

**NATIONAL ASSEMBLY**

**QUESTION FOR WRITTEN REPLY**

**PARLIAMENTARY QUESTION NO: 1641**

**DATE QUESTION: 27 MAY /2016**

**DATE OF SUBMISSION: 07 JUNE 2016**

**Adv A de W Alberts (FF Plus) to ask the Minister of Justice and Correctional Services:†**

1. What is the real reason that the National Prosecuting Authority (NPA) has decided to appeal against the finding of the High Court, in which it was found that the decision of the NPA to suspend the prosecution of the President, Mr Jacob G Zuma, in terms of the 783 charges of gangsterism, corruption and fraud, had been irrational;
2. why is the NPA not giving the President an opportunity to answer to the charges in a criminal court;
3. whether the NPA when they decided to appeal took into consideration the judgment of the Supreme Court of Appeal in the case *National Director of*

*Public Prosecutions v Zuma* *(2009)*, where the finding of Judge Nicholson was rejected, and the findings of the Constitutional Court in the case *Albutt v Centre for the Study of Violence and Reconciliation and Others (2010*) and the case *Democratic Alliance v President of the Republic of South Africa and Others (2011);* if not, why not; if so, (a) why is the NPA then persisting with an appeal when the margin for success is slim and (b) whether the NPA cannot therefore face prosecuting the President?

**NW1811E**

**REPLY:**

As advised, I wish to inform the Honourable member that the National Prosecuting Authority (NPA) has premised its application for leave to appeal to the Supreme Court of Appeal against the judgment and order of the full bench of the Gauteng Division of the High Court, in the matter of *Acting National Director of Public Prosecutions and 2 Others v Democratic Alliance*, which was handled down on 29 April 2016, on six (6) grounds which are set out in its papers, filed on 23 May 2016. The application for leave to appeal is set down for hearing on 10 June 2016.

The effect of the decision of the full bench of the Gauteng High Court is that, absent an application for leave to appeal, would fall upon the National Director of Public Prosecutions (NDPP) to consider the matter.

On 23 May 2016, the NDPP took the public into his confidence in announcing the NPA’s decision to appeal the decision of the full bench of the Gauteng High Court and went to great lengths to explain the NPA’s decision.

The issues raised in the application for leave to appeal are of great constitutional import and relate to the powers of the NDPP. The judgement and order being appealed against impinge upon the independence of the NPA and its powers to make prosecutorial decisions. This has raised vital constitutional questions of peculiar public interest.

In the **first ground** of appeal, the NPA submitted that the Court erred in finding that Mr Mpshe, by not referring the complaint of abuse of process and the related allegations against Mr McCarthy to Court, rendered his decision irrational. In effect, the Court found that Mr Mpshe acted *ultra vires* his powers as vested in section 179(5)(*d*) of the Constitution and section 22(2) of the National Prosecuting Authority Act 32 of 1998 (‘the NPA Act’). In the foreign case referred to by the Court, namely *HKSAR v Lee Ming Tee*, *case FACC no.1 (2003)*, the Hong Kong Court conceded that the question is ‘*debatable*’ and went no further than expressing what it considered to be ‘*the better view*’.

As a matter of logic, there seems to be no reason why the head of the prosecuting service may not take it upon himself to determine that the abuse was so egregious as to warrant discontinuation, even in the absence of a direct causal nexus between the abuse and the prospects of a fair trial. In fact, the NDPP has taken an oath to protect and defend the Constitution. His duty is to protect the institutional integrity of the institution. He is best positioned to weigh the seriousness of abuse within his own hierarchy. If, as in this matter, the NDPP misconducts himself in the internal review of prosecution, it is always open for the matter to be taken on review.

It is a trite principle that a prosecutor is vested with a very broad discretion. The public interest must always factor in his determinations – to the extent that it is not obligatory that every person he considers guilty must be charged**.** In argument on behalf of the First and Second Respondents, reference was made to *Regina (Corner House Research & Another) v Director of the Serious Fraud Office [2008] 3 WLR 568***.** One finds reference to the principle that there is no rule that criminal offences must automatically be the subject of prosecution. In line with the principles of the common law, there is no principle of compulsory prosecution: prosecutors always have discretion whether or not to institute a prosecution and, if so for which offence.

It is emphasised that in the present case, the senior management of the NPA formed the view that it was not in the public interest to proceed with the prosecution in light of the conduct of Mr McCarthy. It would be artificial and make no sense for the prosecutor who has formed the view that the prosecution should not be proceeded with, to wait for the accused to bring an application to stay the prosecution and to then acquiesce.

In the **second ground** of appeal, the Court found that the envisaged prosecution against Mr Zuma was not tainted by the allegations against Mr McCarthy. In this regard, the NPA submitted that the Court should have found that the prosecutorial process was tainted and that it was not irrational to decide to discontinue the prosecution. The Court stated that Mr Zuma should face the charges as outlined in the indictment. In this regard, the NPA submitted that the Court erred.

This finding by the Court is an inappropriate transgression of the separation-of-powers doctrine, which precludes the courts from impermissibly assuming the functions that fall within the domain of the executive. In terms of the Constitution, the NDPP is the authority mandated to prosecute crime. A court can only be allowed to interfere with this constitutional scheme on rare occasions and for compelling reasons. The NPA submitted that no such reasons exist in this matter.

In so far as the **third ground** of appeal is concerned, the Court referred to Mr Mpshe’s reference in his media address to the case of *R v Latif [1996] 1 WLR 104*, in which the Court stated that the Judge must weigh in the balance the public interest in ensuring that those who are charged with grave crimes should be tried against the competing interest in not conveying the impression that the Court will adopt the approach that the end justifies any means.

The Court referred to the ‘*balancing of two imperatives’*, and said that Mr Mpshe omitted to consider or deal with the second imperative in his media release (namely, protecting the public from serious crime). In this regard, the NPA submitted that the Court erred in finding that Mr Mpshe did not balance the two imperatives. In Mr Mpshe’s media statement, under the heading ‘Background’, Mr Mpshe stated that the NPA had received representations pertaining to the following issues:

* The substantive merits;
* The fair trial defences;
* The practical implications and considerations of continued prosecution; and
* The policy aspects militating against prosecution

Mr Mpshe continued:

“*I need to state upfront that we could not find anything with regard to the first three grounds that militate against a continuation of the prosecution, and I therefore do not intend to deal in depth with those three grounds. I will focus on the fourth ground which I consider to be the most pertinent for purposes of my decision ..*.”

In this regard the NPA submitted that it is therefore clear that Mr Mpshe did consider the merits. But for the manipulation of the process, the prosecution would have continued on the merits. Mr Mpshe made it clear that he considered that the public interest factor outweighed the continued prosecution of Mr Zuma, notwithstanding that the prosecutors felt firmly about the merits of the case.

It needs to be emphasized that the NDPP is vested with a discretion which is his alone to exercise provided he is not *mala fide*. Even if his decision is not one which someone else or the Court would have taken, and even if it was unreasonable, it is not a basis to set it aside, absent irrationality. In *R v Latif,**supra, 112 F*, Lord Steyn said:

*“It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system”.*

The Court found that once Mr Mpshe had said the alleged conduct of Mr McCarthy had not affected the merits of the charges against Mr Zuma, *cadit quaestio*, there was no rational connection between the need to protect the integrity of the NPA and the decision to discontinue the prosecution against Mr Zuma. In this regard, the NPA submitted that the Court erred. The NPA further submitted that where the rule of law is undermined, it may be rational to stop the prosecution.

There is ample authority to the effect that conduct amounting to an abuse of process is not confined to that which precludes a fair trial; and this proposition is also a necessary indicant of the rule of law.

In so far as the **fourth ground** of appeal is concerned, the NPA submitted that the Court erred in finding that ‘*the essence*’ of the argument on behalf of the First and Second Respondents was that, having regard to the Browse Mole report criticising Mr McCarthy’s conduct in leaking information to the media, and the contents of the transcript of certain telephone conversations, Mr Mpshe was justified in deciding to discontinue the prosecution of Mr Zuma and that his decision was rational.

In this regard the NPA made the following submissions:

* It was rather the ‘First and Second Respondents’ case that, contrary to the NPA’s statutory obligation to make independent prosecutorial decisions, Mr McCarthy influenced and made decisions related to the timing of the prosecution that were intended to harm Mr Zuma’s chances of successfully challenging the former President, Mr Mbeki at the Polokwane electoral conference for the position of African National Congress (ANC) President, and boosting Mr Mbeki’s prospects of retaining his tenure as such.
* The NPA process had been abused for political reasons. Mr McCarthy and Mr Ngcuka manipulated the NPA to assist Mr Mbeki in his battle against Mr Zuma. The impugned decision to discontinue the prosecution was intended, inter alia, to send a clear message that political interference in the work of the NPA would not be tolerated.
* In essence the First and Second Respondents case was that the conduct of Mr McCarthy, who, *qua* Director of Special Operations, was in effect the head of the prosecution authority for purposes of the case against Mr Zuma, was so egregious, and the process so tainted, that it was not in the public interest to pursue the prosecution. Even to the extent that the Court might have differed as to the particular manner in which Mr Mpshe exercised his discretion, it was not open to displace his determination, namely, that it was more important to restore and maintain the integrity and independence of the prosecution authority than to pursue the conviction of a single individual, no matter how prominent.
* The main reason for opposing the application was that Mr McCarthy unduly influenced and interfered with the service of the indictment for political reasons. This found its way into Mr Mpshe’s address to the media on 6 April 2009, when he referred to Messrs McCarthy and Ngcuka having manipulated the timing of the envisaged service of the indictment to Mr Zuma for political reasons.
* Far from being, as erroneously found by the Court a quo to be, the essence of the case of the First and Second Respondents, the Browse Mole report was simply evidence to demonstrate that Mr McCarthy had for some time followed an agenda to besmirch Mr Zuma, with a view to cementing the position of Mr Mbeki. It is emphasized that it was Mr McCarthy who instituted an investigation against Mr Zuma in terms of section 28(1)(*a*) of the NPA Act. The Browse Mole report simply demonstrated the unethical conduct of Mr McCarthy.

In so far as the **fifth ground** of appeal is concerned, the NPA submitted that the Court erred in finding that the form of censure Mr Mpshe chose, by discontinuing the prosecution, failed to demonstrate a connection or linkage to the alleged conduct of Mr McCarthy.

The principle of legality requires that the exercise of public power must be rationally related to the purpose for which the power was given. Mr Mpshe, as the Acting NDPP, had the power to discontinue the prosecution. The NPA submitted that the Court erred in finding that he did not. His decision was indeed rationally related to the purpose for which the power was conferred. The purpose of that power in this context may be to guard against manipulation, and ensure that all persons who are the subject of a prosecution, are dealt with in a manner which is fair, and by an independent authority not suborned or manipulated for political needs; further that the prosecution process is not in any way manipulated for an extraneous purpose unconnected to the actual prosecution. The NPA accordingly submitted that this establishes the link required for rationality. The aforementioned must be seen in the light of the Court’s finding that the alleged conduct of Mr McCarthy as appears from the transcript of the recorded conversations, if proven, constitutes a serious breach of the law and prosecutorial policy.

In so far as the **sixth ground** of appeal is concerned, the NPA submitted that the Court erred in its findings in paragraphs 76 to 79 of the judgment, in which it failed to appreciate the true reason for the decision of Mr McCarthy and Mr Ngcuka to delay the service of the indictment.

It is a common cause that Mr McCarthy and Mr Ngcuka were bent upon ensuring that the indictment was served after the Polokwane conference, where Mr Mbeki and Mr Zuma would be vying for the Presidency of the ANC. Hofmeyr, inter alia, states in his affidavit:

‘*Before the Polokwane conference, Ngcuka and others opposed to Zuma, debated amongst themselves whether or not Mbeki’s chances of retaining the ANC Presidency would be strengthened by delaying the prosecution. Correctly or incorrectly, they believed that Mbeki’s chances of defeating Zuma would be strengthened if the prosecution were to be delayed. McCarthy did as he was asked to do although it was clear that at times, he did not agree with Ngcuka’s instructions. Ultimately, McCarthy ensured that the prosecution was delayed. He did so for one reason only, to bolster Mbeki’s chances of successfully defeating Zuma*’.

It is clear that Mr McCarthy and Mr Ngcuka believed that the service of the indictment shortly before the Polokwane conference would provoke a reaction and backlash from persons attending the conference who would consider that this was being done in order to besmirch Mr Zuma and to advantage Mr Mbeki. That would, so they believed, move delegates to rally around Mr Zuma.

That they may have miscalculated does not detract from the fact that Mr McCarthy persuaded Mr Mpshe to delay service of the indictment which he believed would disadvantage Mr Mbeki if the NPA did not hold back. It was against this background that Mr Mpshe decided that Mr Zuma’s continued prosecution would be untenable.

The NPA, as any other litigant, has the right to appeal the decision of any judicial proceedings. In this matter, the NPA believes it has reasonable prospects of succeeding the prosecution of its appeal.

Therefore, it is incorrect that his Excellency, the Honourable President of the Republic had at any stage faced charges of gangsterism as contended by the Honourable member. All charges of corruption were withdrawn against the Honourable President prior to being elected as President of the Republic.