IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT, PRETORIA

Case No. 19577/09

In the matter between:

DEMOCRATIC ALLIANCE	Applicant
and	
THE ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE HEAD OF THE DIRECTORATE OF SPECIAL OPERATIONS	Second Respondent
JACOB GEDLEYIHLEKISA ZUMA	Third Respondent
and	
RICHARD MICHAEL MOBERLY YOUNG	First Intervening Party
CCII SYSTEMS (PROPRIETARY) LIMITED	Second Intervening Party

THE INTERVENING PARTIES' HEADS OF ARGUMENT

A. INTRODUCTION

1. The Intervention Application was instituted in the wake of the Respondents disputing the Applicant's standing in the main application.[1] If the Intervening Parties have standing (as we contend they do) it follows in our submission that they have an interest in the main application. Not only do the Intervening Parties have a sufficient interest, the following factors may and ought legitimately to be taken into account when considering this application[2]:

    1.1 There is an overwhelming public interest in a court decision on the merits of the matter, ie the legality of the decision. This Courts and higher Courts should be placed in the best position to reach those merits. It will not be in the interests of justice for the Respondents to succeed in this Court, or a higher Court on appeal, on the basis of the Applicant's lack standing, when the Intervening Parties were prepared to intervene from the outset but were not permitted to do so.

    1.2 The intervention will not result in additional costs or delays or any other form of prejudice to the Respondents. According to the Intervening Parties, "*[t]he factual and legal issues to be determined the application [by the DA] are identical to those that would have to be determined in the event that [they] were to launch [their] own application for the review and setting aside of the decision of First Respondent and the further relief that has been sought by [the] Applicant*".[3] In other words, the Intervening

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[1] In these Heads of Argument, we refer to the various applications and papers in the same manner as in the Heads of Argument dealing with the Rule 6(11) Application. We also use the same abbreviations and the terms as defined in those Heads of Argument.

[2] As pointed out by Erasmus and others *Superior Court Practice* at B1-101 it has often been said that the court has a discretion where a party seeks leave to intervene, and that the power of the court to grant leave to intervene is wider than where joinder of another is demanded of right.

[3] Record: Intervention Application at 19: The First Intervening Party's Founding Affidavit para 44

Parties do not intend to make additional factual allegations or legal submissions.

1.3 In the light of the above, the First Respondent did not consider it necessary to file a separate answering affidavit in respect of the Intervention Application and opted to deal with it along the same lines as the Rule 6(11) Application.[4] The only contentions which were added in the First Respondent's answering affidavit in respect of the Intervention Application concerned the standing of the Intervening Parties.[5]

1.4 The Third Respondent elected to file a separate, lengthy answering affidavit in respect of the Intervention Application[6]. For the most part, however, it merely reiterates what was said in the answering affidavit in the Rule 6(11) Application. In our submission, the only relevant parts of the Third Respondent's answering papers are those dealing with the Intervening Parties' standing.[7]

2. We contend, accordingly, that the Intervention Application should be approached on the basis that it only calls for a decision on whether the Intervening Parties have standing to challenge the First Respondent's decision in review proceedings. If so, they should be allowed to intervene.

3. In this regard, we submit that the Intervening Parties are in the same position as the Applicant in that:

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[4] Record: Intervention Application at 223: the First Respondent's Answering Affidavit para 1

[5] Record: Intervention Application at 250: the First Respondent's Answering Affidavit from para 70

[6] Record: Intervention Application at 80. The Third Respondent's Answering Affidavit comprises some 68 pages. This is in response to the First Intervening Party's Founding Affidavit which consists of 17 pages.

[7] Which appear, in our submission, at Record: Intervention Application at 89 – 105, the Third Respondent's Answering Affidavit at paras 1 -52

3.1 They are members of the public who would be affected by the crimes of political patronage and protection for financial reward allegedly committed by the Third Respondent.

3.2 They also made representations regarding the decision[8]. Ultimately, three sets of representations were made by the First Intervening Party, which were dated 15 January 2009; 27 March 2009 and 29 March 2009.[9]

4. It is submitted that the Intervening Parties have standing to seek the review of First Respondent's decision on these grounds alone. But the most relevant aspect of the Intervention Application concerns the question of whether the Intervening Parties also have standing in their capacity as complainants. We now turn to deal with this question under two headings:

4.1 Were the Intervening Parties complainants in the criminal matter against the Third Respondent?

4.2 Would a complainant in the matter against the Third Respondent have standing to seek the review of the First Respondent's decision?

B. WERE THE INTERVENING PARTIES COMPLAINANTS?

5. On 18 September 2008, Adv Downer SC of the NPA wrote as follows to the First Intervening Applicant:

"Dear Mr Young

The contents of your representations have been noted.

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[8] Record: Intervention Application at 15-16: the First Intervening Party's Founding Affidavit paras 31-2

[9] Record: Intervention Application at 16: the First Intervening Party's Founding Affidavit para 33

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Your concerns as a complainant and state witness carry particular weight."[10]

6. Adv Downer was the senior counsel who not only prosecuted Mr S Shaik, but would also have been the lead counsel in the prosecution of the Third Respondent. There was accordingly no-one in the NPA better placed than Adv Downer to know who the complainant was.

7. In the answering affidavit, the First Respondent attempts to change the stance adopted by Adv Downer by contending that:

7.1 The two Intervening Parties "*were not complainants in the specific matter involving Mr Zuma and Thint*"[11] and that the First Intervening Party's complaint was in respect of the German leg of the arms deal whereas the matters involving Mr Shaik and the Third Respondent arose out of the French leg.[12]

7.2 The offence committed by the Third Respondent was an offence within the "*public domain*" and that neither Intervening Party can show that they suffered any injury beyond that which the Applicant alleges to have been suffered by the general public.[13]

8. It is not necessary to deal with the second contention. We have already pointed out that the Third Respondent's alleged crimes are crimes against the public. He is alleged to have provided political patronage and protection for financial reward. Every South African

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[10] Record: Intervention Application at 56: Annexure **"RMMY10"** to the First Intervening Party's Founding Affidavit

[11] Record: Intervention Application at 251: the First Respondent's Answering Affidavit at para 73

[12] Record: Intervention Application at 252: the First Respondent's Answering Affidavit at para 74

[13] Record: Intervention Application at 252: the First Respondent's Answering Affidavit at para 75

would accordingly be entitled to enforce compliance with the rule of law as every South African is affected by such a crime against the public. This being so, it cannot be correct that no member of the public has standing to ensure that a lawful decision is taken regarding the withdrawal of the prosecution of such a crime.

9. As far as the first contention is concerned:

9.1 The First Respondent lacks the requisite personal knowledge to make the allegation and he has not attached confirmatory affidavits from members of his staff or prosecutors, ostensibly so as not to burden the court.[14] The First Respondent was challenged to produce an affidavit deposed to by one of his staff who would have been prosecuting the case against the Third Respondent confirming his allegation that neither of the Intervening Parties was the complainant.[15] No such affidavit was produced.

9.2 In the past, it was always accepted that the First Intervening Party (personally or on behalf of the Second Intervening Party, or both) was at least a complainant in regard to the alleged criminal conduct of the Third Respondent. The Third Respondent still appears to accept this because, according to Mr Hulley, neither of them was "*the primary and original complainant in regard to the criminal proceedings against the Third Respondent*".[16] It appears to be accepted that the Intervening Parties were complainants but it is disputed that they were the primary or original complainants.

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[14] Record: Intervention Application at 224: the First Respondent's Answering Affidavit at para 3

[15] Record: Intervention Application at 463: the First Intervening Party's Replying Affidavit at para 14

[16] Record: Intervention Application at 136 and further: the Third Respondent's Answering Affidavit at para 115 and further.

9.3 Indeed, until receipt of the First Respondent's answering affidavit, there was never a denial from anyone in the NPA regarding the First Intervening Party's status as complainant.[17] The First Intervening Party was allowed by the NPA to make written submissions to the First Respondent prior to his deciding not to proceed with the prosecution of the Third Respondent. The only reason why the NPA allowed this, was because it regarded the First Intervening Party as the complainant.

9.4 In any event, the Third Respondent's contentions in his answering papers demonstrate how interwoven the allegations regarding the German and French legs are. The Third Respondent contends that the French armament supplier Thales (often referred to in the reported decisions as the "*Thomson-CSF/Thales/Thint group*") only became a member of the German Consortium for the supply of corvettes as a subcontractor after the award of the contract to the Germans.[18] The Constitutional Court recorded the following regarding the Third Respondent's conduct in respect of the Thomson-CSF/Thales/Thint group in **S v Shaik and Others** 2008 (5) SA 354 (CC):

> "[46] The concern of Thomson-CSF (France), as candidly admitted by Mr Moynot in his evidence, was to go into partnership with a company that would have as a backer a person of significant influence in government. It had withdrawn from the proposed joint venture with Nkobi Investments when doubts had been raised as to whether it was such a company. At the meeting of 2 July 1998, Mr

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[17] Record: Intervention Application at 463: the First Intervening Party's Replying Affidavit at para 12. At para 13 it is explained that the First Intervening Party's written submissions were expressly premised on him being an initial complainant. When he thereafter wrote to the NPA to register his unhappiness at having been refused an opportunity to make oral representations, he did so again in his capacity as complainant. At no stage has the NPA refuted his contention in this regard.

[18] Record: Intervention Application at 93 and further: the Third Respondent's Answering Affidavit at para 23 and further.

> Zuma put that doubt to rest. And what is more, it is clear from Mr Shaik's letters (and from the minutes of the shareholders' and directors' meeting of Thint Holding and Thint in June 1998) that he wanted the meeting between Thomson-CSF (France) and Mr Zuma because he knew that the French company needed to understand from Mr Zuma that he supported Mr Shaik and would afford the influence that it sought."

9.5 It is now contended that the influence of the Third Respondent could not have assisted the Thomson-CSF/Thales/Thint group in respect of one part of the arms deal while it is presumably accepted for purposes of argument that it could have assisted the group in respect of another part of the arms deal. In truth no such fine distinctions can be drawn, and no such distinctions were drawn hitherto.

9.6 It must be kept in mind that the First Intervening Party's original complaint was a general one, pertaining to the deselection of the Second Intervening Party's information management system for the patrol corvettes being purchased for the South African Navy.[19] Resulting from that complaint followed, in due course, the prosecution of Mr Shaik and the intended prosecution of the Third Respondent.[20]

9.7 It is submitted that it is not the task of this Court in these proceedings to determine if and how the Third Respondent's influence played a role in the subcontracts awarded to the Thomson-CSF/Thales/Thint group. It is submitted that on the papers before this Court, it must be concluded that the First Intervening Party (personally or on behalf of the Second Intervening Party, or both) is at least a complainant in regard to the alleged criminal conduct of the Third Respondent.

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[19] Record: Intervention Application at 464: the First Intervening Party's Replying Affidavit at para 15.

[20] Record: Intervention Application at 464: the First Intervening Party's Replying Affidavit at para 15.

9.8 In any event, if this Court decides to deal with this issue, it should be done a *prima facie* basis and determined by the founding papers of the Intervening Parties, in which they claim to be complainants.[21]

10. We accordingly submit that the Intervention Application should be decided on the basis that the Intervening Applicants were complainants.

C. THE STANDING OF A COMPLAINANT IN THE REVIEW

11. The Respondents contend that a complainant has an interest in the question as to whether or not a prosecution is instituted in regard to the matter complained of only when such complainant would be entitled to institute a private prosecution under section 7 of the Criminal Procedure Act 51 of 1977 ("the CPA").[22]

12. Section 7(1)(a) of the CPA provides:

> "In any case in which an attorney-general declines to prosecute for an alleged offence ….. (a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence …. may, subject to the provisions of section 9, either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence."

13. The Respondents attempt to place the Intervening Parties beyond the scope of section 7 by contending that the wrong complained of is one

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[21] **Steel and Engineering Industries Federation and Others v National Union of Metalworkers of South Africa** (1) 1993 (4) SA 190 (T) at 191I - J, in which Myburgh J stated that an "objection taken in limine to the locus standi of an applicant must be dealt with on the assumption that all the allegations of fact relied on by the party are true".

[22] Record: Intervention Application at 90 and further: the Third Respondent's Answering Affidavit at para 11 and further; Record: Intervention Application at 251; the First Respondent's Answering Affidavit at para 72

against the Second Intervening Party[23] and that it is not a "*private person*".[24]

14. It is submitted that the issue of the standing of the Intervening Parties can never be determined with reference to whether they would have the right to institute a private prosecution. If so, a company would never have standing because it cannot be a private prosecutor in terms of section 7. If, therefore, the complainant in any particular matter were a company, it would follow from the Respondents' contention that such a complainant would never be able to show that it has an interest in the prosecution. This cannot be correct.

15. The correct approach, as we have already pointed out in our submissions in the Rule 6(11) Application, is that there is a need to uphold the rule of law, particularly where constitutional provisions are at stake, and this requires a more objective approach to be followed which focuses less on the interest of the applicant.[25] We have also

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[23] Record: Intervention Application at 91: the Third Respondent's Answering Affidavit at para 14

[24] Record: Intervention Application at 251; the First Respondent's Answering Affidavit at para 72.3

[25] See, further, **Ferreira v Levin NO; Vryenhoek v Powell NO** 1996 (1) SA 984 (CC) (1996 (1) BCLR 1) para 230:

> "As the arm of government which is entrusted primarily with the interpretation and enforcement of constitutional rights … [the courts carry] a particular democratic responsibility to ensure that those rights are honoured in our society. This role requires that access to the courts in constitutional matters should not be precluded by rules of standing developed in a different constitutional environment in which a different model of adjudication predominated. In particular, it is important that it is not only those with vested interests who should be afforded standing in constitutional challenges, where remedies may have a wide impact."

De Ville **Judicial Review of Administrative Action in South Africa** (2003) at 405:

> "With the emphasis being placed upon the objective (in)validity of law of conduct (as opposed to the subjective positions of the parties to the dispute) the standing of litigants becomes less important in constitutional (and administrative law) cases. Of primary importance, as pointed out by O'Regan J is upholding the Constitution… This approach, with its emphasis on maintaining the rule of law stands radically opposed to the approach of the courts under the common law, which was based rather on a subjective standard of control…".

Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape Provincial

pointed out that the broad approach to standing in constitutional matters cannot be reconciled with a strict interpretation of the interest which an applicant must have in review proceedings. The approach of the Respondents, namely that section 7 of the CPA sets the test to be adopted, is even narrower than the common law test for standing in commercial matters and it is in our submission clearly inappropriate.

16. Both the Intervening Parties have alleged prejudice as a result of the crimes allegedly committed by the Third Respondent. Certainly, if is accepted that they are complainants in the matter against the Third Respondent, then they should be accorded standing in a review of the decision not to prosecute him. The complainant's interest in a prosecution is recognised by several provisions of the CPA:

16.1 In terms of section 179 of the Constitution and section 22 of the CPA, the NDPP may review a decision to prosecute or not to prosecute only after consulting, *inter alia*, the complainant.

16.2 In terms of section 105A of the CPA, the NPA may enter into plea and sentence agreements after affording the complainant the opportunity to make representations regarding the contents of the agreement, and the inclusion in the agreement of a condition relating to compensation or the rendering to the complainant of some specific benefit or service in lieu of compensation for damage or pecuniary loss.

16.3 In terms of section 299A of the CPA, the complainant may become involved in parole board hearings in respect of certain offences. See, also, the Directives Regarding Complainant

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Government and Another 2001 (2) SA 609 (E) at 623 D:

> "Flexibility and a generous approach to standing in a poor country is 'absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realisation of the constitutional objective'."

Participation in Correctional Supervision and Parole Boards GN R248 in GG 28646 of 7 April 2006, adopted under the CPA.

17. The interest of the complainant is accordingly specifically recognised in respect of decisions to prosecute, as well as decisions in respect of sentence and release. In terms of the approach adopted to standing in public law, it follows that a complainant must have standing to review in a matter such as the present.

D. CONCLUSION

18. For all the above reasons, it is submitted that the Intervention Application should be granted with costs, such costs to include the costs of two counsel.

S P ROSENBERG SC

H J DE WAAL
Applicant's Counsel

Chambers
Cape Town
13 May 2010

LIST OF AUTHORITIES

1. Erasmus and others *Superior Court Practice*
2. **S v Shaik and Others** 2008 (5) SA 354 (CC)
3. **Steel and Engineering Industries Federation and Others v National Union of Metalworkers of South Africa** (1) 1993 (4) SA 190 (T)
4. **Ferreira v Levin NO; Vryenhoek v Powell NO** 1996 (1) SA 984 (CC) (1996 (1) BCLR 1)
5. De Ville **Judicial Review of Administrative Action in South Africa** (2003)
6. **Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape Provincial Government and Another** 2001 (2) SA 609 (E)