

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No.CCT 79/08

In the matter between:

THABO MVUYELWA MBEKI

Applicant

and

JACOB GEDLEYIHLEKISA ZUMA

1st Respondent

THE NATIONAL DIRECTOR OF

PUBLIC PROSECUTIONS

2nd Respondent

APPLICANT'S REPLYING AFFIDAVIT

I, the undersigned

THABO MVUYELWA MBEKI

do hereby make oath and state that:

1. I am the Applicant in this matter.
2. The facts herein contained are, save where the contrary appears from the context, within my personal knowledge, to the best of my belief both true and correct, and I can and do swear positively thereto. Where I make legal submissions, I rely on advice that I have received from my legal representatives.
3. I have read the answering affidavits of the First Respondent and, where appropriate, I shall refer to the answering affidavits of persons who can positively swear to the facts that I describe but do not fall within my personal knowledge.
4. I shall respond to the answering affidavits to the extent that the facts therein are put up as an answer to the factual material before this court. Any failure to deal expressly with an allegation made by or on behalf of the First Respondent does not mean that such allegation is admitted; on the contrary I adhere to my version put up in the founding and supplementary affidavits, and subject to any admissions made below, deny any allegations in the answering affidavits which are inconsistent with the contents of my founding and supplementary affidavits.

Response to Answering Affidavit of Michael Andrew Thomas Hulley

5. **AD PARAGRAPH 1**

5.1 I note that Michael Andrew Thomas Hulley (hereinafter referred to as “Hulley”) is a duly qualified, admitted and practicing attorney, and that he is the First Respondent’s attorney.

5.2 I further note that Hulley states that he is duly authorised to oppose this application. I have no knowledge hereof but do not make an issue thereof.

6. **AD PARAGRAPH 2**

6.1 As will appear more fully hereunder, I deny that the facts contained in Hulley’s affidavit are true or correct or that he has personal knowledge of some of the matters that he purports to depose to in his affidavit.

6.2 With particular reference to the hearsay evidence relied on by Hulley, I am advised that no case has been made out by Hulley for the admission of hearsay evidence.

6.3 Save for the foregoing, the remaining allegations herein contained are noted.

7. **AD PARAGRAPH 3**

7.1 I deny that the First Respondent has correctly characterised the substantive application brought by the Applicant as one that lacks urgency; as one in which the Applicant lacks *locus standi in judicio*; as an application that ought not to be granted direct access in the interests of justice; as an application not suited for the granting of the declaratory orders ought; or as an application that is misconceived and bad in law.

7.2 I further deny that there are objective grounds to believe or conclude that the Applicant must have known at all material times of the allegations and issues before Nicholson J, or the nature of those allegations, and that the Applicant nevertheless deliberately elected not to seek leave to intervene or participate in the proceedings before Nicholson J. These allegations shall be responded to more fully in the body of this affidavit where the First Respondent answers the merits of this application.

8. **AD PARAGRAPHS 4 - 7**

8.1 I respectfully submit that the essence of this case is primarily about the findings made concerning me, members of the National Executive and the National Executive as a collective at the hearing at which Nicholson J presided. It is about the violation of constitutional rights and principles. It relates to the fact that I (i.e. in my personal capacity, in my capacity as President of the Republic of South Africa, in my representative capacity as Head of the National Executive, and as a person acting in the public interest) was not given the opportunity to be heard with respect to the findings and conclusions that underpinned the decision arrived at in the Court *a quo*.

8.2 This application further relates to whether the National Executive or I politically interfered in the decisions taken by those holding the office of National Director of Public Prosecution. It relates to questions of jurisdiction, to matters concerning policy and to the violation by Nicholson J of the principle of the separation of powers.

8.3 I respectfully submit that the matters raised in the application are matters that are in the public interest, and ought to be ventilated in this Court in the interests of justice.

8.4 I am further advised and submit, with respect, that much as some of the findings made in the Court *a quo* were *obiter*, these conclusions have important constitutional repercussions that only this Court can address, as it is not bound by the constraints of the Supreme Court Act 59 of 1959 as amended, relating to “a judgment or order” in section 20 (1) thereof.

8.5 In the circumstances, any suggestion by the First Respondent that the application is fundamentally flawed is denied.

9. **AD PARAGRAPH 8**

I reiterate that the issues before the Court *a quo* were of a limited factual and legal nature. The proceedings before the Court *a quo* were, after argument concerning their nature, found to be civil in nature. Had the Learned Judge considered the matters relating to, *inter alia*, the allegations of political interference by members of the National Executive (including myself as President) relevant to these

proceedings, he ought to have invited the National Executive to address him on these matters.

10. **AD PARAGRAPH 9**

The allegations herein contained are noted.

11. **AD PARAGRAPH 10**

11.1 I respectfully submit that if in this allegation the First Respondent seeks to suggest that I had cause to know about the nature, content and extent of the allegations of abuse of process made in those criminal proceedings, and take issue with them, I deny this.

11.2 Save as aforesaid, I note the remainder of the allegations contained in this paragraph.

12. **AD PARAGRAPH 11**

Save to state that, as I was not a party to those proceedings, I had no reason to, and in fact did not, bear specific knowledge of the processes or evidence relevant to the application relating to section

179 as cited in this paragraph. I note the contents of this paragraph.

13. **AD PARAGRAPHS 12 - 13**

13.1 I was not aware of the allegations concerning myself specifically or the fact that I was expected to provide testimony concerning certain aspects of the prosecution and the purported evidence against the First Respondent. Neither the First nor the Second Respondent brought this to my attention by informing me or by serving the necessary court papers on me.

13.2 In the circumstances, I deny that I was aware that the prosecution process with respect to the First Respondent was allegedly being utilised in furtherance of the political conspiracy or campaign alluded to in this paragraph.

13.3 I furthermore deny that I did anything which lent support to the prosecution process, as I have always been very much alive to the constitutional imperative that the prosecuting authority exercises its functions without fear, favour or prejudice.

13.4 I respectfully submit that to the extent that certain media reports did come to my attention, I frankly did not believe that the First Respondent would have made the statements that the media were attributing to him, as he was fully aware of my views regarding the National Executive's constitutional responsibility to the rule of law as expressed, *inter alia*, in the National Assembly at the joint sitting of Parliament on his release from his responsibilities as Deputy President. In fact, again as a member of the National Executive Committee (NEC) of the African National Congress (ANC), the First Respondent was aware of this. I refer in this regard to the statement of the NEC of the ANC dated 21 November 2005 annexed hereto and marked "TMM 2".

13.5 The First Respondent in turn accepted and respected my pronouncement, when he stated that ***"I believe that he has taken this decision not because he believes I am guilty of any crime, but because of considerations relating to the constraints within which government operates"***. This was in reference to my address in the National Assembly in which, *inter alia*, I stated:

"As Honourable Members would know, the primary function of the President of the Republic and the Executive is to regulate the nation's affairs in a manner

that promotes the realisation of the ideals enshrined in our Constitution. Among others these include:

- building a society based on democratic values, social justice and human rights;***
- ensuring that government is based on the will of the people and that every citizen is equally protected by law;***
- improving the quality of life of all citizens; and***
- building a united and democratic society enjoying its rightful place among nations of the world.***

I believe that the Executive should at all times position itself diligently to discharge these responsibilities unencumbered by major distractions and deficiencies that might diminish this focus. It was for this reason that during the Debate on the Vote of the Presidency, I paid particular attention to the work we are doing to improve the capacity of government to meet its obligations to the people.

The Constitution enjoins the President in particular to uphold, defend and respect the Constitution as the supreme law of the Republic; and promote the unity of the nation and that which will advance the Republic. It further prescribes that all spheres of government and all organs of state should respect the constitutional status, institutions, powers and functions of government in the other spheres.

Among others, and relevant to the reason I requested this Joint Sitting, the Executive must discharge its responsibilities within the context of the rule of law, which includes respect for the integrity and independence of the judiciary and presumption of innocence of any person, pending findings of the courts. Similarly, we also have to respect decisions of our Parliament. (Own emphasis)

These obligations are expressly reflected as personal undertakings and are immanent in the Oath of Office for those taking up executive positions in government.

They are especially important with regard to the President of the Republic, who, in terms of our Constitution, is the head of the National Executive and on whom the executive authority of the Republic is vested.”

13.6 I annex hereto as annexures “TMM 3” and “TMM 4” the respective texts of the statements made by myself as President and the First Respondent on the decision to release him of his responsibilities as the Deputy President of the Republic of South Africa.

14. **AD PARAGRAPHS 14 – 24**

14.1 The particular quotations referred to in these paragraphs were not brought to my attention prior to my reading this Answering Affidavit. I repeat that neither I nor the National Executive were parties to those proceedings.

14.2 I do not believe that I am required to attest to the veracity of the contents of these paragraphs, and consequently deny them. To the extent, however, that I am able to clarify the broad issues raised in these paragraphs I note the legal propositions, which I am advised will be addressed at the hearing of this application, and submit the following:

14.2.1 I deny that the charges preferred against the First Respondent have been fuelled by a political conspiracy to remove him as a potential Presidential candidate or as a role player in the ANC. The consideration of who should or should not be President of the ANC has never been the subject of discussions of the leadership of the ANC in the context of the allegations made in these paragraphs, nor was it a part of the reasons for the release of the First Respondent from the position of Deputy President of the Republic. In the ANC there is no tradition of a chosen or ordained candidate for a position of leadership, let alone for the position of President of the Party, or an expectation by a candidate that he or she would be placed in a particular position.

14,2,2 I agree that it is the prerogative of the ANC to decide where a particular member should serve.

14.2.3 I am not aware of the vehement opposition that the First Respondent refers to in these paragraphs. The First Respondent informed me that he believes that

there were external forces, acting together with some South Africans, that were intent on ensuring that his political career is compromised. He at no stage suggested that I was part of such forces. In his closing address to the 52nd national conference of the ANC held as recent as December 2007, the First Respondent referred to me as his comrade, friend and brother. I attach hereto as annexure "TMM6" a copy of his statement in this regard.

14.2.4 With regards to the letter referred to, it is correct that the Cabinet and I were charged with the responsibility to oversee the procurement process that forms the subject matter of that letter. Government has dealt with these allegations of corruption extensively, both publicly and through Parliament.

14.3 The First Respondent makes reference to the fact that I requested him, through others, to resign.

14.3.1 I asked the First Respondent if he would consider resigning in the light of the facts that emerged from the Shaik trial.

14.3.2 It is correct that other people in the leadership of the ANC asked the First Respondent to resign his position in Government.

14.4 With respect to the allegation in these paragraphs under reply regarding the decision to release the First Respondent, I point to annexure “TMM 3”.

14.5 With regard to the Chile visit as referred to in these paragraphs, I deny that Mr. Pikoli briefed me on this matter on my visit to Chile. My visit to Chile was unrelated to Mr. Pikoli’s visit. We did not even travel together. In the event that there was indeed an article in the Cape Times to this effect, I deny that I travelled to Chile to decide on the First Respondent’s political future as alleged.

14.6 I refer this Court to annexures “TMM 3” and “TMM 4” with regard to the basis for the release of the First Respondent from his position as Deputy President of the Republic.

15. **AD PARAGRAPH 25**

15.1 To the extent that I am required to deal with the allegations in this paragraph, I deny that I had a discussion with Mr. Pikoli concerning the prosecution of the First Respondent.

15.2 In this paragraph the First Respondent acknowledges that Mr. Pikoli denied in his testimony under oath that any discussion had taken place between him and me.

16. **AD PARAGRAPHS 26 - 32**

16.1 I reiterate that the quotations referred to in these paragraphs were not pertinently brought to my attention for purposes of responding thereto during the currency of my Presidency. To the extent that this Court would require me to respond to the averments relating to the so-called “Arms Deal” I refer the Court to Annexure “TMM 3” where I addressed the question in the National Assembly.

16.2 I submit that with respect to the letter written by the Government to Parliament:

16.2.1 The letter reflects the position of the Government in relation to the allegations of corruption regarding the Strategic Defence Procurement Programme. This

position was made public on numerous occasions, both in Parliament and before the joint investigation by the Auditor General, the National Prosecuting Authority, and the Public Protector, as well as in statements to the media.

16.2.2 The First Respondent signed that letter in his capacity as the Leader of Government Business in order to communicate the Government's position to Parliament. The First Respondent, as a member of the National Executive was thus part of that decision to communicate Government's view. The formal communication between Government and Parliament is done through the Leader of Government Business.

16.2.3 I have always maintained that the letter referred to was not the First Respondent's letter in his personal capacity but was a letter reflecting Government's position.

16.2.4 It is correct that the First Respondent did not draft that letter. It was drafted in the President's Office in the regular execution of a decision of the government.

16.3 I respectfully submit that at no stage was I called upon as a witness in any of the proceedings relating to the prosecution of the First Respondent. Furthermore, I have not at any stage had sight of the indictment referred to in these paragraphs. In any event, as indicated earlier, there was no expectation on my part that the indictment would be presented to me as the National Prosecuting Authority is enjoined to exercise its functions without fear, favour, or prejudice.

16.4 The annexures referred to in the quotations cited in the Answering Affidavit have not been annexed. I am therefore not in a position to comment thereon.

17. **AD PARAGRAPHS 33 – 36**

17.1 Of the media reports that did come to my attention in whatever format, I did not believe that the First Respondent had made the vexatious allegations attributed to him. This is so because of the statements that the First respondent and I made jointly in this regard. I annex marked "TMM 5" a copy of a report on discussion on a presentation made by the First Respondent and me to the NEC of the ANC on 9 September 2005.

17.2 I reiterate that I was not ever requested by the First or Second Respondent to appear as a witness in the criminal proceedings brought against the First Respondent. Furthermore, I was not aware that the issue of my being called to give testimony, or provide information had been raised in the papers before that Court.

18. **AD PARAGRAPHS 37 – 44**

18.1 I bear no knowledge of any political pressure, influence and/or manipulation by members of Government in December 2007 in encouraging the prosecution of the First Respondent. I certainly did not apply any such pressure, influence or engage in any such manipulation.

18.2 I furthermore was not privy to the discussions that took place between the First and Second Respondents, nor was I advised on the strategy either party was adopting in the proceedings before Court.

- 18.3 I can confirm that there is no truth to the rumours or allegations of political influence or of a political conspiracy against the First Respondent.
- 18.4 In my knowledge of ANC tradition, there is never an expectation to be appointed to any position in the ANC, or in government.
- 18.5 I was not privy to the strategy of either the First or Second Respondent with respect to the manner in which they preferred to deal with the evidence at their disposal, nor was I privy to any discussions relating to the veracity of any allegation of political interference or political meddling and the striking out of these averments.
- 18.6 I bear no specific knowledge of the response of officials in the Presidency on the occasions that they may have been called upon to deal with queries.
- 18.7 The Notice in terms of Uniform Rule 16A of the Uniform Rules of Court was not brought to my attention or to the attention of the legal department in the Presidency. I reiterate that no one brought to my attention the specific legislative provisions or factual averments that either the First or Second Respondent would be

relying on. However, even if the Rule 16A Notice had been brought to my attention I may not have done anything about it as, I am advised, it simply gives notice that a litigant will raise the constitutional issue mentioned therein. The constitutional issue raised by the First Respondent in the section 179 proceedings related to the alleged requirement of calling by the Second Respondent for representations from the First Respondent. It was alleged that the failure by the Second Respondent to call for such representations was a negation of the First Respondent's constitutional rights. That issue rendered it unnecessary to arrive at the findings, conclusions and inferences by Nicholson J, complained about in this application.

18.8 I repeat that I had no knowledge of the issues raised by the First Respondent in the litigation, which I understood to be criminal proceedings, or of the matters that would be emphasised or downplayed by either the First or Second Respondent.

18.9 Save for what is stated above, I deny the allegations made in these paragraphs.

19. **AD PARAGRAPHS 45 - 47**

19.1 I respectfully submit that the issues and evidence that were before the Ginwala Commission of Enquiry were irrelevant to the issue that was before Nicholson J and, *a fortiori*, are irrelevant to this application and should be ignored by this Court. However, if, and only if I am wrong in this submission, I shall briefly respond to the contents thereof.

19.2 I respectfully submit that the passages cited herein are cited out of context and do not convey the meaning that the First Respondent ascribes to them.

19.3 I deny that there was a close relationship between the Government and Mr. Mpshe; that the Government instructed Mr. Mpshe on how to deal with certain matters in the prosecution of Mr. Selebi and Mr. Mpshe and that the latter acted in accordance with such instruction.

19.4 The comment relating to the relationship between Mr. Mpshe and the Government was explored under cross examination at the Ginwala Commission of Enquiry. The gravamen of the evidence elicited there was that Mr. Mpshe took an independent decision to appoint the panel of experts to assist him. The evidence of Mr.

Pikoli under cross examination put the matter of the Government influencing Mr. Mpshe in its proper perspective.

19.5 I thus deny that there was evidence of the Government instructing Mr. Mpshe on how to deal with certain matters in the prosecution of Mr. Selebi. The investigation of Mr Selebi started without any hindrance and continued with my assistance.

19.6 I submit that in any event, the version put up by Mr. Pikoli at the Ginwala Commission was that he believed that the only reason for his suspension is attributable to the investigation and prosecution of the National Commissioner of Police. (see p. 755 line 20 of the record). Mr. Pikoli does not allege that he was prevented from investigating the National Commissioner of Police.

19.7 The Government's contention regarding the Selebi matter was that there was concurrent, but different responsibility on my part where, as the head of the National Executive, I am the person authorised to appoint the National Commissioner of Police to control and manage the police service. The National Director of Prosecutions' interest, on the other hand, is to prosecute offenders.

19.8 I submit that the sum effect of the tension that must be managed is that while the National Director is free to investigate, arrest and prosecute offenders, including the National Commissioner, the President too has the responsibility to ensure that such arrest is executed in a manner that does not affect or compromise the national security of the Republic. In any given set of circumstances, the President would retain the responsibility to ensure that the office of the National Commissioner is not left vacant as a result of the arrest of the National Commissioner.

19.9 The person who approached me for assistance with the investigation of Mr. Selebi was Mr. Pikoli himself. It was at his instance that I got involved in the matter and appointed Reverend Frank Chikane to assist Mr. Pikoli with regard to Mr. Selebi and the South African Police Services furnishing certain information to the investigators.

20. **AD PARAGRAPH 48**

20.1 The matter of the investigation into the Strategic Defence Procurement was irrelevant to the issues that Nicholson J had to determine, and, *a fortiori*, is irrelevant to this application. In any event, as far as I am aware, and as far as the National Executive

that I headed was aware, there is no current investigation in this regard.

20.2 Neither I nor the National Executive ever understood the investigation of the Prosecuting Authority into the First Respondent to be part of the 'Arms Deal' investigation. We understood the investigation into the First Respondent to be an investigation relating to his personal activities which were alleged to constitute criminal offences.

20.3 To the extent that this Court would require me to address the matter of the Government's investigation into this procurement, I respectfully submit that when allegations were made regarding this programme, investigations were carried out by, *inter alia*, the Auditor General, the National Prosecuting Authority, the Public Protector and Parliament. The conclusion arrived at consequent on these investigations was that there was no illegality or irregularity with the award of the primary contracts as regards the National Government and the primary contractors. There were some reports of irregularities relating to individuals and in respect of sub-contracts. There were also allegations of impropriety against some individuals who benefited from this procurement process but who had not been part of the decision makers in the negotiations

between the National Government and the primary contractors. In essence, all these allegations of impropriety related to individuals and to sub-contractors.

20.4 The reports of the above agencies are available but have not been annexed in an effort to avoid burdening this Court with material that it may not wish to scrutinise, and which I consider irrelevant to this application. In the event that this Court would wish to have sight of these reports, they will be made available.

21. **AD PARAGRAPHS 49 – 51**

21.1 I respectfully submit that there are no facts from which the inference to which the First Respondent refers in this paragraph can be drawn.

21.2 I furthermore deny that that the reports referred to were made to the Presidency.

21.3 I deny that I was aware of the substantive allegations on which the First Respondent relied in his defence insofar as these relate to the allegations of political influence or political considerations in the periods and court proceedings referred to in these paragraphs.

21.4 I respectfully submit that as I was not aware of these substantive allegations as aforesaid, I could hardly have been expected to have taken the steps suggested by the First Respondent. I certainly did not consciously and deliberately choose not to deal with these matters as alleged.

22. **AD PARAGRAPHS 52 – 54**

22.1 I reiterate that I had no knowledge of these obstacles, let alone that my presence as a party was imperative, and believe that it would have been simple for any party requiring my presence to serve the necessary papers on me.

22.2 I similarly bear no knowledge of what is contained in the permanent stay papers referred to, and fail to understand why the First Respondent did not take the necessary legal steps to secure my presence as required.

22.3 No reliance can be placed on speculative reports, nor can any individual be expected to respond to speculative reports in the media.

23. **AD PARAGRAPH 55**

23.1 Having had no knowledge of the substantive allegations in the court papers filed by the First Respondent, I respectfully submit that there was no failure on my part to provide the prosecuting authorities with what the First Respondent refers to as countervailing evidence.

23.2 As much as the last sentence in this paragraph lacks clarity, its tenor suggests untoward conduct. I deny it and take strong exception thereto.

24. **AD PARAGRAPHS 56 – 57**

I re-iterate that the permanent stay proceedings referred to were not brought to my attention. I respectfully submit that I could hardly have been expected to respond to matters to which my attention had not pertinently been drawn.

25. **AD PARAGRAPHS 58 - 62**

25.1 Mr. Pikoli's version of events must be analysed within the framework of the entirety of the evidence placed before the

Commission, and with specific reference to his responses when he was being cross examined.

25.2 I re-iterate that Mr. Pikoli approached me to assist in securing certain evidence required from Mr. Selebi. At no stage did I *mero motu* intrude into the domain of the prosecuting authority. For his part, I was only made aware of the imminence of the arrest of Mr. Selebi when Mr. Pikoli attended a meeting with Reverend Chikane and me on the 15th September 2007. Prior to that I was under the impression that he was being assisted in obtaining the information he required for the investigation. The suspension of Mr. Pikoli was a step taken after due consideration of, *inter alia*, the constitutional obligations of the National Director of Public Prosecutions and my constitutional obligations with respect to the security of the Republic and with respect to our international obligations.

25.3 In dealing with the allegations contained in this paragraph, which allegations are denied, I beg the Court's indulgence as I highlight some of the evidence of Mr. Pikoli under cross-examination.

25.4 Mr. Pikoli stated under cross examination that I never said that he must stop the prosecution of Mr. Selebi. (p. 883 line 26). He

further conceded that the suspension letter did not refer to a suspension of the prosecution. (p. 889 line 4). He also conceded that the letter of suspension that I signed created the impression that my only concern was to deal with the implications of the forthcoming arrest and prosecution of Mr. Selebi. (p 889 line 12)

25.4 I am not aware of any steps being taken to prosecute Mr. Pikoli. If the First Respondent intended to refer to the prosecution of Mr. Selebi, I deny that Mr. Mpshe was instructed to undo some of the steps in the prosecution of Mr. Selebi

25.5 To the extent that I may be required to address this matter, I submit that the central issue before the Ginwala Commission was that of determining the correct balance between the concept of prosecutorial independence and the constitutional directive that the Minister of Justice and Constitutional Development must have political oversight over the Prosecuting Authority. It was Government's view then that this is a matter that might indeed become necessary for this Court to pronounce on.

26. **AD PARAGRAPH 63**

26.1 I re-iterate that the meetings I had with Mr. Pikoli were instituted in an attempt to assist him obtain certain evidence from the police. These were meetings held at his instance. No influence was exerted on him.

26.2 In this affidavit I do not seek to deal with the various grounds for suspension in detail as the matter is before the Ginwala Commission. However, to the extent that I am required to deal with the reasons for Mr. Pikoli's suspension, I submit that there was never any attempt to interfere with the prosecutorial independence of the National Prosecuting Authority or the National Director of Public Prosecutions. The considerations that informed the Government's actions in this matter were based on constitutional and legal provisions that require the Minister of Justice and Constitutional Development to exercise final responsibility over the prosecuting authority.

27. **AD PARAGRAPH 64**

With respect, I fail to see the relevance of the allegations in this paragraph to the application before this Court. Government made a full submission to the Ginwala Commission through the evidence of various parties. Should this Court nevertheless wish to have

sight of this record, it can be made available. The Ginwala enquiry reports to the President.

28. **AD PARAGRAPHS 65 - 66**

At no stage was I informed of the substantive issues raised in the litigation in Mauritius referred to herein. The Letters of Request referred to are handled administratively by the Department of Justice and Constitutional Development. In the circumstances, the question of my giving evidence did not arise at all.

29. **AD PARAGRAPHS 67- 72**

29.1 I deny the allegations made in this paragraph. I was not advised of the substantive allegations made in the affidavits of the First Respondent. I had no reason to believe that the Court *a quo* would arrive at findings and conclusions in violation of my constitutional rights as President of the Republic of South Africa, Head of the National Executive, or in my personal capacity.

29.2 It is through no fault or laxity on my part that I was not a party to the proceedings in the Court *a quo*. At no stage was I given the impression that I was a necessary party to the litigation before the Court *a quo*, and, with hindsight, it is my view that considering the narrow issue that was pertinently before that Court, I, in fact, was not a necessary party to that litigation.

29.3 The matters to which the First Respondent's deponent is referring are all irrelevant or collateral issues.

30. **AD PARAGRAPH 73**

I note the contents of this paragraph.

31. **AD PARAGRAPHS 74 – 75**

31.1 I have consistently stated that the Court *a quo* made findings, reached conclusions and drew inferences regarding the conduct of the National Executive as a collective, the two former Ministers of Justice and Constitutional Development, and me in the capacities cited earlier. These findings and conclusions were made without any of us being afforded the opportunity to make representations on the facts relied on and inferences drawn. I submit that this

constitutes a violation of the constitutional principles that accord to a party the right to be heard.

31.2 I dispute the interpretation put up by the First Respondent in these paragraphs if his intention is to contend that the constitutional rights complained of have not been violated on the basis set out hereunder in conjunction with the averments made in the founding and supplementary affidavits, which I incorporate herein.

31.3 The effect of the findings, conclusions and inferences made by the Court *a quo* has been that the general public has been led to believe that the National Executive under my stewardship, and particular members thereof, deliberately and intentionally interfered politically, alternatively, were parties to a political conspiracy aimed at prejudicing the First Respondent. In its remarks, the Court *a quo* made reference to criminal sanctions. I would expect that any competent prosecuting authority that accepted and believed these remarks would apply its mind to the prosecution of the individuals referred to in these findings and conclusions.

31.4 I have, by way of example, stated in my founding affidavit that, *inter alia*, the Court *a quo* found that there was a political struggle or rivalry between the First Respondent and me, which rivalry impacted on the issues to be decided in the application before it.

31.5 These findings and conclusions are summarised by the Learned Judge in his reference to them as a ‘distressing pattern’ in the behaviour of the parties which the Learned Judge concludes is indicative of political interference, pressure or influence.

31.6 In my supplementary affidavit I, *inter alia*, made reference to the appointment and tenure of the National Director of Public Prosecutions as well as the fact that the Court *a quo*, in dealing with the issues raised by the *amicus*, (issues without any merit whatsoever), spent an inordinate part of the judgment dealing in particular with the question of the appointment of a commission of enquiry into the arms deal and implied that I did not appoint such a commission for political reasons or out of favouritism. This was not only unfounded, but also an unjust and unfair conclusion. I also submitted that this digression by the Learned Judge also amounts to a disregard of the constitutional principle of the separation of powers as decisions regarding both matters do not reside within the domain of the judiciary.

31.7 The sum effect is that I have been put in the position where I am compelled to vindicate the constitutional rights of the affected parties who served in a National Executive headed by myself, and to assert that there continues to be justification for the application of the principle of the separation of powers.

32. **AD PARAGRAPHS 76 -87**

Save to state that the Learned Judge was not obliged to go beyond determining the narrow issue raised in the papers before him in relation to section 179 of the Constitution and the First Respondent's right to make representations, nor was he bound by the settlement agreement made between the parties before him in chambers, I bear no knowledge of the allegations made in these paragraphs. I am advised, though, that the averments of which I am complaining were irrelevant and scandalous and ought, in the light of the issue that the Court *a quo* had to determine, to have been struck out

33. **AD PARAGRAPH 88- 91**

33.1 I bear no knowledge of the arguments of or strategy adopted in the Court *a quo* by either the First or Second Respondent.

33.2 I note the allegations made in these paragraphs but persist in my submission that given the findings and conclusions that the Learned Judge arrived at, I would have expected that affected parties would have been called to make representations on the allegations made by the First Respondent which allegations the Court intended to rely on in determining the issues at hand.

34. **AD PARAGRAPH 92**

I and many other people understood the findings in the judgment as a pronouncement that I and the National Executive were guilty of politically interfering with and influencing the prosecution and manner thereof of the First Respondent. That does not amount to a misreading of the judgment or a twisting of its meaning. The Court arrived at specific findings and conclusions, based on inferential reasoning. This application is about the flawed basis for making those findings and arriving at those particular conclusions. It is also about separating the domains of the Executive, the Legislature and the Judiciary. It is about the correctness of the findings and conclusions and the fact that these were based on insufficient and

one-sided evidence. It is about unnecessarily imputing unlawful, even criminal, and therefore, unconstitutional, conduct to a Head of State and his Cabinet without offering them a chance to refute or rebut the allegations.

35. **AD PARAGRAPH 93 - 95**

35.1 In order to clarify the reason that I resigned, I annex hereto marked "TMM 7" and "TMM 8", my letter of resignation and the statement I made to the nation on my resignation.

35.2 I was President and Head of the National Executive when Cabinet took the decision that Nicholson J's judgment should be appealed against. I presided at that particular Cabinet meeting. As far as I am aware, that particular decision of Cabinet has not been reversed. I refer to the accompanying affidavit of Reverend Frank Chikane, the Secretary of Cabinet, as confirmation of this fact.

35.3 I was never asked to resign as President of the Republic until Nicholson J's judgment was handed down. I ask this Court's indulgence that I do not, in these proceedings, address matters which are the subject of political debate. I am ready to have a debate with the First Respondent regarding the alleged reasons for

which I was asked to resign as President of the Republic, which reasons were never given to me. However, I firmly believe that such debate belongs in the political arena.

35.4 I would also like to point out with respect to the example the First Respondent cites in this paragraph, that the views and positions referred to by the First Respondent were the views of Government, of which he was a part, for some time, and not my personal views.

35.5 I have earlier in this affidavit and in the averments made in the founding papers, addressed the flawed basis on which the findings and conclusions of the Court *a quo* were made, and incorporate those averments in answer to the allegations made in these paragraphs.

36. **AD PARAGRAPH 96**

I have annexed as “TMM 3” and “TMM 4” the statements made by both me and the First Respondent, respectively, on the release of the First Respondent from his duties as Deputy President of the Republic. In the light of these two statements, I am surprised by the allegation in this paragraph. The First Respondent clearly fails to understand or chooses not to appreciate the constitutional

imperatives that necessitated that decision in 2005. At that time the First Respondent said that he accepted and understood the basis for the release. Now he gives a different version. On 20 June 2005 the First Respondent issued a further statement wherein he announced his withdrawal from all ANC structures in order to attend to the criminal prosecution against him. A copy thereof is annexed hereto and is marked "TMM 9".

37. **AD PARAGRAPHS 97 - 101**

37.1 These are allegations that the Second Respondent is in a position to respond to. The complaint regarding the failure to give the affected parties the opportunity to respond to these allegations at the appropriate time and forum, which allegations the Court *a quo* relied on, is precisely what brings us before this Court.

37.2 I have explained above the reasons for the release of the First Respondent as Deputy President of the Republic. I incorporate those submissions herein, and further state that the consideration of who should or should not be President of the ANC had never been part of the reasons for the release of the First Respondent from the position of Deputy President of the Republic. In the ANC there is no tradition of a chosen or ordained candidate for a

position of leadership, let alone for the position of President of the Party, or an expectation by a candidate that he or she would be placed in a particular position. In amplification of this I annexed hereto marked "TMM 2" a statement issued by the National Executive Committee of the ANC on 21 November 2005. The statement also deals, *inter alia*, with the finding by the NEC of the ANC that there was no conspiracy against the First Respondent originating within the ANC.

37.3 The issues raised by me in this application are vastly different to the situation of the First Respondent in 2005.

37.4 I have addressed the matters relating to the Rule 16A Notice earlier in these submissions. With regard to the First Respondent's allegations on his ability to approach this Court on the same non-joinder basis, I am advised that as the proceedings in which Squires J presided when certain testimony adverse to the First Respondent was tendered were criminal proceedings, there would be no question of joinder. The proceedings before Nicholson J were found by him to have been civil in nature.

38. **AD PARAGRAPHS 102 - 105**

38.1 I deny that this application is extraordinary or that it violates several basic principles of law.

38.2 We now live in a constitutional democracy, where all law and conduct must comply with the constitutional principles and values enshrined in our Constitution. I am advised that legal argument in amplification of this submission will be advanced at the hearing of this matter, and that the basis for approaching this Court as set out in this affidavit and in the founding and supplementary affidavits, will be ventilated fully at that point.

38.3 It is for the First Respondent, on advice from his legal team, to decide on the strategies and modalities he wishes to adopt in ensuring that he has his day in court in the most appropriate manner. It is, with respect, not my preserve to question the strategies he has to date preferred to adopt.

39. **AD PARAGRAPHS 106 – 111**

39.1 The First Respondent is making legal argument. I am advised that legal argument will be advanced at the hearing of this matter in response to the legal propositions and arguments set out by the First Respondent in these paragraphs. My case is set out in the

founding affidavit, in the fairly concise yet pointed submissions made in the supplementary affidavit and in this affidavit.

40. **AD PARAGRAPHS 112 – 113**

Save to state that I have dealt in the body of this affidavit with the disputes raised by the First Respondent, which averments I am advised will be elaborated on in legal argument advanced at the hearing of this application, I note the contents of these paragraphs.

41. **AD PARAGRAPH 114**

41.1 I confirm that when this application was launched I was still President of the Republic of South Africa, a position I held until Thursday 25 September 2008 when the National Assembly accepted my resignation as President of the Republic and elected a new President.

41.2 The matters raised in this paragraph constitute legal argument which will be addressed by my legal counsel at the hearing of this application.

41.3 Given the broad interpretation that the courts have given the concept of the “public interest” in promoting and protecting the rights enshrined in the Constitution, I am surprised at the First Respondent’s assertion that the matters raised in this application are not in the public interest. Be that as it may, legal argument on this aspect will be advanced at the hearing of this application.

41.4 I reiterate that I presided at the Cabinet meeting where a decision was taken to appeal against the judgment of Nicholson J. I refer this Court to the supporting affidavit of the Secretary of Cabinet annexed hereto, which addresses this particular matter.

42. **AD PARAGRAPH 115**

The contents of this paragraph are noted.

43. **AD PARAGRAPH 116**

Save to state that I did as a matter of fact suspend Mr. Pikoli on the 23 September 2007 and appoint Mr. Mpshe in his place, I note the allegations made in this paragraph.

44. **AD PARAGRAPHS 117 - 118**

44.1 I have set out the basis for approaching this Court in my founding affidavit and in the supplementary affidavit. I continue to rely on those grounds.

44.2 I have elsewhere herein addressed the First Respondent's interpretation of the findings and conclusions of the Court *a quo*.

45. **AD PARAGRAPH 119**

45.1 I note the summary of the issues the Court *a quo* was called upon to decide as set out by the First Respondent, and reiterate that at no stage was I privy to the contents of the affidavits filed of record, the arguments of the parties, or the strategies they adopted in the proceedings.

45.2 I have earlier in this affidavit, stated that the Learned Judge went beyond what he was called upon to decide and in so doing, violated the constitutional rights accorded to individuals and organs of state alike.

46. **AD PARAGRAPH 121**

I have set out the basis for approaching this Court in my founding affidavit and in the supplementary affidavit. I have sought to elaborate elsewhere in this affidavit on those grounds, which I continue to rely on.

47. **AD PARAGRAPHS 122 - 131**

47.1 I deny that the allegations cited in these paragraphs are bald allegations, or that they have been quoted out of context, or incompletely. I further state that for ease of reference, the judgment of Nicholson J was annexed to the founding affidavit.

47.2 This application was launched as an urgent application. The purpose was to execute a request emanating from Cabinet. In citing the examples relied on, the intention was not to furnish a full response to the inferences the Learned Judge drew his conclusions from, but to illustrate the types of matters that I believe the affected parties ought to have had the opportunity to respond to. To that end the Notice of Motion asks for certain declaratory relief.

47.3 I am advised that to enable a full response to those allegations and inferences relied on by the Learned Nicholson J to be furnished,

the National Executive and I in my personal capacity and in the public interest ought to be given the opportunity to be heard.

48. **AD PARAGRAPH 132**

48.1 I have set out the basis for approaching this Court in my founding affidavit and in my supplementary affidavit. I have submitted that the findings and conclusions of the Court *a quo* constitute a violation of the rights of the National Executive of which I was not only a member, but which I headed until a new President and Head of the National Executive was elected on the 25 September 2008.

48.2 The founding affidavit, read with the supplementary affidavit, set out the violations complained of and the parties affected by Nicholson J's disregard of the provisions of the Constitution. Legal argument in support of these submissions will be made at the hearing of this application.

49. **AD PARAGRAPH 133**

49.1 I note the remedies referred to by the First Respondent.

49.2 I am advised that Nicholson J had to decide a very narrow legal point raised, and that he could have arrived at a decision on the nature and ambit of the section 179 (5) (d) without relying on the untested allegations that the First Respondent had incorporated into his affidavits.

50. **AD PARAGRAPH 135**

50.1 I have stated earlier that in this application I seek to vindicate constitutional rights. With regard to section 167 (4) of the Constitution, I have also stated that to the extent that this Court may determine that the findings and conclusions made in the Court *a quo* amount to a failure by me to fulfil the constitutional obligation of the President of the Republic who is duty bound to act in accordance with, inter alia, section 83 of the Constitution, application is made for such findings and conclusions to be struck out. The focus is thus on the violation of constitutional rights and not on the merits or demerits of the allegations made by the First Respondent and relied on by Nicholson J.

51. **AD PARAGRAPH 137**

51.1 I submit that I have addressed these matters elsewhere in this affidavit.

51.2 As Head of the National Executive I represented the interests of the National Executive and both Ms. Mabandla and Mr. Maduna were members of the National Executive that I headed. The issue relating to *locus standi* has been addressed elsewhere.

52. **AD PARAGRAPH 139 – 140**

I have addressed these matters elsewhere in this affidavit.

52. **AD PARAGRAPH 141 – 142**

52.1 At the time that these proceedings were launched, the Second Respondent had not filed papers noting an appeal against the judgment of Nicholson J. I was of the view then, and still hold the view that given the nature and impact of the findings and conclusions of the Court *a quo*, and the constitutional responsibilities of the National Executive, it was important that the integrity of the elected leadership in government be protected.

53.2 Now that the Second Respondent has in fact set the appeal process in motion, and given this Court's reluctance to pre-empt matters or to decide issues in a piece-meal fashion, I shall be taking counsel from my legal team as to the most appropriate manner to have the issues I consider both pertinent and urgent adjudicated on in a manner consistent with the practice of this Court.

54. **AD PARAGRAPH 143**

I deny that the remedy that I seek amounts to requiring this Court to act against the interests of the administration of justice. As submitted earlier herein, I simply seek to vindicate rights that this constitutional democracy holds sacred.

55. **AD PARAGRAPH 144**

I note the contents of this paragraph.

56. **AD PARAGRAPHS 145 – 146**

I note the contents of these paragraphs and am advised that legal argument will be advanced at the hearing of this matter on this aspect.

57. **AD PARAGRAPH 147**

57.1 I submit that the current National Executive has not changed the decision taken at the Cabinet meeting of the 18 September 2008 and subsequently confirmed to appeal against the judgment of the Court *a quo*. I refer the Court to the confirmatory affidavit of the Secretary of Cabinet in this regard.

58. **AD PARAGRAPHS 148 – 150**

This Court has the authority to exercise jurisdiction over the matters raised in this application. Legal argument on this aspect will be advanced at the hearing of this application.

59. **AD PARAGRAPHS 151 – 153**

I deny the allegations made in these paragraphs and submit that this Court is the most appropriate forum in which to raise the complaints set out in the founding and supplementary affidavits.

60. **AD PARAGRAPHS 154 – 158**

60.1 I have elsewhere in this affidavit dealt with the issues raised in these paragraphs.

60.2 I dispute that there may arise an occasion where oral evidence may be necessary to enable this Court to apply its mind to the orders prayed for in the Notice of Motion.

61. **AD PARAGRAPHS 159 – 163**

61.1 I submit that at the time that these proceeding were launched, the matters raised herein required urgent resolution as they impacted on the dignity of the office of President of the Republic, and the integrity of the entire leadership in government, i.e. members of the Executive. At that time, the Second Respondent had not filed papers noting an appeal in court.

61.2 The landscape has changed. The Second Respondent has noted leave to appeal. I have set out elsewhere in this affidavit the possible impact of this, as well as this Court's general attitude to deciding matters piece-meal. As a consequence, I have been advised that legal argument will be advanced at the hearing of this matter to address the issues raised by the First Respondent in these paragraphs.

62. **AD PARAGRAPHS 164 - 167**

62.1 I have earlier in this affidavit dealt with the matters raised in these paragraphs.

62.2 I reiterate that at the launch of this application I was Head of the National Executive and brought this application, *inter alia*, on behalf of Cabinet and at its behest.

62.3 I further submit that to date there has been no reversal of the decision taken by Cabinet to take issue with the judgment of Nicholson J. I refer to the confirmatory affidavit of the Secretary of Cabinet in this regard.

62.4 This application raises matters of substance concerning the manner in which the leadership of government under my stewardship conducted itself. The findings and conclusions of Nicholson J will continue to be matters that ought to be ventilated and determined in the public interest.

63. **AD PARAGRAPHS 168 - 171**

63.1 I set out the basis for filing a supplementary affidavit in that affidavit. The Court *a quo*'s disregard of the separation of powers principle is ventilated in the submissions in that affidavit. I further more succinctly explain the manner in which these matters were relied on by Nicholson J as he drew inferences that led to the findings and conclusions that have become the subject matter of this application.

63.2 In his judgment Nicholson J in comparing my conduct in appointing the Hefer Commission of Enquiry and the calls for a commission of enquiry into the arms deal by implication linked what he considered to be my motives regarding the arms deal matter to his conclusions that I did not appoint a commission of enquiry for political reasons or out of favouritism. That was a gratuitous finding on an issue that had absolutely no merit.

63.3 His remarks concerning the appointment and tenure of the National Director of Public Prosecutions as well as those relating to the relationship between the National Director of Public Prosecutions and the Cabinet member responsible for the administration of justice were similarly drawn into the general *ratio* that underpinned his findings and conclusions of political

interference. All of these matters are the preserve of a different arm of government.

64. **AD PARAGARAPHS 172 - 176**

64.1 I have dealt with the matters raised in these paragraphs elsewhere in these submissions.

64.2 I have annexed my statement to the National Assembly as well as the statement by the First Respondent as annexure “TMM 3” and “TMM 4”, respectively and stand by what I have stated above.

65. Accordingly, I respectfully request the relief stated in the Notice of Motion.

DEPONENT

THUS SIGNED AND SWORN to before me at _____ on this the 13th day of October 2008 by the Deponent, he having acknowledged that he knows and understands the contents of this

affidavit, that he has no objection to taking the prescribed oath and considers same to be binding on his conscience.

COMMISSIONER OF OATHS