

Statement by the National Director of Public Prosecutions on the matter S v Zuma and others

### **Introduction**

I stand before you today to announce the most difficult decision I ever made in my life. It was not an easy task at all. I had the privilege of having listened to inputs and comments of very eminent jurists of the NPA and I am thankful to them for their candid and frank arguments.

It was then and it still is difficult for me to comprehend that which is set out below could have happened. The painful facts that I am about to put before you have serious implications for the integrity and independence of the NPA especially regarding the prosecution of Mr Zuma.

We believe that it is vital that the NPA must expose this conduct and deal with the consequences as honestly and constructively as possible if it is to have any chance of rebuilding its credibility and integrity. Our democracy will have to find ways to learn from this bitter experience and to build a stronger and more independent NPA.

Over the last three weeks the NPA has been engaged in a difficult and painful process of dealing with allegations that the case of Mr Zuma has been affected by manipulation and abuse of process.

We have come across information about collusion between the former heads of the Directorate of Special Operations (DSO) and NPA to manipulate the prosecutorial process before and after Polokwane elections. We regarded these allegations as extremely serious and set out to investigate them as fully as possible within the limited time at our disposal.

I will return to the result of our investigation and its impact on the case in due course.

### **Speculation in the media**

As will become clear from the discussion below, this is a decision of great importance to the NPA and it was vital that the process be done thoroughly and properly, and that any decision be based on proper investigation of the allegations and proper discussion of the issues.

Although I can understand that the matter at hand is an issue which is of great public importance, I wish to say that much of the speculation verged on the irresponsible and has had the effect of placing the NPA under a great deal of pressure. Much of the speculation was based on information that it is patently wrong, and it continued to be reported even when explicitly denied by the NPA. It is also worrying that the views of so-

called 'sources' are given great prominence even when it is clear that they do not have access to the correct information.

For the record, I wish to state that the NPA was not presented with any further evidence or information about the arms deal or the involvement of others in it.

Nor was the NPA deeply divided about this issue. As with any other serious issue, there was serious and considered debate and discussion, but I can say without hesitation that no-one was of the view that this is an easy and clear cut decision to make and all of us had respect for the views of others.

All members of the senior management and the prosecuting team participated in this discussion, and ultimately I take full responsibility for the decision I make. It is unfair, wrong and downright mischievous to portray these discussions as acrimonious debates between particular individuals as has been done in a number of publications.

### **Background**

We received representations from the legal representatives in the matter of the State versus Zuma. The representations included written as well as oral representations and in addition we were given access to certain recordings.

In reaction to the said representations, we also received representations and petitions from a wide range of interested parties and individuals.

I have also consulted the Investigating Director of the Directorate of Special Operations. All representations were carefully considered.

The representations submitted by the legal representatives pertained to the following issues:

The substantive merits

The fair trial defences

The practical implications and considerations of continued prosecution.

The policy aspects militating against prosecution

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. I will now deal with the policy aspects militating against the prosecution.

### **Possible abuse of process**

In the course of the representations, the defence made certain very serious allegations about alleged manipulation of the NPA and indicated that these were substantiated by recordings of certain telephone conversations which it intended handing into court during the intended application for a permanent stay of prosecution.

The NPA decided that it would listen to these recordings because it felt that the allegations were serious enough to impact on the NPA's decision if they were true. It felt it should do so despite the fact that it was not clear whether the recordings had been intercepted legally or were legally in the possession of the defence.

I appointed a senior team consisting of Messrs Mzinyathi and Hofmeyr to listen to, verify and investigate the contents of the recordings.

Although the recordings sounded authentic, the NPA decided to approach agencies that have a legal mandate to intercept telephone calls with a view to ascertaining whether they may have legally obtained recordings of the same conversations.

The National Intelligence Agency (NIA) confirmed to the NPA that it indeed had legally obtained recordings of many of the same conversations which were obtained during the course of its investigation into the circumstances surrounding the production and leaking of the Browse Mole report.

NIA indicated that it was able to share these legally with the NPA for the purposes of the investigation and for reaching a decision in this matter. Thus the NPA was able to make transcripts of the relevant portions of the recordings for this purpose and NIA has declassified these transcripts as they are not directly relevant to its own investigation. The NPA is thus confident that its decision is based on information that was intercepted legally and obtained legally by the NPA.

The transcripts contain material that was of vital importance in the NPA reaching its decision, and the NPA has decided to make its contents public as it believes it is in the public interest to do so. The transcripts have been declassified, the NPA believes that there is no legal impediment to its doing so.

In regard to the allegations of abuse, we have also been in contact with Messrs Bulelani Ngcuka and Leonard McCarthy. A meeting took place between Mr Ngcuka and members of the prosecuting team. Mr Ngcuka responded to a set of questions. We communicated with Mr McCarthy by e-mail but he preferred not to respond to the questions.

The NPA has decided to request the Inspector-General of Intelligence formally to investigate any possible illegality surrounding the recordings that were presented to it.

### **Legal considerations**

The Constitution of the Republic of South Africa is the supreme law and any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. (Section 2)

Section 179(4) of the Constitution requires of the prosecuting authority to exercise its functions without fear favour or prejudice.

The extent of this obligation was described as follows in the State versus Yengeni 2006 (1) SACR 405 in paragraphs 51- 53:

Every member of the authority is obliged to undertake an oath or affirmation prior to the commencement of their service to uphold this provision. The Constitution guarantees the professional independence of the National Director of Public Prosecutions and every member of his staff, with the obvious aim of ensuring their freedom from any interference in their functions by the powerful, the well connected the rich and the peddlers of political influence. The untrammelled exercise of their powers in the spirit of professional independence is vital to the functioning of the legal system. The independence of the Judiciary is directly related to, and depends upon, the independence of the legal professions and of the National Director of Public Prosecutions. Undermining the freedom from outside influence would lead the entire legal process, including the functioning of the Judiciary, being held hostage to those interests that might be threatened by a fearless, committed and independent search for the truth.?

In applying the above principles the court in *S v Yengeni* (supra) found as follows with regard to the requirement of fearless and unfettered exercise of the powers of the office of the National Director of Public Prosecutions:

The independence of the office of that he held, and the fearless and unfettered exercise of the extensive powers that this office confers, are incompatible with any hint or suggestion that he might have lent an ear to politicians who might wish to advance the best interest of a crony rather than the search for the truth and the proper functioning of the criminal and penal process. (p428 g-h)

A submission made in Chaskalson et al, *Constitutional Law of South Africa*, of a broad and creative interpretation of 'impartiality' as required from the judiciary to include a member of the prosecuting authority was endorsed in *Smyth v Ushewokunze* and Another 1998 (2) BCLR 170 (ZS):

Section 18(2) embodies a constitutional value of supreme importance. It must be interpreted therefore in a broad and creative manner so as to include within its scope and ambit not only the impartiality of the decision making body but the absolute impartiality of the prosecutor himself whose function, as an officer of the court, forms an indispensable part of the judicial process. His conduct must of necessity reflect on the impartiality or otherwise of the court? (p178 par B)

The court furthermore in outlining what society expects of a prosecutor stated as follows:  
?A prosecutor must dedicate himself to the achievement of justice .... He must pursue that aim impartially..... Since he represents the State, the community at large and the interest of justice in general , the task of the prosecutor is more comprehensive and demanding than that of the defending practitioner.....

..... Like Caesar's wife, the prosecutor must be above any trace of suspicion.? (p174 G-H)

There are generally two categories of abuse of process:

- a) a manipulation or misuse of the criminal justice process so as to deprive the accused of a protection provided by law or to take an unfair advantage over the accused;
- b) where, on a balance of probability the accused has been, or will be prejudiced in the preparation or conduct of his defence or trial by either a delay or haste on the part of the prosecution which is unjustifiable. (R v Derby Crown Court, ex Parte Brooks [1985] 80 Cr. App. R 164, per Ormrod LJ)

The issue can be formulated as follows:

The question is whether a legal or judicial process which is aimed at dispensing justice with impartiality and fairness to both parties and to the community which it serves should permit its processes to be abused and employed in a manner which gives rise to unfairness and/or injustice. (See Jago v District Court of New South Wales, [1989] 168 CLR 23 at 30, per Mason CJ)

Prosecutors have an inescapable duty to secure fair and just treatment of those who come or are brought before them.

Fair trial is not the only test of abuse of process. Abuse of process may occur on its own, either because:

- a) it will not be possible to give the accused a fair trial, or
- b) it will offend one's sense of justice, integrity and propriety to continue with the trial of the accused in the particular case. Discontinuation is not a disciplinary process undertaken in order to express one's disapproval of abuse of process; it is an expression of one's sense of justice and propriety.(See Connelly v DPP 1964 AC 1254)

The framework within which abuse of process has to be considered was set out in R v Latif 1996 1 WLR 104. There will always be a tension between two extreme positions in that, if a trial is discontinued, the public perception would be that the criminal justice system condones improper conduct and malpractice by law enforcement agencies ? and if a trial is discontinued the criminal justice system will incur the reproach that it is failing to protect the public from serious crime.

An assessment of abuse of process involves a balancing exercise. In Latif it was clear that a fair trial was possible. The overriding question, however, was whether the trial ought to be discontinued ?on broader considerations of the integrity of the criminal justice system?. According to Lord Steyn, criminal proceedings may be discontinued not only where there will be no fair trial but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion to discontinue should be exercised in particular circumstances will not be useful. But it is possible to balance the public interest in ensuring that those charged with serious crime should be tried against a compelling public interest which expresses a distaste and outrage for abuse of process by law enforcers who are expected to behave with absolute integrity,

impartiality, fairness and justice. Such an approach conveys the view that a fair and just criminal system should not accept the attitude that the end justifies the means.

The approach in *Latif* has been followed consistently. Thus:

‘No single formulation will readily cover all cases, but there must be something so gravely wrong as to make it unconscionable that a trial should go forward?’ (R v *Martin*, [1998] 1 All ER 193, at 216, per Lord Clyde).

‘Something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all respects a regular proceeding.’ (R v *Hui-Chi-Ming* [1992] 1 AC 34, at 57B, per Lord Hope)

‘An abuse may occur through the actings 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’. (*Martin* (supra), at 215, per Lord Clyde)

Recently Harms DP remarked as follows in *NDPP v Zuma* (573/08) (2009) ZASCA at paragraphs 37-38:

‘The court dealt at length with the non-contentious principle that the NPA must not be led by political considerations and that ministerial responsibility over the NPA does not imply a right to interfere with a decision to prosecute.... This however, does need some contextualisation. A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent, something not alleged by Mr Zuma and which in any event can only be determined once criminal proceedings have been concluded. The motive behind the prosecution is irrelevant because, as Schreiner JA said in connection with arrests, the best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal. The same apply to prosecutions. This does not, however, mean that the prosecution may use its powers for ‘ulterior purpose’. To do so would breach the principle of legality. The facts in *Highstead Entertainment (Pty) Ltd t/a ‘The Club’ v Minister of Law and Order* illustrate and explain the point. The police had confiscated machines belonging to Highstead for the purpose of charging it with gambling offences. They were intent on confiscating further machines. The object was not to use them as exhibits ‘they had enough exhibits already- but to put Highstead out of business. In other words, the confiscation had nothing to do with the intended prosecution and the power to confiscate was accordingly used for a purpose not authorised by the statute. This is what ‘ulterior purpose’ in this context mean. That is not the case before us. In the absence of evidence that the prosecution of Mr Zuma was not intended to obtain a conviction the reliance on this line of authority is misplaced as was the focus on motive.’

Allegations of abuse of process in recordings of telephone calls

I will now deal with the contents of some of the recordings as set out below. I believe that it is in public interest to make this available as this is matter of huge public interest, and I believe that it is important for members of the public to be able to draw their own conclusions about the nature conduct:

Calls about manipulating the timing of charges for other purposes

2. Date 7.11.2007 10h25 BN

c. LM: The second thing is, I, remembering what you said on Saturday, I read yesterday's Business Day editorial, you must just read it

d. BN: Just remind me

e. LM: yes, its in line with your thinking

f. BN: Laughs

g. LM: I am serious Apparent reference to the enclosed Business Day editorial of 6.11.07. The editorial is of the view that it appears to benefit Mr Mbeki when Mr Zuma is not facing charges

h. LM: The third issue is, I met with the guy I mentioned, and you know his line is almost like that of Sam

i. BN: Laughs

j. LM: But he said he will. He says he will speak to the man but his he is back over the weekend, but he knew, he feels very strongly that I should not see the guy directly

k. LM: So that he has a shield, so that if this issue comes up then he can say ?I don't know what the fuck you are talking about? There is regular reference to the need to meet or discuss with ?the man?, ?the other fellow? or ?guy? or ?he?. In calls 17, 21, 25, 26, 28 it is clear that it is the President. In most other cases it is not clear who is meant.

y. BN: you know very interesting there is different points of view across the board

z. LM: You don't want to join this dinner with Mzi?

aa. BN: No, you will see, his view is completely opposite ? he agrees with you. He and Sam agree with you. We had dinner on Sunday, quite a number of people, mine was there, Dlamini? was there

i. I put a hypothetical question to them, let's assume the judgement comes out in next few weeks and its in favour of those guys, what must happen by when?

ii. Mzi was the only one on that table who said lets do it now, he was the only one

iii. If he tells you the truth he and tells you that, everyone there disagreed with him

Discussion of timing of charge of Mr Zuma. Mzi Khumalo appears to be only one who supports LM in view that it should happen before Polokwane

6. Date 26.11.07 20h43 BN

g. BN: So you the only one who can just save this country from its madness

h. LM: hmm

i. BN: You know

j. BN: I just cant believe it, I really cant believe it, I don't know, so we also busy now

k. Hmm

l. And a

m. LM: and what does the big man say, is he oraait,

n. BN: I don't know,

o. BN: I want to, I will try to call him later tonight, he is in a meeting the whole day, at Shell house of all places (laughs)

q. LM: I did what you said I should do, I must say

r. BN: you did right, right thing

s. LM: up until Friday, I received a strong memorandum to say charge and charge now ?

t. BN: Friday

u. LM: No this Friday, the team says we have been fucking around with this thing, we are allowing ulterior considerations to come in, it will become an impossibility later ? we

now must take action and deal with 'finish and klaar' as Jackie Selebi says, but we will talk when I see you Following a discussion about ANC provincial nomination conferences, LM is the only one who can save the country

Appears as if BN requested that LM obtain the view of the team to bolster the argument that charges should be brought before Polokwane (in case it was needed)

10. Date Wednesday 12.12.07 10h41 BN

r. LM: But listen, I think you guys must just keep your heads open about the 'when?' factor because I mean we will file our docs tomorrow, we will, Mpshe is going on leave tomorrow and I am acting.

s. LM: We will have our section 2e order and our, our 'we will have finalized the processing of the decision

The when factor is an apparent reference to whether Mr Zuma should be charged before or after Polokwane.

The s2(e) order is a reference to the authorisation for a racketeering prosecution that must be issued by the NDPP

t. BN: As long as you don't do it this weekend

u. LM: If we hold it back, it will be because the clever people like you and others are saying to us that the country needs cool heads but I would hate to have been seen to be wrong later

v. BN: just don't do it this weekend

w. LM: it might change

x. BN: I can't keep an open mind, you can't do it this weekend, our minds won't change

y. The exchange is repeated several times

z. BN: Just don't do it this weekend

aa. LM: I won't move this weekend, if this change, just let us know

bb. BN: it won't change BN makes it clear that they do not want Mr Zuma to be charged before Polokwane despite the fact that everything is in place to do so

Calls about manipulating the filing of papers in the Constitutional Court for other purposes

8. 12.12.07 Wednesday 10h15 SMS exchange BN & LM

a. BN: When are you filing

b. LM: We're stretched. It has tripled in size now. Likely to file tomorrow afternoon or Friday afternoon only. What up!

c. BN: The sooner the better. Not later than tomorrow. It will assist a great deal Refers to the NPA's reply to Mr Zuma's application for leave to appeal to the Con Court in the search warrant matter. It was due on 14 Dec.

9. Date Wednesday 12.12.07 10h41 BN

?

a. LM: We must have one of those Yengeni nights ? remember we said we will not leave this fucking hotel until its done The reference is to a meeting with Mr Yengeni's lawyers that lasted late into the night

b. BN: If this thing comes out the way we discussed it yesterday,

i. those key issues, right

ii. it will be a devastating one for them,

iii. and it will cause people to wake up to know what they are actually doing

iv. without being dramatic, without you making arrests,

v. it will say, this is what we have, this is what we have, and we are forced to state it now and people will wake up think what are we doing

c. LM: Friday, by Friday people are packing bags, they won't even read the fucking newspapers

d. BN: That is the thing, that is the thing, that is why it will be good if it could come out today (ie Wednesday)

e. LM: Today is difficult, I will call a Yengeni night, we are not leaving here until we finalise this tomorrow morning, we file by lunch time and give it to the media,

f. BN: You made my day This is a discussion about the need to file it earlier so that it can be reported in the newspapers before the delegates leave for Polokwane.

10. Date Thursday cell 13.12.07 12h20 BN

a. LM: What is the mood like?

b. BN: Is it out?

c. LM: no no, I am just checking the pulse of securities

d. LM: You know, I thought I will give call you once a day, twice a day to hear whether the position has not changed

e. That thing will only be filed tomorrow

iv. So we will probably only file tomorrow at about 12h50, we have a date for 10 to 1

f. BN: how does it look

g. LM: its ugly, you need someone who can nitpick and read through all that shit of 212 pages, and look at para 79 ?

h. BN: Can you deliver a draft to my place?

i. BN: I will be in Johannesburg

j. LM: I will get, I will rather come myself, I don't want to take changes

k. BN: No I will be late tonight,

l. LM: I will wait for you, or see you first thing in morning. I don't want intermediaries here,

m. BN: ok, your right,

n. LM: Zuma will say we are conspiring against him

o. LM: can I ask, the script has not changed yet,

p. BN: Ya, no

q. LM: because (do/don't) feel like going to Polokwane and charging him there Cont discussion about the need to file Con Court papers earlier

The position or script are apparent references to whether Mr Zuma should be charged before or after Polokwane

LM undertakes to deliver a draft of the Con Court papers to BN personally to avoid it becoming known

It is unclear whether he says he 'do' or 'don't' want to do this

12. Date Friday 14.12.07 10h53 BN

a. LM: are you in position where I can drop something off or send someone to drop something off

b. BN: drop it at home, not there yet

c. LM: the one thing is a 8 pager, which you should read because it deals with whatever is new

i. The rest is just same shit we have heard for the last 3 years

d. ?.

e. LM: I want to get this to you, I can't leave it in envelope with drivers and things it is too risky. My guy can drive to where you are and give it to you

f. BN: its not possible, in East London

g. LM: Can also fax it to you,

h. BN: I will give you a fax no

i. LM: You must physically stand there and wait for it

LM prepares and sends a short summary of key issues that are newsworthy to BN for apparent distribution to the media

13. Date Friday 14.12.07 12h03 SMS BN

a. BN: The fax number is 040 653 2223. Thanks

14. Date Friday 14.12.07 12h32 SMS BN

a. BN: I am standing next to the fax machine. Hope you won't forget me.

15. Date Friday 14.12.07 12h43 SMS BN & LM

a. BN at 12h43: Got it. Thank you very much

b. LM at 12h56: Hold onto it for a while, until ..

16. Date Friday 14.12.07 BN 13h08

a. LM: I just wanted to say its been filed, I am told you can show it even to the guy on the beachfront

b. LM: It is in court, anyone can access it ? I just got an sms, it was filed 3 min ago

LM informs BN that papers have been filed and can be distributed

Apparent political affiliation

28. Date: about 24.12.07 11h49 Voicemail to F Davids

a. LM: Davids, uh, McCarthy here, give me a ring please, you send me 'n gevaarlike sms here just before Christmas. I am Thabo man, I mean we are still wiping the blood from our faces, or egg, or egg and blood from our faces. Saw the man on Friday evening, we planning a comeback strategy And once we have achieved that, we will clean up all around us my friend. Bye Allegiance to Mr Mbeki, confirm that they met, and 'we' are planning a comeback strategy

Discussion with person in private intelligence industry about seemingly political solutions to NPA cases:

18. Date 16.12.07 SMS exchange between Luciano to LM

b. LM: I have been advised to give Ouboet & Oujan a break in the interest of SA?.  
Tenuous times. QV?

i. L: What did Jesus say? Give to the emperor what is due to him and to the church what is due to her. You serve at the pleasure of the emperor. Any other choice wld mean not serving at the pleasure of the emperor

j. LM: I hear you emperor sir. They're asking for a review. What

k. L: Primus salus amicus et familia. That's the motto

l. LM: Yea. Threatening to expose no. 1

m. L: Approach hold even if Lume loses (sic) As far as can be established, Luciano is a private intelligence operative

Ouboet is Mr Selebi

Oujan is probably Mr Zuma

Presumably a review of the cases

?Lume? is nickname for Mr Mngwengwe, the Investigating Director of the DSO

19. Date 17.12.07 SMS exchange between Luciano to LM

L: Thought over night ? 1. Recommend we help you find 2 sympathetic and credible international lawyers that can join each of the 2 reviews.

2. International component important for SA's reputation and your own. If carefully selected will support objective.

3. In ouboet's case need international component to deal decisively with o sullivan factor. Matter also high profile given K allegations, media interest and focus on crime in lead up to 2010.

4. Iro Oujan recommend a comprehensive review is done of ALL MLA and prosecution cases are done flowing from arms deal not just his by review panel with international lawyers as you originally recommended. cont

5. You can then deal with oujan in context of broader review.

6. If you are going to do this in interest of SA recommended you request

6.1 You submit review report to Special Committee of 4 ministers justice, intel, foreign affairs and safety and security. Do not take sole responsibility. Yr current line management structure will result in sole responsibility.

6.2 Recommend you come to clear agreement about SAG support for the next phase of yr career including a date.

6.3 You are going to need resources incl special budget because above all the media will have to be managed locally and globally. End.

Proposal for what appears to be a further review panel for the Selebi (and Zuma) matters  
The Selebi review panel had concluded its work at the end of November 2007.

K is probably Kebble

SAG = SA Government? The review panels appear to be linked to the future World Bank position

**<b>Conclusion</b>**

It is against this broad principle of abuse of process that the conduct of Mr McCarthy must be seen and tested. The question for close consideration is encapsulated in expressions such as “so gravely wrong”, “gross neglect of the elementary principles of fairness”, “so unfair and wrong”, “misusing or manipulating the process of the court.” If the conduct can be so categorized, it would be unconscionable for the trial to continue.

Using one’s sense of justice and propriety as a yardstick by which McCarthy’s abuse of the process is measured, an intolerable abuse has occurred which compels a discontinuation of the prosecution.

What actually triggers the abuse of process is a major determining factor, because it is that trigger which determines the purpose of the abuse and reveals whether the conduct in question is directed at a legitimate or illegitimate purpose.

In the present matter, the conduct consists in the timing of the charging of the accused. In general, there would be nothing wrong in timing the charging of an accused person, provided that there is a legitimate prosecutorial purpose for it and the accused is aware, should be aware or has been made aware of such purpose. For example, the timing may be related to the availability of witnesses, or the introduction or leading of specific evidence to fit in with the chain of evidence.

It follows therefore that, any timing of the charging of an accused person which is not aimed at serving a legitimate purpose is improper, irregular and an abuse of process. A prosecutor who uses a legal process against an accused person to accomplish a purpose for which it is not designed abuses the criminal justice system and subjects the accused person to that abuse of process.

Abuse of process through conduct which perverts the judicial or legal process in order to accomplish an improper purpose offends against one’s sense of justice.

The above implies the following:

Mr McCarthy used the legal process for a purpose outside and extraneous to the prosecution itself. Even if the prosecution itself as conducted by the prosecution team is not tainted, the fact that Mr McCarthy, who was head of the DSO, and was in charge of the matter at all times and managed it almost on a daily basis, manipulated the legal process for purposes outside and extraneous to the prosecution itself. It is not so much the prosecution itself that is tainted, but the legal process itself.

Mr McCarthy used the legal process for a purpose other than which the process was designed to serve, ie. for collateral and illicit purposes. It does not matter that the team acted properly, honestly, fairly and justly throughout. Mr McCarthy's conduct amounts to a serious abuse of process and offends one's sense of justice.

What Mr McCarthy did was not simply being over-diligent in his pursuit of a case, it was pure abuse of process.

If Mr McCarthy's conduct offends one's sense of justice, it would be unfair as well as unjust to continue with the prosecution.

In the light of the above, I have come to the difficult conclusion that it is neither possible nor desirable for the NPA to continue with the prosecution of Mr Zuma.

It is a difficult decision because the NPA has expended considerable resources on this matter, and it has been conducted by a committed and dedicated team of prosecutors and investigators who have handled a difficult case with utmost professionalism and who have not been implicated in any misconduct.

Let me also state for the record that the prosecution team itself had recommended that the prosecution should continue even if the allegations are true, and that it should be left to a court of law to decide whether to stop the prosecution.

However, I believe that the NPA has a special duty, as one of the guardians of the constitution and the Bill of Rights, to ensure that its conduct is at all times beyond reproach.

As an officer of the court I feel personally wronged and betrayed that on a number of occasions I have given evidence under oath that there has not been any meddling or manipulation of the process in this matter.

It is with a great regret that I have to say today that in relation to this case I can not see my way clear to go to court in future and give the nation this assurance.

The need for further investigation

The NPA has taken the information that was uncovered very seriously and has done its utmost to get to the bottom of all the allegations that it has investigated. It has also taken the initiative to cooperate fully with the Browse Mole investigation into possible illegal intelligence gathering activities in the DSO, and has managed to uncover significant new information in the process.

The NPA has also tried to investigate and assess the impact of the revelations on other aspects of our work that happened in the past.

However, in the time available, it has simply not been able to deal fully with all these aspects and come to firm conclusions. While the NPA will continue with its investigations, it has also decided to prepare a full report and present it to the Minister of Justice and the President to decide on further action.

The NPA believes that it is vital that a full and proper investigation must be conducted by a judge or independent person to make recommendations about any further actions to be taken, whether of disciplinary or criminal nature, as well as the framework within which the NPA operates to ensure that such abuses never occur again.