IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. 5867/2013

In the matter between:

GASTON SAVOI	**FIRST APPLICANT**
INTAKA HOLDINGS (PTY) LTD	**SECOND APPLICANT**
FERNANDO PRADERI	**THIRD APPLICANT**

and

THE NATIONAL PROSECUTING AUTHORITY	**FIRST RESPONDENT**
THE SOUTH AFRICAN POLICE SERVICE	**SECOND RESPONDENT**

JUDGMENT

Delivered on: 23 February 2018

MNGUNI J

[1] This application is a sequel to the permanent stay application launched on 27 May 2013 by the applicants against the State. The applicants are amongst the accused in two prosecutions currently pending in KwaZulu-Natal and the Northern Cape. They are facing various charges including, corruption, racketeering, money laundering and fraud. The permanent stay application relates to these charges and is predicated on the alleged evidence of systemic and systematic violations of the applicants' fundamental rights by the respondents. The applicants assert that the abuses of prosecutorial power by the respondents are so egregious that it would not

be possible for the applicants to receive a fair trial. They contend also that any prosecution against them would bring the administration of justice into disrepute.

[2] The applicants have identified the alleged abuses in the permanent stay application to include:

(a) repeated violations of the applicants' legal professional privilege which occurred through the police seizing, keeping and utilising in their reports documents which are subject to such privilege and which go to the heart of the applicants' defence in the criminal trial;

(b) deliberate and concerted infringements of the applicants' constitutional rights by detaining the first and third applicants unlawfully and in circumstances where detention was unnecessary, seeking to punish the first applicant by opposing his release on bail in circumstances where palpably there were no grounds to do so, restricting the first applicant's right to communicate with his legal representatives, unreasonably seizing the applicants' property and hampering the applicants' business, disregarding the presumption of innocence and ignoring and violating binding court orders made in favour of the applicants;

(c) adopting an impermissible "convict-at-all-costs" approach in the State's dealings with the applicants; and

(d) the unlawful, irrational and inexplicable refusal by Advocate Noko (Noko), who is the Director of Public Prosecutions in KwaZulu-Natal, to withdraw the charges against the applicants, in circumstances where charges have been withdrawn against certain of the applicants' co-accused who are alleged to be politically connected on the ground that the evidence against them was unconvincing, unsubstantiated and insufficient to ground a conviction beyond a reasonable doubt.

[3] The permanent stay application is opposed by the State and is pending in this court. The applicants have now brought this interlocutory application in terms of

Uniform rule 35(11) seeking an order directing the respondents to produce certain documents which they contend go to the heart of what they are alleging in the permanent stay application and relate to the conduct of the prosecuting authority in regard to the decision to withdraw charges against the alleged politically connected Nkonyeni and Mabuyakhulu. They contend that the respondents would be seeking to rely on the same evidence against the applicants which the respondents have concluded would be insufficient to sustain a successful prosecution against Nkonyeni and Mabuyakhulu, but have refused to withdraw charges against the applicants. The applicants contend that these documents are relevant to assess the prosecutorial conduct and motive in conducting the criminal case against them and that the documents will assist them in the exercise of their rights and in placing before the court hearing the permanent stay application with all the information relevant to the determination of whether the alleged abuses justify the permanent stay of prosecution. The applicants seek to have the State's opposition in the permanent stay application struck out should the respondents fail to provide the requested documents and an order directing the respondents to pay their costs on an attorney and client scale including the costs of two counsel. The documents requested by the applicants are:[1]

'3.1 Documentation leading to the decision to remove advocate Dunywa from the case (including documents indicating who took the decision, when it was taken and what the reasons were for the decision);

3.2 Letters and correspondence (presumably to the accused) referred to by advocate Noko in her handwritten notes recording her decision to withdraw the charges ("*withdrawal decision*");

3.3 Correspondence exchanged between the prosecution team amongst themselves or with the Head Office in Pretoria in respect of each of the meetings held (including but not limited to the meetings of 20 July 2012, 8 August 2012, 13 August 2012 and 20 August 2012) and including all emails, agendas for meetings, hand-written notes, memoranda and/or any other documentation (electronic or otherwise) that formed the basis of, or were taken into account in respect of the withdrawal decision;

[1] Notice of Motion dated 30 May 2016.

3.4 Minutes of the meeting of 8 March 2012 at VGM disclosed in the memorandum dated 25 April 2012, including correspondence, notes, internal memoranda and/or any other documentation (electronic or otherwise) that formed the basis of, or were taken into account in respect of the withdrawal decision; and

3.5 All documents which are obliged to be disclosed under the order of Vahed J in case number 4962/2013, namely: "*the record of the decision relating to the decision to withdraw charges against [Peggy Yoliswa Nkonyeni] and [Michael Mabuyakhulu]*".'

[4] I appreciate that I have been called upon to adjudicate only on the rule 35(11) application. This is, however, not a hermetically sealed inquiry because of the manner in which litigation has been conducted in the entire matter so far. Hence, Willem Schalk Burger Van der Colff (Van der Colff) the applicants attorney of record stated in para 4 of the founding affidavit that for the purposes of economy, the permanent stay application papers will not be annexed to his affidavits. He stated that all allegations made in the permanent stay application are expressly adopted and incorporated. He went further and said that this interlocutory application is to be viewed in light of the permanent stay application in which the applicants allege that they have suffered an irreparable violation of their fair trial rights because of the conduct of the respondents. It follows therefore that I am obliged to range beyond the rule 35(11) application to a consideration of some matters upon which this court is yet to finally pronounce.

[5] The chronology of the common cause events preceding this application, as they emerge from the affidavits, may be summarised as follows. On 15 July 2014 the applicants delivered a notice in terms of Uniform rule 35(12) to the respondents requesting the respondents to produce, make available for inspection and permit copies to be made of the documents referred to or referenced in the respondents answering affidavit in the permanent stay application. The respondents did not respond to this notice. On 12 August 2014 the applicants delivered a notice of irregular step in terms of Uniform rule 30A to the State (the first rule 30A notice). Despite the elapse of more than ten days, no response was received to the first rule 30A notice. On 3 September 2014, the applicants launched an application to compel in terms of rule 30A (the first compelling application).

[6] The first compelling application was heard on 11 November 2014 before Henriques J and was, up to that date, unopposed. On the morning of the hearing respondents' counsel appeared at court and sought an indulgence to oppose the matter and to file an affidavit setting out the grounds of their opposition. The learned judge granted the respondents indulgence and adjourned the matter to 8 December 2014. The learned judge ordered the respondents to show cause why a punitive costs order ought not to be granted against them and directed the respondents to file their answering affidavits on or before 1 December 2014, indicating their grounds for refusing to produce the documents requested and their explanation for failing to comply with the time limits. By 8 December 2014, which was the date for the next court appearance, the respondents had failed to comply with the court order. Again, the matter served before Henriques J on that day. The learned judge, after observing that the respondents "appear to have adopted a contemptuous attitude" towards her order of 11 November 2014, made an order in the following terms:

'1. The failure of first and second respondents to comply with the provisions of Rule 35 (12) of the Uniform Rules of court are unlawful.

2. The respondents, being the first and second respondents, are directed within ten (10) days of today's date to comply with the provisions of Rule 35 (12) and to produce the documents referred to in the applicants' Rule 35 (12) notice of 15 July 2014 that they have not supplied.

3. Directing that should the first and second respondents fail to comply with the orders issued in paragraph 2 above that the opposition to the permanent stay application be struck out, and

4. The first and second respondents are directed to pay the applicants' costs occasioned by the hearings on 11 November and today being 8 December 2014 on an attorney/client scale, such costs to include the costs of two counsel.'

[7] Subsequent to the court order of 8 December 2014, the respondents produced most of the requested documents in the first compelling application. According to the applicants, after perusal of the produced documents it appeared to them that there were further documents in the possession of the respondents which

they contended were directly relevant to the determination of the permanent stay application and which would enable the applicants to advanced their case and harm that of the respondents. In consequent on 28 July 2015 Van der Colff addressed a letter to the Kgosi Gustav Lekabe (Lekabe) of the respondents' attorneys based in Johannesburg intimating that the applicants intended filing a replying affidavit in the permanent stay application but might require further documentation from the respondents. On the same day Lekabe responded and invited Van der Colff to urgently advise him of the further documents which the applicants might require from the respondents.

[8] By letter dated 6 August 2015 Van der Colff advised Lekabe of the additional documents which he alleged were discoverable in terms of rule 35(11). In the same letter Van der Colff referred to an article published on 28 July 2015 in the Daily Maverick newspaper in which Noko had published a response to an earlier article and had referred to a memo she reportedly received from the prosecution team which ostensibly caused her to withdraw the criminal charges against ten of the applicants' erstwhile co-accused including Nkonyeni and Mabuyakhulu. On 17 August 2015 Lekabe addressed a letter to Van der Colff enclosing a copy of the memorandum from the prosecution team addressed to Noko dealing with withdrawal of the charges against the applicants' erstwhile co-accused.

[9] On 24 August 2015 Van der Colff addressed a further letter to Lekabe requesting the following documents and information which Van der Colff contended was necessary for a proper understanding of the memorandum of the prosecution team:

'3.1 Minutes of the meeting which took place during March 2012 ("**the First Meeting**") at the conclusion of which "*a decision was taken that certain accused must be removed (charges must be withdrawn)*".

3.2 Which members of the KZN prosecuting team were present and took the decision at the First Meeting?

3.3 Which senior officers from the National Office were present and took the decision at the First Meeting?

3.4 Transcripts of the First Meeting/notes/memoranda/recordings, including the written decision and reasons.

3.5 In respect of which "*certain accused*" was the decision taken that the charges must be withdrawn and the prosecuting team tasked with redrafting an indictment?

3.6 Which members of the KZN prosecution team were involved in revisiting the evidence against each and every accused, and which members "*came to a conclusion that there was insufficient evidence for a successful prosecution*" of the listed accused?

3.7 In respect of the meeting on 13 August 2012 with Advocate Noko ("the Second Meeting"), we require transcripts of the minutes of the Second Meeting and/or any notes/memoranda/recordings, including the written decisions and reasons.'

[10] Lekabe did not respond to this request. This prompted Van der Colff to address two further letters to him dated 27 August 2015 and 28 September 2015 requesting a response to the letter of 24 August 2015. By that time there was a pending application (the DA application), launched by the Democratic Alliance (the DA) against the Acting Director of Public Prosecutions in KZN (the ADPP-KZN) and three others in which the DA was seeking an order to review and set aside the decision of the ADPP-KZN to refuse to grant the DA request for access to information under the Promotion of Access to Information Act[2] (PAIA) dated 30 August 2012. Nkonyeni and Mabuyakhulu respectively were cited as the third and fourth respondents in the DA application. The PAIA request was mainly directed at accessing the record of the decision to withdraw the charges against the two. On 25 September 2015 Vahed J handed down judgment in the DA application and made the following order:

'(1) The First Respondent's decision to refuse to grant the Applicant's request for access to information dated 30 August 2012 is set aside.

[2] 2 of 2000.

(2) The First Respondent is to furnish to the Applicant, within 15 days of this Order, the record of the decision relating to the decision to withdraw charges against the Third and Fourth Respondents.

(3) The Respondents, jointly and severally, the one paying the others to be absolved, are to pay the Applicants' costs such costs to include those consequent upon the employment by the Applicant of two counsel.'

[11] Subsequent to the order of Vahed J, Van der Colff dispatched a letter to Lekabe requesting the respondents to produce the documents which the respondents had been ordered to release to the DA pursuant to that order. By 8 October 2015 the respondents had not given the applicants the requested documents despite Van der Colff having made two requests. On 8 October 2015 Van der Colff addressed a further letter to Lekabe reminding him of the respondents' constitutional obligations under sections 195 and 237 of the Constitution[3] and threatened to bring an application to compel the production of the requested documents if the respondents failed to produce them by 16 October 2015.

[12] The threat of bringing an application to compel seemed to have worked. On 2 November 2015 Lekabe addressed a letter to Van der Colff and gave answers and information to the questions contained in Van der Colff's letter dated 24 August 2015 which are enumerated in para 9 above. With regard to paras 4 and 5 of this letter Lekabe pertinently responded as follows:[4]

'The removal of Advocate Dunywa from the case, just as any other prosecutor in the employ of the National Prosecuting Authority falls within the prerogative of the NPA and does not in any way prejudice the accused in the conduct of their case'.

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[3] The Constitution of the Republic of South Africa, 1996.

[4] Paras 4 and 5 of the letter dated 24 August 2015 provide:

'4. Finally, in respect of the newspaper article, a copy of which was annexed to our letter of the 6th instant, advocate Noko indicates that a decision was taken to remove advocate Dunywa from the case.

5. In this regard, please will you provide us with the following information:

5.1 Who took that decision?

5.2 When was it taken?

5.3 What were the reasons for the decision?'.

In the same letter he enclosed an internal memo from Anthony Mosing (Mosing) with the concurrence of Lawrence Mrwebi and handwritten notes purportedly taken by Noko at various meetings with the KZN prosecution team which led to the withdrawal of the charges against Nkonyeni and Mabuyakhulu. Mosing is an Advocate in the Office of the first respondent who is dealing with the permanent stay application presently pending before this court.

[13] On 6 November 2015 Van der Colff addressed a letter to Lekabe advising him that the handwritten notes provided by him were generally illegible and that in the notes it appeared that Noko referred to certain letters written by her to the applicants' erstwhile co-accused recording her decision to withdraw charges against them. Van der Colff requested copies of those letters as well. By letter dated 3 December 2015 Lekabe responded to Van der Colff's letter of 6 November 2015 and enclosed the typed version of the handwritten notes. In respect of the letters to the applicants' erstwhile co-accused Lekabe indicated that the respondents had not been successful in tracing them but undertook to provide them to Van der Colff as soon as they were found.

[14] Fast forward, on 14 April 2016 Van der Colff addressed a letter to Lekabe reminding him that the requested documents mentioned in para 3 of this judgment remained outstanding. Van der Colff made it clear that should the respondents fail to produce the requested documents, the applicants would bring a further application to compel discovery and seek an appropriate costs order. Lekabe did not respond to this letter. Nevertheless on 22 April 2016 Van der Colff sent another letter to him giving him an ultimatum to deliver the requested documents by the end of April 2016. Again, no response was received.

[15] The upshot was the present application launched on 30 May 2016 seeking an order as foreshadowed in para 3 above. The respondents did not file a notice of opposition until the applicants set the matter down on the unopposed roll on 4 July 2016. On 4 July 2016 the respondents' counsel appeared in court. The matter served before Seegobin J who, by the consent of the parties, adjourned it sine die after the respondents had pleaded for time to file their opposing papers. Seegobin J ordered the respondents to file their answering affidavits (if any) on or before 19 July

2016 and directed that such affidavits should also deal with the question of condonation for the late opposition to the application. The respondents were also directed to pay the costs occasioned by the adjournment of the matter on that day on an attorney and client scale.

[16] Pursuant to Seegobin J's order Lekabe and Mosing filed their answering affidavits. In his answering affidavit, Lekabe also dealt with the issue of condonation for the late opposition of the application as directed by the court.

[17] With this background I turn to deal with, first, the issue of whether the respondents have justified their previous failure to file any opposing papers within the time limits before the matter was set down on the unopposed roll for 4 July 2016. I hasten to point out that the application for condonation is opposed by the applicants.

[18] It is common cause that the rule 35(11) application was properly served on the respondents' Pietermaritzburg correspondent attorneys on 30 May 2016. Lekabe deposed that he was on leave from 23 May 2016 to 3 June 2016. He only returned to work on 6 June 2016. He stated that he read Van der Colff's letter of 27 May 2016 when he returned from leave. He only became aware of this application on 1 July 2016. By that time the application had already been set down for hearing on the unopposed roll on 4 July 2016. He stated that Patrick John Kevan (Kevan) who is dealing with the matter at the Office of the State Attorney in KZN did not forward the application papers to him when he received them. When he enquired from Kevan about his failure to send the application papers, Kevan told him that he was under the impression that Van der Colff had sent the application papers to Lekabe via email as a matter of courtesy. He was also not aware of an email which Kevan sent to him on 31 May 2016.

[19] Kevan deposed to an explanatory affidavit and confirmed receipt of the rule 35(11) application papers on 30 May 2016 via email from Van der Colff. He noticed that Lekabe was also an addressee in the said email and assumed that the application papers would come to his attention. He therefore did not see the need to resend them to him. On 3 June 2016 he received a further email from Van der Colff

which was also addressed to Lekabe. Again, he assumed that Lekabe was aware of this application. On 31 May 2016 the respondents' Pietermaritzburg correspondent emailed the application papers to his office. Because of the previous emails which Van der Colff had sent to him and Lekabe he assumed that Lekabe was aware of the matter and did not forward the application papers to him. He only learnt on 30 June 2016 that Lekabe was not aware of the application and it was then that he contacted Lekabe's office to establish what was happening in the matter. He accepted that this was an error on his part.

[20] The applicants opposed the condonation application. In his replying affidavit which incorporated the grounds of opposition, Van der Colff asserted that Lekabe received and read his letter of 27 May 2016 because Lekabe referred to and quoted from that letter in his letter of 1 July 2016 addressed to him. He asserted that Kevan wrote to him on 31 May 2016 and indicated that he had forwarded his letter of 27 May 2016 to Lekabe and was awaiting his further directions in the matter. He asserted that because of these communications between him on the one hand and Lekabe and Kevan on the other, both Lekabe and Kevan knew as far back as 27 May 2016 of the applicants' intention to bring this application, and were forewarned of its importance in light of the court's duty to consider all the relevant documents in the hands of the State. He also sent a "WhatsApp" message to Lekabe on 30 May 2016 advising him that the application "papers will be served and filed on today".[5]

[21] He asserted that on the same day he also sent a series of six emails to Lekabe and Kevan. In one of the emails he enclosed a copy of the founding affidavit relating to this application. According to him the emails sent to Lekabe elicited "read receipts". On 3 June 2016 he also had a telephone conversation with Lekabe concerning the postponement of the permanent stay application which was set down on 10 June 2016. He thereafter sent an email to Lekabe confirming what Lekabe had conveyed to him in respect of this application. According to him, Lekabe had stated the following:[6]

'You have not had an opportunity to consider our papers in the most recent compelling application in terms of Rule 35 (11). You will consider these papers in due course. Your

[5] Annexure "A".
[6] Annexure "W16".

initial view is, however, that the application is requesting documents to which our client is not entitled and therefore without merit'.

He asserted that the email sent to Lekabe received a "read receipt" indicating that Lekabe had read it on the same day. According to him Lekabe's conduct made it plain that, as at 3 June 2016 at least, the respondents were aware that this application had been launched and had formed a prima facie view on its merits. During their telephone conversation Lekabe did not assert to him that he was not aware that the application papers had been served or that this application had been brought. He accused Lekabe of not taking the court into his confidence and asserted that Lekabe did not make any reference in his affidavit to the emails and "WhatsApp" message sent to him, telephone conversation and letters sent to him between the period 30 May 2016 and 29 June 2016.

[22] Riaad Adams (Adams) filed a confirmatory affidavit in which he dealt with a series of "read receipts" received by Van der Colff following the emails he sent to Lekabe. According to him the "read receipts" are automatic emails generated by Microsoft Outlook on the machine on which the email is read and sent automatically to the person who sent the original email which has been read. He confirmed that in each case the read receipt email was sent from the Department of Justice system where Lekabe is employed and was sent in response to emails sent by Van der Colff to Lekabe.

[23] On 16 November 2016 Lekabe filed what he called a "supplementary answering affidavit" in which he dealt with some of the issues relating to the condonation application raised by Van der Colff in his replying affidavit. Lekabe stated that he had no access to his email and correspondence whilst he was on leave. He maintained his version that he had become aware of the letters of 27 and 31 May 2016 on his return from leave on 6 June 2016. He was not aware of any "WhatsApp" message sent to him by Van der Colff and was not able to find it after diligent search. He had not personally read Annexures "W4" to "W9" to the replying affidavit because he was still on leave at that time. He stated that it was possible that his secretary Phina Dikgale (Dikgale) who had access to his emails might have opened his emails and not necessarily read them. Dikgale did not advise him of any

emails or correspondence that came in during his leave of absence. Dikgale filed a confirmatory affidavit in this regard.

[24] Subsequent to that Van der Colff filed a conditional supplementary replying affidavit in which he contended that Lekabe's supplementary answering affidavit was an abuse of court and falls to be disregarded as pro non scripto because Lekabe did not seek leave of this court to file it and it was not accompanied by a condonation application. He contended that in the absence of such leave, a party's purported filing of a further affidavit beyond the replying affidavit is impermissible.

[25] As I have already pointed out, on 4 July 2016 Seegobin J granted leave to the respondents to file their answering affidavits on or before 19 July 2016 and ordered that such affidavits should also deal with the question of condonation for late opposition to the application. It seems to me that to that extent the respondents were within their rights to file further affidavits to deal with the averments raised in Van der Colff's replying affidavit relating to the question of condonation without seeking leave of this court. Van der Colff has also criticised Lekabe for his failure to provide an explanation for the delay in the filing of this affidavit. I find this criticism well founded. Having said that, I find that it will be in the interests of justice that all the affidavits be taken into account in order to decide the merits of the dispute between the parties, unfettered by technicalities.

[26] Having reached that conclusion, I turn to deal with the question of condonation. Lekabe does not deny the emails referred to in para 11 of Van der Colff's replying affidavit but states that he was not privy to them as he was on leave at the time. Lekabe's evidence is that he saw and read the rule 35(11) application for the first time on 1 July 2016. The parties are in dispute on whether Van der Colff's email of 3 June 2016 (Annexure "W16") is the correct recordal of the telephone conversation between Van der Colff and Lekabe on 3 June 2016. According to Lekabe this telephone conversation occurred at the time of his leave and when he was on holiday in Durban. His evidence is that Annexure "W16" does not represent a completely correct recordal of the discussion between them. He was not aware at the time of the impending application. All he knew was that the applicants intended to bring an application of this nature.

[27] Not according to Van der Cloff. He asserts that Lekabe has failed to disclose all the correspondence between the two of them including the correspondence wherein Lekabe admits knowledge of the application. He asserts that Lekabe did not explain his failure to disclose the correspondence or to deal with the replying affidavit's averments that showed his evidence to be demonstrably false, including that he had knowledge of this application at least as early as 3 June 2016. He insisted that Annexure "W16" is a correct recordal of the telephone conversation of 3 June 2016. In the circumstances, he contends that Lekabe has failed to provide a full detail and accurate account of the reasons for the delay for the entire period despite being ordered to provide such by the court on 4 July 2016.

[28] In *Van Wyk v Unitas Hospital & another (Open Democratic Advice Centre as Amicus Curiae)* the Constitutional Court said:[7]

'This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success'. (Footnotes omitted.)

[29] An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable (*Van Wyk* supra). In terms of the Rules of this court the respondents were required to file the opposing papers by 21 June 2016. It is common cause that the respondents filed notice of opposition and the answering affidavit on 19 July 2016 after being ordered by Seegobin J to do so. It has not been argued, correctly in my view, that the delay is inordinate. The thesis advanced on behalf of the applicants is the absence of (a) a reasonable explanation and (b) his alleged failure to disclose certain correspondence which Van der Colff contends that Lekabe was aware of this application at least as early as 1 June 2016.

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[7] *Van Wyk v Unitas Hospital & another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) para 20.

As stated in *Van Wyk* prospects of success on the merits is also an important factor to be considered in the application of this nature. It is clear from the evidence of Van der Colff and Lekabe that most of the aspects on the issue of whether Lekabe was on leave when the letters and emails were sent to him by Van der Colff are common cause.

[30] The point of departure is whether Lekabe became aware of this application whilst he was on leave and/or immediately on his return to the office. On this aspect, the versions of the parties are mutually destructive. I have been invited by the applicants' counsel to infer based on the read receipts received from the emails sent by Van der Colff to Lekabe, correspondence and the telephone conversation of 3 June 2016 that Lekabe must have been aware of this application. Obviously, these are motion proceedings. It follows therefore that on accepted rules of motion proceedings, the respondents' version must stand. I am satisfied that the consideration of fairness to both parties, the importance of the matter, the interests of justice and the prospects of success on the merits demand that the condonation for the late filing of the respondents' answering affidavit be granted.

[31] Turning to the question of whether the applicants are entitled to the documents sought I pause to record that rule 35(11) gives the court the power, in any proceedings, to order the production of documents that are relevant to any matter in question in such proceedings. It provides:

'(11) The court may, during the course of any proceeding, order the production by any party thereto under oath of such documents or tape recordings in his power or control relating to any matter in question in such proceeding as the court may think meet, and the court may deal with such documents or tape recordings, when produced, as it thinks meet'.

[32] In para 3 above I have captured the five categories of the requested documents which the applicants seek to compel the respondents to produce. This is then the convenient stage to deal with them in sequence.

[33] As to the first category: The respondents have refused to provide this information to the applicants on the ground that the removal of Dunywa from the case, just as any other prosecutor in the employ of the first respondent, falls within

the prerogative of the first respondent and does not in any way prejudice the applicants in the conduct of their case.

[34] The applicants' counsel accepts that in an ordinary criminal prosecution, this may be so. The high water mark of his argument under this category is that the permanent stay application is predicated on the grounds of prosecutorial abuse and the unlawful exercise of prosecutorial discretion. He submitted that because of this factor this information becomes vital to the proper ventilation of the issues at stake in the permanent stay application. In his submission the first respondent's refusal to provide this information adds fuel to the applicants' suspicion that Dunywa was removed from the prosecution team for improper motives and those motives formed part of the prosecutorial abuses which are catalogued in the permanent stay application.

[35] As stated in para 4 above, I have been obliged to range beyond this application and to consider the grounds on which the permanent stay application is predicated in the exercise of my discretion whether to compel the respondents to provide the documents to the applicants under this category. I observed that on 2 November 2015 the respondents advised the applicants of their stance on this issue. As can be seen, the applicants did not provide facts from which this court could draw 'some' conclusion that Dunywa might have been removed from the prosecution team for improper motives. Van der Colff refers to the suspicion without telling this court more. I am unable to find any iota of evidence which enables me to exercise the discretion in favour of the applicants in relation to this category of documents. In the circumstances I endorse the stance adopted by the respondents in this regard.

[36] As to the second category. Initially the respondents did not produce the required documents under this category until this application was launched. On 15 July 2016 and subsequent to the launching of this application the respondents disclosed five one-page letters dated 16 August 2012 addressed by Noko to the applicants' erstwhile co-accused advising them that the charges against them would be formally withdrawn when the matter comes before the court. I observed that on 3 December 2015 Lekabe addressed a letter to Van der Colff advising him that the respondents had unsuccessfully traced these letters. He undertook to continue

tracing them and to provide the letters to the applicants as soon as they became available. The respondents conceded that these letters were provided to the applicants belatedly but they emphasised that the applicants were advised as far back as 3 December 2015 that the respondents were busy tracing the letters.

[37] The applicants' counsel submitted that the late production of these letters after this application was launched justifies the filing of this application. Notwithstanding the vigour of the applicants' counsel argument on this point, the common cause facts say otherwise. As already stated, the evidence demonstrates that the respondents undertook to provide these letters to the applicants as soon as they were found. In my view it has not been satisfactory explained why it was necessary to include this category of documents in this application. In any event, I find it incomprehensible as to what extent a letter directed to an erstwhile co-accused informing him of the withdrawal of the charges against him would assist to advance the applicants' case in the permanent stay application. I must accordingly hold against the applicants on this argument.

[38] As to the third category. The applicants are amongst the accused in two prosecutions currently pending in KwaZulu-Natal and the Northern Cape. The applicants are already in possession of the witnesses' statements from the dockets on which the prosecution team would rely in pursuing these prosecutions. In addition, the applicants have been provided with the handwritten and typed notes of the meetings of 20 July 2012 and 8, 13 and 20 August 2012. The respondents have maintained their stance that the documents pertaining to the withdrawal of the charges against the applicants' erstwhile co-accused have been provided to the applicants.

[39] Applicants' counsel has sought to argue that the respondents have given two contradictory assertions regarding this category of documents. He submitted that in the first instance the respondents have stated that these documents are privileged as they pertain to the preparation for trial. In the second instance, he submitted that the respondents contended that they had already disclosed the requested documents under this category. Adumbrating this ground he submitted that the respondents were invited to indicate whether the notes of the meetings are the only

documents that grounded the decision to withdraw charges against the applicants' erstwhile co-accused and the respondents had failed to make such indication. He expressed the view that it is improbable that the decision to withdraw the charges was based only on these notes. He submitted that the applicants have a reasonable belief that there are more documents in possession of the respondents sought under this category.

[40] From an analysis of the evidence and contemporaneous documents it seems to me that the respondents drew a clear distinction between the two categories of documents under this head. The first category relates to the preparation for trial. The respondents have, correctly in my view, indicated that these documents are privileged. The second category relates to the withdrawal of charges and these have been provided to the applicants. I have not been provided with the surrounding facts on which the basis of "a reasonable belief that there are more documents" is founded. What, in my view, casts an oblique but significant shadow across the path of the applicants on this aspect is what the first applicant says in his founding affidavit in the permanent stay application. In para 221 thereof he states:

'I have to stress that no new evidence was made available which could have explained these extraordinary decisions by the prosecuting authority. Indeed, I can confidently say that the State case is the same as it always was. The only change has been personnel at the office of the National Prosecuting Authority. Advocates Simelane and Mlotshwa are out and Advocate Noko is now the acting DPP in KwaZulu-Natal. Certainly no new witness statements or documents were provided to the Defence and no witnesses added to the list. Indeed, none of the erstwhile accused feature as section 204 witnesses.'

[41] As to the fourth category. Under this head the respondents have stated that the first respondent has furnished all the documents pertaining to the withdrawal of the charges. They have also stated that any further documentation required is privileged as it pertains to the first respondent's preparation for trial. The applicants' counsel have advanced an argument similar to the one advanced under the third category above. In addition he submitted that the fact that "further documentation" is referred to by Mosing in his answering affidavit makes it clear that all the documentation has not been provided to the applicants.

[42] He submitted that the applicants in the founding affidavit have made it clear that all of the documentation which "formed the basis of or were taken into account in respect of the withdrawal of charges" is required for the applicants properly to run their case in the permanent stay application wherein they allege that the first respondent improperly exercised its discretion in withdrawing charges against the "politically connected accused" but not doing so against the applicants. He expressed the view that the reluctance of the first respondent to provide this information leads to an inference that the respondents have something to hide in respect of this documentation. He submitted that the applicants have a right to know on what basis it is alleged that the case against the politically connected accused was found to have been "insufficient evidence".

[43] I must confess I have strained to find any discernible features in the requested documents under this category and those requested under the third and fifth categories. To my mind what resonates in all three categories is that they all relate to the withdrawal of the charges against the applicants' erstwhile co-accused. In para 40 of this judgment I have already indicated why I am unable to exercise the discretion in favour of the applicants in relation to the requested documents under that category. That reasoning commends itself to me as applying equally to this category. It is common cause that the applicants have been provided with the handwritten and typed notes, minutes of the meetings, and statements of witnesses contained in the dockets and memorandum setting out how the decision to withdraw charges against the applicants' erstwhile co-accused including Nkonyeni and Mabuyakhulu was arrived at.

[44] With regard to the fifth category the respondents have stated that they have understood this request to refer to notes of meetings, memoranda and correspondence in respect of the decision to withdraw charges. I have already touched on the germane aspect of the requested documents under this category.

[45] The applicants' counsel submitted that access to the documents requested is fundamental to the proper ventilation of the permanent stay application which the applicant have brought against the state. He submitted that the documents requested go to the very heart of the permanent stay application and relate directly

and materially to the applicants' rights to a fair trial, the administration of justice and the rationality and lawfulness of the first respondent's decisions to withdraw charges against Nkonyeni and Mabuyakhulu.

[46] He expressed the view that, given that some of the behaviour by the respondents that has given rise to the permanent stay application has taken place behind closed doors, there may well be further grounds to justify the permanent stay application which will emerge from the documents requested but which the applicants are not aware of until they have had sight of them. He submitted that the respondents' failure to produce the requested documents has resulted in the applicants being unable to properly plead their case in the permanent stay application.

[48] I find the argument raised by the applicants' counsel under this case fundamental flawed. The flaw seems to lie in the fact that it is predicated on the search for material in the hope of being able to raise allegations of fact, as opposed to the elicitation of evidence to support allegations of fact which have been raised bona fide with adequate particularisation. It seeks to obtain information which may lead to eliciting evidence in general support of the applicants' case. It is anchored on an unsound foundation. In any event, not the slightest basis is placed before this court to support the relief that any of these documents (other than those already produced) exist at all. Further, it has not been demonstrated, if they do exist, that they can be of any assistance in the determination of any relevant issues which might impact on the relief sought in the permanent stay application.

[49] I find s 20(1) of the National Prosecuting Authority Act[8] apposite in this regard. It provides:

'(1) The power, as contemplated in s 179 (2) and all other relevant sections of the *Constitution*, to-

(a) institute and conduct criminal proceedings on behalf of the State;

(b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and

[8] 32 of 1998.

(c) discontinue criminal proceedings,

vests in the *prosecuting authority* and shall, for all purposes, be exercised on behalf of the *Republic*.'

[50] I shall make it plain that I have not, quite rightly, been told of any of the facts underlying the political situation in the withdrawal of the charges. This court is in no way concerned with the political merits, nor is it concerned with the wisdom, expediency or political consequences of the first respondents' conduct. The question is whether the applicants have provided facts from which this court can exercise its discretion in their favour. I have to judge the question wearing spectacles which exclude all political lines. It is common cause that the applicants were provided with internal memos and handwritten notes which were subsequently typed at their request. These documents and minutes of the meetings of the prosecution team set out the process followed by the respondents which culminated in the withdrawal of the charges against the applicants' erstwhile co-accused including Nkonyeni and Mabuyakhulu.

[51] On 28 November 2016 I heard argument on the matter and on completion of argument I reserved judgment. Surprisingly, on 6 December 2016 the applicants' attorneys launched an application to introduce further evidence in respect of the documents requested under category five of the main application.

[47] In his founding affidavit to this application Brett Michael Nicholson (Nicholson) deposed that at the hearing of this application on 28 November 2016, the respondents' counsel took an entirely different approach from that previously deposed to by Mosing. According to Nicholson, the respondents' counsel submitted that the documents in the Vahed J record consisted only of the handwritten and typed notes of the meetings and the withdrawal letters to the applicants' erstwhile co-accused, all of which had been provided to the applicants. He asserted that it was during this submission that I enquired from the applicants' counsel whether the applicants were seeking the "re-production" of the record, since the record had apparently already been provided to the applicants. He asserted that the applicants' counsel reiterated that what the applicants was seeking was the delivery of all the documents that form part of the Vahed J record so that the applicants could perform

a comparison exercise to see whether what had already been provided to them was concomitant with what had been provided to the DA following Vahed J's order. He asserted that until such time as the Vahed J record was produced, it was impossible for the applicants or the court to know whether the documents already provided to the applicants were coterminous with the documents constituting the Vahed J record.

[52] Nicholson asserted that this new argument took the applicants by surprise and appeared to suggest that the only documents in the Vahed J record were the memoranda and letters, which amount to 20 pages. He asserted that that was inconsistent with what Lekabe stated in his answering affidavit, where Lekabe attempted to limit the documents requested under the fifth category as encompassing only the memorandum and letters. He asserted that this stance was also inconsistent with the allegations contained in Lekabe's supplementary answering affidavit wherein he suggested that he did not know what the Vahed J record entailed and disputed its relevance. According to him he made enquiries after the hearing with Venns Attorneys and spoke to Mr Geyser who acted for the DA in the matter before Vahed J. Mr Geyser informed him that the record produced by the State in the DA application, following a compelling application, was vast and ran into thousands of pages. According to him, Mr Geyser informed him that the record was so voluminous that the State could not provide hard copies but instead provided electronic copies of the documents on compact disc. He asserted that what Mr Geyser said demonstrates beyond doubt that the 20-odd pages of memoranda and letters which have been provided to the applicants do not constitute the full extent of the Vahed J record, which runs into thousands of pages.

[53] In his answering affidavit Lekabe denied Nicholson's assertion and pointed out that during argument the respondents' counsel referred to Mosing's answering affidavit in the rule 35(11) application in which Mosing stated that the first respondent had furnished all the documents pertaining to the withdrawal of charges and that further documentation required is privileged as it pertains to the first respondent's preparation for trial. According to Lekabe, the respondents have provided all the documents that they were obliged to provide to the applicants in this matter. Lekabe pointed out that the new argument allegedly advanced by the respondents' arose in

argument in reply when the court enquired from the applicants' counsel whether the applicants were seeking "re-production" of the record and the applicants' counsel then stated for the first time that a rule 53 record was sought. Lekabe was steadfast in pointing out that this argument was advanced in the reply in response to the re-production question from the court. He asserts that the applicants, in bringing this application are actively abusing the court process as the purpose of seeking Vahed J's record is to engage in a comparison exercise to ascertain whether what had been provided to the applicants was concomitant with what had been provided to the DA following the Vahed J order. Lekabe pointed out that the "thousands of pages" referred to in this application constitutes to a large extent contents of the case docket which were provided to the applicants at their first appearance in the criminal court.

[54] On 22 September 2017 the application to introduce further evidence was heard. During the course of argument I enquired from the applicants' counsel whether the applicants were furnished with the statements of witnesses contained in the dockets relating to the charges the applicants are currently facing. The applicants' counsel conceded that the applicants are in possession of the statements of the witnesses relating to these prosecutions. It also became common cause that the DA to which the order of Vahed J relates is not involved in the criminal prosecution currently pending against the applicants. The applicants' counsel found it difficult to explain to this court why it was necessary to bring this application to introduce further evidence on the issue which was already squarely before the court for determination. To illustrate this point as early as 18 July 2016 Mosing deposed in the answering affidavit in the rule 35(11) application as follows:

"The first respondent has furnished all the documents pertaining to the withdrawal of charges. Any further documentation required is privileged as it pertains to the first respondent's preparation for trial".

[55] In *Mkwanazi v Van der Merwe & another*[9] Holmes JA identified the degree of materiality of evidence as one of the considerations which usually falls to be weighed in an application of this nature. The respondents have maintained their version that they considered the fifth category under the rule 35(11) application to comprise no more than letters, memoranda and deliberations pertaining to the withdrawal of

[9] *Mkwanazi v Van der Merwe & another* 1970 (1) SA 609 (A) at 616.

charges against Nkonyeni and Mabuyakhulu. They maintain that all such documents have been provided to the applicants.

[56] Having carefully considered this matter I am not pursued that the applicants have met the test as set out in *Mkwanazi*. It follows therefore that the application to introduce further evidence falls to be dismissed with costs.

[57] What remains to be considered is the question of costs. The general rule is that in the ordinary course costs follow the result. I am not satisfied in the manner in which the parties have conducted themselves in the litigation of this matter. However, having carefully considered the grounds upon which the permanent stay application is founded, I find that this application was ill-conceived. Nonetheless, I find it unacceptable that the attorneys for the respondents would take, as it can be seen in this judgment, such a long time to respond to simply queries and letters from the applicants' attorneys and to provide the requested information. In light of all that I am of the view that an appropriate costs order in respect of the condonation and rule 35(11) applications would be to direct that each party pays its own costs. Insofar as the application to introduce further evidence I find that there was no need to bring such an application. In the circumstances I am of the view that the applicants should pay the costs of that application.

[58] Pausing here for a moment, I am mindful of the fact that it is not necessary for me to express any definite view one way or the other in respect of the permanent stay application. It seems to me, however, that the proper forum to decide the issues raised thereon would be the trial court. In *Zuma v Democratic Alliance & others* Navsa ADP said:[10]

'It is incumbent on prosecutors to disclose to a court any fact which, in their view, may impact negatively on the prosecution and in favour of the accused. This is in line with the constitutional values and the provisions of the NPA Act. It is in the interests of the NPA, accused persons and the public's confidence in the administration of justice, that decisions concerning allegations of abuse of process be made before a trial court.'

[10] *Zuma v Democratic Alliance & others* 2018 (1) SACR 123 (SCA) ([2017] ZASCA 146) para 91.

The trial court will also be better placed to decide on the admissibility of such evidence should it transpire that the respondents are about to introduce such privileged information during the trial.

[59] In the circumstances the following order shall issue:

(a) Application for condonation for the late opposition to the application is granted.

(b) The application in terms of Uniform rule 35(11) is dismissed.

(c) Each party is directed to pay its own costs in the condonation and rule 35(11) applications.

(d) The application to introduce further evidence in these proceedings is dismissed with costs.

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MNGUNI J

Appearances

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Delivered:	23 February 2018
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