention or control. The right to be tried without undue delay applies once a person has been officially accused of an offence[53], and complements principles against abuse of process. The New Zealand Courts have been willing to consider whether any delays in the pre-charge period have meant that delays in the post-charge period are "undue".

The leading case on undue delay is the Court of Appeal decision of Martin v District Court at Tauranga, [1995] 2 NZLR 419[54] in which Casey J stated: "... the early trial objective of para (b) is aimed at the ***perceived affront to human dignity caused by drawn-out legal process, as recognised over the centuries in those jurisdictions acknowledging the worth and liberty of the individual.***" The issue before the court was whether a **seventeen (17) month delay** between the laying of a criminal charge and the trial date breached the accused's right to be tried without "undue delay" under section 25(b) of the Bill of Rights. Although the decision was decided with reference to Canadian authority, both the High Court and the Court of Appeal considered International human rights instruments including the ICCPR and the ECHR in defining "undue delay". Section 25(b) serves three purposes.[55] Firstly, it ensures that persons charged with an offence are afforded a fair trial. Delays in the trial process may lead to a miscarriage of justice as witnesses' memories of events fade or they no longer remain available to testify for whatever reason. Secondly, delays to the start of a trial may mean that an accused is held in custody or subject to stringent bail conditions for a longer period than necessary. And thirdly, section 25(b) seeks to preserve an individual's security or liberty interest. That is, the courts have acknowledged that lengthy delays may have an impact on an individual's sense of certainty about his or her future, even if they are not held in custody. The independence of the liberty interest was identified in Hughes v Police, [1995] 3 NZLR 443, 453, where Gallen J stated: "***The Courts have accepted the pressures and personal consequences arising from an extended delay on the person subjected to such delay, can of themselves amount to prejudice for the purposes of an abuse of process application, even where they are not seen as directly impinging upon the ability of the person concerned to defend him or herself.***" Therein lies the rub.

Pre-trial delay giving rise to an abuse of process is likely to give rise to consideration as to whether the accused would receive a fair trial. R v O [1999] 1 NZLR 347, 350. The scope of section

[53] There is case law suggesting that "undue delay" in question relates to post not pre charge delay (R v S (1993) 9 CRNZ 490, R v B (1993) 11 CRNZ 174, R v H (1993) 10 CRNZ 563). However, those cases seem to have adopted a narrow interpretation of "charged with an offence" as shown later.

[54] The Court in that case held that a **17 month delay** from charge to trial date resulting from the unjustified action of the prosecutor amounted to "undue delay" under section 25(b) of the Bill of Rights Act.

[55] The European Court of Human Rights has also included a fourth consideration: the desire to avoid delays which might jeopardise the effectiveness and credibility of the administration of justice. See, Procurator Fiscal, Linlithgow v Watson and Burrows; Her Majesty's Advocate v JK [2002] UKHRR.

25(b) is broader than what may otherwise be the case because the courts have been willing to consider whether any delays in the pre-charge period have meant that delays in the post-charge period are "undue". Also the word "charge" under section 25(b) has been defined by the courts to refer to "**the first official accusation**". Martin v Tauranga District Court [1995] 2 NZLR 419, 420 and not simply to the act of formally filing charges.

The Court in Martin set out general principles in delay cases which should be adopted in New Zealand, and, in particular, trial related consideration such as the degree of prejudice to the accused should be examined to see whether delay is undue. Further, although overseas cases would serve as a guide for determining whether delay was "undue in any given situation, such cases are not conclusive." The Court of Appeal noted that a stay of proceedings was the appropriate remedy in Martin but hinted that expediting proceedings, the grant of bail to a defendant who has been held in custody, or even the payment of damages may be appropriate depending upon the circumstances of the case.

In R v Palmer (1996) 2 HRNZ 458 the Court of Appeal held that where there is a well-founded assertion that a breach of a right guaranteed under the Bill of Rights Act has occurred, the burden shifted to the prosecution (Crown) to establish on the balance of probabilities that there has in fact been no breach. (R v Mungroo [1991] 1 WLR 1351, 1355.) The Court of Appeal followed the general approach and principles as expressed in the judgments of the Court in Martin v District Court of Tauranga 12 CRNZ 509, 532; R v Coghill (1995) 13 CRNZ 258 and R v Burney and Parkes CA 231/95 and CA 278/95. These cases emphasise that what constitutes delay such as to breach an accused person's right under section 25(b) will depend on all the circumstances. Aspects of the lapse of any significant time will be attributable to different matters. No one matter will necessarily be dominant. The overall length of time must be considered in light of the nature of the charges, whether the accused has contributed to, or acquiesced in, the delay will be relevant as will the failure to complain if that reasonably might have been expected. As appears from the judgment of R v Burney and Parkes it will be of considerable significance if a trial has been held and a conviction entered without any suggestion of a miscarriage of justice. It is important that breaches of section 25(b) do not equate with failure to meet target guidelines in the management of criminal proceedings. The heavy and increasing demands on District Courts will lead from time to time to errors and omissions. The Court can give no encouragement to immediate resort to section 25(b) when ever that occurs. The Court of Appeal (in Palmer) held that overall the proceeding did not warrant quashing the conviction. See also R v B [1996] 1 NZLR 385 where substantial and undesirable delay did not result in a miscarriage of justice; R v Grant (29-5-96; CA 471/95) serious delay but because appellant took no active steps in respect of trial delay until outcome of another case known the appeal was dismissed; R v Barlow [1996] 2 NZLR 116. The Court of Appeal held that until there was a passage of time by its length or cause properly called delay, other prejudice was not relevant; C v Wellington District Court [1996] 1 NZLR 668.

Speaking of the high normative value attached to a Bill of Rights, Richardson J. made this point succinctly in *Martin v Tauranga District Court* [1995] 2 NZLR 419 at p 428. He said:–**"…. *the***

objective is to vindicate human rights, not to punish or discipline those responsible for the breach. The choice of remedies should be directed to the values underlying the particular right. The remedy or remedies granted should be proportional to the particular breach and should have regard to other aspects of the public interest."

The courts in New Zealand have also indicated that they will not necessarily accept a lack of resources as an adequate reason for explaining a delay. R v Haig [1996] 1 NZLR 184, 193. See also, Martin at 421 where Cooke P made the same point. However, Cooke P went on to make the observation that, where the court is aware that the government is conscious of a problem and is taking prompt steps to deal with it, the courts would be reluctant to stay proceedings on the ground of systemic delay only. However, the courts may take into consideration the steps that the Crown has taken to address causes of systemic delay when assessing whether any delay is unreasonable.[56] That length of delay is not to be taken as a yardstick for what is an unreasonable delay, indeed, Cooke, P. in his judgment at p.13 said, "I would not at the present stage under the Bill of Rights regard delays of the order exemplified in the present case as necessarily beyond the pale. ***It is the contribution from the prosecutor that tips the balance in this case.***" The "contribution from the prosecutor" in Mr. Zuma's case would do more than just tip the scales; it is an egregious dereliction of duty over a 22 months period (more than the 17 months in Martin). When the additional post-charge period of 13 months during which the case was pending before Judge Msimang is considered in light of Judge Msimang's express findings that the NPA was at fault not just for delays but for a litigation strategy that caused the case to limp from one disaster to another, it becomes apparent that the NPA's case would not survive in a New Zealand court. It would in all probabilities be dismissed for the August 2003 to June 2005 delay alone without even considering the later developments.

2.14(d) United Kingdom Courts and "Strasbourg Jurisprudence" Approach to Right To A Fair Public Trial Without Unreasonable Delay As Abuse of Process

The test applied by the UK courts in deciding whether a defendant's right to a fair trial had been infringed by delay, is set out in Lord Templeman's judgment in Bell v. DPP of Jamaica [1985] A.C. 937 at 951-952D-F[57]. He cited with approval the judgement of Powell J. in the Supreme Court of the United States in Barker v. Wingo (1972) 407 U.S. 514, in which Powell J. identified four factors to which "the

[56] The Court's willingness to hold the government responsible can yield benefits and lead to reforms in the system. For instance, after the Court of Appeal in Martin v District Court at Tauranga stayed the proceedings after a 17 months delay between the charge and the trial, the issue of trial delay became the subject of public debate and ministerial questions and the Courts and Criminal Procedure (Miscellaneous Provisions) Amendment Act which brought about changes to the court structure to avoid further stays of proceedings. Arguably, the decision led to the case management system undergoing an overhaul to make case management more efficient. All courts within the system scrutinised their procedure to avoid further delays. The problem of undue delay of trials resurfaced in 1997 when the increase of jury trials in the District Courts led to backlog and delay and the resulting of stay of proceedings because of it. Parliament enacted the Community Magistrates Act to ease the backlog and avoid stay of proceedings.

[57] The Privy Council in Bell v. DPP of Jamaica [1985] 2 All E.R. 585 recognised that the courts enjoy a common law power to prevent abuse of process by unreasonable delay. Lord Templeman went further and rejected a submission that the accused would have to prove "**some specific prejudice**" to come within the power.

court should have regard to. As explained earlier, where there has been substantial delay in bringing a prosecution, the court (under British common law) may stay (halt) the case as an abuse of process.[58] Typically, a stay of proceedings on the ground of unjustifiable delay alone is very rare and will only be granted by the courts in exceptional circumstances.[59] Generally speaking, stays have been reserved for very rare cases of prosecutorial misconduct or some fault on the part of the prosecution. This is understandable since in the absence of some constitutionally guaranteed rights such as the right of an accused to a speedy trial, the UK courts could only base a stay for abuse of process on the prosecution's "fault" which was also based on amorphous concepts. Later on the courts articulated the rationale for this inherent power to stay proceedings as judicial acceptance of ***"a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action*** **and** ***to refuse to countenance behaviour that threatens either basic human rights or the rule of law."***

And finally, the UK espouse a philosophy that absent serious prejudice to an accused or fault on the prosecution's part, a stay of proceedings should be granted only in exceptional circumstances. It must be shown that the delay had produced genuine prejudice and unfairness. In Attorney-General's Reference

---

[58] Corker and Young, Abuse of Process in Criminal Proceedings, 2nd ed (2003), 22.

[59] In Dyer v Watson [2002] UKPC D1, [2004] 1 AC 379, 403-3, paras 52-5 Lord Bingham of Cornhill set out a series of propositions material to determining the reasonableness of the time taken to complete the hearing of a criminal case:

> "52. In any case in which it is said that the reasonable time requirement has been or will be violated, the first step is to consider the period of time which has elapsed. Unless that period is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further, since the Convention is directed not to departures from the ideal but to infringements of basic human rights. The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. But if the period which has elapsed is one which, on its face and without more, gives ground for real concern, two consequences follow. First, it is necessary for the court to look into the detailed facts and circumstances of the particular case. The Strasbourg case law shows very clearly that the outcome is closely dependent on the facts of each case. Secondly, it is necessary for the contracting state to explain and justify any lapse of time which appears to be excessive.
>
> 53. The court has identified three areas as calling for particular inquiry. The first of these is the complexity of the case. It is recognised, realistically enough, that the more complex a case, the greater the number of witnesses, the heavier the burden of documentation, the longer the time which must necessarily be taken to prepare it adequately for trial and for any appellate hearing. But with any case, however complex, there comes a time when the passage of time becomes excessive and unacceptable.
>
> 54. The second matter to which the court has routinely paid regard is the conduct of the defendant. In almost any fair and developed legal system it is possible for a recalcitrant defendant to cause delay by making spurious applications and challenges, changing legal advisers, absenting himself, exploiting procedural technicalities, and so on. A defendant cannot properly complain of delay of which he is the author. But procedural time-wasting on his part does not entitle the prosecuting authorities themselves to waste time unnecessarily and excessively. The third matter routinely and carefully considered by the court is the manner in which the case has been dealt with by the administrative and judicial authorities. It is plain that contracting states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. It is, generally speaking, incumbent on contracting states so to organise their legal systems as to ensure that the reasonable time requirement is honoured. But nothing in the Convention jurisprudence requires courts to shut their eyes to the practical realities of litigious life even in a reasonably well-organised legal system. Thus it is not objectionable for a prosecutor to deal with cases according to what he reasonably regards as their priority, so as to achieve an orderly dispatch of business. It must be accepted that a prosecutor cannot ordinarily devote his whole time and attention to a single case. Courts are entitled to draw up their lists of cases for trial some time in advance. It may be necessary to await the availability of a judge possessing a special expertise or the availability of a courthouse with special facilities or security. Plans may be disrupted by unexpected illness. The pressure on a court may be increased by a sudden and unforeseen surge of business. There is no general obligation on a prosecutor, such as that imposed on a prosecutor seeking to extend a custody time limit under section 22(3)(b) of the Prosecution of Offences Act 1985, to show that he has acted 'with all due diligence and expedition.' But a marked lack of expedition, if unjustified, will point towards a breach of the reasonable time requirement, and the authorities make clear that while, for purposes of the reasonable time requirement, time runs from the date when the defendant is charged, the passage of any considerable period of time before charge may call for greater than normal expedition thereafter."

(No.1 of 1990) [1992] QB 630, (1992) 95 Cr. App. R. 296, Lord Chief Justice Lane observed (as followed in Attorney-General's Reference No.2 of 2001, R v J (2001) EWCA Crim. 1568):

> "(1) that generally speaking a prosecutor has as much right as a defendant to demand a verdict of a jury on an outstanding indictment and, where either demands a verdict, a judge has no jurisdiction to stand in the way of it and therefore the jurisdiction to stay proceedings is exceptional;
> (2) a stay should never be imposed where the delay has been caused by the complexity of the proceedings;
> (3) it would be rare for a stay to be imposed in the absence of fault on the part of the prosecutor or complainant;
> (4) delay contributed to by the actions of the defendant should not found the basis of a stay;
> (5) the defendant needs to show on a balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held. In other words, the continuance of the proceedings amounts to an abuse of the process of the court. In assessing whether there is likely to be prejudice and if so whether it can properly be described as serious, the following matters should be borne in mind: first, the power of the judge at common law and under the Police and Criminal Evidence Act 1984, to regulate the admissibility of evidence; secondly, the trial process itself, which should ensure that all relevant factual issues arising from the delay will be placed before the jury as part of the evidence for their consideration, together with the powers of the judge to give appropriate directions to the jury before they consider their verdict "

In this regard, the courts seem to have almost an exaggerated confidence that prejudice to the accused can be alleviated because of the power of the judge/magistrates to regulate the process including admissibility of evidence. In other words even if evidence is technically admissible, it can be given reduced weight and therefore an accused's inability to recollect events dating back to say a ten year period may not be held against him.[60] The courts are also of the view that during the trial itself, factual issues relating to delay can be placed before the jury as part of the evidence and the judge may issue proper instructions to the jury about delay and its impact, if any, before the jury commences its deliberations or considers its verdict.[61] See also the comments of the Privy Council in DPP v Tokai [1996] AC 856, that if proceedings were not stayed it was the trial judges duty to direct the jury as to any matter arising from the delay which was favourable to the defence.

Despite this acceptance of responsibility to prevent behaviour that constitutes a threat to basic human rights, the UK courts, unlike their US and Canadian counterparts still display a reluctance to

[60] Lord Justice Hobhouse in R. v. B [1996] Crim. L.R. 406 observed: "That it is incumbent upon the judge to give guidance to the jury on the issue of delay and its relevance. Appropriate assistance should be given to the jury on matters such as the difficulty of witnesses being able to give detailed evidence about incidents said to have occurred in the distant past and the defendant's ability to check detail by reference to separate independent evidence."

[61] The issue of judicial directions was also considered in R. v. Hickson [1997] Crim. L.R. 494— Lord Justice Beldam said: "…that where specific aspects of disadvantage are raised by the defence it is incumbent on a Judge to remind the Jury of those aspects which have been raised, and to point out the particular difficulties of which the defence complained… in a case where the offences can properly be regarded as of antiquity… the Judge ought to refer generally to the difficulties faced by the defendant in meeting the charges and particularly if the defendant cannot be expected to remember or is unable to recall what he was doing at a particular time, but the nature of such a direction, and its extent and how for the Judge feels it necessary in a given case to direct a jury will depend on the circumstances of the case … how old the offences are and on the issues which are raised".

dismiss cases for abuse of process. One can isolate a dozen reasons why that is so, but it suffices for the present to state the following: Egregious prosecutorial misconduct on a scale seen in the US is rare in Britain. Clear rules and guidelines on pre-trial publicity and prosecutorial conduct are in place and enforced – most certainly, a Zuma scenario would probably have been averted by the prosecutors and even the courts to ensure that the accused's rights were fully protected. It would be rare to find an accused like Zuma who has a legitimate claim that a prosecutor has violated his rights under no less than eight separate provisions of the constitution since UK prosecutors are conscientious enough and operate within clearly defined rules and guidelines.

However, the UK and other European courts have shown willingness to adopt a broader approach when confronted with the interpretation of citizen's rights under the European convention such as Article 6(1) of the European Convention which deals with the right to a fair trial. A purposive interpretation is preferred and adopted in order to give full effect to the rights enshrined in human rights instruments. The purpose of the reasonable time guarantee was identified in the case of Stogmuller v Austria [1969] 1 EHRR 155 as being "***to protect people against excessive criminal delays; in criminal matters, especially, it is designed to avoid that a person charged should remain too long in a state of uncertainty about his fate.***" The right to a fair trial within a reasonable time under Article 6(1) has a higher normative force than under the common law: The protection afforded by Article 6(1) may be regarded as demanding a standard of performance by the prosecutor which is more exacting than that set by the common law, as it does not require the person charged to demonstrate prejudice. Indeed, in contrast to the common law ground of abuse of process, where prejudice caused by trial or judicial delay was necessary, the courts must ignore the prejudice requirement and address potential infringements of Article 6(1) resulting from delays in the judicial process directly.[62] For the purpose of setting the stage for the argument in favour of a dismissal in Zuma's case, I will refer extensively to UK cases discussing the abuse of process and delay in the context of human rights instruments.

The courts have addressed a threshold question of exactly when does the clock start ticking for the purpose of measuring undue or unreasonable delay? Unlike the South African constitution which addresses the situation of an "accused person", Article 6(1) of the convention specifically mentions a "criminal charge." The first matter to be determined in Zuma's case is the commencement date for the computation of the time which has lapsed so as to ascertain whether or not a reasonable time has passed. The meaning of "criminal charge" in Article 6(1) is an autonomous concept and it is necessary to look behind the national terms used to get to the substance of the situation. In *Attorney General's Reference No 2 of 2001 Sub Nom, R v J* [2001] EWCA Crim 1568 (hereinafter referred to as *Attorney General's Reference No 2 2001*) the Lord Chief Justice said:

> "9. The meaning of the word `charged' is well known within this jurisdiction. However for the purpose of considering what amounts to `charging' someone for the purpose of the

[62] Trial within a reasonable time is an independent right from the other fair trial rights established by Article 6(1), so a complaint of delay cannot be answered by showing that the other rights were not breached. Porter v Magill [2001] UKHL 67, [2002] 2 AC 357.

reasonable time requirement in Article 6(1) it is necessary to bear in mind that as the Convention applies to a number of jurisdictions and the meaning of `charged' in Article 6(1) may not necessarily correspond with our domestic approach to the charging of a criminal offence.

10. **The *jurisprudence (of Strasbourg) does not confine a charge for the purpose of Article 6 to precisely the circumstances which we would regard in this jurisdiction as amounting to a charge.*** However in the great majority of situations the date that a defendant is charged (in the sense we use that term in our domestic jurisprudence) will provide the answer. *Ordinarily therefore the commencement of the computation in determining whether a reasonable time has elapsed will start with either a defendant being charged or being served with a summons as a result of the information being laid before the magistrates.*

11. ***There will however be situations where a broader approach is required to be adopted in order to give full effect to the rights preserved by Article 6(1) of the Convention. …. For the purposes of that Article there could be a period prior to a person formally being charged under English law if the situation was one where the accused has been substantially affected by the actions of a state so as a matter of substance to be in no different position from a person who has been charged."(emphasis added).***

One gathers from this decision, Attorney General's Reference (No. 2 of 2001), that their "Lordships" were unanimous on this issue and I need only refer to the headnotes. "(2) *That as a general rule time would begin to run for the purposes of article 6(1) from the earliest time at which a person was officially alerted to the likelihood of criminal proceedings being brought against him; and that such period would ordinarily begin when a defendant was formally charged or served with a summons rather than when he was arrested or interviewed under caution*." In another context, the courts have stated that although "*time runs from the date when the defendant is charged,* ***the passage of any considerable period of time before charge may call for greater than normal expedition thereafter***" Dyer v. Watson at 1509.

One must bear this in mind when one considers any post charge delay in Zuma's case. Even if time did not run from 2001, we know with certainty that by August 2003, the NPA had made an assessment of the quantum and quality of its evidence and could confidently announce to the entire world that "prima facie evidence of corruption" existed against Zuma. The NPA was clearly in a position to initiate criminal prosecution of Zuma. It was a point at which Mr. Zuma had been "***…substantially affected by the actions of a state so as a matter of substance to be in no different position from a person who has been charged."*** No right-thinking person would quarrel with the proposition that Mr. Zuma was subjected to severe prejudice and trial by proxy during a substantial period of time when the NPA chose to defer his formal indictment.

Even assuming for argument's sake that time did not run from August 2003, the *passage of this considerable period of time before charge should call for greater than normal expedition after* Zuma was formally charged. That of course did not happen. The NPA's dilatory action and litigation tactics make a compelling case as to why time should begin to run not from charge but from the time when Zuma should or could have been charged. The language of Section 35(3) of the constitution and the rationale behind that provision, namely, that the defendant and his family should be protected from the trauma of having criminal proceeding hanging over their head certainly compel this conclusion.

Arguably, the Attorney General's Reference (No. 2 of 2001) court's "broader approach" must be adopted in order to give full effect to the rights enshrined in Section 35(3) of the constitution. The NPA has already challenged Zuma on this very point and it can be expected to press strenuously its argument that the clock started running only after Zuma was formally charged in June 2005. It has conveniently side-stepped or ignored the question of whether in light of its public announcement of a "prima facie: case of corruption against Zuma, its imposition of an official stigma of criminal wrongdoing on Zuma, coupled with the trial by proxy in the court of public opinion and in the Shaik matter and before Zuma was formally charged, created a situation where Zuma **"has *been substantially affected by the actions of a state so as a matter of substance to be in no different position from a person who has been charged."***

The *Attorney General's Reference No 2 2001* court went on to adopt the approach followed in *Deweer v Belgium* [1980] 2 EHRR 439. At paragraph 46 of the judgment it is observed:

> "There accordingly *exists a combination of concordant factors conclusively demonstrating that the case has a criminal character under the Convention.* ***The `charge' could, for the purposes of Article 6(1) be defined as the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence. In several decisions and opinions the Commission has adopted a test that appears to be fairly closely related, namely, whether `the situation of the (suspect) has been substantially affected'***."

In Mr. Zuma's case, a public announcement that he was in essence an unindicted guilty crook walking and that he was Shaik's "unindicted co-conspirator" was undeniably "***the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence.***" Nothing more would be needed to trigger Zuma's rights to trial without undue delay. I am also confident that no court will ignore the Public Protector's adverse findings against the NPA during that same period – those findings conclusively answer the question of whether Zuma's "***situation was one where the accused has been substantially affected by the actions of a state so as a matter of substance to be in no different position from a person who has been charged."*** As the U.S. courts cases recognize, that public state-imposed stigma triggered a duty on the part of the NPA to provide Zuma with a forum to vindicate his rights. The NPA would simply be unable to deny the obvious- that these circumstances bring these prosecution's action within the definition of an official notification that Zuma had committed a criminal offence for which there was "prima facie" evidence.

I am confident that a court would agree that the relevant period to be considered therefore is that the first period to be considered is that between August 23, 2003 and June 2005, which is a period of about 22 months. The second period would be the overall period from August 23, 2003 and the present. That should be considered excessive delay by any measurement. To cinch the matter, there is plenty of case law suggesting that the time starts to run in the following circumstances: (a) when he is officially notified of charge - Ewing v UK (1986) 10 EHRR 141; Neumeister v Austria (No 1) (1968) 1 EHRR 91; (b) when a defendant is substantially affected by criminal proceedings - Deweer v. Belgium (1980) 2 EHRR 439; (c) when he is aware that he is under suspicion – X v Austria [1967] CD 8; (d) when he is

aware that he is under investigation Eckle v Germany (1982) 5 EHRR1.[63] If the court agrees to adopt the broader "Strasbourg' approach, Zuma may even be allowed to expand the time under consideration to relate back to 2001 when the NPA first announced it was investigating Zuma. When viewed with this prism, five year delay to charge Zuma would clearly appear presumptively prejudicial. If that is so, the length of the delay in this instance does trigger an enquiry into the factors that brought it about and requires an assessment of the reasonableness of the delay.

Be that as it may, Article 6(1) is directed primarily towards excessive procedural delays in the conduct of a prosecution. It surely is not limited just to the period after formal charges are filed. What amounts to a "reasonable time" inevitably depends on the circumstances of each case. Accordingly, an overall assessment should be made of what is reasonable considering all the circumstances, not just the length of time of a particular part of the process. In Konig v Federal Republic of Germany (1978) 2 EHRR 170, paragraph 99 the European Court, in the context of the test in civil proceedings, afforded some relevant guidance:

> "The reasonableness of the duration of proceedings covered by Article 6(1) of the Convention must be assessed in each case according to its circumstances. When inquiring into the reasonableness of the duration of criminal proceedings, the court has regard, inter alia, to the complexity of the case, the applicant's conduct and the manner in which the matter was dealt with by the administrative and judicial authorities."

The next issue one needs to consider is whether in line with the Strasbourg cases, Zuma can establish a breach of his entitlement to a fair and public hearing within a reasonable time without showing that he was prejudiced by the delay. In the UK, several cases, including the case of Dyer v. Watson [2002] 3 W.L.R. 1488, PC and *Porter v Magill*; *Weeks v Magill* [2002] AC 357 have ruled that this is a free-standing right not dependent on proof of specific prejudice. This is to be contrasted with the US, for example, where in *Barker v Wingo* 407 US 514 (1972), the US Supreme Court held that a relevant factor was whether the accused had been prejudiced. Furthermore, no such requirement is evident in the leading Strasbourg case of Eckle v Germany [1982] 5 EHRR 1 and in Howarth the court regarded the matter as irrelevant to the reasonableness of delay. A similar conclusion was reached in the High Court of Judiciary in Crummock (Scotland) v HM Advocate [2000] JC 408. This is further buttressed by the reasoning in Magill v Porter Magill v Weeks [2001] UKHL 67 [64] where the issue in that appeal was

[63] In **Howarth v United Kingdom** (2000) 31 EHRR 861, Jeremy Howarth, a British national complained under Article 6 § 1 (right to a fair trial within a reasonable time) of the European Convention on Human Rights that the two year delay between his original and subsequent sentence was excessive. He also complained under Article 3 (prohibition of degrading treatment) of the Convention. The European Court of Human Rights held by six votes to one that there had been a violation of Article 6 and unanimously that there had been no violation of Article 3. the European Court held that the period for determining 'undue delay" had begun with the first police interview of the defendant, but only 4½ months separated that interview from the charge and attention was largely focused (p 865, para 20) on the passage of time between sentence and final determination of a reference by the Attorney General under section 36 of the Criminal Justice Act 1988. Arrest will not ordinarily mark the beginning of the period. An official indication that a person will be reported with a view to prosecution may, depending on all the circumstances, do so.

[64] The approach to the reasonable time requirement in civil proceedings is exactly the same as in criminal cases. The House of Lords in Porter v Magill [2001] UKHL 67 [2002] 2 AC 357 emphasised that the right to a determination of a person's civil

whether an auditor should have certified any sum to be due to Westminster City Council from two council officials. The question of unreasonable delay and the right to the determination of civil rights and obligations within a reasonable time under Article 6(1) of the Convention arose in the course of the hearing. The House of Lords made a definitive determination that the Article 6(1) guarantee of a hearing within a reasonable time is not subject to any words of limitation and that it is not necessary for an accused to show that prejudice has been or is likely to be caused as a result of delay. At paragraph 108 - 109 Lord Hope of Craighead said:

> 108. I would also hold that the right in Article 6(1) to a determination within a reasonable time is an independent right and that it is to be distinguished from the Article 6(1) right to a fair trial. As I have already indicated, that seems to me to follow from the wording of the first sentence of the Article which creates a number of rights which, although closely related, can and should be considered separately. This means that it is no answer to a complaint that one of these rights was breached that the others were not. To take a single example, the fact that the hearing took place in public does not deprive the applicant of his right to a hearing before an independent and impartial tribunal established by law.
>
> 109. I would respectively follow Lord Steyn's observation in ***Darmalingum v The State*** [2000] 1WLR 2303 about the effect of section 10(1) of the Constitution of Mauritius when he said that the reasonable time requirement is a separate guarantee. *It is not to be seen simply as part of the overriding right to a fair trial, nor does it require the person concerned to show that he has been prejudiced by the delay.* In Flowers v The Queen [2000] 1WLR 2396 a differently constituted Board, following Bell v Director of Public Prosecutions [1985] AC 937, held that prejudice was one of four factors to be taken into account in considering the right to a fair hearing within a reasonable time in section 20(1) of the Constitution of Jamaica. In the context of Article 6(1) of the Convention however, the way this right was construed in Darmalingum v The State seems to me to be preferable. … The Article 6(1) guarantee of a hearing within a reasonable time is not subject to any words of limitation, nor is this a case where other rights than those expressly stated are being read into the Article as implied rights which are capable of modification on grounds of proportionality: see Brown v Stott [2001] 2 WLR 817, 851(b)-(e); R (Pretty) v Director of Public Prosecutions [2001] UKHL 61 para 90. The only question is whether having regard to all the circumstances of the case, the time taken to determine the person's rights and obligations was unreasonable."

Strasbourg jurisprudence shows that the underlying purpose of the reasonable time requirement in the criminal context is to avoid the defendant remaining too long in a state of uncertainty, especially when he may be in custody as well as to avoid delays which might jeopardise the effectiveness and credibility of the administration of justice. Therefore, in determining whether or not there has been delay in breach of Article 6(1), the European Court considers that prejudice is irrelevant in that a violation of the reasonable time requirement can occur in the absence of prejudice. In Procurator Fiscal v Watson and Burrows [2002] UKPC D1 [2004] 1 AC 379, the House of Lords relied upon Strasbourg jurisprudence when considering whether delays between the defendants being charged and their trials violated their right to a fair trial within a reasonable time. Lord Bingham held that the first step was to consider the period of time that had elapsed, and only if it gave "grounds for real concern" would it be necessary for

---

rights within a reasonable time was, on a proper interpretation of Article 6(1), an independent right that was not simply part of an overriding right to a fair trial. It therefore did not require the complainant to show himself prejudiced by the delay.

the court to look into the detailed facts and circumstances surrounding the particular case. Both Lord Hope and Lord Bingham explained that proving a breach of the reasonable time requirement is difficult. As Lord Bingham indicated, the Convention is "directed not to departures from the ideal but to *infringements of basic human rights*".

Regarding the consequences of breach of the right to a trial within a reasonable time under the European Convention, I need to digress to address a mistaken interpretation of the decisions of the courts. The courts have made a very clear distinction between cases of pure delay unaccompanied by other constitutional violations on the one hand and cases involving "fault" by the prosecuting authorities (which may or may not involve violations of constitutional magnitude) on the other. It is therefore erroneous to assume that the courts have taken a somewhat forgiving approach in dealing with delays. A careful review of decision of the House of Lords in ***Attorney General's Reference No. 2 of 2001*** make this abundantly clear.

In that case the defendants were charged with offences arising out of prison riots in 1998. When they came to trial in early 2001 the judge stayed the indictment on the ground that there had been a breach of their right under article 6(1) of the Convention to have the charges heard within a reasonable time. The Attorney General referred to the Court of Appeal two questions, one of which was whether criminal proceedings could be stayed on the ground that there had been a violation of the reasonable time requirements in article 6(1) in circumstances where the accused could not demonstrate any prejudice arising from the delay. Having given its opinion the Court of Appeal referred the same questions for determination by the House of Lords. The House sat in an Appellate Committee of nine members and decided by a majority that although through the lapse of time in itself there was a breach of article 6(1), the appropriate remedy would not necessarily be a stay but would depend on all the circumstances of the case. Lord Bingham of Cornhill, who gave the leading opinion for the majority, set out as two of the fundamental first principles applying to article 6(1), that (a) the core right guaranteed by the article is to a fair trial (para 10) and (b) the article creates rights which though related are separate and distinct (para 12). It does not follow that the consequences of a breach of each of these rights is necessarily the same. He quoted with approval the aphorism of Hardie Boys J in the New Zealand case of Martin v Tauranga District Court [1995] 2 NZLR 419, 432: "*The right is to trial without undue delay; it is not a right not to be tried after undue delay.*" Lord Bingham (at para.16) stated: "***A defendant who is not guilty should have the opportunity of clearing his name without excessive delay. A guilty defendant, facing conviction and punishment, should not have to undergo the additional punishment of protracted delay, with all the implications it may have for his health and family life.***" Lord Hope of Craighead, dissenting, considered concerns raised with the remedies for breach and stated: "***One ought not to overlook the benefits of taking a firm line on elimination of delays in the criminal justice system. Of course, the prospect of releasing dangerous criminals on the public is unattractive. But so too is the prospect of long delays in bringing those who are accused of crimes to trial, bearing in mind the presumption of innocence which is guaranteed by article 6(2) of the Convention.***"

Lord Bingham stated in paragraph 22 that the threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. He went on to summarise his conclusions at paragraphs 24 and 25:

> "24. If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under article 6(1). For such breach there must be afforded such remedy as may (section 8(1)) be just and appropriate or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing. If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction. Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time.
>
> 25. The category of cases in which it may be unfair to try a defendant ***of course includes cases of bad faith, unlawfulness and executive manipulation of the kind classically illustrated by R v Horseferry Road Magistrates' Court, Ex p Bennett*** [1994] 1 AC 42, but Mr Emmerson contended that the category should not be confined to such cases. That principle may be broadly accepted. ***There may well be cases (of which Darmalingum v The State [2000] 1 WLR 2303 is an example) where the delay is of such an order, or where a prosecutor's breach of professional duty is such (Martin v Tauranga District Court [1995] 2 NZLR 419 may be an example), as to make it unfair that the proceedings against a defendant should continue.*** It would be unwise to attempt to describe such cases in advance. They will be recognisable when they appear. Such cases will however be very exceptional, and a stay will never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's Convention right".

On the issue of remedy for unreasonable delay, Lord Rodger of Earlsferry (who together with Lord Hope of Craighead dissented on the point of principle) agreed with the majority, he said :

> "177. I would therefore hold that, when a court is faced with a situation where going on with a prosecution and holding a trial would lead to a hearing after the lapse of a reasonable time, it should not hesitate to say that these steps would violate article 6(1) and, hence, would be unlawful in terms of section 6(1) of the Human Rights Act 1998. Then, in terms of section 8(1), the court should go on to consider what relief or remedy would be

> 'just and appropriate' for this unlawful act of violating the reasonable time guarantee. For the reasons given by Lord Bingham, in most cases the court would conclude that a declaration or a reduction in sentence or an award of damages, as the case might be, would be the just and appropriate remedy of this unlawful act. Unless the court had assessed the position incorrectly, that remedy would also constitute an effective remedy for the violation of article 6(1) in terms of article 13 and, by granting it, the court would fulfil the United Kingdom's international obligation under the Convection. In these circumstances nothing in the Convention or elsewhere compels the court to go further and grant a stay. Indeed it would be contrary to section 8(1) for the court to grant a stay where a stay would not be the just and appropriate remedy. And, as Lord Bingham suggests, it will only be in rare cases that the just and appropriate remedy for an unreasonable delay will be a stay. Only in those rare cases need, or indeed should, the court grant such a stay under section 8(1). In other cases the trial can proceed and the defendant will get the appropriate remedy at the proper time."

Lord Hope was of a different view :

> "110. I would answer the first point of law referred by the Attorney General in the affirmative. *In my opinion criminal proceedings may be stayed on the ground that there has been a violation of the reasonable time requirement in article 6(1) of the Convention in circumstances where the accused cannot demonstrate that he will suffer any prejudice arising from the delay at his trial. It is arguable that a stay of the proceedings is the ordinary and appropriate remedy where this guarantee has been breached. That is the position which the Court of Appeal in New Zealand has adopted, it is consistent with what the Judicial Committee has held to be right for Mauritius and it is the position which has been adopted also by the High Court of Judiciary. But, as it is open to the court under section 8(1) of the Human Rights Act 1998 to make such order within its powers as it considers just and appropriate, I would not go so far as to say that it was the inevitable remedy. I would hold that the proceedings may be stayed if, in all the circumstances, the court considers this to be the appropriate remedy.*"

From the foregoing it appears that if a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of a Convention right, whether or not the defendant has been prejudiced by the delay. This does not, however, automatically give rise to a stay of proceedings.[65] An appropriate remedy should be afforded for such breach, but the hearing should not be

---

[65] While Lord Bingham recognised "*a powerful argument*" that if a public authority causes or permits such a delay sufficient to breach Article 6(1), further prosecution would be unlawful so that there should be an automatic stay, he stated that there were four reasons which, "cumulatively compel" the rejection of that argument.

(i) It would "be anomalous if breach of the reasonable time requirement had an effect more far-reaching than breach of the defendant's other art 6(1) rights when (as must be assumed) the breach does not taint the basic fairness of the hearing at all, and even more anomalous that the right to a hearing should be vindicated by ordering that there be no trial at all;"

(ii) A "rule of automatic termination of proceedings in breach of the reasonable time requirement cannot sensibly be applied in civil proceedings? [it] would defeat the claimant's right to a hearing altogether and seeking to make good his loss in compensation from the state could well prove a very unsatisfactory alternative."

(iii) A rule of automatic termination "has been shown to have the effect in practice of emasculating the right which the guarantee is designed to protect." If judges were required to stay proceedings automatically once upon proof of breach of the reasonable time requirement then the judicial response would be to set the threshold unreasonably high.

(iv) Strasbourg jurisprudence "gives no support to the contention that there should be no hearing of a criminal charge once a reasonable time has passed." In Eckle v Germany (1982) 5 EHRR 1 the European Court held that at the remedy stage, the "sole matter to be taken into consideration is the prejudice possibly entailed" by the fact of the delay. Therefore, although prejudice is not relevant when determining whether delay has occurred in breach of Article 6(1), it assumes paramount importance at the remedy stage when

stayed or a conviction quashed on account of delay alone, unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all. The appropriate remedy will also depend on the stage at which the breach is established. In criminal cases, a stay may be necessary if it is determined before the hearing takes place that the delay would result in an unfair hearing. If, however, it is established retrospectively that a trial was unfair, any resulting conviction will be quashed.

It should also be noted that the discussion of Strasbourg jurisprudence by the House of Lords takes place against a very unique background. First, some cases make their way to the European Court of Human Rights after a trial has already ran its course and a hearing has already been completed and quite naturally, there are no more proceedings to "stay." In that scenario, the only appropriate remedy that could be afforded for such breach would be some kind of declaratory relief, quashing the conviction, or ordering monetary compensation. Second, and most importantly, unlike South Africa, Canada, New Zealand and the US, Britain does not have a written constitution with an entrenched bill of rights. Accordingly, the minimalist stance taken by the court reflects its view of simply ensuring that "***the court would fulfil the United Kingdom's international obligation under the Convection***." The court concludes that in these circumstances "***nothing in the Convention or elsewhere compels the court to go further and grant a stay.*** Indeed it would be contrary to section 8(1) for the court to grant a stay where a stay would not be the just and appropriate remedy." The ECHR does not prescribe the remedies to be awarded for violations of Convention rights; the ECtHR's role (other than in relation to awards of compensation under Article 41) is to consider whether the national authorities have made sufficient and appropriate redress for such violations. In surveying the ECtHR's jurisprudence on the adequacy of the remedies awarded by national authorities for a breach of the requirement of trial within a reasonable time, Hope LJ said: "The European Court has repeatedly held that unreasonable delay does not automatically render the trial or sentence liable to be set aside because of the delay (assuming that there is no other breach of the accused's Convention rights), provided that the breach is acknowledged and the accused is provided with an adequate remedy for delay in bringing him to trial (though not for the fact that he was brought to trial), for example by a reduction in the sentence. Dyer v Watson [2002] UKPC D1, para 129; X v Federal Republic of Germany (1980) 25 DR 142; Eckle v Germany (1982) 5 EHRR 1; Bunkate v Netherlands (1995) 19 EHRR 477.

Not surprisingly, one gets a different outcome when one proceeds from a constitutional analysis standpoint – the issue being to safeguard the citizen's rights entrenched in a bill of rights. That is the fundamental difference which will be addressed in the next section. If the court follows the route taken in Canada, the United States and New Zealand then it must hold that the natural or ordinary remedy for a breach of the reasonable time provision is a permanent stay. Indeed Lord Bingham recognized this same

---

there is a balancing exercise to be carried out between the competing purposes of Article 6(1): the public interest in the final determination of criminal charges, on the one hand, and the right of the applicant to a fair trial within a reasonable time on the other.

point when he stated: "… In Canada it has been held that in circumstances such as these a stay should be granted: Rahey v The Queen (1987) 39 DLR (4th) 481; R v Askov [1990] 2 SCR 1199; R v Morin [1992] 1 SCR 771. A similar answer has been given in the United States: Doggett v United States (1992) 505 US 647. In the face of a long and unjustified delay by a prosecutor, the New Zealand Court of Appeal has allowed an appeal against refusal of a stay: Martin v Tauranga District Court [1995] 2 NZLR 419." Attorney General's Reference (No.2 of 2001) at 10, para. 18."

The issue which the court has to decide therefore is whether the delay which the prosecution took to charge Zuma and to reinstate proceedings against him once its case was struck off the roll could be said to have been oppressive to the accused. If so, is that an abuse of process and what remedy is Zuma entitled to?

As demonstrated by case-law, a court usually enjoys a discretion as to the relief it could grant for the violation of the right to be tried without undue delay. The Supreme Court of Zimbabwe has pointed out that if the court were to direct that the trial proceed forthwith (notwithstanding the violation), it would be contradicting the accepted claim that the inordinate delay had denied the accused person a fair trial; it would amount to participating in a further violation of the right. On the other hand, an order that the charge be dismissed would be tantamount to a pronouncement of innocence without a final determination of the issue of innocence or guilt. In Re Mlambo, Supreme Court of Zimbabwe,[1993] 2 LRC28. The Supreme Court of Canada has observed that a finding that a right to trial without undue delay has been infringed goes to the jurisdiction of any court to put the accused on trial or to continue with the charges. "If an accused has the constitutional right to be tried within a reasonable time, he has a right not to be tried beyond that point in time and no court has jurisdiction to try him or order that he be tried in violation of that right. After the passage of an unreasonable period of time, no trial, not even the fairest possible trial, is permissible." Rahey v. R, Supreme Court of Canada (1987) 1 SCR 588, per Lamer J. Although the New Zealand court in Martin v Tauranga District Court [1995] 2 NZLR 419 expressed some doubts as to whether the issue of trial after undue delay implicates a court's jurisdiction it agreed with the Canadian courts and ruled that "the standard remedy" for undue delay under the Bill of Rights should logically be a stay. Cooke P. ruled "But I would be inclined to see some incongruity in any suggestion that, although undue delay has been found, the state should continue with a trial and, even if it results in a conviction and imprisonment, accompany it with an award of compensation. A stay seem the more natural remedy. Generally speaking, it seems better to prevent breaches of rights than to allow them to occur and then give redress. It is apposite to refer to the case of Darmalingum V The State [1999 PRV 42], where their Lordships quashed a conviction due to unreasonable pre-trial delay. The court had the following to say: "***Moreover, the independence of the "reasonable time" guarantee is relevant to its reach. It may, of course, be applicable where by reason of inordinate delay a defendant is prejudiced in the deployment of his defence. But its reach is wider. It may be applicable in any case where the delay has been inordinate and oppressive.***"

The key to a winning argument in Zuma's case is to highlight that the delay has not only been inordinate and oppressive but that it has been the result of a calculated strategy and the inaction of the NPA's office. This can be accomplished by taking the leading cases that have been recognized as constituting egregious delay in the US, Canada and New Zealand and then argue that these cases pale in comparison to the violations in Zuma's case. One can start with Darmalingum v The State [2000] 1 WLR 2303, a case cited by the House of Lords as example of a case where the delay is of such an order, or where a prosecutor's breach of professional duty is such as to make it unfair that the proceedings against a defendant should continue. And yet, that case did not involve any other violations of defendant's rights other than the right to be tried without undue delay. In the case of Darmalingum, the court considering that between December 1985 to January 1992 there was a complete silence from the prosecuting authorities with the result that the accused was in the dark as to the intentions of the authorities, concluded that there has been an inordinate long delay. However in Zuma's case, the situation is radically different and the violation even more egregious. The alleged corruption offence took place in or about February 2000. Zuma was charged in June 2005 and, after the NPA piled delay upon delay, its case was dismissed without prejudice by the Court. The cumulative period of delay up to the dismissal was about 13 months. Ironically, the NPA took another 15 months to re-file its case. The record clearly shows that unlike Darmalingum where the accused was faced with complete silence from the prosecuting authorities, Zuma was subjected to intense and vituperative media campaign and leaks emanating in part directly from the NPA's office. Instead of simply subjecting Zuma to deafening silence as in Darmalingum, the NPA seems to have initiated, coordinated and even stage-managed the public condemnation of Zuma as discussed before.

Another example is the leading New Zealand case, Martin v Tauranga District Court [1995] Z NZLR 419 which sets out the principles if the prosecution creates the unwarranted delay, prejudice will be less significant, though still relevant. Prejudice by reason of delay is not just measured in terms of the fairness of the trial itself; it includes anxiety about the pending proceedings and damage to reputation. Id. To cinch the matter, Court in that case held that a ***17 month delay*** from charge to trial date resulting from the unjustified action of the prosecutor amounted to "undue delay" and ordered a stay. That length of delay is not to be taken as a yardstick for what is an unreasonable delay, indeed, Cooke, P. in his judgment at p.13 said, "I would not at the present stage under the Bill of Rights regard delays of the order exemplified in the present case as necessarily beyond the pale. ***It is the contribution from the prosecutor that tips the balance in this case.***" In other words, if the prosecution is negligent, deliberately procrastinates or engages in other unprofessional actions detrimental to the accused, a relatively short period may suffice as a basis to find undue delay.

The smartest approach in Zuma's case is to craft an argument that synthesizes all the legal standards articulated by the courts from Canada, UK, US, New Zealand and the European court of Human Rights and then argue persuasively that Zuma meets and exceeds all the criteria. I suggest that we start with a worst case scenario, that is assume that we are dealing with a tough judge who wants to set the set

the threshold unreasonably high and require Zuma to jump through the hoops to prove his entitlement to a permanent stay. It is a bold strategy that acknowledges that Zuma can meet even the toughest legal standards for the dismissal of his case. In this regard, our first task is to ask whether Zuma can meet the toughest standard for an outright dismissal, that is, the standard set by the US Supreme Court. I believe that Zuma easily meets the applicable standard. We conclude that the US Supreme Court's analysis in Doggett would compel dismissal of the indictment in Zuma's case. We are also persuaded that, under our constitution, the seven year delay between the commencement of an investigation and Zuma's indictment was excessive in the extreme and is sufficient to give rise to presumptive prejudice. As in Doggett, the cause of the seven year delay here was the state's tactical decision, indifference or gross negligence in failing to properly assess its evidence and take even the most basic steps to locate defendant in order to pursue the prosecution against Zuma. Zuma did not acquiesce in the delay, and the state has not rebutted the presumption of prejudice arising from the seven-year delay.

2.15 Mr. Zuma Is Entitled To A Dismissal Of the Criminal Charges On The Ground Of Discriminatory or Vindictive Prosecution

Another issue that has been assiduously avoided by the so-called legal experts critical of the principled stance adopted by Cosatu and SACP on the entire Zuma saga is the apparent vindictive prosecution in Zuma's case. To be blunt, this is a case where the NPA has now added thirteen additional charges in its resurrected case against Zuma. This for a prosecution that could not diligently prosecute or manage the original case involving only three charges and which was a mirror image of a case the prosecution had just won- the Shaik case. This development further begs the question - if the NPA could not efficiently manage and diligently prosecute a simple easy case which was a virtual replica of a case it actually one against a different defendant what justifies the public's confidence that the prosecuting authorities would get it right this time around? A prosecutor violates due process when he brings additional or more severe charges under circumstances where he appears to punish the defendant for exercising a constitutional or statutory right. For instance, a defendant in Mr. Zuma's position has certain rights to file complaints against a prosecutor with the public protector's office. He may also file motions to strike a case off the roll or dismiss the prosecution's case and may even exercise his statutory right to appeal certain adverse court rulings. A prosecutor may be embarrassed by any of the complaints or successful defence motions and adverse comments from the judiciary criticizing the prosecutor's litigation strategy. However, a prosecutor is not allowed to "up the ante" by filing charges he would otherwise not have filed or increasing the severity of the charges following a defendant's successful motion or appeal.

Just like a case of a defendant who challenges an abuse of process through a motion to dismiss a selective or vindictive prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution. In other words a defendant might argue, as a bar to trial, that even if she was provably guilty as charged, the decision to prosecute her was grounded in ulterior vindictive motive, or that her

selection for prosecution, from among the many who could have been prosecuted, was deliberately based upon an unjustifiable standard such as race, political activities, speech, or other arbitrary classification. In essence, the point is not that the defendant is not or might not be guilty, or that she could not be called to account for her alleged wrongdoing by someone, but that the manner or motivation of her prosecution renders it illegitimate. She is not being prosecuted to serve the proper aims of justice; the injustice of the prosecutor's treatment of her undermines the right of the polity (for whom the prosecutor is acting) to call her to account—at least on this occasion. "You're picking on me unfairly" does not exculpate me, but it does (if true) undermine your standing to demand that I answer to you. As shown below, vindictive prosecution is a species of the abuse of process doctrine but its contours have been defined and clarified better in the US criminal justice system. There is a reason for that - as the discussion of the common law court's reticence to discipline the "crown" prosecutors has shown, the courts in the countries without a written constitution with an enshrined Bill of Rights have eschewed exercising disciplinary authority over the prosecution for alleged misconduct. This is so even where the courts have accepted the task of preventing executive encroachments into protected civil liberties, they have articulated a different rationale as in *Martin v Tauranga District Court* [1995] 2 NZLR 419 at p 428 where the court said:–**"….** ***the objective is to vindicate human rights, not to punish or discipline those responsible for the breach."***

In Zuma's case, the NPA would like us to believe that its case, like fine wine, keeps getting better with the passage of time. After that agency's own misconduct caused Zuma's case to be dismissed, the NPA waited until the ANC conference in Polokwane had determined who the next ANC leader would be before announcing to the whole world that it would file new charges against Zuma. The problem with the NPA's position is that it appears to take advantage of a procedural technicality and a striking of the case from the roll which was occasioned by the NPA's misconduct in the first place. It is the appearance of vindictiveness, rather than vindictiveness in fact, which controls. Unless the court's condemn the NPA's tactics as a species of abuse of process and bring errant prosecutors under control, the NPA's prosecutorial tactics would have far-reaching and devastating consequences on our criminal justice system. A lackadaisical prosecutor would be encouraged to prematurely file charges against citizens suspected of criminal wrongdoing no matter how flimsy the evidence. Comfortable in the knowledge that the only penalty the court can conceivably impose for the deliberate procrastination would be to strike the case off the roll, that same prosecutor can subject citizens to multiple vexatious and harassing prosecutions. Most important, such repeated attempts gain the prosecution many tactical advantages – at each stage the NPA has the opportunity to gauge how the defendant's litigation strategy will evolve take shape. Its tactical ploy which causes a case to be dismissed is simply converted into an opportunity to circumvent the previous court order denying a postponement of the case. In a twist of irony, a prosecution team that was lambasted by a sitting judge for its dilatory action and was in fact denied a postponement precisely because such postponement would presumably be unduly prejudicial to the accused is now given the opportunity to gain additional time to plot its strategy and to decide when new charges against the accused can be filed. For the prosecution, the greatest advantage of all is not just the

enormous drain on a defendant's financial and emotional resources – it is the ability to wield its powers to bludgeon defendants into acquiescing to prosecution's future requests for postponement no matter how unreasonable. In violation of the principle of equality of arms, the prosecution would not only be empowered to extract enormous strategic advantages from its own misconduct; it would also be allowed to use its power to file even more serious charges than those in the previously dismissed case.

Let us ponder the consequences. In the future, defendants with cases that are clearly eligible to be dismissed because of the NPA's laziness would be deterred from exercising their rights to oppose unreasonable NPA requests for postponement simply to avoid the Zuma scenario – they would be fearful that a vengeful prosecutor who was embarrassed or humiliated by a judge's stinging rebuke would pile serious additional charges when the government re-indicts. It is the appearance of vindictiveness, rather than vindictiveness in fact, which controls. In my opinion, serious attention must be given to a curtailment of the procedure that allows cases that were dismissed by a court for prosecutorial delays to be reinstated willy-nilly at the whim of the same prosecutor whose proven misconduct aborted the case in the first place. Presently, the system is rife with potential for serious prosecutorial abuses in that it unfairly and unjustly grants prosecutors unrestrained license to violate court procedures at the expense of defendants.

Let us consider how other major democracies have tackled the issues of prosecutorial abuse through vindictive prosecution. Not surprisingly, US judges operating within the framework of a written constitution with entrenched bill of rights have carved out a clear position on the issue. In North Carolina v. Pearce, 395 U.S. 711 (1969), the United States Supreme Court held that when a trial court imposes a more severe sentence after a defendant's successful appeal, "due process requires that the reasons for imposing such sentences upon retrial must affirmatively appear so that an accused may be free, when taking an appeal, of any apprehension of subsequent retaliatory or vindictive sentencing because of his appeal." United States v. Ruesga-Martinez, 534 F.2d 1367, 1368 (9th Cir. 1976) (citing Pearce, 395 U.S. at 725-26). The US Supreme Court extended Pearce to the apprehension of prosecutorial vindictiveness in Blackledge v. Perry, 417 U.S. 21 (1974).

The defendant, Perry, was convicted in an inferior North Carolina court of a misdemeanor. Perry decided to exercise his right to a trial de novo in the Superior Court. Before the de novo trial, however, the prosecution secured an indictment charging Perry with a felony for the same conduct for which it had previously charged a misdemeanor, resulting in an 11-months increase in sentence. "The US Supreme Court held that, when the circumstances '*pose a realistic likelihood of "vindictiveness" . . .due process of law requires a rule analogous to that of the Pearce case.*'" Ruesga-Martinez, 534 F.2d at 1369 (quoting Blackledge, 417 U.S. at 27). "Thus, *even though there was absolutely no evidence of vindictiveness in the record, the Court held that it was constitutionally impermissible for the prosecution to bring the more serious charge against Perry after he had exercised his statutory right to appeal.*" Ruesga-Martinez, 534 F.2d at 1369. It is thus well-established that a presumption of vindictiveness arises when the government increases the severity of the charges following a defendant's successful appeal. United States v. Motley,

655 F.2d 186, 188 (9th Cir. 1981); United States v. Shaw, 655 F.2d 168, 171 (9th Cir. 1981); United States v. Griffin, 617 F.2d 1342, 1346-47 (9th Cir. 1980). "[I]t is ***the appearance of vindictiveness, rather than vindictiveness in fact, which controls***."United States v. Groves, 571 F.2d 450, 453 (9th Cir. 1978). Once the presumption of vindictiveness arises, the "***heavy***" burden shifts to the government to show that the increased charges are "*justified by sufficiently independent reasons to dispel any possible appearance of vindictiveness*." United States v. Burt, 619 F.2d 831, 837-38 (9th Cir. 1980); see also Griffin, 617 F.2d at 1346 (stating that the prosecution has a "'*heavy burden' . . . to justify the increase in severity of the alleged charges whenever it has the opportunity to reindict the accused because the accused has exercised a procedural right.");* Ruesga-Martinez, 534 F.2d at 1369 ("the prosecution bears a *heavy burden of proving that any increase in the severity of the alleged charges was not motivated by a vindictive motive*"). "*It is irrelevant that a particular defendant exercises his statutory rights, despite his fear of vindictiveness and despite lack of vindictiveness in fact in subsequent proceedings instituted by the prosecutor*." United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir. 1977). The prophylactic rule of Pearce and Blackledge "is designed not only to relieve the defendant who has asserted his right from bearing the burden from 'upping the ante' but also to prevent chilling the exercise of such rights by other defendants who must make their choices under similar circumstances in the future." Id.

If a South African court follows the US precedent, the court may very well agree that the presumption of vindictiveness applies in the circumstances of Mr. Zuma's case. It appears the NPA responded to the striking of its case from the roll by reindicting Zuma on essentially the same charges and adding more than a dozen additional and serious counts. These circumstances--"upping the ante" as a result of Zuma's successful exercise of a procedural right, that is opposition to the postponement request--raise a presumption of vindictiveness. See Blackledge, 417 U.S. at 427. Indeed, these circumstances present a quintessential appearance of vindictiveness. Zuma exercised his procedural right at the time when he was only being charged with three (3) counts of corruption and tax evasion- he successfully opposed the NPA's request for a postponement. The Court (Justice Msimang) in an eloquent and thoughtful decision blasted the NPA's litigation strategy as a disaster and obviously embarrassed the NPA's hot shot prosecutors. The NPA responded to the legal setbacks and humiliating dismissal of its case by piling further delays upon delays in the case and when it finally decided to reindict it did so with a vengeance. The new charges, particularly the "racketeering" charges provide a revealing insight into the NPA's renewed determination to take advantage of its procedural advantages and to punish Zuma through drawn-out court proceedings.

Some of the serious charges brought against Zuma are defined under South African law such as the Prevention of Organised Crime Act in 1998 (POCA) which defines such as money laundering, assisting another to benefit from the proceeds of unlawful activities and acquisition as well as possession or use of proceeds of unlawful activities. The main objectives of POCA are: (a)To criminalize racketeering and to create offences relating to activities of criminal gangs; (b) to criminalize money laundering in general and also to create a number of serious offences in respect of laundering and

racketeering; (c) to create a general reporting obligation for businesses coming into possession of suspicious property, and (d) to create a mechanism for criminal confiscation of proceeds of crime and for civil forfeiture of proceeds. Although the Act does not define 'racketeering' it does provide a definition of a 'pattern of racketeering activity'. This refers to the planned, ongoing, continuous or repeated participation or involvement in offences like murder, rape, corruption, fraud, perjury, theft and robbery as well as any offence punishable with imprisonment of more than one year without the option of a fine. A person who is convicted of a money laundering offence under section 4,5 or 6 of POCA is liable to a maximum fine of R100 million or to imprisonment for a period not exceeding 30 years(life imprisonment). Neatly tucked away in the statute is a provision with questionable constitutional validity, Section 2(2) which is meant to facilitate the prosecution of the case and which calls for abrogation of some of the rules of evidence. It provides that the "***court may hear evidence, including evidence with regard to hearsay, similar fact or previous convictions, relating to offences …notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair***." Therein lies the rub – the NPA is clearly taking advantage of the fruits yielded by the Shaik trial. It clearly understands that it may even rely on hearsay evidence and similar fact or previous convictions (of Shaik) relating to the offences Zuma is being charged with "***notwithstanding that such evidence might otherwise be inadmissible."***

Clearly, the new tax, money laundering and racketeering not only create the risk of a substantial increase in prison time and thus have a chilling effect on future defendants; they also make the NPA's case easy to prove. The scenario gets even murkier when one considers that it is highly probable that both the statute under which Zuma is being charged and the bulk of the evidence the NPA contemplates offering during trial will be fiercely challenged on constitutional grounds. This will result in further legal skirmishes and procedural side-shows that are likely to stall the case for a considerable period of time possibly 3 to 4 years. E.g., Hammond v. Brown, 323 F. Supp. 326 (N.D. Ohio 1971). The court in Hammond expunged the report of an Ohio grand jury that had indicted twenty-five persons in connection with the events in 1970 at Kent State. Id. at 358. The indictment had charged twenty-three unindicted faculty members with sharing responsibility for the shooting by the National Guardsmen. Id. at 347-48. Unindicted co-conspirators also frequently appear in highly publicized "mega trials" -- so named because they involve a large number of defendants. See, e.g., United States v. Gallo, 668 F. Supp. 736 (E.D.N.Y. 1987), aff'd, 863 F.2d 185 (2d Cir. 1988). In Gallo, a twenty-two count indictment named sixteen defendants and charged thirteen of them with conspiring with each other and with several unindicted co-conspirators "to participate in the affairs of a racketeering enterprise." Id. at 738. The court stated that these "**monster"** trials burden the court, the defendants, and the jury. Id. at 754. The "monster" trial contemplated in Zuma's case will irreparably destroy the credibility of our criminal justice system and must accordingly be stopped.

Be that as it may, a reasonable observer will interpret the government's conduct as demonstrating that if defendants successfully exercise a procedural right challenging the NPA's failure to diligently

prosecute a simple case, the government will add many layers of complexity with the attendant delays to the case and ensure that they face more severe charges and more prison time the next time around. A court need not find that the prosecutor acted in bad faith or that he maliciously sought the additional indictment before ordering a dismissal of the new Zuma case.

Zuma can point to additional evidence in support of his vindictive prosecution argument. The NPA made a flurry of statements to the news media which seem to have been orchestrated to coincide with the ANC conference in Limpopo and confirm the appearance of vindictiveness created by the sequence of events: After more than 15 months of media churning of its impending decision to re-indict Zuma and only after Zuma won the hotly contested race for the ANC presidency, the NPA announced that it was reindicting Zuma on essentially the same charges and adding 12 new counts including tax evasion, racketeering and one count of money laundering. A reasonable observer may conclude that based on the timing and severity of the charges that Zuma's public complaints about the fairness of the trial or use of state organs to settle political differences were substantial motivating factors in the government's decision to charged Zuma with additional and more severe charges. A prosecution motivated by a desire to discourage expression protected by the constitution is barred and must be enjoined or dismissed- that is the law.

To be sure, the argument is not going to be one-sided – one can anticipate a spirited and sometimes highly emotional debate on this very issue which is based on impugning both the integrity of the prosecuting authority and questioning the bona fides of individual NPA decision-makers in exercising their discretion. This is quite understandable given the overall political context of the case. However, the mudslinging by the contending parties must never be allowed to cloud the legal issues that must be resolved in the interest of our democracy. The NPA can be expected to fiercely resist any attempts to obtain a dismissal of this case and would most likely raise the following issues: First, the strongest NPA would be that the cases the government cites here involve claims in the pretrial setting, that is, cases in which the presumption of vindictiveness does not apply. See United States v. Goodwin, 457 U.S. 368, 382-84 (1982) (holding that no presumption of vindictiveness arises when the government increases the severity of the charges against the defendant before he has been tried); see also United States v. Gallegos-Curiel, 681 F.2d 1164, 1167 (9th Cir. 1982) ("cases involving increased charges or punishments after trial are to be sharply distinguished from cases in which the prosecution increases charges in the course of pretrial proceedings"). The foregoing cases, notwithstanding, this is the rare case in which the presumption applies because Zuma's case was derailed and struck from the roll by the NPA's proven misconduct. In other words, he would have had a trial but for the dilatory tactics of the NPA. In the US a disciplinary dismissal of a lawsuit because of a party's proven dilatory tactics which are condemned by a judge on the record for having caused undue prejudice would have been the death knell of the prosecution's case. Further, in the course of pretrial proceedings, the parties are given much leeway in amending their "pleadings" and so a prosecutor may re-evaluate and freely amend the charges thus increase their level of severity in light of the evidence without raising the spectre of vindictive

prosecution. The reason why one does not encounter "vindictive prosecution" case-law in US cases involving disciplinary dismissal of a case is because the court's decision in that scenario would typically have ended the prosecution unless it is reversed on appeal. Even where the case is not dismissed as a form of sanction, very few prosecutors would have flagrantly added multiple layers of complexity to a case which has been dogged by admittedly long delays and skirmishes on procedural issues. After all this is a case which has already caused consternation amongst the judges for lack of diligence on the part of the NPA.

Before analyzing possible avenues for the NPA's anticipated attempt to rebut the presumption of vindictiveness, it is important to identify the reasons the government will be unable to articulate or give for the new charges. The NPA will be unable to validly contend that it was unable to bring the tax and money laundering and racketeering charges in the first Zuma prosecution. See United States v. Gann, 732 F.2d 714, 723-24 (9th Cir. 1984) (holding that district court did not abuse its discretion by finding that government rebutted presumption of vindictiveness by explaining that the information necessary for the new charges was not available at time of the first trial). The NPA cannot deny that at the time of the first Zuma prosecution it had possession of the relevant alleged bribery documents and that Zuma's tax returns could have been readily obtained and presented as evidence in the first Zuma prosecution. Merely characterizing the series of alleged payments from Shaik to Zuma and related transactions as "racketeering" activity or money laundering adds nothing substantial and does not change the fact that documents pertaining to these events were available at all times and were actually used as evidence to convict Shaik during his trial. Equally unavailing would be the NPA's anticipated argument that the need for the documents obtained from Mauritius and the unresolved status of the search warrants authorizing raids on Zuma's offices and those of his attorneys somehow impacted the NPA's ability to formulate its final charges. See Ruesga-Martinez, 534 F.2d at 1369-70 (holding that there was no justification for government's increase of charges against defendant where the prosecutor was aware of the evidence on which the new charges were based before he brought the original charges); Groves, 571 F.2d at 454 (finding that government did not dispel appearance of vindictiveness that arose with filing of new marijuana charges when the government knew all the facts related to the marijuana charge at the time it brought the original charges). The problem for the NPA is that its admission during the course of its postponement request that it was prepared to proceed with a trial by February 2007 even if these matters were unresolved undercuts its argument. Further, the record amply demonstrates that copies of the Mauritius documents were admittedly available and in the possession of the NPA as early as 2001. As to the tax evasion charges in this case allegedly involving millions of rands in transfers of money from Shaik to Zuma, a reasonably competent prosecutor would certainly have obtained Zuma's tax returns to ascertain whether the alleged bribes and kickbacks were declared as income or even acknowledged in any way. Even a first year law student would have known better to pursue that line of inquiry and course of investigation before filing criminal charges precipitately.

The prosecutor's statements confirm the appearance of vindictiveness created by the sequence of events: the government charged Zuma with additional and more severe charges in retaliation for his procedural victory and public complaints about the fairness of the prosecution and use of state organs to settle political battles. See United States v. P.H.E., Inc., 965 F.2d 848, 849 (10th Cir. 1992) (stating that "a prosecution motivated by a desire to discourage expression protected by the First Amendment is barred and must be enjoined or dismissed, irrespective of whether the challenged action could possibly be found to be unlawful"). To be sure, the NPA addressed this appearance of vindictiveness by its stentorian denial of political manipulations or interference during its many press conferences and press releases. Further, the NPA may contend that the new charges reflect its re-evaluation of its litigation/trial strategy in the wake of its partial victory in the SCA in the appeals involving the search warrants and the Letters of Request to Mauritius. Unfortunately, that line of reasoning would be too slender a read on which to rest an argument in opposition to a Zuma motion to dismiss. The NPA knew with certainty that these matters were guaranteed to be appealed and were actually still pending before the Constitutional Court at the time the new charges were announced.

In all events, the foregoing explanation would not satisfy the government's heavy burden of dispelling the presumption of vindictiveness. The government's announcement of its decision to file more than a dozen new additional charges involving tax and money laundering and racketeering charges shortly after Zuma's success in the ANC presidential contest during which he made the misuse of the organs of state including the Scorpions a centre-piece of his argument is equally consistent with the evidence suggesting that the new charges were brought in retaliation for Zuma's bitter complaints about his perceived persecution by the NPA, about the damaging NPA media leaks which gained momentum as the ANC conference drew closer and about the unfairness of the NPA's overall conduct which fuelled speculation about his future even if elected as the ANC president. The government decided to pursue such charges only after its strategy to derail Zuma's political career failed and after his party, the ANC seemed to endorse not only his public attacks on the fairness of the prosecution but also his argument that the Scorpions had become a law unto themselves and were a paradigmatic example of misuse of state organs. Moreover, the NPA itself prefaced its announcement of the new charges with an overly defensive statement denying any political manipulation.

Even if the NPA was unwilling to drop the Zuma prosecution altogether because of concerns about public outcry, one would have expected a sagacious prosecution team to adopt a focussed strategy that simplifies its case and excludes the more complicated additional charges of a dubious nature. After all this is a prosecution team which was still reeling from a prior criticism from a trial judge (Justice Msimang) and had just been sternly reprimanded for tardiness and for cavalierly flouting the rules of the constitutional court by the country's chief justice (the Honorable Justice Langa). In order to avoid a rehash of my earlier argument about prejudicial delay and the effect of certain court decisions about and involving Zuma, I simply need to add that the NPA has guaranteed through its strategy that Zuma will be hamstrung politically for the foreseeable future: It has ensured that even if ultimately acquitted Zuma

would be tied up in the courts and involved in prolonged legal wrangling while his lawyers are making all the heroic efforts to untangle the morass of the new NPA charges. That could conceivably be more than four years. It has also added tax evasion racketeering and money laundering charges that ensure that Zuma will go to jail if convicted. See Motley, 655 F.2d at 189 (holding that the government's decision to simplify its case justified its posttrial reformulation of the charges to exclude the more complicated counts, but did not justify the increased severity of the charges; the government could have simplified the trial without increasing the severity of the charges).

By the sheer number of the additional charges and the prosecution's legendary tardiness it seems that a Zuma trial will drag on for more than three years at least and will certainly impact his ability to assume the presidency of the country even if chosen by his party at the forthcoming election. In other words, the government's deeds and words create the perception that it not only added the new charges to make Zuma look like a common criminal and thus dissipate the criticism heaped on the NPA and the government for abuse of state organs but that it also wants to tie Zuma up in court and deny him the opportunity to assume the presidency. When legitimate court delays are mixed with NPA's lackadaisical prosecution of the case, the line between normal systemic delays and political manipulation can be fatally blurred.

The problem with this perception, however, is that it will discourage defendants from exercising their constitutional right to criticize their prosecutions and their statutory right to argue for dismissal of their cases in the face of prosecution's dilatory tactics. If they do, and they are successful, the government will punish them by bringing more serious charges. See DeMarco, 550 F.2d at 1227 (stating that Blackledge's prophylactic rule is designed "***to prevent chilling the exercise of such rights by other defendants who must make their choices under similar circumstances in the future"***). The NPA's failure to comply with court procedures or at the very least to heed admonitions by the courts about its litigation strategy further increases the risk that public perception may hold that agency as being above the law and even above our courts. A judge presiding at the new Zuma trial is going to be placed in the unenviable and exceedingly difficult position either ignoring the NPA's past misconduct his actions may raise suspicion in the minds of the public that he is ignoring the concerns expressed by other judges about the NPA's litigation strategy and thus condones prosecutorial misconduct. If he rules that the agency has forfeited its rights to further indulgences from the courts and throws the case out of court before trial he runs the risk of appearing to appease the "Zuma camp" in deference to Zuma's powerful position as the ANC president or perhaps even the president of the Republic at the time the trial finally gets under way.

The relevant question, however, is not whether the prosecutor subjectively believes that it is appropriate to bring the new charges. See Groves, 571 F.2d at 453 ("We need not find that the prosecutor acted in bad faith or that he maliciously sought the …indictment"); see also Ruesaga-Martinez, 534 F.2d at 1369 (dismissing for vindictive prosecution and stating that the court does "not intend by [its] opinion to impugn the actual motives of the United States Attorney's office in any way"). The dispositive question is whether the government has met its burden of identifying intervening or independent objective

facts that dispel the presumption of vindictiveness. I suggest that the NPA has not. By all appearances, these delays were not simply systemic delays due to inherent case or systems requirement – they seemed strangely orchestrated to coincide with the ANC's Polokwane conference. These circumstances--"upping the ante" as a result of Zuma's successful procedural challenges and after his victory at a conference in which the prosecution authority's abuse of power came under the spotlight--raise a presumption of vindictiveness. The ball is now in the NPA's court to rebut that presumption in light of the totality of evidence showing a plethora of prosecution errors.

2.16 In The Alternative, Mr. Zuma's Prosecution Is Barred By the Doctrine of Abuse of Process By Re-Litigation

Another variant of estoppel that can come in handy for Zuma is the doctrine of abuse of process by relitigation recognized by UK and the Canadian court cases. The law discourages relitigation of the same issues decided in a previous case except by means of an appeal. This rule is concerned with the interests of the defendant: a person should not be troubled twice for the same reason. This policy has generated the rules which prevent relitigation when the parties are the same: autrefois acquit, res judicata and issue estoppel. The second policy is wider: it is concerned with the interests of the state. There is a general public interest in the same issue not being litigated over again. The second policy can be used to justify the extension of the rules of issue estoppel to cases in which the parties are not the same but the circumstances are such as to bring the case within the spirit of the rules. Consider the following examples. In *Reichel v. Magrath* (1889) 14 App. Cas. 665 Mr. Reichel, the vicar of Sparsholt, resigned. The bishop of Oxford accepted his resignation. Then the vicar changed his mind. He brought an action against the Bishop and the Queen's College, Oxford, which had the right of presentation, for a declaration that his resignation had been void. The judge held that it had been valid and that the living was vacant. His decision was affirmed on appeal. The college appointed its Provost, Dr. Magrath, as the new vicar. Mr. Reichel refused to move out of the vicarage. Dr. Magrath brought an action for possession. Mr. Reichel pleaded in defence that his resignation had been void and he was still the vicar. The court struck out the defence as an "**abuse of the process of the court**." Although the parties were different, the case was within the spirit of the issue estoppel rule. Dr. Magrath was claiming through the college, which had been a party to the earlier litigation.

The leading case on the application of the power to dismiss proceedings on this ground as an abuse of the process of the court is *Hunter v. Chief Constable of the West Midlands Police* [1982] A.C. 529. It concerned the trial of the six men convicted of an I.R.A. bombing in Birmingham in 1974. The defendants claimed that the police had beaten them to extract confessions. The trial judge held a voir dire and decided that the prosecution had proved beyond reasonable doubt that they had not been beaten. They were convicted. They applied for leave to appeal, but not on the ground that the confessions had been wrongly admitted. Leave to appeal was refused. In prison, the accused commenced proceedings against

the policemen for assault, alleging the same beatings as had been alleged at the criminal trial. The House of Lords decided that it was an abuse of the process of the court to attempt to relitigate the same issue and that the actions should be struck out. *Hunter v. Chief Constable of the West Midlands Police* [1982] A.C. 529 shows that, superimposed upon the rules of issue estoppel, the courts have a power to strike out attempts to relitigate issues between different parties as an abuse of the process of the court. But the power is used only in cases in which justice and public policy demand it. Lord Diplock began his speech, at p. 536, by saying that the case concerned:

> *"**the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied;** … It would, in my view, be **most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."***

The pivotal question is now this: would the relitigation of the issues about undue delay, prosecutorial procrastination and NPA strategy which caused the case to limp "from one disaster to another" as previously decided by the Honourable Judge Msimang be "manifestly unfair" to Jacob Zuma? As a corollary to that, would a collateral attack on Judge Msimang's ruling or the relitigation of these issues bring the administration of justice into disrepute? As Lord Diplock said later in his speech, at p. 541, the abuse of process exemplified by the facts of the case was: "***the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made***." The NPA had fully opportunity to litigate undue delay and prejudice to Zuma during the first case – it did but lost big time. It cannot now litigate these same issues when Zuma relies on the court's finding to argue for a dismissal.

The Canadian Supreme court has also agreed with the foregoing estoppel principle. See, *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 and Ontario v. O.P.S.E.U., 2003 SCC 64, [2003] 3 S.C.R. 149. This may apply even where, strictly speaking, the common law doctrine of issue estoppel is not applicable because not all the elements are present. In *C.U.P.E., Local 79*, the Supreme Court of Canada quoted, at paragraph 37, Goudge J.A., from *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.)[66] [at paragraphs 55-56]:

---

[66] In ***Canam Enterprises Inc. v. Cole,*** 2000 ONCA C33982 a majority of the Ontario Court of Appeal observed that the doctrine is an intangible discretionary doctrine, not bound by categories, but guided by public policy objectives. Finlayson J.A. stated: "*However, we are not limited in this case to the application of issue estoppel.* ***The court can still utilize the broader doctrine of abuse of process. Abuse of process is a discretionary principle that is not limited by any set number of categories. It is an intangible principle that is used to bar proceedings that are inconsistent with the objectives of public policy. The doctrine can be relied upon by persons who were not parties to the previous litigation but who claim that if they were going to be sued they should have been sued in the previous litigation.***"

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

The statement that the doctrine is "unencumbered by the specific requirements of concepts such as issue estoppel" means that even where the requirements of the issue estoppel doctrine (i.e, that the issue be the same as the one decided in the prior decision and that the prior judicial decision be final and that there be mutuality) have, strictly speaking, not been met, the abuse of process is the most appropriate doctrine to resolve these cases.[67] The main concern in that case does not relate to the technical requirements of mutuality or other estoppel criteria, but to the broader question of the integrity of the judicial adjudicative function. Although both doctrines promote the better administration of justice, issue estoppel is a more appropriate doctrine to use when the focus is primarily on the interests of litigants. Abuse of process, on the other hand, transcends the interests of litigants and focuses on the integrity of the entire judicial system. Obviously in Zuma's case, where an attempt will be made by the NPA to relitigate issues of delays and undue prejudice in a criminal case where a judge has already clearly expressed his views and has placed the blame squarely on the NPA, the doctrine of abuse of process provides the better line of inquiry and argumentation.

The Supreme Court of Canada has, in numerous cases, also echoed the statements of Lord Diplock by stating the following: "**a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings** except those provided by law **for the express purpose of attacking it**" (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, at paragraph 20; see also *Wilson v. R.*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; and *R. v. Sarson*, [1996] 2 S.C.R. 223). Additionally, there is some jurisprudence that "the second proceeding must be manifestly unfair to a party for the doctrine to be invoked" (see, for example, *Genesee Enterprises Ltd. v. Abou-Rached* (2001), 84 B.C.L.R. (3d) 277 (S.C.); *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431 (B.C.S.C.); *Ernst & Young Inc. v. Central Guaranty Trust Co.* (2001), 283 A.R. 325 (Q.B.); and *Baziuk v. Dunwoody* (1997), 13 C.P.C. (4th) 156 (Ont. Gen. Div.)).

There are strong policy reasons to deny the NPA the opportunity of arguing against the record, the mountain of evidence of prosecutorial misconduct and dilatory tactics as already decided by Judge

---

[67] As explained by the Supreme Court in *C.U.P.E., Local 79* [at paragraph 37], "Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice."

Msimang in this case. That allowing this may lead to an abuse of court process or an illegitimate harassment is exemplified in Hunter v the Chief Constable and the Canadian authorities cited above.[68] What is even more pellucid clear is that these principles stand firmly in support of Zuma. As explained, The court has adequate grounds to dismiss the prosecution's case on the basis that the same issues between the same parties have been finally decided by a court of competent jurisdiction (Judge Msimang) and there is no new evidence or circumstances which, had the judge had those circumstances before him, would have led to a different decision. In fact, Zuma can now cite the further aggravating factors which show that the length of the delay by the NPA after its case was struck off the roll is even longer than the period of delay between June 2005 and September 2006. The question of length of delay by the NPA, whether its delay was justified and whether or not the NPA's deliberate procrastination and dilatory tactics prejudiced Zuma cannot be decided in a vacuum. Given Judge Msimang's thoughtful and thorough analysis, it is fair to contend that what is essentially left for Zuma on this score is a legal mopping up operation in which Zuma has to show that despite the court's strong admonitions, the NPA's dilatory tactics and reckless statements to the media continued unabated. To put the icing on the cake, Zuma is able to show the trial judge that his claims of conspiracy and political manipulations are not fanciful but are grounded in objective facts. The NPA pursued a cloak and dagger strategy - despite its sworn promise to the court that it would be ready to put Zuma on trial by the end of 2006, the NPA assiduously avoided an indictment of Zuma. The NPA issued press releases, generated rumours about Zuma's political future and milked the subsequent adverse publicity against Zuma for what it was worth. It concentrated on a media campaign until the ANC Polokwane conference was over. What Zuma needs to remind the court about is this: Abuse of process may manifest itself in different ways and the categories of abuse of process are not closed. The doctrine of abuse of process by relitigation has its roots in the inherent jurisdiction of courts to control their own process. Where an issue is res judicata, it is an abuse of process to relitigate the issue. Nonetheless, where the requirements of issue estoppel are not met and an issue is not strictly speaking res judicata, abuse of process by relitigation may yet be established on the facts of the case. A prosecution team that is found guilty of misconduct by a court which roundly

---

[68] Donald J. Lange, a well-respected author on the doctrine of *res judicata* summarizes the common-law principles on abuse of process in ***The Doctrine of Res Judicata in Canada***, 2nd ed. (Toronto. LexisNexis Butterworths, 2004), at pages 375-376:

(1) The doctrine is not encumbered by the specific requirements of *res judicata*.

(2) The proper focus for the application of the doctrine is the integrity of the judicial decision-making process.

(3) Relitigation may be necessary to enhance the credibility and effectiveness of judicial decision-making when, for example, there are special circumstances.

(4) The interests of the parties, who may be twice vexed by relitigation, are not a decisive factor.

(5) The motive of a party in relitigating a previous court decision for a purpose other than undermining the validity of the decision is of little import in the application of the doctrine.

(6) The status of a party, as a plaintiff or defendant, in the relitigation proceeding is not a relevant factor.

(7) The discretionary factors that are considered in the operation of the doctrine of issue estoppel are equally applicable to the doctrine of abuse of process by relitigation.

condemns such dilatory actions as unduly prejudicial to an accused should not be allowed a second bite of the apple at the expense of the accused.

In my opinion, the context of the Zuma case demonstrates that this high threshold has been met. Should the courts allow the NPA to relitigate the question of whether the NPA had been dilatory and failed to act with due diligence, whether it pursued disastrous litigation strategy that piled delay upon delay and caused Zuma undue prejudice, that would amount to an abusive attempt to relitigate issue already decided by The Honorable Judge Msimang. As argued below, this would be especially damaging to our judicial system if the NPA was allowed to reargue these matters and resuscitate its arguments before another judge other than Judge Msimang. The NPA did not appeal Judge Msimang's findings of facts and the prosecution must now live with that judgment- which is the law of the case.

2.17 Dilatory Tactics and Disastrous Litigation Strategy Causing the Case To Be Struck off The Roll Are NPA's Abuse of Process and Judge-Shopping

This part of the argument is admittedly controversial but completely sensible when judged in accordance with the following legal principles. To start with, the common-law discretion of the prosecutor to reinstitute criminal proceedings against an accused following court's striking the matter off the roll must be circumscribed by constitutional considerations. In other words, the prophylaxis is not available to all comers in all circumstances merely because they have the presence of mind to chant the accepted common law liturgy. To the contrary, in the circumstances of the Zuma case, the NPA must be required to show at the very least that its new criminal prosecution will not constitute an abuse of the process of the court. This is not a particularly onerous burden and it is based on the inherent power of the court, in the words of Lord Blackburn, "to see that its process was not abused by a proceeding without reasonable grounds so as to be vexatious and harassing…" Connelly v. D.P.P. supra. Everyone, with the exception of the NPA of course, can see a quandary that would make it very difficult for any judge to side-step this fundamental question: If Judge Msimang denied a continuance or postponement on the grounds that such postponement would be unduly prejudicial to Zuma and that the prosecution was at fault, why would any judge reach a contrary conclusion when Zuma raises the same argument now, almost 18 months after Judge Msimang's ruling? It is undisputable that the NPA failed to heed the court's earlier admonition and caused even more delay in complete disregard of the concerns raised by Judge Msimang. If another judge now rejects Judge Msimang's earlier ruling and grants the NPA further indulgence to prosecute Zuma that would make our judiciary appear as if it speaks with a forked tongue. It would certainly convey the impression that justice in our country is by lottery and that the outcome of cases depends on whether the NPA can deliberately procrastinate and flout deadlines set by a judge who is not "pro-prosecution" in order to get another chance before a different judge who may be more congenial to the NPA. That of course would also constitute a violation of the principle of equality of arms discussed above.

No one can seriously argue with the proposition that a criminal justice system in which the prosecutor alone is able to select the judge of his choice to preside at trial, even in limited types of cases, raises serious concerns about the appearance of partiality, irrespective of the motives of the prosecutor in selecting a given judge. Francolino v. Kuhlman, 224 F.Supp.2d 615, 630 (S.D.N.Y.2002); see also United States v. Pearson, 203 F.3d 1243, 1264 (10th Cir.2000) (stating that **prosecutorial judge-shopping**, "if undertaken on a large scale, **arguably threatens the independence of the judiciary**"); Tyson v. Trigg, 50 F.3d 436, 442 (7th Cir.1995) (Posner, J.) (noting that "[t]he **practice of allowing the prosecutor to choose the grand jury and hence the trial judge is certainly unsightly** ... [and] **lack[s] the appearance of impartiality**"). It is well established, moreover, that "**due process requires a `neutral and detached judge in the first instance**.'" Concrete Pipe & Prods., Inc. v. Constr. Laborers Pens. Trust, 508 U.S. 602, 617, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993) (quoting Ward v. Village of Monroeville, 409 U.S. 57, 61-62, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972)). Some courts have taken a firm line against "judge-shopping" even where lawyers are retained or motions for recusal of judges are filed solely to force the judge in question to recuse himself. "**This court has long adhered to a firm and unwavering policy against `judge shopping' by attorneys, and we will not abide an orchestrated effort to force a judge's removal from a case**." Seeco, 334 Ark. at 140. It is impermissible for parties or counsel to create an infirmity for the purpose of forcing a judge to recuse. Irvin v. State, 345 Ark. 541, 49 S.W.3d 635 (2001); State v. Clemmons, 334 Ark. 440, 976 S.W.2d 923 (1998); Secco, supra. Some courts have carefully guarded against any action that would "**open the flood gates to judge shopping**." Patterson v. Isom, 338 Ark. 234, 992 S.W.2d 792 (1999); Dougan v. Gray, 318 Ark. 6, 884 S.W.2d 239 (1994). A trial court has the inherent authority to protect the integrity of the court in actions before it. City of Fayetteville v. Edmark, 304 Ark. 179, 801 S.W.2d 275 (1990). If our criminal justice system does not allow the NPA to directly handpick a particular judge to preside over a case why should it countenance a scenario where the NPA achieves the same objectives indirectly because its initial misconduct led to a dismissal of a case. The NPA, if it gets a new judge, would have succeeded in doing just that by manoeuvring to have the case first Zuma case struck off the roll and then getting it assigned to another congenial judge who might adopt a more charitable view of the NPA's proven misconduct. No one can seriously argue with the proposition that a prosecution team that engages in deliberate misconduct that result in a mistrial or in the case being struck off the roll because of the presiding judge's exasperation with its tactics should not be given second bite at the apple at the expense of the accused who was actually the victim of the earlier NPA misconduct. Obviously, to do so would be to reward the very misconduct condemned by the judge who roundly criticized the prosecution team.

The next question I want to tackle is whether the circumstances in Zuma's raise a spectre of judge-shopping and unfair appearance of bias on the part of any judge (other than Judge Msimang) assigned to preside over the new Zuma prosecution. There is a tangible risk that a even if the newly appointed judge is above reproach, the NPA's calculated but condemned strategy would tarnish the court's appearance of fairness and actually appear to place the court's imprimatur on a judge-shopping practice which most

courts around the world always have denounced. When allowed to manipulate the system this way the NPA does more damage to the rule of law than any member of the public who bribes court personnel to have a "docket disappear." To countenance such behaviour would destroy the public's naïve believe in the law as something which will honestly protect their rights, our democracy, and our country.

The NPA engaged in amazing and brazen manipulation of legal procedures in connection with the Zuma case. It is now a matter of record that the NPA not only embarked on a disastrous litigation strategy which led to striking the case off the roll but that agency appears to have taken a carefully calibrated risk that striking its case off the roll would be without consequences - at the most it would give prosecutors additional time to gather evidence and most importantly, an opportunity for a fresh start before another judge who may be more charitable and even tolerant of lackadaisical action on the part of the prosecution. In December 2005, while the first Zuma case was pending before the High Court, the NPA launched an application, on notice to Zuma, in terms of Section 2 (1) of the International Co-Operation in Criminal Matters Act, No. 75 of 1996 ("the ICCM Act"). The NPA sought an order for the issuance of a Letter of Request (LOR) that the original documents seized on 9 October 2001 and still held by the Mauritian authorities, be handed to the South African High Commissioner in Mauritius for transmission to the NPA. After conclusion of the argument before Judge Combrinck, the NPA sought an amended Order which would have allowed for the leading of evidence before a Commissioner in Mauritius, much in the form of the Order granted in S. v. Basson 2000 (2) SACR 188 (T) at 198e. In March 2006 Judge Combrinck, concluded that he did not have the power to grant such an Order. That power was vested in the Court presiding at the criminal trial. The NPA faced the prospect of having to raise the matter before Judge Msimang, a no-nonsense judge who was assigned to preside over the criminal trial due to commence on 31 July 2006. Unsure of its prospects because of the language of the statute, Section 2 (1) of the "the ICCM Act", the NPA deliberately embarked on further dilatory tactics which forced the Judge to strike the case from the Roll. The NPA filed a request for a postponement of the trial but that application was refused by Judge Msimang, J. on 20 September 2006. The prosecution declined to withdraw the charges and the matter was struck from the Roll. Apparently the NPA saw this as an opportunity to use another deceptive tactic to deprive Zuma of a chance to oppose the NPA's application for a LOR[69].

For months, the NPA steadfastly declined to say whether Zuma would be re-charged or not and took advantage of the legal "twilight zone" it created for Zuma. Incredibly, it seized upon the fact that its misconduct caused the case to be struck from the roll and argued that since there were no "criminal proceedings" pending, Zuma had no standing to oppose its request for a LOR. In a Section 2 (1) process under the ICCM Act, (which applies when there are pending criminal proceedings) the accused is entitled in principle to attend and cross-examine any witness testifying abroad (at State expense should the Court

[69] In normal circumstances such an application (i.e. in terms of Section 2 (2) of the ICCM Act) would be made ex parte, that is without notice to the subject of the investigation. In the Zuma matter, notice of the application was given to Zuma, Thint Holdings and Thint (Pty) (sic).

so order - Section 3 (1)). Such a right is also recognised by Section 158 of the Criminal Procedure Act, No. 51 of 1977. However, the NPA relied on a Section 2 (2) process which does not allow the potential accused any of these rights - it is only the person in charge of the investigation who plays a role in a Section 2 (2) process under the ICCM Act (see Section 3 (2)). Under Section 2 (2) a person who is subsequently accused has no right to challenge and adduce evidence by means of cross-examination of the witness from abroad - the accused can only challenge the admissibility of the already taken evidence under Section 5 (2). Despite having promised the Court that it would be ready to proceed to trial by February 2007, the NPA lollygagged for several months and deliberately procrastinated in announcing the decision to charge Zuma until after the conclusion of the ANC Polokwane conference.

No one can seriously argue with the proposition that a judicial assignment system that allows a prosecution team to abort a criminal case under circumstances where a trial judge finds at least damnable fault on the prosecution side and then in a round-about turn re-institute the same prosecution before a different judge deprives the defendant of a neutral and impartial judge presiding at trial. This is especially so in this case where the NPA essentially admitted that it administers justice by lottery or the luck of the draw by taking chances "every day" in courts. If the NPA was the culprit in aborting the initial first Zuma prosecution as seen through the eyes of a thoughtful judge like Judge Msimang, the public has every right to expect that the NPA's manipulation should not result in a windfall where a new judge, even if randomly assigned to the new case, nullifies or puts Msimang's ruling in doubt. A member of the public should not be put in the unenviable position of having to wonder whether the "new judge" was truly impartial or the NPA's agent or henchman. The process by which the new judge is assigned to preside when seen against the established NPA violations of applicable rules will always be seen as prejudicial to defendant. Accordingly and in the interest of protecting the integrity of the judicial process the parties must be sent back to Judge Msimang to fashion an appropriate remedy and to finally provide Jacob Gedleyihlekisa Zuma with a fair trial.

2.18 The Only Way To Avoid NPA's Abuse of Process and Judge-Shopping Is To Assign The Zuma Case To The Honorable Justice Msimang.

Questions have been raised about the surprise trial date unilaterally set by the NPA and its impact on the integrity of the judicial system. Some in the media have simply described the NPA's actions as "mess-up" on the part of the NPA or mere failure to properly arrange for the trial with Judge President Tshabalala or not following "the correct protocol to consult" the Judge President directly. The issue is more serious than that and involves a practice that has been roundly condemned in international jurisprudence, namely, prosecutorial manipulation of the court docket system or the trial court's calendar in a manner that puts the accused at a disadvantage. Such actions not only violate the principle of equality of arms recognized in human rights law but they constitute an abuse of the court process. The 'equality of arms' is a principle of procedural fairness which states that in any adversarial proceedings both parties must be on an equal footing when presenting their case. The principle requires that the

accused be afforded a reasonable opportunity of presenting his case in conditions that do not place him at a disadvantage vis-a-vis his opponent.

Further questions have been raised about why the NPA is free to reinstitute the charges against Zuma despite Judge Msimang's earlier decision to dismiss the case for prosecutorial negligence and incompetence. Are there constitutional limits to the apartheid-era procedure of striking cases off the roll? And finally, questions have been asked about why Judge president Tshabalala should be mulling over the question of appointing a new judge instead of assigning the case to Judge Msimang who dismissed the first Zuma case. Further complicating this scenario is media speculation that Judge Levinson would be the new judge appointed to preside over Zuma's case. Unless such matters are handled appropriately, they have the potential to conspire to erode public confidence in our judicial system and to permanently damage the international reputation of our judiciary. If prophylactic measures are not instituted as a matter of urgency, the downward spiral would continue and Zuma would never get a fair trial that all our citizens have so vociferously clamoured for.

To answer the first question regarding the trial date, Section 144(4) of the Criminal Procedures Act provides that once the NPA has decided to indict an accused the director of public prosecutions must lodge an indictment with the registrar of the High Court. This is followed by service of the indictment on the accused. Service of the indictment, together with a notice of trial, must take place at least ten days before the date appointed for trial, unless the accused agrees to a shorter period. There is nothing cumbersome or confusing about this procedure - it does not require that charges be filed eight months prior to a trial date or that prosecutors become instant media celebrities by holding press conferences to announce an indictment. In all events, complying with this simple procedure should not have involved all the drama and accompanying song and dance engaged in by the NPA in Zuma's case.

I happen to remember that while the ANC conference was underway in Limpopo the NPA, in a not so veiled effort to influence the outcome of the hotly contested ANC elections, kept issuing media statements about Zuma's pending charges. It went so far as to publicize its "draft indictment" of Zuma to dampen the mood of his supporters and to rain on his victory parade following his election. In its gadarene rush to garner maximum publicity, the NPA issued a December 28, 2008 press release announcing Zuma's indictment on a plethora of new charges. Despite having been chastised by Chief Justice Langa just a few days prior to that date for cavalierly flouting the rules of the constitutional court in another Zuma appeal, the NPA once again embarked on a strategy which has put our judiciary in an extremely embarrassing predicament. As Judge Tshabalala reminded the NPA, a "***high-profile case such as Mr Zuma's requires many court days and therefore careful arrangements are required by me. The registrar's office is not my office, and I cannot run the courts according to what I read in the newspapers. It is the correct protocol to consult me directly.***" Members of the public can be forgiven for asking, exactly when will our courts tell the NPA "enough already" and at what point will our judiciary definitively pronounce that the NPA, through its indolence has forfeited any plausible claim to further indulgences from our courts?

To be sure the NPA has a plethora of excuses and has justified its premature announcement of a trial date by claiming that all parties had known of the proposed prosecution date, which appeared on the indictment that was filed at the Pietermaritzburg High Court on 28 December 2007. In a 1 January 2008 statement, NPA spokesman Tlali Tlali said: ***'An indictment has been issued for trial in the Pietermaritzburg High Court, commencing on 4 August 2008.'*** These flimsy excuses, instead of allaying the public suspicion about the suspiciously long time between the indictment and the "proposed" trial date, further raise the spectre of prosecutorial manipulation of the court docket system or the trial court's calendar to cause maximum damage to the accused's right to a fair trial. Without proper procedural safeguards the prosecution is virtually free to hastily indict a citizen and to unilaterally set a trial date far into the future and thus subject the accused to overly long and vexatious criminal proceedings. This is an avenue that is simply not available to the accused. For this reason, most civilized legal systems reject any system of complete and exclusive prosecutorial docket control as inimical to judicial independence and a violation of the principle of equality of arms. If left unchecked such prosecutorial control encourages judge-shopping and allows prosecutors to pick and choose when to schedule cases for a time when their "favourite" judge would be available or to avoid certain judges. If remedial actions are not instituted soon, the NPA's shenanigans and accompanying downward spiral will continue and adversely affect judicial integrity, the justice system, and public confidence.

As noted elsewhere, public confidence in the judicial system depends not only on the impartial administration of justice, but also on a public perception of impartiality. Thus, it is an accepted principle that justice should be dispensed according to law and should not depend upon the whim of individual judges. Equally important is the principle that prosecutors or lawyers must not be allowed to engage in "judge shopping" that is an effort by a lawyer or litigant to influence a court's assignment of a case so that it will be directed to a particular judge or away from a particular judge.

Canadian courts have confronted and condemned tactics similar to those employed by the PNA in Zuma's case. In R. v. Scott, [1990] 3 S.C.R. 979, the accused contended that the conduct of the prosecution in staying the charges before the first judge because it did not like his ruling in favour of the defence, and reinstating them in hopes of a more favourable ruling from a different judge, constitutes an abuse of process and an infringement of the accused's rights under ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms. The only question before the court was whether the prosecution's conduct in entering a stay and then recommencing the proceedings for the purpose of avoiding an unfavourable evidentiary ruling constitutes an abuse of process or violates the Charter, with the result that the convictions should be set aside.

The Court has recognized the manipulation by the prosecution as prohibited under doctrine of abuse of process, quite independently of the Charter. A judge has the power to stay or strike down proceedings which are oppressive or vexatious and violate the fundamental principles of justice underlying the community's sense of fair play and decency. As stated in R. v. Conway, [1989] 1 S.C.R. 1659, at p. 1667: "*A trial judge has discretion to stay proceedings in order to remedy an abuse of the*

court's process. This Court affirmed the discretion "where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings" (R. v. Jewitt, [1985] 2 S.C.R. 128, at pp. 136-37, borrowing from R. v. Young (1984), 40 C.R. (3d) 289 (Ont. C.A.))." The court stated that an abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice. It stated that one must "*read these criteria cumulatively. While Wilson J. in R. v. Keyowski, [1988] 1 S.C.R. 657, at pp. 658-59, used the conjunction "or" in relation to the two conditions, both concepts seem to me to be integral to the jurisprudence surrounding the remedy of a stay of proceedings … It is not every example of unfairness or vexatiousness in a trial which gives rise to concerns of abuse of process. Abuse of process connotes unfairness and vexatiousness of such a degree that it contravenes our fundamental notions of justice and thus undermines the integrity of the judicial process.*"

The Court then moved from the general principle to the concerns raised by the prosecution's conduct in the case. It ruled that while evidence of prosecutorial misconduct or bad faith may be factors in determining whether an abuse of process has been established, they are neither necessary nor sufficient. The court quoted the ruling in R. v. Keyowski, supra, where Wilson J., speaking for the Court, stated, at p. 659: ***To define "oppressive" as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine. In this case, for example, where there is no suggestion of misconduct, such a definition would prevent any limit being placed on the number of trials that could take place. Prosecutorial misconduct and improper motivation are but two of many factors to be taken into account when a court is called upon to consider whether or not in a particular case the Crown's exercise of its discretion to re-lay the indictment amounts to an abuse of process.***"

The court went on to state that while prosecutorial misconduct or bad faith per se may not be at issue, the case raised three concerns which have been addressed by the courts in the context of abuse of process. "**The first is the evil of "judge-shopping". The second is concern for the impartiality of the administration of justice, both real and perceived. The third concerns the need to uphold the dignity of the judiciary and judicial process**." The "***concern with "judge-shopping" arises from the use of the stay to avoid the consequences of an unfavourable ruling. Normally, Crown counsel faced with an unfavourable ruling is expected to accept it. The remedy is by way of appeal. To permit the Crown to stay a proceeding because of an unfavourable ruling and then reinstate the proceeding before a different judge in the hope of a different ruling is obviously to condone, in some sense, judge-shopping, notwithstanding that the Crown's motive may have been honourable***." Such conduct also "***raises concern for the impartiality of the administration of justice, real and perceived. The use of the power to stay, combined with reinstitution of proceedings as a means of avoiding an unfavourable***

ruling, gives the Crown an advantage not available to the accused. An accused's only remedy for an unfavourable ruling is an appeal: the Crown, if conduct such as that raised in this case is condoned, has a choice of whether to stay and start afresh before a new judge or to appeal. Absolute equality between the prosecution and the defence may not be possible. But good reasons must exist if the Crown, which already has at its disposal the superior resources of the state, is to be given an advantage such as this." And finally, the court ruled that case raises "*concerns for the dignity of the judiciary and the integrity of the judicial process. The normal and proper operation of the judicial system contemplates that judicial errors be corrected through the appeal process. That process should not be subverted without good reason. From the point of view of theory, an order or ruling stands as valid until set aside on appeal. Any other assumption leads to uncertainty and confusion. It may, moreover, result in the "error" of one trial judge being implicitly "corrected" by another judge of the same level*."

The court then dealt with these concerns which are underlined in a series of cases dealing with the refusal by a trial judge to grant the prosecution's request for an adjournment, usually as a result of the unavailability of a key witness. "In the first of the three cases I will refer to, the Crown stayed proceedings pursuant to s. 508 of the Code and then laid a new information in order to re-institute proceedings. In the latter two cases, the Crown simply attempted to withdraw the charge with a view to relaying it and proceeding when the witness relied upon was available." The court then quoted from each of these three cases -- all of which resulted in the Court's ordering a stay of proceedings -- in order to capture some of the concerns alluded to:

> It is not the function of this Court to review the discretion of the Judge who refused the adjournment of the first information. ***Whatever dilemma the prosecution may face in subjecting a discretionary ruling of a lower Court to the scrutiny of a higher Court, the procedural expediency adopted in this case cannot be countenanced as a substitute for an appeal or prerogative proceeding . . . .***
>
> ***It is not too difficult to contemplate the evils where such a procedure could be extended to manoeuvre any trial proceeding before a Judge of choice***.

Per Jones Prov. Ct. J. in R. v. McAnish and Cook (1973), 15 C.C.C. (2d) 494 (B.C.), at p. 495.

It also quoted the following from another case. "It seems quite apparent that ***the purported withdrawal of the informations at that stage after an unsuccessful attempt for an adjournment, was a move designed to circumvent the Judge's ruling which they found unsatisfactory*** . . . . The Crown ***have [sic] simply ignored the dismissals of the Court and re-laid the informations . . . . When the accused is brought back to face the same charge, that was disposed of by the Court, without any ruling by a higher Court as to the propriety of the lower Court's ruling, it does not appear to the accused or the public, that the administration of justice is impartial, but rather that it is something to be manipulated by the Crown***." Per Crossland Prov. Ct. J. in R. v. Scheller (No. 1) (1976), 32 C.C.C. (2d) 273 (Ont.), at pp. 278 and 283.

The court also quoted language from another case. "I find that the ***procedure adopted by the Crown in this case of withdrawing the charge and re-laying it subsequently was calculated to***

circumvent the Judge's refusal to grant an adjournment. It was an affront to the dignity both of the Provincial Court Judge and the relevant appellate authorities. More important, it constituted an attack upon the judicial system itself by an endeavour to bypass or disregard judicial authority in an endeavour to take the control of a criminal proceeding out of the hands of the appropriate judicial officer." Per Vanek Prov. Ct. J. in R. v. Weightman and Cunningham (1977), 37 C.C.C. (2d) 303 (Ont.), at pp. 317-18.

It is my contention that the bizarre South African procedure of allowing a prosecution to simply resurrect a case that was "struck from the roll" under circumstances where a High Court judge expressly denied a postponement amidst express finding of prosecutorial misconduct and prejudice to the accused will encourage all the evils condemned by the Canadian courts. The use of a "striking off the roll" to circumvent an adverse ruling is illegitimate and constitutes an abuse of process. Concerns relating to judge-shopping, the impartiality of the administration of justice and the integrity and dignity of the judicial process are all present in Zuma's case. Our system should not be seen to be rewarding a lackadaisical prosecution by allowing them to resurrect a case they sabotaged through their own incompetence and gross misconduct. It certainly should not be seen to be giving the NPA a fresh start before a new judge. This may mean that in future the NPA would, if facing a non-nonsense judge, have no incentive to comply with the court's procedures – it could pile delay upon delay, overtax a court's patience and provoke the court into striking a case off the roll with the full knowledge that it would get a fresh start with a different judge. This is very much like the procedure condemned in other major democracies. In R. v. Regan, [2002] 1 S.C.R. 297, 2002 SCC 12, the Canadian Supreme Court had the following to say about the practice:

> 60 This Court has adverted to the impropriety of trying to influence the outcome of a proceeding by trying to "select" the judge. Where it appeared that the Crown had abandoned a case before one judge to avoid an unfavourable ruling, and then reinstated charges at a new trial before a new judge, McLachlin J. was quick to point out the affront to the integrity of the system (R. v. Scott, [1990] 3 S.C.R. 979. Scott, supra, at pp. 1008-9):
>
> > The concern with "judge-shopping" arises from the use of the stay to avoid the consequences of an unfavourable ruling. Normally, Crown counsel faced with an unfavourable ruling is expected to accept it. The remedy is by way of appeal. . . .
> >
> > Such conduct also raises concern for the impartiality of the administration of justice, real and perceived. The use of the power to stay, combined with reinstitution of proceedings as a means of avoiding an unfavourable ruling, gives the Crown an advantage not available to the accused.

These courts have recognized judge shopping as offensive in that it illustrates inequality between the prosecution and defence, in that only the prosecution has the power to influence which judge will hear its case by manipulating the timing of the laying of the charge. Even if this advantage was not ultimately exploited, it must be reasserted that judge shopping is unacceptable both because of its unfairness to the accused, and because it tarnishes the reputation of the justice system.