

SOUTH AFRICA / JUDGMENT

## Zuma v Downer and Another (788/2023) [2023] ZASCA 132; [2023] 4 All SA 644 (SCA); 2024 (2) SA 356 (SCA); 2024 (1) SACR 589 (SCA) (13 October 2023) [2023] ZASCA 132

### COURT

Supreme Court of Appeal

### BEFORE

Molemela, Ponnann, Saldulker, Mocumie, Mothle

### CASE / FILE NUMBER

788/2023

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## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

### JUDGMENT

Reportable

Case no: 788/2023

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA

APPELLANT

And

WILLIAM JOHN DOWNER

FIRST RESPONDENT

KARYN MAUGHAN

SECOND RESPONDENT

Neutral citation: Jacob Gedleyihlekisa Zuma v William John Downer and Another (Case no 788/2023) [2023] ZASCA 132 (13 October 2023)

Coram: MOLEMELA P and PONNAN, SALDULKER, MOCUMIE and MOTHLE JJA

Heard: 28 September 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date for hand down is deemed to be 13 October 2023 at 11h00.

Summary: Section 18 of the Superior Courts Act 10 of 2013 – suspension of order pending appeal – abuse of process – not to order judgment to be carried into effect – will prolong the abuse.

## ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Kruger, Henriques and Masipa JJ, sitting as court of first instance):

The appeal is dismissed with costs, including those of two counsel, to be paid on the attorney and client scale.

Ponnan JA (Molemela P and Saldulker, Mocumie and Mothle JJA concurring):

- [1] The appellant, Mr Jacob Zuma, the former President of this country, is facing multiple charges of corruption, fraud, racketeering and money laundering. He first appeared in court in relation to those charges on 29 June 2005, his trial has still not commenced. Throughout this period, the first respondent, Mr William Downer, has served as the lead prosecutor for the National Prosecuting Authority (NPA). He also handled the related prosecution of Mr Schabir Shaik, who was convicted of corruption in 2005, in respect of conduct in which Mr Zuma was implicated.
- [2] In 2021, Mr Zuma finally had to plead to the charges. He did not plead to the substance of the charges. He raised a special plea in terms of s 106(1)(h) of the Criminal Procedure Act 51 of 1977 (the CPA). The application was launched on 17 May 2021 with the Kwazulu-Natal Division of the High Court, Pietermaritzburg (the high court). Mr Zuma alleged that Mr Downer is not a fit person to prosecute him. Koen J dismissed the application in a 107-page judgment, in which he analysed Mr Zuma's contentions and rejected each of them.[1] Mr Zuma thereafter applied to the high court and then this Court for leave to appeal, which failed. So too, his application to the President of this Court for a reconsideration in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 (the Act) and his two applications thereafter to the Constitutional Court for leave to appeal.
- [3] On 5 September 2022, Mr Zuma instituted a private prosecution in the high court against Mr Downer, as also, against the second respondent, Ms Karyn Maughan, a senior legal journalist, who has been reporting on the criminal investigation, his criminal indictment and the numerous legal challenges and proceedings for well on 20 years. Mr Downer and Ms Maughan (collectively referred to as the respondents) applied separately to the high court to have the private prosecution set aside as an abuse of process of the court. The applications were consolidated and heard on 10, 20 and 22 March 2023, before a specially constituted court of three judges (Kruger, Henriques and Masipa JJ), sitting as a court of first instance.

On 7 June 2023, the high court, in a judgment running to 63 pages, set aside the criminal summons against the respondents, interdicted the private prosecution

and ordered Mr Zuma to pay costs on a punitive scale (the main judgment). Mr Zuma applied for leave to appeal the main judgment,

which was dismissed by the high court on 11 September 2023. At the bar in this Court, we were informed that a petition to this Court will follow and, if that fails, an application will be made to the Constitutional Court for leave to appeal.

[4] Both respondents applied to the high court in terms of s 18(1) read with s 18(3) of the Act for an order that the setting aside of the private prosecution is to remain in force pending the outcome of any appeal against the main judgment. On 3 August 2023, the high court made such an order (the execution order). Exercising his automatic right of appeal under s 18(4)(ii) of the Act, Mr Zuma filed a notice of appeal with this Court against the execution order on 14 August

2023. And, after compliance by the parties with the directions issued by the President of this Court, the matter was enrolled, in accordance with s 18(4)(iii), as one of urgency for hearing on Thursday 28 September 2023, which was the penultimate day of the court term. [2]

[5] The respondents contend that Mr Zuma has engaged in an unremitting campaign to delay the commencement of his criminal trial and that, to allow the proposed private prosecution (which is described as a sham and an abuse) to proceed, would mean that he would be allowed to succeed in his strategy of delay. This will of course be addressed in

the attempted appeal by Mr Zuma against the main judgment. For now, so the contention proceeds, the suspension of the private prosecution should remain in force while that process plays out.

[6] As long ago as May 2007, Mr Zuma's then counsel intimated, in response to a query from Hugo J, that he was following a 'Stalingrad' strategy' in the conduct of Mr Zuma's defence to the criminal charges that the latter faced. As explained by Wallis JA in *Moyo v Minister of Justice and Constitutional Development and Others*:

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

The high court recorded in the main judgment that '[t]he application [by the respondents to set aside the private prosecution] is directed at ensuring that there is an end to the abuse of an unlawful private prosecution and an end hopefully to the "Stalingrad"

strategy’.

[7] A key plank of this appeal is that no other court had been as ready to accept the characterisation ‘Stalingrad’, as was the high court in this matter. That is not entirely accurate. In *Democratic Alliance v President of the Republic of South Africa*, three judges of the Gauteng Division of the High Court, Pretoria found that Mr Zuma had adopted a ‘Stalingrad defence strategy’,

which had ‘cost the state, and hence the taxpayer, thus far a total amount of between R16 788 781.14 and R32 million’.[4] Meyer J (Ledwaba DJP and Kubushi J concurring) observed that the law reports are indeed replete with judgments dealing with Mr Zuma’s criminal prosecution.[5] The court noted that Mr Zuma had ultimately been unsuccessful in every one of the challenges, almost always with an adverse costs order.

[8] In 2017, Navsa ADP commenced a judgment of this Court with a reference to TS Eliot’s ‘recurrent end of the unending’.[6] He proceeded to refer to what Harms JA said some eight years earlier in *National Director of Public Prosecutions v Zuma*:

‘The litigation between the NDPP and Mr Zuma has a long and troubled history and the law reports are replete with judgments dealing with the matter. It is accordingly unnecessary to say much by way of introduction and a brief summary will suffice.’[7]

This abbreviated history illustrates that on any reckoning, the scale of litigation, which is likely unprecedented in the South African courts, justifiably attracts the epithet ‘Stalingrad’.

[9] The private prosecution is not the last attempt by Mr Zuma to achieve the removal of Mr Downer as the prosecutor. On 18 April 2023, he launched a second application for Mr Downer’s removal. That application, to be heard by Chili J, has been postponed for argument on 26 October 2023. Mr Zuma has repeatedly attacked the NPA and Mr Downer in an attempt to discredit him and disqualify him as the prosecutor in his criminal case. The overarching theme of Mr Zuma’s

answering affidavit in the s 18(3) application is that the implementation order should not be granted, because he should not be

prosecuted by Mr Downer. In that regard, Mr Zuma asserted, absent a true factual foundation, that ‘[t]he entire public prosecution

was employed to discredit me politically and Mr Downer was used as a prosecutorial and political hitman to weaponize prosecutorial power to achieve political ends’.

[10] What emerges is that the central purpose of the private prosecution is to enable Mr Zuma to have Mr Downer removed as the prosecutor on the basis that he (Mr Downer) stands accused in the private prosecution. However, the question whether Mr Downer should be removed as prosecutor is of course not before this Court. Mr Zuma’s second attempt (following upon the failed attempt before Koen J) to achieve this is pending before Chili J. Ultimately, whether Mr Downer is prosecuted depends on the successful outcome of Mr

Zuma's appeal of the main judgment.

[11] The facts demonstrate that the private prosecution of Mr Downer is an abuse of the process of the court, for multiple reasons: first, as the high court found, it was instituted as a further step in a sustained attempt by Mr Zuma to obstruct, delay and prevent his criminal trial – this is an ulterior purpose, and the institution of the private prosecution was accordingly unlawful; second, it was instituted in order to have Mr Downer removed as the prosecutor in Mr Zuma's trial – this too is an ulterior purpose, which renders the private prosecution unlawful; and, third, the contemplated private prosecution is patently a hopeless case. It is obviously unsustainable. Mr Zuma has not made out any possible basis on which Mr Downer might be convicted, even on Mr Zuma's own version of the facts. This, too, renders the private prosecution an abuse of the process.

[12] As to the third: Mr Zuma's case against Mr Downer consists of two charges. The first charge is a complaint that Mr Downer disclosed confidential or private medical information about Mr Zuma to Ms Maughan, in breach of s 41(6) of the National Prosecuting Act 32 of

1998. The undisputed fact is that Mr Downer made no such disclosure to Ms Maughan. The disclosure in question was made by Adv Breitenbach SC, a member of the prosecution team. In any event, both Koen J and the high court found that there was no disclosure of confidential or private information. Each thus rejected the charge as unfounded. In reply before us, Counsel suggested that Koen J had not made a firm pronouncement as to the confidentiality of the information. A suggestion neither raised on the papers, nor foreshadowed in the heads. However, that is to misconstrue the effect of Koen J's

judgment. Koen J found that Mr Zuma's doctor's note was not truly intended to be confidential;[8] it did not contain any confidential information;[9] and, its disclosure did not constitute an actionable violation of his rights.[10] It is so that in the course of his judgment Koen J did proceed to consider further hypotheticals, presumably for the benefit of an appeal court and on the assumption that it may take a contrary view to him on his primary finding. In the event, his further

'ruminations', as he described it, proved unnecessary, because leave to appeal was refused, which means that his primary

finding that the note did not contain any confidential information stands. The second charge relates to a conversation that Mr Downer had with a journalist, Mr Sam Sole, in 2008. Mr Zuma has never previously sought to bring any complaint or charges against Mr Downer in this regard. And, like the first charge, the information disclosed was not confidential or private. The facts show that Mr Downer was authorised to make the disclosure. Both Koen J and the high court considered and also rejected this charge as unfounded.

[13] Turning to Ms Maughan: It was initially contended before the high court by Mr Zuma that a first nolle prosequi certificate (issued on 6 June 2022), which expressly named Mr Downer, also covered her. Mr Zuma now appears to contend that a second nolle prosequi certificate

(issued on 21 November 2022) covers Ms Maughan. This, on the basis of an affidavit subsequently deposed to by the prosecutor who issued it. The high court held that the second certificate still 'does not name her as a suspect'. If the purpose of the second certificate was to include Ms Maughan, one imagines that it would surely have named her expressly (like the first certificate did of Mr Downer). The high court also held that the second certificate was issued well after Mr Zuma had initiated

the private prosecution against Ms Maughan, and thus cannot retrospectively cure the unlawfulness of the prosecution. Before the

initiation of the private prosecution against Ms Maughan, Koen J had already found that the note issued by Mr Zuma's doctor (upon which the private prosecution rests) was not intended to be confidential, did not contain any confidential information and its disclosure did not constitute an actionable violation of his rights.

[14] Ms Maughan characterises her private prosecution as one that has been brought by a powerful former President against a journalist (who has been reporting on his legal troubles in a manner that displeases him), which will have a chilling effect on her journalistic freedom and press freedom more widely. It also means that she will have to continue to report, in the face of insults and threats from his supporters, with a cloud of criminal opprobrium hanging over her head, which undermines her journalistic credibility. There is nothing to gainsay any of this. If anything, as the high court recorded, having regard to Mr Zuma's answering affidavit, 'his personal animosity toward [her] is exposed': 'She is alleged to have colluded, conspired and been in partnership with State prosecutors perpetuating a false narrative about his conduct toward litigation and the delays in the criminal trial. This is repeated on a number of occasions in the answering affidavit and his hatred, impatience and vitriolism toward her is patently obvious.' She has been labelled 'a hostile journalist' and 'an anti-Zuma crusader', who is being used as the 'propaganda machinery of the media'.

[15] In the main judgment, the high court concluded:

'In the result, we are of the view that considering the respective grounds advanced by Downer and Maughan, the submissions of the

respective amici, and the various case authorities referred to hereinbefore, the Respondent's private prosecution of Downer and Maughan constitutes an abuse of process as it has been instituted for an ulterior purpose and consequently, they are entitled to the relief sought in the respective notices of motion.'

For the present, the correctness of that key finding is not before us. That is a matter for the main appeal. The finding stands until set aside by a court of competent jurisdiction.[11] It does, however, appreciably narrow the scope and extent of the present appeal.

[16] This Court has examined the prerequisites for the implementation of an order pending an appeal in *University of the Free State v Afriforum*;<sup>[12]</sup> *Ntlemeza v Helen Suzman Foundation*;<sup>[13]</sup> *Premier of Gauteng v Democratic Alliance*;<sup>[14]</sup> and, *Knoop v Gupta (Knoop)*.<sup>[15]</sup> It is not necessary that those be revisited here. As Wallis JA observed in *Knoop* (para 1):

‘The immediate execution of a court order, when an appeal is pending and the outcome of the case may change as a result of the appeal, has the potential to cause enormous harm to the party that is ultimately successful. That was well-illustrated by the facts in

*Philani-Ma-Afrika*,<sup>[16]</sup> where the judge granted leave to appeal against an eviction order and at the same time gave leave to execute. . . In giving the judgment of this court, Farlam JA said: “The facts of this case provide a striking illustration of the need for orders of the nature of the execution order to be regarded as appealable in the interests of justice.”<sup>[17]</sup>

In my view, this is not such a matter.

[17] Prior to the enactment of s 18 of the Act, the accepted common law rule of practice was that generally, the execution of a judgment was automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment could not be carried out and no effect could be given thereto, except with the leave of the court which granted the judgment. The court had a wide general discretion in that regard, which was part and parcel of the inherent jurisdiction which the court has to control its own judgments (*South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd (South Cape Corporation)*).<sup>[18]</sup>

[18] For the high court to have allowed the suspension of the main judgment pending an appeal would have been mutually incompatible with the conclusion reached by it that the private prosecution of the respondents constituted an abuse. If anything, in the light of the need for the high court to control its own judgments, it may well have been obliged to order the main judgment to be carried into effect to prevent an ongoing abuse. If Mr Zuma’s private prosecution is indeed an abuse of the process as the high court held, then it follows that allowing it to be enforced pending an appeal will prolong and perpetuate that abuse. This will make a mockery of the high court’s judgment and will undermine public confidence in the judiciary’s capacity to control its own judgments and to protect individuals from an abuse of process, including an unlawful,

abusive and oppressive private prosecution.

[19] Indeed, as Corbett JA noted in *South Cape Corporation*:

‘The purpose of this [common law] rule as to the suspension of the judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy and a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from.’<sup>[19]</sup>

The determination of this appeal depends, in part, on the proper interpretation of the order that issued against Mr Zuma in the main judgment. The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's

intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules

relating to the interpretation of documents.[20] As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.[21]

[20] The order that issued against Mr Zuma in the main judgment is not one *ad factum praestandum*, which called upon him to perform a certain act or refrain from specified action, on pain of contempt. The high court set aside the summons in the private prosecution and interdicted him from pursuing it on 'substantially the same charges as those advanced in the summons'. Having put a red line through the prosecution in the main judgment, it restored the parties to the status quo ante in ordering the implementation of its order pending the proposed appeal. In that, the high court did no more than turn back the clock to that point in time immediately before the institution of what it held was an unlawful prosecution.

[21] There seemed to be an acceptance that if the appeal against the main judgment were to ultimately succeed either before this Court or the Constitutional Court, then Mr Zuma could simply pick up his private prosecution. The effect of the execution order is that the private prosecution has been placed on hold pending Mr Zuma's attempt at an appeal. The only conceivable adverse consequence of the execution order on Mr Zuma is that his private prosecution will be delayed until finalisation of the appeal process. The private prosecution is plainly not urgent. Indeed, Mr Zuma instituted the prosecution over a year after publication of the doctor's note. There is no cognisable harm to Mr Zuma. He will suffer no harm because the respondents remain under threat of prosecution until such time as Mr Zuma's appeals are exhausted. If Mr Zuma is successful in the appeals, he can simply resume the private prosecution. In the circumstances, there may as well be something to be said for the suggestion that the matter falls to be dealt in terms of s 16(2)(a)(i) of the Act, according to which this Court may dismiss an appeal where 'the issues are of such a nature that the decision sought will have no practical effect or result'.

[22] After due consideration, it is in any event doubtful that any of the issues in the appeal, are truly deserving of the attention of this Court, much less engage its urgent jurisdiction. No real questions of law are involved. The case raised no questions of important principle. And, there were no other considerations that called for the attention of this Court, either on an urgent basis or at all. Thus, although Mr Zuma had an automatic right of appeal to this Court, he did not have to exercise it. His exercising the right has the result that cases of greater complexity and which are truly deserving of the attention of this Court have to compete for a place on the court roll with a case which is not. The abridgement of the time

periods prescribed by the rules of this Court and the expedited hearing of the matter meant that Mr Zuma was able to steal a march on those other litigants.

[23] A suspension of the high court's orders and the continuation of the private prosecution while Mr Zuma is attempting to appeal, will negate the orders issued and result in the respondents forfeiting the substantive relief which that court ordered in order to put a stop to the abuse. The premise of the argument advanced on behalf Mr Zuma is that the purpose of the implementation order was to prevent the next appearance of the respondents in the criminal court on 4 August 2023.

But that is to take too narrow a view of the matter. It was to: prevent their continuing appearance in the criminal courts from time to time; avoid the delays and obstruction in Mr Zuma's criminal trial that will result from the continuation of the private prosecution; and, avoid the private prosecution being used in an attempt to remove Mr Downer as the prosecutor. The harm continues beyond 4 August 2023 and will persist pending attempted appeals. Should this Court not dismiss the current appeal and confirm the high court's enforcement order, the respondents will once again have to appear as accused persons on 1 November 2023, and on further dates in the future, pending the progress up to the Constitutional Court of Mr Zuma's applications for leave to appeal against the main

## judgment.

[24] The mere decision to prosecute can have a far-reaching impact on an accused person's life. It should not be lightly made, because even if an accused is ultimately acquitted, the harm already suffered could prove to be irreparable.[22] As Howie P pointed out in *S v Western Areas Ltd and Others*:

'A criminal trial cuts across a number of an accused person's fundamental rights. Attendance at the trial, even if on bail, limits freedom of movement and even the right to liberty is curbed to an extent.'[23]

On each occasion that the respondents are compelled to appear in the criminal dock, their personal liberty is further inhibited and human dignity further eroded. The indignity is compounded by the personal insults that they, and in particular Ms Maughan, has to endure especially on social media. Mr Zuma shrugs that the social media abuse of Ms Maughan is 'an occupational hazard' and 'comes with the territory'. Nothing could be further from the truth. What Mr Zuma fails to appreciate is that these violations constitute a steady erosion not just of her liberty and dignity but will also likely discourage other journalists from reporting on powerful individuals for fear of similar reprisals. Guaranteeing the freedom of the press and public confidence in judicial authority and the administration of justice is an ongoing process and requires constant vigilance.

[25] Whilst the prosecution of crime is a matter of some constitutional importance to the citizenry of this country, sight cannot be lost of the fact that this is not a public prosecution by the NPA, an agency constitutionally created to prosecute in the public interest, which is constitutionally bound to respect, protect, promote and fulfil the rights in the Bill of Rights.

[24] Given the adversarial nature of criminal trials, prosecutors play a critical role in our criminal justice system. It is for a prosecutor

to evaluate the conduct of the police and the strength of the case that will be actively presented to a court. It is not the function of a prosecutor 'disinterestedly to place a hotchpotch of contradictory evidence before a court, and then [to] leave the court to make of it what it wills'. [25] There is nothing to suggest that any of those safeguards obtain here. In the circumstances, to permit the continuation of a private

prosecution pending an appeal as to the lawfulness of that prosecution likely constitutes a direct violation of the constitutional rights of the respondents.

[26] In the locus classicus, *Solomon v Magistrate, Pretoria*, it was held that where a prosecutor undertakes a prosecution with an ulterior purpose, 'the taking out of the summons is an abuse of the process of the court; if it was done not with the object of having justice done to a wrongdoer, but in order to enable the prosecutor to harass the accused or fraudulently to defeat his rights. . . The process of the Court, provided for a particular purpose, would be used not for that purpose, but for the achievement of a totally different object, namely for the oppression of an adversary'. [26] In the context of a private prosecution, the question is whether the prosecution was instituted for some collateral purpose rather than with the object of having criminal justice done to an offender. [27]

[27] In *Nedcor v Gcilitshana*, the court put it thus:

'Ordinarily, the reasons and motives of a party for instituting legal proceedings are irrelevant. However, "(w)hen . . . the court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse. But it is a power which has to be exercised with great caution, and only in a clear case."' [28]

[28] This is the clearest of cases. The private prosecution is part of the 'Stalingrad strategy' announced by Mr Zuma's counsel to Hugo J over a decade and a half ago, when he said: "This is not like a fight between two champ fighters. This is more like Stalingrad. It's burning house to burning house." [29] It is further demonstrated by the patent lack of substance to the charges; by the fact that Mr Zuma has clearly not pursued the

prosecution as would someone intent on obtaining a conviction; and, by Mr Zuma's identification of witnesses. It was common cause in the main application that when Mr Zuma produced his prosecution docket, it showed that he had obtained no statements from any of the witnesses whom he says he will call. The only statements he has are those which already formed part of the police docket. The witnesses he lists include Mr Breitenbach SC (who as the high court found, says that Mr Downer did not communicate Mr Zuma's medical information to Ms Maughan).

Further, it is vexatious and per se an abuse of process to institute proceedings that are ‘obviously unsustainable’ as a certainty not merely on a balance of probability.[30]

[29] Mr Zuma’s attacks are directed not only at Mr Downer, but also at the NPA itself. Mr Downer pointed out that Mr Zuma has consistently attacked and questioned the credibility of the NPA as an institution. The harm to be avoided is thus not only to Mr Downer personally, but also to him in his capacity as the prosecutor in Mr Zuma’s case as well as to the State and to the administration of justice. In the case of Ms Maughan, it bears emphasis that freedom of the press and the principle of open justice are closely interrelated. Free speech goes hand in hand with open justice, which is a fundamental principle of the common law. There is a necessary interdependence between the court and the press. It has thus come to be accepted that the media, reporting accurately and fairly on legal proceedings and judgments, make an invaluable contribution to public confidence in the judiciary and, thus, to the rule of law itself.[31]

[30] The harm asserted by the respondents, which was set out in some detail, is not theoretical. It is real. The denial by Mr Zuma is ineffective. The private prosecution is without any foundation in either fact (Mr Downer did not disclose Mr Zuma’s doctor’s report to Ms Maughan and there was no breach of confidentiality or privacy) or law (no cognisable offence has been committed, even if all of the facts alleged by Mr Zuma are true). The respondents appearing as accused persons in an abusive private prosecution will undeniably compromise public confidence in the courts and the administration of justice.

[31] Finally, the question of jurisdiction is a foundational pillar upon which Mr Zuma’s appeal rests: it is contended that he has excellent prospects of success in his appeal against the main judgment because courts have held that a challenge to the title of the private prosecutor must be raised in the criminal court, not in a civil court. But that misses the point. Although the founding affidavit also makes the point that Mr Zuma has not proved some injury that he individually suffered in consequence of the alleged commission of the offence as required by s 7(1)(a) of the CPA,[32] the primary basis of the application to set aside the private prosecution was not that Mr Zuma lacked title to prosecute; it is that the private prosecution is an abuse of process. Our courts have repeatedly held, for more than 70 years, that a civil court will grant an interdict to set aside a private prosecution if it is an abuse. The authorities are long-established and clear both that a court has the power (and in fact a duty) to prevent an abuse of its process and that this principle applies to proceedings in a civil court in relation to a private prosecution which is irregular, vexatious or an abuse of the process of court.[33] The proposition is trite. In its judgment in the main application, the high court dealt with the authorities in this regard.

[32] More narrowly construed therefor, the issue in this appeal is whether Mr Zuma should be permitted to continue the private prosecution while an application for leave to appeal or (if granted) an appeal is pending. For the reasons given, that question falls to be answered against him. If the implementation orders are upheld, a potential obstacle to the

commencement of Mr Zuma's trial will be removed. Those orders will facilitate the expeditious commencement and management of his criminal trial. Mr Zuma announced his intention to bring this appeal even before he had seen the high court's reasons for granting the execution order. This demonstrates that his decision to approach this Court was not motivated by any dispassionate analysis of his prospects of success in the light of the high court's reasons. It is evident that Mr Zuma filed his appeal within hours of the high court judgment being delivered, precisely, so it would seem, to ensure that the respondents would have to appear in the dock on the next day, 4 August 2023. This, despite the fact that any appearance on that day would have been only for the sake of a postponement. Mr Zuma had little, if anything, to gain by noting the appeal so speedily. All told, it is hard to resist

the conclusion that this appeal is itself an abuse of process.

[33] Costs remain: In the heads of argument filed with this Court, Mr Zuma alleges bias on the part of the members of the high court. The allegation is scandalous. The bias is said to arise from the attitude of the judges towards counsel and/or his client and some of the inexplicable findings made. No explanation is given as to what it is about the 'attitude' of the judges or which of them demonstrated bias toward either counsel or Mr Zuma. It is a mere allegation, without any attempt to produce any evidence to justify it. It is improper. As to the 'inexplicable findings', for the reasons set out above, the findings of the high court can hardly be faulted. However, even if they could, that does not give rise to a complaint of bias.

[34] In *Zuma v Democratic Alliance and Another*, where similar allegations of bias were raised by Mr Zuma, it was stated:

'The contention, absent any factual foundation, that all three judges who heard the matter had left their judicial station, scandalises the court. If true, that all three either independently of each other, or worse still acting in concert, would have renounced their judicial impartiality is a most serious allegation. Imputing bias to a judicial officer should not lightly be made. Nor, should the imputation of a political motive. This is not to suggest that courts are immune from criticism, even robust criticism for that matter. But, the criticism encountered here falls outside acceptable bounds.'

[35] There is nothing on record to sustain the suggestion that the presiding judges in this matter were biased or not open-minded, impartial or fair. The allegations were made with a reckless disregard for the truth. And, whilst not advanced during oral argument, they were not retracted. However, they ought not to have been made at all. Moreover, the previous admonition of this Court appears to have fallen on deaf ears. The propensity to accuse judicial officers of bias, absent a proper factual foundation, is plainly deserving of censure. The respondents argue that Mr Zuma should be penalised with a punitive costs order as a mark of this Court's displeasure and to vindicate the integrity of the high court and the judiciary. A submission with which I cannot but agree.

[36] In the result, the appeal must fail and it is accordingly dismissed with costs, including those of two counsel, to be paid on the attorney and client scale.

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V M PONNAN

JUDGE OF APPEAL

#### Appearances

For the appellant: DC Mpofu SC, BN Buthelezi, K Pama-Sihunu and Z Mshololo Instructed by: Ntanga Nkuhlu Inc., Johannesburg Peyper Botha Attorneys, Bloemfontein For the first respondent: G Budlender SC and H Rajah Instructed by: The State Attorney, Pietermaritzburg DPP, Bloemfontein For the second respondent: T Ngcukaitobi SC and B Winks Instructed by: Willem de Klerk Attorneys, Johannesburg Honey Attorneys, Bloemfontein.

[1] S v Zuma and Another [2021] ZAKZPHC 89; [2022] 1 All SA 533 (KZP); 2022 (1) SACR 575 (KZP).

[2] Section 18 of the Superior Courts Act, which governs the suspension of a decision pending an appeal, provides: ‘(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the

application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

(4) If a court orders otherwise, as contemplated in subsection (1) –

(i) the court must immediately record its reasons for doing so; (ii) the aggrieved party has an automatic right of appeal to the next highest court; (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and (iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsection (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.’

[2] Section 18 of the Superior Courts Act, which governs the suspension of a decision pending an appeal, provides:

‘(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

(4) If a court orders otherwise, as contemplated in subsection (1) –

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(iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsection (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.’

[3] *Moyo v Minister of Justice and Constitutional Development and Others; Sonti v Minister of Justice and Correctional Services and Others*

[2018] ZASCA 100; 2018 (8) BCLR 972 (SCA); [2018] 3 All SA 342 (SCA); 2018 (2) SACR 313 (SCA) para 169.

[4] *Democratic Alliance v President of the Republic of South Africa and Others; Economic Freedom Fighters v State Attorney and Others* [2018] ZAGPPHC 836; [2019] 1 All SA 681 (GP) para 1, this decision was upheld by this Court in *Zuma v Democratic Alliance and Another* [2021] ZASCA 39; [2021] 3 All SA 149 (SCA); 2021 (5) SA 189 (SCA).

[5] The high court observed *ibid* para 23: ‘The law reports are indeed replete with judgments dealing with Mr Zuma’s criminal prosecution and the related civil proceedings, and in particular his challenges to: (a) the lawfulness of the search warrants issued against him (*Zuma and another v National Director of Public Prosecutions and others* 2006 (1) SACR 468 (D); [2006] 2 All SA 91 (D); *Thint (Pty) Ltd v National Director of Public Prosecutions* [2008] 1

All SA 229 (SCA); National Director of Public Prosecutions v Zuma and another [2008] 1 All SA 197 (SCA) and Thint (Pty) Ltd v National Director of Public Prosecutions and others; Zuma and another v National Director of Public Prosecutions and others 2009

- (1) SA 1 (CC)); (b) the letter of request issued to access information held by the Mauritian authorities (National Director of Public Prosecutions v Zuma and others (13569/2006) 2 April 2007 (DC&LD) unreported; Zuma and others v National Director of Public Prosecutions [2007] ZASCA 135; [2008] 1 All SA 234 (SCA) and Thint Holdings (Southern Africa) (Pty) Ltd and another v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions [2008] ZACC 14; 2009 (1) SA 141 (CC)); (c) his indictment in terms of s 179 of the Constitution (Zuma v National Director of Public Prosecutions [2009] 1 All SA 54 (N); 2009 (1) BCLR 62 (N); and National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009 (2) SA 277 (SCA)); (d) the DA's locus standi in the DA's review application, the reviewability of the decision of the acting NDPP to discontinue his prosecution and to the furnishing of the record to the DA (Democratic Alliance and others 2012 (3) SA 486 (SCA); [2012] 2 All SA 345 (SCA); [2012] 2 All SA 345 (SCA); 2012 (6) BCLR 613 (SCA)); (e) the disclosure of the transcripts of the conversations recorded in the spy tapes (Democratic Alliance v Acting National Director of Public Prosecutions and others 2016 (2) SACR 1 (GP);

[2016] 3 All SA 78 (GP); Zuma v Democratic Alliance and others

- [2014] 4 All SA 35 (SCA)); (f) and his opposition to the DA's review application (Zuma v Democratic Alliance and others; Acting National Director of Public Prosecutions and another v Democratic Alliance and another 2018 (1) SA 200 (SCA); [2017] 4 All SA 726 (SCA); 2018 (1) SACR 123 (SCA); Democratic Alliance v Acting National Director of Public Prosecutions and others 2016 (2) SACR 1(GP)).' (My emphasis underlined.)

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- (a) the lawfulness of the search warrants issued against him (Zuma and another v National Director of Public Prosecutions and others 2006 (1) SACR 468 (D); [2006] 2 All SA 91 (D); Thint (Pty) Ltd v National Director of Public Prosecutions [2008] 1 All SA 229 (SCA); National Director of Public Prosecutions v Zuma and another [2008] 1 All SA 197 (SCA) and Thint (Pty) Ltd v National Director of Public Prosecutions and others; Zuma and another v National Director of Public Prosecutions and others 2009

- (1) SA 1 (CC));

- (b) the letter of request issued to access information held by the Mauritian authorities (National Director of Public Prosecutions v Zuma and others (13569/2006) 2 April 2007 (DC&LD) unreported; Zuma and others v National Director of Public Prosecutions [2007] ZASCA 135; [2008] 1 All SA 234 (SCA) and Thint Holdings (Southern Africa) (Pty) Ltd and another v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions [2008] ZACC 14; 2009 (1) SA 141 (CC));
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- (d) the DA's locus standi in the DA's review application, the reviewability of the decision of the acting NDPP to discontinue his prosecution and to the furnishing of the record to the DA (Democratic Alliance and others 2012 (3) SA 486 (SCA); [2012] 2 All SA 345 (SCA); [2012] 2 All SA 345 (SCA); 2012 (6) BCLR 613 (SCA));
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- (f) and his opposition to the DA's review application (Zuma v Democratic Alliance and others; Acting National Director of Public Prosecutions and another v Democratic Alliance and another 2018 (1) SA 200 (SCA); [2017] 4 All SA 726 (SCA); 2018 (1) SACR 123 (SCA); Democratic Alliance v Acting National Director of Public Prosecutions and others 2016 (2) SACR 1(GP)).' (My emphasis underlined.)
- [6] Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another [2017] ZASCA 146; [2017] 4 All SA 726 (SCA); 2018 (1) SA 200 (SCA); 2018 (1) SACR 123 (SCA).
- [7] National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 2.
- [8] S v Zuma and Another fn 1 above Koen J held (para 263): 'The only inference is that the intention, at that point, was that the letter of 8 August 2021 would form part of the application for a postponement . . . which would mean that it would become public when filed That would be inconsistent with the protestations that the letter was a confidential document, of which the confidentiality, if it in fact was confidential in the first place, was not waived.'
- [9] Ibid para 264: 'The letter had furthermore been disclosed to Mr Downer, Ms Naicker and the DPP of KZN, without any specific

restrictions as regards confidentiality, by the Head of the Correctional Centre at Estcourt on 8 August 2021. The letter did not contain anything significantly confidential . . .’

[10] Ibid para 265: ‘The letter of Brigadier General (Dr) Mdutywa is vague and general in its terms and does not disclose any

particularity, which could be said to amount to a violation of Mr Zuma’s rights his rights to privacy. Specifically, it does not mention the medical condition Mr Zuma suffers from . . .’; and, para 266: ‘I am not persuaded that the disclosure of the contents of the letter constituted an actionable violation of Mr Zuma’s rights.’

[11] Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & Others [2013] ZASCA 5; [2013] 2 All SA 251 (SCA) para 17.

[12] University of the Free State v Afriforum and Another [2016] ZASCA 165; [2017] All SA 79 (SCA); 2018 (3) SA 428 (SCA).

[13] Ntlemeza v Helen Suzman Foundation and Another [2017] ZASCA 93; [2017] 3 All SA 589 (SCA); 2017 (5) SA 402 (SCA).

[14] Premier for the Province of Gauteng and Others v Democratic Alliance and Others [2020] ZASCA 136; [2021] 1 All SA 60 (SCA).

[15] Knoop and Another NNO v Gupta (Tayob Intervening)

[2020] ZASCA 149; [2021] 1 All SA 17 (SCA); 2021 (3) SA 135 (SCA).

[16] Philani-Ma-Afrika and Others v Mailula and Others [2009] ZASCA 115; 2010 (2) SA 573 (SCA); [2010] 1 All SA 459 (SCA).

[17] Ibid para 20.

[18] South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) at 544H-545A.

[19] Ibid at 545B.

[20] Firestone South Africa (Pty) Ltd v Genticuro AG 1977

(4) SA 298 (A) at 304D-E.

[21] Ibid at 304E; see also Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others

[2012] ZASCA 49; 2013 (2) SA 204 (SCA) para 13.

[22] Doorewaard and Another v S

[2020] ZASCA 155; [2021] 1 All SA 311 (SCA); 2021 (1) SACR 235 (SCA) para 80.

- [23] S v Western Areas Ltd and Others [2005] ZACA 31; [2005] 3 All SA 541 (SCA); 2005 (5) SA 214 (SCA); 2005 (1) SACR 441 (SCA) para 1.
- [24] Section 179(4) of the Constitution, 1996.
- [25] Van Der Westhuizen v S [2011] ZASCA 36; 2011
- (2) SACR 26 (SCA) para 11.
- [26] Solomon v Magistrate, Pretoria 1950
- (3) SA 603 (T) (Solomon).
- [27] Phillips v Botha [1998] ZASCA 105; 1999
- (2) SA 555 (SCA) at 565H (Phillips).
- [28] Nedcor Bank Ltd v Gcilitshana and Others 2004
- (1) SA 232 (SE) (Nedcor Bank) at 241A-B, citing Hudson v Hudson and Another 1927 AD 259 (Hudson) at 268.
- [29] Democratic Alliance v President of the Republic of South Africa and Others; Economic Freedom Fighters v State Attorney and Others [2018] ZAGPPHC 836; [2019] 1 All SA 681 (GP) para 11.
- [30] MEC, Department of Co-operative Governance and Traditional Affairs v Maphanga 2021
- (4) SA 131 (SCA) para 25. See also Holmes JA in African Farms and Townships Ltd v Cape Town Municipality 1963
- (2) SA 555 (A) at 575.
- [31] As it was put in Van Breda v Media 24 Limited and Others; National Director of Public Prosecutions v Media 24 Limited and Others
- [2017] ZASCA 97; [2017] 3 All SA 622 (SCA); 2017 (2) SACR 491 (SCA) paras 9 and 10: ‘In R v Secretary of State for the Home Department Ex Parte Simms, Lord Steyn stated: “Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), “the best test of truth is the power of the thought to get itself accepted in the competition of the market”: Abrams v United States [1919] USSC 206; (1919) 250 US 616 at 630 per Holmes J (dissent). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas

informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in

principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.” The right of the media to gather and broadcast information, footage and audio recordings flows from s 16 of the Constitution. The right to freedom of expression is one of a “web of mutually supporting rights” that holds up the fabric of the constitutional order. The right is not limited to the right to speak, but also to receive information and ideas. The media hold a key position in society. They are not only protected by the right to freedom of expression, but are also the “key facilitator and guarantor” of the right. The media’s right to freedom of expression is thus not just (or even primarily) for the benefit of the media: it is for the benefit of the public. In *Khumalo v Holomisa*, the Constitutional Court emphasised: “In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility.”

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- [32] Section 7(1)(a) of the Criminal Procedure Act 51 of 1977 states that a private prosecution may only be instituted and conducted by a private person ‘who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence’.
- [33] As to the underlying principle: *Western Assurance Co v Caldwell’s Trustee* 1918 AD 262; *Hudson* fn 28 above at 267-268. As to the application of the principle to private prosecutions see inter alia *Solomon* fn 26 above at 607E to 608A; *Van Deventer v Reichenberg* 1996 (1) SACR 119 (C); *Phillips* fn 27 above at 565E-565I; and, *Nedcor Bank* fn 28 above para 26-27.
- [34] *Zuma v Democratic Alliance and Another*
- [2021] ZASCA 39; [2021] 3 All SA 149 (SCA); 2021 (5) SA 189 (SCA) para 49.

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