



**REPORT BY THE PUBLIC PROTECTOR SUBMITTED TO
PARLIAMENT IN TERMS OF SECTION 182(1)(b) OF THE
CONSTITUTION, 1996 AND SECTION 8(2)(b) OF THE PUBLIC
PROTECTOR ACT, 1994**

**REPORT NO 26
(SPECIAL REPORT)**

**REPORT ON AN INVESTIGATION BY THE PUBLIC PROTECTOR OF A
COMPLAINT BY DEPUTY PRESIDENT J ZUMA AGAINST THE NATIONAL
DIRECTOR OF PUBLIC PROSECUTIONS AND THE NATIONAL
PROSECUTING AUTHORITY IN CONNECTION WITH A CRIMINAL
INVESTIGATION CONDUCTED AGAINST HIM**



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Executive summary

The Public Protector investigated a complaint by Deputy President Jacob Zuma against the National Director of Public Prosecutions (the National Director) and the National Prosecuting Authority (the Prosecuting Authority) in connection with a criminal investigation that was conducted against him. The criminal investigation related to allegations of the improper involvement of the Deputy President in the Strategic Defence Procurement of the South African National Defence Force, commonly referred to as 'the arms deal'.

On 23 August 2003, the National Director issued a press statement stating that although there is a *prima facie* case of corruption against the Deputy President, he would not be prosecuted, as the prospects of success were "not strong enough". This announcement sparked off a media frenzy and a public debate regarding Mr Zuma's alleged or suspected involvement in corrupt relationships and improper conduct.

The complaint by the Deputy President was lodged on 30 October 2003. In the main, Mr Zuma raised his concerns about the:

- Manner in which the criminal investigation against him was conducted;
- Leaking to the media by the Prosecuting Authority of confidential information relating to the criminal investigation;
- Failure by the Prosecuting Authority to inform him of the criminal investigation against him;
- Public statement by the National Director that there is a *prima facie* case of corruption against him;



- Apparent continuation of the criminal investigation after it was decided not to prosecute him;

The proceedings of the Hefer Commission of Enquiry into allegations of spying against the National Director coincided with the investigation by the Public Protector of the complaint by the Deputy President. However, as the Commission made no finding on the allegations of abuse of office by the National Director, it had no influence on the investigation. President Mbeki took note of remarks made by Judge Hefer in his report in regard to leaks of confidential information by the Prosecuting Authority and commissioned an internal investigation. It found:

- Nothing that suggested that the National Director could have been party to the leaks; and
- Strong circumstantial evidence that privileged information in the possession of the Prosecuting Authority found its way to unauthorized persons outside its structures.

In response to the recommendations made by the inquiry to prevent such leaks from occurring again, the President instructed the (new) Minister of Justice and Constitutional Development, together with the Justice, Crime Prevention and Security Cluster, to:

- Develop, as a matter of urgency, a proper security management system that meets the accepted standards of information security. This should include guidelines to ensure that no privileged information lands in the hands of 'sources' used in the course of investigations;



- Ensure that all personnel of the Prosecuting Authority, including external consultants are properly screened in terms of section 19B of the National Prosecuting Authority Act, 1998 (the NPA Act) and the Intelligence Services Act, 1994; and
- Ensure that the Ministerial Coordinating Committee, established in terms of section 31 of the NPA Act urgently attend to all matters of relationships between the Directorate: Special Operations and other intelligence and security institutions to improve effective coordination in the performance of their functions.

In order to determine which of the matters raised by the Deputy President could be investigated by the Public Protector, the following had to be considered:

- The jurisdiction of the Public Protector to investigate the affairs of the Prosecuting Authority;
- The independence of the Prosecuting Authority; and
- Avoidance of matters that are *sub judice*.

It was decided to investigate whether:

- ❖ The public statement by the National Director that there is a *prima facie* case of corruption against the Deputy President, but that he would not be prosecuted, resulted in the Deputy President being improperly prejudiced;
- ❖ The said statement was fair and proper under the circumstances;
- ❖ The Deputy President was properly and timeously informed of the criminal investigation against him; and
- ❖ The criminal investigation against the Deputy President continued after the decision not to prosecute him was publicly announced.



The investigation was conducted in terms of section 7 of the Public Protector Act, 1994. The Public Protector decided that it would be in the best interest of the parties involved in the complaint by the Deputy President and in the criminal matter of the State v S Shaik and others, to conduct the investigation by means of correspondence and the submission of reports.

In the main, the investigation comprised:

- ◆ An evaluation and consideration of voluminous documentation submitted by the Deputy President;
- ◆ Consideration of the *Joint Investigation Report into the Strategic Defence Procurement Packages*;
- ◆ A study of the transcript of the proceedings and the report of the Hefer Commission of Enquiry;
- ◆ Telephonic discussions between the Public Protector and the Minister;
- ◆ A meeting between the Public Protector and the Minister;
- ◆ A meeting between the Public Protector and the National Director and senior officials from his office;
- ◆ Correspondence between the Public Protector and the Minister;
- ◆ Correspondence between the Public Protector and the National Director;



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- ◆ A study of a report submitted to the Minister on 23 August 2003 by the National Director, entitled: "*Report in terms of section 35(2)(b) of the National Prosecuting Authority Act pertaining to the Arms Deal Investigation into allegations of corruption involving Mr Jacob Zuma, in particular insofar as it relates to his relations with Schabir Shaik, the Nkobi Group of companies and the Thomson/Thales group of companies*";
 - ◆ Consideration of the contents of the Summary of Substantial Facts in terms of section 144(3) of the Criminal Procedure Act, 1977, that was presented by the Prosecuting Authority in the High Court (Durban & Coastal Local Division) case of: *The State v Schabir Schaik and Others*;
 - ◆ A study of the relevant provisions of the Constitution, the Public Protector Act, the NPA Act, the Prosecution Policy, the United Nations Guidelines on the Role of Prosecutors and other legislative prescripts and common law principles applicable to the matter in question;
 - ◆ Consideration of a legal opinion obtained from independent Senior Counsel in regard to certain matters pertaining to the investigation; and
 - ◆ Consideration of case law relevant to the matters investigated.

During the investigation the Public Protector relied on the cooperation of the former Minister of Justice and Constitutional Development (the Minister) and the National Director, as provided by the Constitution, 1996. They were approached on several occasions to provide information and their responses to the complaints of the Deputy President. Apart from repeatedly stating that the matters that Mr Zuma complained about were *sub judice* and therefore beyond investigation by the Public Protector, they failed to provide any assistance.



The investigation was conducted in a manner that did not interfere with the performance of the powers and functions of the Prosecuting Authority.

The *sub judice* rule had no bearing on the investigation, even if such investigation was to extend to the issues that have arisen or may arise in the court case against Mr Shaik and others. Particular care and caution were taken not to traverse matters that would cause the risk of the Public Protector having to make public statements in connection with this criminal case. Care was also taken not to create a perception that the Public Protector was questioning or reviewing the decision by the National Director not to prosecute the Deputy President.

Having considered the meaning of “a *prima facie* case” in a criminal matter, it was deduced that whether or not such a case exists against a person

- Is determined by a court of law;
- After hearing the evidence submitted by the prosecution and such evidence has been subjected to cross examination and the version of the accused has been put to the witnesses for comment; and
- When satisfied that a reasonable person might, in the absence of further contesting evidence by the accused, convict him/her of the crime he/she is being charged with.

It was found that the right to human dignity contained in the Bill of Rights (Chapter 2 of the Constitution, 1996) includes both the value of the intrinsic worth of a person and his/her individual reputation built upon his or her own individual achievements. Mr Zuma’s right to human dignity could, under the circumstances relevant to the investigation, only have been justifiably limited in terms of a law of general application. Neither the United Nations Guidelines on



the Role of Prosecutors nor the NPA Act and the Prosecution Policy provide for a public statement regarding a person's apparent but not provable guilt. To the contrary, these provisions prohibit inappropriate media statements and unfair conduct by prosecutors.

From the investigation, the following key findings were made:

- ◆ The Prosecuting Authority is accountable to Parliament in respect of the exercising of its powers and the performance of its functions and duties;
- ◆ The Prosecuting Authority is also accountable to Parliament for its decisions regarding the institution of prosecutions;
- ◆ The Minister and the National Director were constitutionally obliged to cooperate with the Public Protector in the investigation of the complaints of the Deputy President;
- ◆ The reluctance and failure by the Minister and the National Director to cooperate with the Public Protector in the investigation was improper and unconstitutional. It resulted in the Public Protector having to conclude the investigation without the benefit of proper responses by those implicated by the complaints of the Deputy President;
- ◆ The press statement made by the National Director on 23 August 2003, that there is a *prima facie* case of corruption against the Deputy President, but that he would not be prosecuted, unjustifiably infringed upon Mr Zuma's constitutional right to human dignity and caused him to be improperly prejudiced;



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- ◆ The press statement (referred to above) was unfair and improper;
 - ◆ The Deputy President had probably not been informed by the Minister and the National Director of the criminal investigation against him shortly after it commenced, as was publicly claimed by the National Director;
 - ◆ As the Minister was replaced in the Cabinet after the 2004 elections, it would serve no purpose to make any recommendations to Parliament in regard to his improper failure to cooperate with the Public Protector.
 - ◆ The provisions of section 31 of the NPA Act that established a Ministerial Coordinating Committee have not been implemented.
 - ◆ The steps taken by the President to attend to the remarks made by the Hefer Commission in regard to the leaking of confidential information by the Prosecuting Authority should be commended. The recommendations made by the investigators and the instructions given by the President in this regard, are supported.

The Public Protector recommended that Parliament take urgent steps to:

- ➔ Ensure that the National Director and the Prosecuting Authority are held accountable, by virtue of the provisions of sections 41(1) and 181(3) of the Constitution and section 35 of the National Prosecuting Authority Act, 1998, for:

Failing to cooperate with the Public Protector in the investigation of the complaint of the Deputy President;



Infringing upon the Deputy President's constitutional right to human dignity and thereby causing him to be improperly prejudiced; and

Acting in an unfair and improper manner in regard to the Deputy President.

- Ensure that the Ministerial Coordinating Committee contemplated by section 31 of the National Prosecuting Authority Act, 1998:

Convenes as a matter of urgency; and

Determines policy guidelines in respect of the functioning of the Directorate of Special Operations that would prevent a recurrence of the improprieties referred to in this report.



SPECIAL REPORT ON AN INVESTIGATION BY THE PUBLIC PROTECTOR OF A COMPLAINT BY DEPUTY PRESIDENT J ZUMA AGAINST THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND THE NATIONAL PROSECUTING AUTHORITY IN CONNECTION WITH A CRIMINAL INVESTIGATION CONDUCTED AGAINST HIM

1. INTRODUCTION

This Special Report is submitted to Parliament in terms of the provisions of section 182(1)(b) of the Constitution, 1996 and section 8(2)(b) of the Public Protector Act, 1994. It relates to an investigation by the Public Protector of a complaint by Deputy President J Zuma against the National Director of Public Prosecutions and the National Prosecuting Authority, in connection with a criminal investigation conducted against him.

2. BACKGROUND

2.1 The Strategic Defence Procurement of the South African National Defence Force ('the arms deal')

2.1.1 Section 200 of the Constitution, 1996 provides that it is the primary objective of the South African National Defence Force (SANDF) to defend and protect the Republic, its territorial integrity and its people. South Africa also has international commitments, particularly in the African Region, to support operations under the auspices of the United Nations and other similar organizations, which involve military resources. The



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- SANDF has the additional task of protecting the coastline and the marine resources of the Republic.¹
- 2.1.2 By 1996 it was obvious that some of the strategic defence equipment of the SANDF was outdated and inoperative and that it needed urgent replacement to enable the SANDF to fulfill its constitutional mandate.
- 2.1.3 In order to address the matter, a White Paper on Defence was prepared and submitted to Parliament in May 1996, by the former Minister of Defence. It made provision for a Defence Review to be conducted in regard to several aspects of the size and role of the SANDF and to provide the policy framework based on the long term planning of issues such as structure, force design, force levels and armaments.²
- 2.1.4 The Defence Review provided the Cabinet and Parliamentary Defence Committees with several force design options, one of which was chosen, subject to the availability of finances. The chosen option resulted in the Department of Defence adopting a 'package' approach to the acquisition process, as opposed to the individual purchasing of equipment types. It became known as the 'Strategic Defence Packages' (SDP). The procurement of the armaments involved was and is generally referred to as the 'arms deal'.
- 2.1.5 The South African Defence Review was approved by Parliament in April 1998.³

¹ *Joint Investigation Report into the Strategic Defence Procurement Packages*, November 2001, submitted to Parliament by the Public Protector, the Auditor-General and the National Director of Public Prosecutions on 14 November 2001 (Joint Report), page 2.

² *Joint Report*, page 4

³ *Joint Report*, page 5



2.1.6 Contracts for the procurement of the SDP were signed on 3 December 1999, at a cost of R 30 300 million.⁴

2.2 The Special Review of the Auditor-General

2.2.1 During November 1998, the Office of the Auditor-General identified the procurement of the SDP as a high-risk area, from an audit point of view and decided to perform a special review of the procurement process.⁵

2.2.2 The Special Review identified a number of shortcomings in the procurement process and made several recommendations.

2.2.3 It became the subject of hearings and deliberations of the Parliamentary Standing Committee on Public Accounts, which eventually culminated in a suggestion that an independent and forensic investigation be conducted by the Office of the Public Protector, the Office of the Auditor-General and the National Prosecuting Authority (the Prosecuting Authority).⁶

2.3 The Joint Investigation

2.3.1 The three mentioned investigation agencies accepted the request for an independent investigation and preparations in this regard commenced at the end of 2000.

2.3.2 It was decided that the Office of the Auditor-General would conduct an extensive forensic investigation, the Directorate: Special Operations of the

⁴ *Joint Report*, page 249

⁵ *Joint Report*, page 5

⁶ *Joint Report*, page 7



Prosecuting Authority would focus on allegations and suspicions of criminal conduct, whilst the Office of the Public Protector would look into the quality of the contracts and unethical conduct of any of the public officials involved.⁷

2.3.3 The Joint Investigation was concluded in November 2001. The Public Protector, the Auditor-General and the National Director of Public Prosecutions submitted their 'Joint Investigation Report into the Strategic Defence Procurement Packages' (Joint Report) to Parliament, on 14 November 2001.

2.3.4 Although the Joint Report indicated that a number of shortcomings in relation to the procurement process were found during the investigation, the main finding was that:

"No evidence was found of any improper or unlawful conduct by the Government. The irregularities and improprieties referred to in the findings contained in this report, point to the conduct of certain officials of the government departments involved and cannot, in our view, be ascribed to the President or the Ministers involved in their capacity as members of the Ministers' Committee or Cabinet. There are therefore no grounds to suggest that the Government's contracting position is flawed."⁸

2.3.5 As far as the status of the criminal investigation by the Directorate: Special Operations (DSO) was concerned, it was reported that several allegations were still being pursued, but that due to the nature of these

⁷ *Joint Report*, page 8



investigations, the details could not be divulged at the time.⁸ It was, furthermore, stated in this regard that:

“Whilst there may have been individuals and institutions who used or attempted to use their positions improperly, within government departments, parastatal bodies and in private capacity, to obtain undue benefits in relation to these packages, up until now no evidence has emerged, to suggest that these activities affected the selection of the successful contractors/bidders, which may render the contracts questionable.”⁹

2.4 Media reports in connection with the criminal investigation against Mr Zuma

2.4.1 On 29 November 2002, the *Mail and Guardian* reported that the Scorpions (DSO) were actively investigating allegations against Mr Zuma regarding a bribe relating to the arms deal. It was, *inter alia*, stated that:

“Startling details of the allegations against Zuma are contained in a confidential affidavit filed by a senior Scorpions prosecutor, Advocate William Downer, in August last year. The *M&G* obtained a copy last week. The affidavit was tabled in camera to judges in four countries in support of raids by the Scorpions that took place simultaneously on 9 October last year at Thomson’s premises in France, Turkey, Mauritius and South Africa.”

⁸ *Joint Report*, page 23

⁹ *Joint Report*, page 23



2.4.2 This revelation by the *Mail and Guardian* caused widespread media speculation about the allegations being investigated against the Deputy President. He denied that he was involved in any wrongdoing and repeatedly stated that he had not been informed of the investigation against him.

2.4.3 Early in December 2002 and in response to the media speculation, the 'Scorpions' reportedly "dispelled suggestions that they are 'actively' investigating Deputy President Jacob Zuma's alleged involvement in a bribe to cover up the arms procurement deal"¹⁰

2.4.4 How serious the revelation of the criminal investigation against the Deputy President was viewed at the time, appeared, for example, from an article in the *Sowetan* of 8 December 2002 that reported:

"We find it disconcerting that Jacob Zuma, the deputy president, has been implicated in alleged corrupt activities related to the controversial arms procurement process.

Zuma is allegedly being investigated by the Scorpions for attempting to secure a bribe of R 500 000 a year from Thomson CSF, a French defence conglomerate.

While we understand that these are mere allegations and that he is innocent until proven guilty, it is nevertheless worrying that aspersions have been cast on his moral standing.

¹⁰ *The Cape Argus* of 3 December 2002. See also *The Daily News* and *The Star* of 3 December 2002



One would expect that the deputy president is a man of integrity, whose character is beyond reproach; not someone who allegedly abuses his office to extort money, as leaders of banana republics do.

This, by the way, is a man whose name has become synonymous with the moral regeneration movement.

Though his office has been quick to deny the allegations, his character will remain in doubt until he has cleared his name.”

2.4.5 In regard to whether the former Minister of Justice was aware of the criminal investigation against Mr Zuma, the *Business Day* of 18 February 2003 reported:

“Justice Minister Penuell Maduna says he does not know if the Scorpions are investigating Deputy President Jacob Zuma for allegedly soliciting a R500 000 bribe from a company involved in the arms programme. ‘I know as much as the media have reported’ he said. Maduna, who is the politically accountable head of the Scorpions, said: ‘I am therefore not in the position to say whether there is a probe into the deputy president, or if there is one, when that will be concluded, I don’t know.’”¹¹

2.4.6 On 27 July 2003, the *Sunday Times* published a verbatim version of 35 questions that were sent to Mr Zuma’s attorneys by the Scorpions, in terms of the provisions of the National Prosecuting Authority Act, 1998 (the NPA Act). The questions clearly related to the alleged criminal investigation that was conducted against Mr Zuma. The Deputy President

¹¹ See also the *Sowetan* and the *Citizen* of 18 February 2003



objected to what was generally accepted as having been a 'leak' of information. The *Sunday Times* refused to reveal their source.¹²

2.4.7 During the media frenzy that followed the publication of the questions, the Prosecuting Authority announced an internal investigation into the leak of the 35 questions. The *Sowetan* of 30 July 2003 reported that:

"The NPA's Integrity Management Unit head Dipuo Mvelase told *Sowetan* yesterday it had started the investigation on its own initiative. The probe, suggesting the scale of the crises, comes a day after repeated assurances from the NPA and its political boss, Justice Minister Penuell Maduna, that they were satisfied the source of the leak was not within the agency."

2.5 The public announcement of the decision not to prosecute Mr Zuma

2.5.1 On 23 August 2003, the National Director of Public Prosecutions (the National Director), Mr B T Ngcuka, issued a press statement, entitled:

"Decision on whether to prosecute after the completion of the investigation against Deputy President, Mr Jacob Zuma, Shabir Shaik and others".

2.5.2 Under the heading: "*The decision*", the press release, *inter alia*, stated¹³:

¹² *Natal Witness, Business Day, the Star, the Citizen and the Sowetan* of 28 July 2003. and the *Daily Sun* of 29 July 2003.

¹³ On page 14 thereof



“The investigating team recommended that we institute a criminal prosecution against Deputy President Zuma.

After careful consideration in which we looked at the evidence and facts dispassionately, we have concluded that, whilst there is a prima facie case of corruption against the Deputy President, our prospects of success are not strong enough. That means that we are not sure if we have a winnable case.

Accordingly, we have decided not to prosecute the Deputy President.”
(emphasis added)

2.6 The public response to the announcement

2.6.1 The local and international media responded quite aggressively (either in newspapers or on their respective web sites) to the announcement by the National Director.

2.6.2 On 25 August 2003, the *Cape Times*, for example, stated that:

“The directorate argues that the prospects of a successful prosecution are not strong enough. In the absence of full access to the information at its disposal, the public has no choice but to accept the legal basis on which the decision was made. Yet, politically, this is a most unfortunate development. On the one hand, as predictably happened, the opposition parties will attribute the decision not to prosecute Zuma to political interference. On the other hand, the decision denies Zuma himself an opportunity to once and for all put to rest the allegations in a court of law. The latest development does no-one any favours: Now the allegations will



forever swirl around Zuma's head, and his integrity will always remain in question.

It is an undesirable outcome after months, if not years, of allegations and rumours. The question must be asked: was the investigation managed in the most effective and professional manner. To raise so many contentious issues around the deputy president, and then to decline to prosecute him in the end, is, at best, inept; at worst, downright vindictive. Now we will never know whether Zuma was indeed involved in any improper behaviour regarding the arms deal. What is certain, however, is that his reputation has been irreparably damaged." (emphasis added)

2.6.3 *The Star* expressed their disappointment on the decision, on 26 August 2003, as follows:

"It is rather unfortunate that the Scorpions, having investigated Jacob Zuma for possible fraud, decided not to press charges against the deputy president. The decision complicates his life since it leaves a cloud of suspicion over his head. It would have been better if he had been charged and cleared by the courts. The pronouncement by the head of the Scorpions, Bulelani Ngcuka, that there is indeed a prima facie case of corruption against Zuma but that the matter was not being pursued because of insufficient evidence, only added to the controversy.

But the truth is that Zuma's reputation and integrity have been severely tainted and unless he is cleared by the court, the pungent smell around him would not go away. Under the circumstances, Zuma would do his



party, his country and above all himself, a great favour by resigning.”
(emphasis added)

2.6.4 In the United Kingdom, *The Guardian* reported on the matter on 26 August 2003. Reference was made to the response by the Democratic Alliance that Mr Zuma was, in their view, “fatally wounded and that he should stand down.” The report went on to state: “But Mr Zuma countered by saying he wanted a chance to clear his name. ‘The statement is equivalent to a judgment against me,’ he said. ‘The purpose is to leave a cloud hanging over my integrity.’”

2.6.5 Opposition political parties publicly called for Mr Zuma’s resignation. Their reaction received much attention in the media. The *Sunday Argus*, for example, referred to it, on 24 August 2003, by stating:

“The Scorpions have handed Deputy President Jacob Zuma a poisoned chalice, declining to prosecute him despite having found prima facie evidence of corruption against him and leaving a cloud over his political future. The decision to let South Africa’s second most powerful man of the hour for allegedly taking bribes from would-be defence contractors in the arms deal has drawn howls of outrage from opposition parties. They say the move is a political one which undermines the course of justice.”

2.6.6 Several letters on the matter were sent to and published by the print media. Ms Carol Johnson MP, the NNP spokesperson on justice, for example, managed to get her letter published by the *Mercury* on 27 August 2003. She, *inter alia*, stated:



“The NNP fails to understand why Ngcuka has gone against the recommendation of his own investigation team. His argument that their prospects of success in a criminal case were not strong is no reason to decide not to prosecute.”

2.6.7 A reader from KwaZulu/Natal wrote to the *Sunday Times* and his letter appeared in the 31 August 2003 edition. He held the view that: “Zuma has repeatedly stated that he is innocent and will successfully defend himself in court. Now he has been deprived of the opportunity to defend himself in court but burdened for life with the finding of a prima facie case against him”.

2.6.8 In another letter published by the *Sunday Times* on 31 August 2003, a reader from Gauteng made the following remarks:

“Under the law of evidence, prima facie evidence implies that proof to the contrary is still possible. In the absence of proof to the contrary, prima facie evidence will, generally speaking, become conclusive evidence. Thus, the state bears the onus of proving every element of the accused’s guilt beyond reasonable doubt. People are taken to court not because they are guilty but on the basis of the prima facie evidence available at the time. Whether the case is winnable is neither here nor there. For as long as Deputy President Jacob Zuma is not brought before a court to disprove the prima facie evidence that the National Directorate of Public Prosecutions says it has against him, a dark cloud will continue hovering above his head.”



2.6.9 The former Minister of Home Affairs and leader of the Inkatha Freedom Party, Chief Mangosuthu Buthelezi, was reported to have reacted to the announcement by stating that¹⁴:

“I think the way the Zuma saga has been handled has not been fair. I agree that he has been tried by the media. To say that there is a prima facie case, but not enough evidence for a conviction, is talking from both sides of your mouth.”

2.6.10 In a report under the heading: “*Zuma affair is dragging South Africa’s name through the mud*”, the *Sunday Times* of 31 August 2003 referred to the international profile of Deputy President Zuma by virtue of his role in conflict resolution in the Great Lakes region in Africa. It described the humiliation caused to Mr Zuma and South Africa when news of the announcement by the National Director was made known to delegates at the Southern African Development Community meeting in Tanzania on 23 August 2003. The newspaper’s report remarked in this regard:

“However, Ngcuka’s announcement that the Scorpions had prima facie evidence of wrongdoing by Zuma but would not be able to secure a conviction took the humiliation to a new level. The implication is that the man is guilty but covered his tracks well.” (emphasis added)

¹⁴ *Mail and Guardian* of 26 August 2003



3. THE COMPLAINT OF DEPUTY PRESIDENT J ZUMA

3.1 On 30 October 2003, Deputy President J Zuma lodged a formal complaint against the National Director and the Prosecuting Authority with the Public Protector, in terms of the provisions of section 6 of the Public Protector Act, 1994 (the Public Protector Act).

3.2 The complaint relates to the criminal investigation that was conducted against him by the Prosecuting Authority in connection with allegations of corruption pertaining to the arms deal.

3.3 Mr Zuma raised his concerns mainly in regard to the following:

3.3.1 The manner in which the investigation was conducted

3.3.1.1 According to Mr Zuma, the National Director was aware of the fact that he could not have influenced any of the crucial decisions that were taken in connection with the arms deal, as he was not part of the National Government at the time. Mr Zuma was a Member of the Executive Council of the KwaZulu/Natal Provincial Government during the relevant times, until he joined the national Cabinet as Deputy President, in June 1999. According to Mr Zuma, his participation in the arms deal process was subsequently limited to his participation in the Cabinet in the approval of recommendations made by the institutions involved in the procurement process.

3.3.1.2 The Deputy President contended that the investigation was conducted in bad faith and with the only intention to humiliate him. In this regard he complained that the Prosecuting Authority did not properly inform



him of the investigation and that detailed confidential information about the investigation was leaked to the media.

3.3.2 The conclusion of the investigation

3.3.2.1 Mr Zuma formulated his complaint in this regard as follows:

“The conclusion of the investigation against me was extremely prejudicial to me. Firstly, the decision not to prosecute by the National Director (supported by the Minister of Justice), whilst at the same time stating that there was a ‘prima facie’ case against me, has effectively denied me the opportunity to defend myself both as a citizen of this country and as a government official holding a high ranking office.”

3.3.2.2 According to Mr Zuma, the original decision of the Prosecuting Authority to prosecute him was changed.

3.3.2.3 He was, furthermore, concerned about the public statement by the National Director that the information that he provided during the investigation was not helpful.

3.3.3 The continuation of the investigation

3.3.3.1 Mr Zuma referred to media reports indicating that the Prosecuting Authority regarded the Hefer Commission of Enquiry¹⁵ as merely a “sideshow” and that the investigation against him would continue once the Commission’s investigation was concluded.

¹⁵ See paragraph 6 below



3.3.3.2 During the investigation of Mr Zuma's complaints, he also provided further information suggesting that the criminal investigation against him was continuing even after the decision that he would not be prosecuted was announced¹⁶.

4. THE ESTABLISHMENT, JURISDICTION, POWERS AND FUNCTIONS OF THE PUBLIC PROTECTOR

4.1 Establishment

4.1.1 The institution of the Public Protector was established by virtue of the provisions of Chapter 9 of the Constitution, 1996 (the Constitution).

4.1.2 It forms part of a group of state institutions that have the mandate to support and strengthen the constitutional democracy of the Republic of South Africa.

4.1.3 In terms of section 181 of the Constitution, the Public Protector is an independent institution, subject only to the Constitution and the law. It must be impartial and must exercise its powers and perform its functions without fear, favour or prejudice.

4.1.4 All organs of state must assist the Public Protector to ensure the independence, impartiality, dignity and effectiveness of this institution.

4.1.5 The Public Protector is accountable to the National Assembly.

¹⁶ See paragraph 23.7.1 below



4.2 Jurisdiction, powers and functions

4.2.1 Section 182(1) of the Constitution, provides that:

“The Public Protector has the power, as regulated by national legislation

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action.”

4.2.2 The jurisdiction, powers and functions of the Public Protector are further regulated by the Public Protector Act.

4.2.3 In terms of section 6(4) of the Act, the Public Protector shall be competent to investigate any alleged:

4.2.3.1 Maladministration in connection with the affairs of government at any level;

4.2.3.2 Abuse or unjustifiable exercise of power or unfair or other improper conduct by a person performing a public function; or

4.2.3.3 Act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person.



-
- 4.2.4 At any time prior to, during or after an investigation, the Public Protector may make an appropriate recommendation to the appropriate public body affected by it.
- 4.2.5 The Public Protector determines the format and the procedure to be followed in conducting any investigation¹⁷.
- 4.2.6 In terms of section 7(4)(b), the Public Protector or any person duly authorized by him or her may request an explanation from any person whom he or she reasonably suspects of having information which has a bearing on a matter being investigated. Any person who, without just cause, refuses or fails to comply with such a request for an explanation, shall be guilty of an offence¹⁸.
- 4.2.7 Section 7(9)(a) deals with the responses by those implicated by in a matter being investigated by the Public Protector. It provides that:

“If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.”(emphasis added)

¹⁷ Section 7(1)(b)(i) of the Public Protector Act

¹⁸ Section 11(3) of the Public Protector Act



4.2.8 The Public Protector is compelled, by virtue of the provisions of section 8(2)(b), to submit a report (special report) to the National Assembly on the findings of a particular investigation if:

4.2.8.1 he or she deems it necessary;

4.2.8.2 he or she deems it in the public interest; or

4.2.8.3 it requires the urgent attention of, or intervention by, the National Assembly.

4.2.9 In terms of section 9, no person shall insult the Public Protector or in connection with an investigation do anything, which, if the said investigation had been proceedings in a court of law, would have constituted contempt of court¹⁹.

5. THE PROSECUTING AUTHORITY

5.1 Establishment and independence

5.1.1 Section 179 of the Constitution, established a single national Prosecuting Authority for South Africa.

5.1.2 It consists of:

¹⁹ Section 11 of the Public Protector Act provides that such conduct is a criminal offence.



5.1.2.1 A National Director of Public Prosecutions, who is the head of the Prosecuting Authority and is appointed by the President, as the head of the National Executive; and

5.1.2.2 Directors of Public Prosecutions as determined by the NPA Act.

5.1.3 The Prosecuting Authority must exercise its functions without fear, favour or prejudice.

5.2 Powers and functions

5.2.1 In terms of section 179(2) of the Constitution, the Prosecuting Authority has the power to institute criminal proceedings on behalf of the state and to carry out any necessary functions incidental to instituting criminal proceedings.

5.2.2 Section 21 of the NPA Act provides that the National Director shall, with the concurrence of the Minister (of Justice) determine a prosecution policy and issue policy directives, which must be observed in the prosecution process.

5.3 Responsibility for the Prosecuting Authority

5.3.1 Section 179(6) of the Constitution provides that the Cabinet member responsible for the administration of justice must exercise final responsibility over the Prosecuting Authority.



5.3.2 To enable the Minister to exercise his or her final responsibility, the National Director is obliged, at the request of the Minister, in terms of section 33(2) of the NPA Act, to:

5.3.2.1 Furnish the Minister with information or a report with regard to any case, matter or subject dealt with by the National Director in the exercise of his or her powers; and

5.3.2.2 Arrange meetings between the Minister and members of the Prosecuting Authority.

5.4 Ministerial Coordinating Committee

5.4.1 Section 31 of the NPA Act established a Ministerial Coordinating Committee that has the authority to determine policy guidelines in respect of the functioning of the Directorate of Special Operations (Scorpions).

5.4.2 The Committee consists of at least 5 Cabinet members.

5.5 Accountability to Parliament

5.5.1 Section 35(1) of the NPA Act provides that:

“The Prosecuting Authority shall be accountable to Parliament in respect of its powers, functions and duties under this Act, including decisions regarding the institution of prosecutions.”(emphasis added)



5.5.2 In terms of section 35(2)(b), the National Director may, at any time, submit a report to the Minister or Parliament with regard to any matter relating to the Prosecuting Authority, if he or she deems it necessary.

5.6 The Prosecution Policy

5.6.1 Adoption

The Prosecuting Authority adopted a Prosecuting Policy on 1 October 1999. This Policy was determined and issued in compliance with the provisions of section 21 of the NPA Act.²⁰

5.6.2 The United Nations Guidelines on the Role of Prosecutors

5.6.2.1 The United Nations Guidelines on the Role of Prosecutors (the Guidelines) were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Cuba from 27 August to 7 September 1990.

5.6.2.2 Section 22 of the NPA Act provides that the National Director is obliged to bring the Guidelines to the attention of the Directors of Public Prosecutions and prosecutors and to promote their respect for and compliance with the principles contained therein.

5.6.2.3 Article 12 of the Guidelines provides that:

²⁰ See paragraph 5.2.2 above



“Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously and respect and protect human dignity and uphold human rights, thus contributing to ensure due process and the smooth functioning of the criminal justice system.”

- 5.6.2.4 In terms of Article 13, prosecutors shall, in the performance of their duties, keep matters in their possession confidential, unless the performance of duty or the needs of justice requires otherwise.
- 5.6.2.5 Prosecutors are to give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, and grave violations of human rights.²¹
- 5.6.2.6 As far as the exercise of discretion is concerned, paragraph 17 of the Guidelines provides that the law or rules and regulations should provide guidelines to enhance fairness and consistency of approach in the taking of decisions in the prosecution process.
- 5.6.2.7 Observance of the Guidelines is acknowledged in paragraph A 1 of the Prosecution Policy of the Prosecuting Authority.

5.6.3 The purpose of the policy provisions

The purpose of the Prosecution Policy (the Policy) is to guide prosecutors in the way they perform their functions, exercise their powers and carry out their duties. Its aim is to make the prosecution process more fair, transparent, consistent and predictable.²²

²¹ See Article 15 of the Guidelines

²² See paragraph A 2 of the Policy



5.6.4 The role of the prosecutor

5.6.4.1 A prosecutor has a discretion to make decisions, which affect the criminal process. Primarily that decision involves whether or not to institute criminal proceedings against an accused.²³

5.6.4.2 “Members of the Prosecuting Authority must act impartially and in good faith. They should not allow their judgment to be influenced by factors such as their personal views regarding the nature of the offence or the race, ethnic or national origin, sex, religious beliefs, status, political views or sexual orientation of the victim, witnesses or the offender.”²⁴

5.6.5 The criteria governing the decision to prosecute

5.6.5.1 The criteria are discussed in much detail in paragraph 4 of the Policy. It is, *inter alia* stated that:

“In deciding whether or not to institute criminal proceedings against an accused, prosecutors should assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. (emphasis added)

and

“This test of a reasonable prospect must be applied objectively after careful deliberation to avoid an unjustified prosecution.”

²³ See paragraph A 3 of the Policy

²⁴ See paragraph A 3 of the Policy



5.6.5.2 In relation to the role that the public interest plays in a decision whether or not to prosecute, paragraph A4(c) of the Policy provides that once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, a prosecution should normally follow, unless public interest demands otherwise. There is no rule in law, which states that all the provable cases brought to the attention of the Prosecuting Authority must be prosecuted.

“It is important that the prosecution process is seen to be transparent and that justice is seen to be done.”

5.6.6 Reasons for decisions

5.6.6.1 Paragraph B of Part 6 of the Policy deals with reasons provided for decisions relating to prosecution. It provides that, in general, the ratio of the decision should be given, rather than specific details. Furthermore, reasons should be handled with care in order not to cause embarrassment or unnecessary debate.

5.6.7 Media statements and public communications

In paragraph C of Part 47 of the Policy, the following is, *inter alia*, prescribed in this regard:

“1. Prosecutors should refrain from making inappropriate media statements, public communications or comments.

.....



4. The purpose of responding to media or public enquiries is to assist the public in understanding the nature and course of criminal proceedings and yet not to prejudice the parties before the court who cannot defend themselves against public comment." (emphasis added)

6. THE HEFER COMMISSION OF ENQUIRY

- 6.1 In early September 2003, a report in a Sunday newspaper alleged that the National Director had previously been a spy for the former apartheid government. The sources of these allegations appeared to be former Minister Mac Maharaj and Mr M Shaik, previously attached to an intelligence unit of the African National Congress (ANC).
- 6.2 The allegations against the National Director were linked to further allegations of abuse of office. The media had a field day.
- 6.3 On 19 September 2003, the President appointed a commission of enquiry into the matter. The appointed Commissioner was retired Judge J Hefer.
- 6.4 The terms of reference of the Commission changed a number of times. Its final version read as follows:

"The Commission shall inquire into, make findings and report on the allegations by Messrs Maharaj and Shaik that the National Director of Public Prosecutions was an agent of the security services of the pre-1994 government under code name RS452 or any other code name and, as a result thereof, improperly and in violation of the law, taken (sic) advantage of or misused the prosecuting authority and, in particular,



abused, advanced, promoted, prejudiced or undermined the rights and/or interests of any person or organization.”

6.5 The report of the Commission was submitted to the President on 7 January 2004. The main findings contained in the report read as follows:

“(a) I find that Messrs Maharaj and Shaik’s allegations of spying have not been established. Mr Ngcuka probably never acted as an agent for a pre-1994 government security service.

(b) In view of this finding, the question whether Mr Ngcuka has misused the National Prosecuting Authority falls away.”²⁵

6.6 The following extract from the Commission’s report is of particular significance in respect of the complaint lodged by Deputy President Zuma against the National Director that confidential information about the criminal investigation against him was leaked to the media:²⁶

“Mr Maharaj’s complaint relates to an investigation by Mr Ngcuka’s office, firstly, into two contracts awarded while he was still Minister of Transport and, secondly into alleged transactions between him and Mr Schabir Shaik (Moe’s brother) or some of the latter’s companies. Section 41(6)(a) of the National Prosecuting Authority Act, 1998, expressly prohibits the disclosure, without the consent of the National Director, by any person of any information which came to his or her knowledge in the performance of his or her functions in terms of the Act. The essence of Mr Maharaj’s

²⁵ See page 61 of the *Report of the Commission of Inquiry into allegations of spying against the National Director of Public Prosecutions, Mr B T Ngcuka* (January 2004)

²⁶ From paragraph 73 on page 53 of the report



complaint is that Mr Ngcuka has leaked, or has condoned the leaking of, information relating to the investigation contrary to the provisions of section 41(6)(a). The result, he claims, is that, although the investigation has not led to a prosecution, he and his wife have been vilified in the public eye. Moreover, he says, the same has happened to other well known individuals, including the Deputy President. In his view this reveals an unfair, and indeed unlawful, pattern in the use of the Prosecuting Authority.

I do not intend dealing in detail with Mr Maharaj's evidence or with Mr Ngcuka's rebuttal. Suffice it to say that there can be no doubt that someone did leak information which must have been gathered in the course of the investigation against Mr Maharaj. Mr Ngcuka was not prepared to concede that the guilty party must have been someone in his office because he had ordered an investigation into that possibility and the outcome had been inconclusive. But there is acceptable evidence that Mr Jovial Rantau (a newspaper editor) told Mr Maharaj during a telephone conversation that his source was 'within the Scorpions' and the probabilities are overwhelming that this was indeed the case. It must accordingly be accepted that someone in Mr Ngcuka's office has disclosed information relating to a pending investigation to the press and that this is likely to have occurred contrary to the provisions of section 41(6)(a).

I am not prepared to accept that the guilty party was Mr Ngcuka himself. Mr Maharaj firmly believes that this was the case; but Mr Ngcuka has denied it under oath and there is no evidence to contradict him, nor do the probabilities favour the conclusion that he supplied the information himself."



Referring to the investigation ordered by Mr Ngcuka into the alleged leaks from his office, the Commissioner continued²⁷:

“As previously mentioned, Mr Ngcuka testified that he ordered an investigation into the leaking of sensitive information but that the outcome was inconclusive.²⁸ His evidence in this regard was not particularly informative and created the impression that he wanted to disclose as little as possible. Yet, I have his word that an investigation was indeed conducted and there is nothing to contradict or render it improbable. I have to accept his word. And that being the case, I cannot say that he condoned the leaks.

However, I find Mr Maharaj’s evidence most disturbing. As I have already said, it is beyond doubt that leaks did occur. I have also indicated that it is highly likely that the guilty party was within Mr Ngcuka’s office and we have it from Mr Ngcuka himself that he or she could not be traced. Such a state of affairs cannot be tolerated. Months have elapsed since Mr Maharaj was questioned by members of the Investigative Directorate and, although Mr Ngcuka has assured me that the investigation has not been completed, no charges have yet been preferred against Mr Maharaj or against his wife. In the mean time press reports about the allegations against them kept appearing. In a country such as ours where human dignity is a basic constitutional value and every person is presumed to be innocent until he or she is found guilty, this is wholly unacceptable. Section 41(6)(a) of the Prosecuting Authority Act was not enacted for nothing and as long as someone in the National Director’s office keeps flouting the prohibition against the disclosure of information, one cannot

²⁷ Paragraph 77 on page 55 of the report

²⁸ See paragraph 2.4.7 above



be assured that the Prosecuting Authority is being used for the purpose it was intended.

Be that as it may, although matters do not appear to be what they should be in Mr Ngcuka's office as far as the observance of section 41(6)(a) is concerned, Mr Maharaj's complaint has, for reasons I have previously explained, not been brought within the ambit of my terms of reference."

- 6.7 In his letter of response to the Commission's report, addressed to Judge Hefer on 19 January 2004, President Mbeki referred to the issue raised by the Commissioner, as referred to in paragraph 6.6 above, and stated:

"I have also noted your observation that the person(s) responsible for the 'leak' which led to the complaint lodged by Mr Maharaj has/have as yet not been identified. I agree with you "such a state of affairs cannot be tolerated". We will therefore follow up this matter."

7. PENDING THE INVESTIGATION

- 7.1 The Hefer Commission was appointed less than three weeks after the complaint by the Deputy President was lodged with the Office of the Public Protector. At that time the investigation of the complaint was in its preliminary phase.
- 7.2 It was decided to pend the investigation until the Commission's findings were known, for the following reasons:



- 7.2.1 To have involved the National Director in two highly controversial investigations at the same time would have been inappropriate and impractical;
- 7.2.2 The terms of reference of the Commission also related to allegations of abuse of office by the National Director and there was a possibility that some of the matters raised by the Deputy President might have been canvassed by the Commission; and
- 7.2.3 Initial indications were that the Deputy President might have been called to testify before the Commission. Depending on the evidence before the Commission at that stage, Mr Zuma's complaints of abuse of office against the National Director might have been raised, as happened in the case of Mr Maharaj.
- 7.3 In the light of the findings made by the Commission, the investigation of the complaints by the Deputy President resumed early in January 2004.

8. THE INVESTIGATION BY THE PUBLIC PROTECTOR INTO AN ALLEGED BREACH OF THE EXECUTIVE ETHICS CODE BY DEPUTY PRESIDENT ZUMA

- 8.1 In his press release,²⁹ the National Director stated that³⁰:

"We will be referring the issue around declaration of gifts and donations received by the Deputy President to Parliament for their consideration."

²⁹ See paragraph 2.5.1 above

³⁰ On page 12



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- 8.2 On 26 August 2003, the media started reporting about the contents of the charge sheet that was presented to Mr Shaik and others in the criminal case of corruption against them, relating to the arms deal. The Deputy President was (and is) clearly and repeatedly implicated in several of the charges.³¹
- 8.3 In September 2003, Mr D Gibson MP, lodged a complaint with the Public Protector, in terms of the provisions of the Executive Members' Ethics Act, 1998. Mr Gibson suggested that the contents of the mentioned charge sheet and the information provided to the Speaker of the National Assembly by the National Director, justified a concern regarding substantial benefits allegedly received and liabilities incurred by the Deputy President that may not have been declared by him in terms of the Executive Ethics Code.
- 8.4 The matter was investigated and a report was submitted to the President, by virtue of the provisions of section 3(2)(a) of the Executive Members' Ethics Act, 1998, on 6 October 2003.
- 8.5 It was found that an investigation in regard to matters that form part of the charge sheet would be improper and unlawful as it might improperly interfere with the prosecution and the right of the accused concerned to a fair trial. As far as other allegations in connection with the declaration of certain of Mr Zuma's interests and liabilities are concerned, the Public Protector found that those interests and liabilities relevant to the

³¹ See paragraph 15 below



Executive Ethics Code have been properly declared in the Register of Financial Interests.³²

9. THE INVESTIGATION BY THE PARLIAMENTARY JOINT COMMITTEE ON ETHICS AND MEMBERS' INTERESTS INTO THE ALLEGED RECEIPT OF BENEFITS BY DEPUTY PRESIDENT ZUMA

9.1 The Parliamentary Joint Committee on Ethics and Members' Interests (the Joint Committee) investigated the information submitted to them by the National Director³³.

9.2 In their report on the matter, tabled in Parliament on 19 November 2003, the Joint Committee concluded:

“(1) In respect of the allegations against the Deputy President, the Committee takes note that three different authorities have investigated the allegations. The NPA (Prosecuting Authority) has looked at the matter in respect of the Strategic Arms Procurement process. The Public Protector is charged with looking at the issues of impropriety and any potential conflict of interest as required in the Executive Members' Ethics Act. The Committee is charged with considering whether there is a breach of the disclosure requirements of the Code of Conduct for Members of Parliament.

³² See paragraph 7 of the *Report (by the Public Protector) on an investigation of an alleged breach of the Executive Ethics Code by the Deputy President of the Republic of South Africa, Mr J Zuma*.

³³ See paragraph 8.1 above



(2) In considering the allegations of breaches to the Code of Conduct for MPs, the Committee has to carefully consider the allegations, and to further consider the Member's response and any other information at hand, in terms of the Procedure for the Investigation of Complaints. In this matter, the Deputy President provided documents to the Committee, which verified his response that there was no benefit received. It is on this basis that the Committee finds that there is no breach of the Code of Conduct."

10. THE CONSIDERATION OF ISSUES RELEVANT TO THE INVESTIGATION OF THE COMPLAINT

10.1 Jurisdiction

The Prosecuting Authority is a constitutional state institution performing a public function. The Minister responsible for Justice has the ultimate responsibility for this institution and it is accountable to Parliament. By virtue of the provisions of section 182(1) of the Constitution and section 6(4) of the Public Protector Act, 1994, the Prosecuting Authority falls within the ambit of the jurisdiction of the Public Protector³⁴.

10.2 Recognizing the independence of the Prosecuting Authority

10.2.1 The complaint by the Deputy President created the invidious situation of one independent constitutional institution having to investigate the conduct of another.

³⁴ See paragraph 4.2 above



10.2.2 Section 179(4) of the Constitution provides that national legislation must ensure that the Prosecuting Authority exercises its functions without fear, favour or prejudice. This provision was described by the Constitutional Courts as: “a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts.”³⁵

10.2.3 Section 32(1) of the NPA Act gave effect to this requirement of the Constitution. It provides that:

“(a) A member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.

(b) Subject to the Constitution and this Act, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.”
(emphasis added)

10.2.4 The Public Protector (as an institution) can only investigate the conduct and affairs of the government agencies that fall under its jurisdiction by

³⁵ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA*, 1996(4) SA 744(CC) paragraph 146



virtue of the provisions of the Constitution and the national legislation providing it with additional powers and functions.³⁶

10.2.5 In terms of section 182(1) of the Constitution, the Public Protector has the power to investigate any alleged or suspected improper conduct by state institutions, such as the Prosecuting Authority.

10.2.6 It therefore, follows that an investigation by the Public Protector of allegations or suspicions of any improper conduct by the Prosecuting Authority is authorized, as long as it can be justified in terms of the Constitution and does not improperly interfere, hinder or obstruct the Prosecuting Authority in the performance of its functions.

10.2.7 During the investigation of the complaint by the Deputy President these issues had to be carefully and continuously considered, especially in regard to the criminal investigation against and pending prosecution of Mr S Shaik and others.

10.3 Avoiding matters that are *sub judice*

10.3.1 The *sub judice* rule provides that it is inappropriate to make public statements about issues arising in matters pending before the courts.

10.3.2 In principle, this rule does not in any way affect an investigation by the Office of the Public Protector of any matter that falls within the ambit of its jurisdiction, even if such an investigation should extend to issues that have arisen or may arise in a pending court case.

³⁶ See paragraph 4.2 above



10.3.3 The *sub judice* rule therefore governs the public statements made by the Public Protector and not the investigations conducted.

10.3.4 However, as the report by the Public Protector on an investigation that was conducted is (except in certain circumstances) open to the public³⁷, the investigation of issues that are pending before a court of law should preferably be avoided. It is for this reason that it was decided not to consider and report on matters that might form part of the evidence in the forthcoming criminal court case in which Mr Shaik and others are prosecuted and that have not been made public.

10.4 Reliance on the constitutional principles of co-operative government and intergovernmental relations

10.4.1 The investigation of the complaints by the Deputy President could only be conducted effectively with the assistance of the National Director and the Minister of Justice and Constitutional Development (the Minister).

10.4.2 From the outset, it was expected that the National Director and the Minister would provide their assistance and support to the investigation, in compliance with the provisions of section 41(1)(g) of the Constitution, which provides that:

“All spheres of government and all organs of state within each sphere must co-operate with one another in mutual trust and good faith by assisting and supporting one another”.

³⁷ See section 8(2A)(a) of the Public Protector Act, 1994



10.4.3 It was also expected of the National Director and the Minister to comply with the provisions of section 181(3) of the Constitution that compels all organs of state to assist the Public Protector. Section 92(3) of the Constitution also provides that members of the Cabinet must act in accordance with the Constitution.

11. MATTERS INVESTIGATED

Having considered the complaints by the Deputy President and the issues referred to in paragraph 10 above, it was decided to investigate whether:

- 11.1 The public statement by the National Director that there is a *prima facie* case of corruption against the Deputy President, but that he would not be prosecuted, resulted in the Deputy President being improperly prejudiced;
- 11.2 The mentioned statement was fair and proper under the circumstances;
- 11.3 The Deputy President was properly and timeously informed of the criminal investigation against him;
- 11.4 The criminal investigation against the Deputy President continued after the decision not to prosecute him was publicly announced.



12. THE INVESTIGATION

The investigation of the matters, referred to in paragraph 11 above, was conducted in terms of the provisions of section 7 of the Public Protector Act. It, *inter alia*, comprised:

- 12.1 An evaluation and consideration of voluminous documentation submitted by the Deputy President;
- 12.2 Consideration of the *Joint Investigation Report into the Strategic Defence Procurement Packages*;
- 12.3 A study of the transcript of the proceedings and the report of the Hefer Commission of Enquiry;
- 12.4 Consideration of the matters referred to in the "*Report (by the Public Protector) on an investigation of an alleged breach of the Executive Ethics Code by the Deputy President of the Republic of South Africa, Mr J Zuma*", dated 6 October 2003.
- 12.5 A study of the "*Report of the Joint Committee on Ethics and Members' Interests on the alleged receipt of benefits by the Deputy President, Mr J G Zuma*", dated 19 November 2003.
- 12.6 Telephonic discussions between the Public Protector and the Minister;
- 12.7 A meeting between the Public Protector and the Minister on 13 January 2004;



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- 12.8 A meeting between the Public Protector and the National Director and senior officials from his office, on 16 February 2004;
- 12.9 Correspondence between the Public Protector and the Minister;
- 12.10 Correspondence between the Public Protector and the National Director;
- 12.11 A study of a report submitted to the Minister on 23 August 2003 by the National Director, entitled: "*Report in terms of section 35(2)(b) of the National Prosecuting Authority Act pertaining to the Arms Deal Investigation into allegations of corruption involving Mr Jacob Zuma, in particular insofar as it relates to his relations with Schabir Shaik, the Nkobi Group of companies and the Thomson/Thales group of companies*";
- 12.12 Consideration of the contents of the Summary of Substantial Facts in terms of section 144(3) of the Criminal Procedure Act, 1977, that was presented by the Prosecuting Authority in the High Court (Durban & Coastal Local Division) case of: *The State v Schabir Schaik and Others*;
- 12.13 A study of the relevant provisions of the Constitution, the Public Protector Act, the NPA Act, the Prosecution Policy, the United Nations Guidelines on the Role of Prosecutors and other legislative prescripts and common law principles applicable to the matter in question;
- 12.14 Consideration of a legal opinion obtained from independent Senior Counsel in regard to certain matters pertaining to the investigation; and
- 12.15 Consideration of case law relevant to the matters investigated.



13. APPROACHING THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT FOR ASSISTANCE

13.1 The former Minister of Justice and Constitutional Development was informed, in writing, of the complaint lodged by the Deputy President, on 10 November 2003. He was also informed that the Office of the Public Protector was, at the time, conducting a preliminary investigation in to the allegations made by Mr Zuma.

13.2 In his letter, the Public Protector requested the Minister's assistance, as follows:

"In his press statement of 23 August 2003 in connection with the decision not to prosecute Mr Zuma, the National Director stated that a full report on the matter was submitted to you, in terms of the provisions of section 32(2)(b) of the National Prosecuting Authority Act, 1998. In order to deal with Mr Zuma's complaint lodged at my office, it is necessary that the contents of that report be considered.

It would, therefore, be appreciated if you could kindly, but urgently provide me with a copy of the report submitted to you by Mr Ngcuka. As we are aware of the fact that the contents of this document might contain facts that have a bearing on other investigations and/or prosecutions, it will be treated confidentially so as not to jeopardize those cases."

13.3 During subsequent telephonic discussions between the Minister and the Public Protector, it appeared that the Minister was hesitant, and in fact reluctant, to respond to the request for a copy of the report concerned. Eventually, the Public Protector met with the Minister, on 13 January



- 2004, to discuss the matter and it was only then that the Minister agreed to the request. The report was sent to the Public Protector on 19 January 2004.
- 13.4 It transpired that more detailed information was required to enable the Public Protector to consider the complaint of the Deputy President. The Minister was approached again. His comments were requested on the preliminary views and findings made from the investigation up to that stage, by virtue of him being ultimately responsible for the Prosecuting Authority, as indicated above.³⁸
- 13.5 In a letter, addressed to the Minister on 10 February 2004, the Public Protector, *inter alia*:
- 13.5.1 Expressed his concern regarding the contents of the report by the National Director and stated:
- “It would be appreciated if you could comment on this issue and indicate whether you agree with the finding of Mr Ngcuka that there is a *prima facie* case of corruption against the Deputy President. Any additional comments that might assist us in our understanding of this matter, would also be appreciated.”;
- 13.5.2 Indicated that information obtained and media reports suggested that the Prosecuting Authority was continuing with the criminal investigation against Mr Zuma, despite the announcement by the National Director that he would not be prosecuted. The Minister was requested to respond to

³⁸ See paragraph 5.3 above



this information and, if it was correct, to provide the reasons for the continuation of the investigation and to indicate whether it was conducted with his approval.

13.5.3 Requested the Minister to respond to the statement made by the National Director in his report that the information provided by Mr Zuma during the criminal investigation was not very helpful:

“From the contents of the report, we find it difficult to understand why the responses provided by Mr Zuma were regarded as not very helpful. What we also fail to understand is why no reference was made to his detailed responses on certain allegations, in either the report that was submitted to you or the press statement made by Mr Ngcuka. Only the evidence accumulated by the NPA was discussed, whilst Mr Zuma’s answers, specifically in regard to the solicitation of a bribe, a matter that received vast attention in the media, was apparently ignored. The public was therefore not informed of Mr Zuma’s explanation that was submitted to the NPA on these very serious allegations. The question that arises is whether this failure (if it was indeed a failure) to publicly acknowledge Mr Zuma’s version of what happened, conformed to the requirements of section 179 of the Constitution, 1996, that obliges the prosecuting authority to act reasonably and fairly.”;

13.5.4 Referred to the draft indictment in the criminal case of Mr S Shaik and others where Mr Zuma was cited as accused no 3. The Minister was requested to indicate whether the information submitted to the Public Protector in this regard was correct and, if so, on what basis the decision the initial decision to prosecute Mr Zuma was taken;



13.5.5 Requested the Minister to indicate whether he agreed with the contention expressed by the National Director in his report that the public interest was one of the issues that had to be considered when the decision whether or not to prosecute Mr Zuma was taken; and

13.5.6 Quoted the statement by the National Director in his press release that³⁹:
“Both the (sic) Minister Maduna and the National Director informed the Deputy President about this investigation shortly after it started.” The Minister was requested to indicate when and how the Deputy President was informed; and

13.6 Surprisingly, no response was received from the Minister to the letter of the Public Protector, dated 10 February 2004.

14. MEETING WITH THE NATIONAL DIRECTOR

14.1 The National Director was informed, in writing, on 10 November 2003, of the complaint by the Deputy President and that a preliminary investigation was underway. In his letter to him, the Public Protector also stated:

“Once we have all the required information, I will determine how the complaint should be dealt with further. You will, naturally, be afforded a full opportunity to respond to the allegations made against you, in terms of section 7(9) of the Act and my office will contact you again in this regard as soon as we are in a position to do so.”

³⁹ On page 8



14.2 The Public Protector, subsequently, initiated a meeting with the National Director to discuss the investigation and to request the assistance of the Prosecuting Authority.⁴⁰

14.3 On 16 February 2004, the Public Protector met with the National Director and senior officials of the Prosecuting Authority. The difficulties pertaining to the investigation were discussed and it was agreed that the Office of the Public Protector would not investigate and evaluate the issues that would be traversed during the forthcoming criminal trial of Mr Shaik and others.⁴¹

14.4 The contents of the meeting was confirmed by a letter of the National Director, dated the same day. He also submitted a copy of the 'final charge sheet and summary of substantial facts'.

15. THE INDICTMENT AND THE SUMMARY OF SUBSTANTIAL FACTS IN THE MATTER OF THE STATE V SCHABIR SHAIK AND OTHERS

15.1 References to Mr Zuma

15.1.1 At the meeting between the Public Protector and the National Director of Public Prosecutions,⁴² the Public Protector was referred to the Indictment and the Summary of Substantial Facts that were presented in the criminal case against Mr S Shaik and others. Although he maintained that the Prosecuting Authority did not have sufficient evidence to prosecute the Deputy President, the National Director was adamant that the seriousness

⁴⁰ See paragraph 10.4 above

⁴¹ This agreement was in accordance with the view of the Public Protector on the matter. See paragraph 10.3 above.

⁴² See paragraph 14.3 above



of the allegations against Mr Zuma appears from the contents of these documents.

15.1.2 In paragraph E of the Indictment, in which the accused is amongst other crimes, charged with corruption, it is (*inter alia*) alleged that:

- During the period October 1995 to September 2002, Mr Zuma benefited in an amount of more than R1,3 million by way of payments made to him by Mr Shaik or one of his companies;
- The accused agreed to pay an amount of R 500 000 per annum to Mr Zuma as a bribe in exchange for his “protection and support of the accused for future projects.”
- Mr Zuma needed funds to pay for the development of his traditional residential village in KwaZulu/Natal;
- The benefits paid to him, as referred to in the Indictment, were not legally due to Mr Zuma; and
- These payments made to Mr Zuma, “who would otherwise not have been able to meet his liabilities and fund his excessive expenditure, were corruptly made in furtherance of an ongoing scheme to influence Zuma to use his office or position to advance the accused’s private business interests and/or reward Zuma.”

15.1.3 The Summary of Substantial Facts (the Summary) was compiled by the Prosecuting Authority, by virtue of the provisions of section 144(3)(a) of the Criminal Procedure Act, 1977. This section provides that such a



summary shall accompany an indictment in a criminal case before the High Court, and that it consists of those facts that are, in the opinion of the Director (National Director) of Public Prosecutions, necessary to inform the accused of the allegations against him/her/them. It should therefore, be based on the evidence that could, and if necessary would, be submitted during the trial. The summary becomes part of the court record and is therefore a public document. In the summary under consideration, the following pertinent statements in connection with Mr Zuma were made:

- Details of his financial predicaments and certain payments that were made to him by the accused, that were not legally due to him;
- The accused made certain payments to Mr Zuma in return for favours relating to their involvement in the arms deal and other businesses; and
- That he requested and later confirmed his request to Thomson CSF (a company involved in the arms deal) for a bribe and that a scheme was devised to effect payment of the bribe to him.

15.2 Public response to the contents of the Indictment and the Summary

15.2.1 The Indictment and the Summary were presented to Mr Shaik when he appeared in court on 25 August 2003, 2 days after the decision not to prosecute the Deputy President was announced.



15.2.2 Most of the mayor newspapers gave a full account of what is stated in these documents, many of them focusing directly on the references to the financial troubles of the Deputy President, the “general corrupt relationship” between Mr Shaik and Mr Zuma, the latter’s improper involvement in Mr Shaik’s business deals in return for his funding of Mr Zuma’s “extravagant expenditure” and the agreement in terms of which Mr Zuma was to have accepted a bribe in return for protecting the interest of a company during the Joint Investigation into the arms deal.⁴³

16. A FURTHER REQUEST FOR CLARIFICATION AND ASSISTANCE BY THE MINISTER AND HIS RESPONSE IN TERMS OF SECTION 7(9) OF THE PUBLIC PROTECTOR ACT

16.1 Having studied the contents of the Indictment and the Summary, and as the Minister had failed to respond to the letter addressed to him by the Public Protector on 10 February 2004⁴⁴, the Public Protector again approached the Minister for assistance in the investigation of the complaint of the Deputy President.

16.2 In a letter addressed to the Minister on 25 February 2004, the contents of the Indictment and the Summary and its apparent discrepancies with the report that was submitted to him by the National Director, were discussed in some detail. The Public Protector *inter alia* stated:

“You are aware of the fact that there has been tremendous public and media interest in regard to our investigation of Mr Zuma’s complaint. As

⁴³ See, for example, the *Cape Times* of 26 August 2003, *Mail and Guardian* of 29 August 2003 and *Sunday Times* of 31 August 2003.

⁴⁴ See paragraph 13 above



the prosecuting authority is, by virtue of the provisions of section 35 of the NPA Act, 1998 accountable to Parliament, we also need to inform Parliament of our preliminary findings as a matter of urgency. You will appreciate that it is furthermore, in the interests of all the parties involved that this matter be concluded as soon as possible.”

The Minister was referred to section 7(9)(a) of the Public Protector Act.⁴⁵The Public Protector continued:

“You are hereby formally requested, in your capacity as the Minister responsible for the prosecuting authority ... to provide us with your detailed written response to the matters raised in this and our previous letter, dated 10 February 2004.”

16.3 As far as the alleged continuation of the criminal investigation against Mr Zuma was concerned, it was stated that:

“During our meeting (on 16 February 2004), Mr Ngcuka also informed me that the criminal investigation against Mr Zuma has been concluded and that no further investigations are being conducted against him. It would be appreciated if you could confirm that this is the position, as was also requested in paragraph 4.3 of my previous letter.”

16.4 The Minister never responded to this letter.

⁴⁵ See paragraph 4.2.7 above



17. PROVIDING THE NATIONAL DIRECTOR WITH AN OPPORTUNITY TO RESPOND IN TERMS OF SECTION 7(9) OF THE PUBLIC PROTECTOR ACT

17.1 On 25 February 2004, the Public Protector furnished the National Director with copies of the letters addressed to the Minister on 10 and 25 February 2004. He was requested, in terms of the provisions of section 7(9) of the Public Protector Act, to respond to its contents⁴⁶.

17.2 Referring to the complaint by Mr Zuma that the criminal investigation against him appeared to be continuing, the Public Protector indicated that according to the Deputy President, a summons issued in terms of the NPA Act, was served on Ms N Fakude-Nkuna, the contents of which appear to relate to such further investigation. He continued:

“In the light of the assurance provided by you, during our meeting on 16 February 2004, that the criminal investigation against the Deputy President has been concluded, it would be appreciated if you could indicate whether a perception, created by this summons, that it is in fact still continuing, would be justified.”

18. THE RESPONSE ON BEHALF OF THE MINISTER AND THE NATIONAL DIRECTOR

18.1 On 5 March 2004, the Public Protector received a letter from Adv L F McCarthy, the Head of the Directorate of Special Operations (the Scorpions) of the Prosecuting Authority.

⁴⁶ See paragraph 4.2.7 above



18.2 Adv McCarthy purported to be acting on behalf of the Minister and the National Director in responding to the letters of the Public Protector addressed to them personally, on 10 and 25 February 2004, respectively.

18.3 The gist of Adv McCarthy's attempt to respond to the request by the Public Protector for assistance in the investigation of the complaint by the Deputy President, was the following:

18.3.1 The letters by the Public Protector were regarded as "distressing, if not confusing";

18.3.2 The Public Protector was accused of having "somersaulted" from a position that he previously adopted in meetings with the Minister and the National Director;

18.3.3 The investigation by the Public Protector was regarded as an illegal attempt to review the decision not to prosecute the Deputy President. In this regard it was suggested that the prudent thing for the Public Protector to do would have been to seek a review in the High Court or to apply for a certificate *nolle prosequi* and to prosecute the Deputy President himself!

18.3.4 In terms of the *sub judice* rule, the Public Protector is precluded from investigating the complaint by the Deputy President;

18.3.5 As far as the question relating to the continued investigation against the Deputy President is concerned: "If anything, under the law, the National Prosecuting Authority is entitled to question whomsoever it has cause to,



-
- whenever it wishes to do so, no matter their relationship with any person, including the Deputy President of the Republic of South Africa”;
- 18.3.6 That the answers provided by the Deputy President during the criminal investigation were unhelpful and that its contents were not revealed as it is protected by the provisions of section 41(6) of the NPA Act;
- 18.3.7 That the Public Protector has a “misguided and flawed interpretation of the meaning of ministerial responsibility” hence his approach to the Minister for assistance in the investigation; and
- 18.3.8 In conclusion that: “My instruction from the Minister in this regard are that he cannot, and shall not even attempt to, answer any questions that relate to the investigations conducted by persons with appropriate forensic skills and authority under the law.”
- 18.4 The contents of Adv McCarthy’s letter was both surprising and disconcerting as it:
- 18.4.1 Claimed to be a response to letters addressed by the Public Protector to the Minister and the National Director personally;
- 18.4.1 Clearly indicated a lack of understanding of the constitutional mandate and the role and function of the Public Protector;
- 18.4.2 Was phrased in an aggressive and defensive manner and provided no assistance to the Public Protector, as is required by law;



18.4.3 Insulted the Public Protector by insinuating that he is a liar and incompetent; and

18.4.4 Created the impression that the Prosecuting Authority regards itself as beyond question and criticism.

19. REACTION BY THE PUBLIC PROTECTOR

19.1 Copies of Adv McCarthy's letter⁴⁷ were sent to the Minister and the National Director on 9 and 12 March 2004, respectively.

19.2 In his covering letter, the Public Protector expressed his objection to its contents and insulting tone and requested them to urgently indicate whether it represented their response to his request for assistance.

19.3 By 15 March 2004, both the Minister and the National Director failed to respond. Because of the sensitivities involved and the vital importance to the investigation of a proper answer to the issues raised by the Public Protector, it was decided to approach the President for assistance. A letter setting out the difficulties experienced in obtaining cooperation from the Minister and the National Director, was sent to Mr Mbeki on 15 March 2004.

⁴⁷ Referred to in paragraph 18 above



20. THE REPLY BY THE MINISTER AND THE NATIONAL DIRECTOR

20.1 On 23 March 2004, the Minister addressed a letter to the Public Protector, stating the following:

“We all must appreciate the reality that because of the case pending against Mr Shaik, the manner in which we deal with the Deputy President’s complaint presents all of us with an unprecedented challenge. Accordingly, we are bound to run into instances of misunderstandings and miscommunication from time to time. In this regard, it may well be that the letter from Advocate McCarthy lacked the precision that was necessary under the circumstances. I regret any confusion that such letter may have caused.

What we sought to communicate is that the National Prosecuting Authority believes that it has placed before you all the information that it can reveal at this stage. To present you with more information will certainly compromise the outstanding criminal case that I have referred to.”

It was however, not clear from the Minister’s letter which “information” he was referring to.

20.2 A letter was also received from the National Director, dated 24 March 2004, in which he informed the Public Protector that:

“The Minister has informed me that he has, on our behalf, already responded to your letter. It will therefore serve no useful purpose for me



to respond to your letter in as much as I will be addressing the same issues as the Minister.”

- 20.3 Both the Minister and the National Director indicated their willingness to cooperate with the investigation. They did not, however, indicate how they would assist under circumstances where they had already declared their unwillingness to provide any of the requested information.

21. THE MEANING OF “A *PRIMA FACIE* CASE” IN A CRIMINAL MATTER

21.1 The expression ‘*prima facie* case’ has a legalistic origin and is commonly used by the legal fraternity. Journalists and others also use it quite often, but just as often quote it out of context and meaning.

21.2 The references to a *prima facie* case or *prima facie* evidence in South African court cases and by South African writers on the Law of Evidence, relate to a particular stage in a civil or criminal case before a court of law when the presiding officer has to decide whether or not to decree absolution at the end of the case of the plaintiff or to discharge the accused at the end of the prosecution’s evidence. L H Hoffmann and D T Zeffert in *The South African Law of Evidence*⁴⁸ stated in this regard⁴⁹:

“It is often said that in the absence of such evidence there is ‘no case to answer’, but the refusal of absolution or discharge does not necessarily mean that an answer is required. The defendant or accused may close his case at once and still succeed. In this sense, therefore, a ruling that a

⁴⁸ Fourth Edition

⁴⁹ On page 596



party has 'made out a *prima facie* case' means only that his opponent runs the risk of losing if he offers no evidence.

Although this meaning of *prima facie* evidence is in constant use, there is another, which is even more common. In the other sense one is dealing with what may better be called '*prima facie* proof' and the different meanings attached to the words *prima facie* evidence have been remarked on by Jansen JA in *Marine & Trade Insurance Co Ltd v Van der Schyff*.⁵⁰ In *Ex parte Minister of Justice: re R V Jacobson and Levy*⁵¹ Stratford JA said:

'*Prima facie* evidence in its usual sense is used to mean *prima facie* proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the *prima facie* proof becomes conclusive proof and the party giving it discharges his onus.'

- 21.3 That the question as to whether or not there is a *prima facie* case against the accused is a matter for a court to decide after conclusion of the evidence presented by the prosecution, also appears from the judgment in the case of *S V Heller and Another (2)*⁵²: "The test that is usually applied is whether or not there is any evidence of the commission of the offence upon which a reasonable man might convict the accused".⁵³

⁵⁰ 1972(1) SA 26 (A)

⁵¹ 1931 AD 466 AT 478

⁵² 1964(1) SA 525 (WLD) on 541 G

⁵³ See also *S v Khanyapa* 1979(1) SA 824 (A) and *S v Ostilly and Others* 1976(2) SA 104 (D & CLD)



21.4 In *S v Cooper*⁵⁴ the Court referred to the well known case of *R v Blom 1939 A D 188* and stated:

“It is the task of the triers of fact to estimate and weigh their evidence and the Court of Appeal cannot undertake it. If, however, a basic finding of fact was not one to which the triers of fact could reasonably have come, or the inference of guilt from proved objective facts are not consistent with all the proven facts and the proven facts are such that they do not exclude every reasonable inference from them save the one sought to be drawn then the triers of fact have not performed their judicial function properly. The rules of logic referred to in *Blom’s* case are to be applied by the triers of fact in respect of proved facts at the end of the trial, in order to see whether guilt has been proved beyond a reasonable doubt and there is generally speaking no scope for their application by the Judge at the close of the case for the prosecution; at that stage the facts are not yet proved and he only has to determine whether a reasonable man might convict, not should convict. (emphasis added)

21.5 From what is stated above it can be deduced that whether or not a *prima facie* criminal case exists against a person:

21.5.1 Is determined by a court of law;

21.5.2 After hearing the evidence submitted by the prosecution and such evidence has been subjected to cross examination and the version of the accused has been put to the witnesses for comment; and

⁵⁴ 1976(2) SA 875 (TPD) on 890 B



21.5.3 When satisfied that a reasonable person might, in the absence of further contesting evidence by the accused, convict him/her of the crime he/she is being charged with.

22. THE RIGHT TO HUMAN DIGNITY

22.1 Chapter 2 of the Constitution consists of sections 7 to 39 that constituted a Bill of Rights.

22.2 Section 7 of the Constitution provides that the Bill of Rights is a cornerstone of democracy and that it enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. The state is obliged to respect, promote and fulfil these rights.

22.3 In terms of section 8, the Bill of Rights applies to all law and binds all organs of state.

22.4 As far as interpreting the Bill of Rights is concerned, section 39, *inter alia*, provides that a court, tribunal or forum:

22.4.1 Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; and

22.4.2 Must consider international law.

22.4.3 When interpreting any legislation, must promote the spirit, purport and object of the Bill of Rights. (emphasis added)



22.5 As far as the limitation of the rights contained in the Bill of Rights is concerned, section 36 provides that:

“(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”

22.6 Section 10 of the Constitution provides as follows:

“Everyone has inherent dignity and the right to have their dignity respected and protected.”

22.7 The Constitutional Court has, on several occasions considered and remarked on the meaning of ‘a right to dignity’.

22.7.1 In *S v Makwanyane*⁵⁵ the right to life and the right to dignity were described as the most important human rights. It was pointed out that the right to dignity is intricately linked with other human rights. O’Regan J stated in this regard that:

⁵⁵ 1995(6) BCLR 665 (CC)



"Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings; human beings are entitled to be treated as worthy of respect and concern."⁵⁶

22.7.2 *Dawood and Another v Minister of Home Affairs and Others*⁵⁷ is another case where the right to dignity was considered. The Court held that:

"The value of dignity in our Constitutional framework cannot... be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels."

22.7.3 In *Khumalo and Others v Holomisa*⁵⁸ the Constitutional Court had to consider issues of defamation and human dignity. O'Regan J found that:

"The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both personal sense

⁵⁶ Paragraph 328

⁵⁷ 2000(3) SA 936 (CC)

⁵⁸ Case No CCT 53/01



of self-worth as well as the public's estimation of the worth or value of an individual.⁵⁹(emphasis added)

23. OBSERVATIONS AND FINDINGS

23.1 The reluctance and failure of the Minister and the National Director to cooperate with the investigation

23.1.1 It was decided that it would be in the best interest of the parties involved in the complaint by the Deputy President and in the criminal matter of the State v S Shaik and Others, to conduct the investigation by means of correspondence and the submission of reports. This decision was taken in terms of the provisions of section 7(1)(b)(i) and 7(9)(a) of the Public Protector Act.⁶⁰

23.1.2 The Minister and the National Director failed to adequately respond to the several requests made and directed to them by the Public Protector for assistance in the investigation.

23.1.3 A letter received from Adv McCarthy of the Prosecuting Authority, purported to be a reply on behalf of the Minister and the National Director. The contents of this letter are, to say the least, insulting, aggressive and arrogant and were most unhelpful. The Public Protector requested both the Minister and the National Director to confirm that the contents of Adv McCarthy's letter represented their response, as intimated by him, to the request for their assistance in the investigation. No response was received in this regard.

⁵⁹ Paragraph 27

⁶⁰ See paragraphs 4.2.6 and 4.2.8 above



23.1.4 It was only after the intervention of the President was requested that the Minister and the National Director personally wrote to the Public Protector. They both only indicated that to present the Public Protector with the requested information would “certainly compromise the criminal case” against Mr Shaik and others. It was however, not explained in what manner the investigation of the matters complained of by the Deputy President would have any bearing on the evidence that the Prosecuting Authority intends to present in the criminal matter. The Deputy President’s complaint was about the conduct of the National Director and the Prosecuting Authority and not about the contents of the evidence the Prosecuting Authority claims to have against Mr Shaik and his co-accused. This clearly appears from the contents of the letters of the Public Protector addressed to the Minister and the National Director, to which they never responded.

23.1.5 It was never confirmed or denied by the Minister and the National Director that Adv McCarthy was acting on their behalf. The Minister only apologized for the “lack of precision” of Adv McCarthy’s letter, indicating his regret of “any confusion that such letter may have caused” (whatever it was supposed mean).

23.1.6 The *sub judice* rule had no bearing on the investigation by the Public Protector of the matters complained of by the Deputy President, even if such investigation was to extend to the issues that have arisen or may arise in the court case against Mr Shaik and others.

23.1.7 The unjustifiable failure and reluctance of the Minister and the National Director to cooperate with the investigation impinged on the constitutional



imperative that obliges them to support the Public Protector⁶¹. It also resulted in the Public Protector being left with no option but to conclude the investigation without the benefit of detailed responses to the complaints of the Deputy President by the parties implicated. Their failure was therefore not in the interest of justice and created an untenable situation, especially in the light of the high profile status of all the parties involved. It also set a poor example to other organs of state in regard to cooperation between government agencies, as is required by the Constitution.

23.2 The obligation to investigate and to report to Parliament

23.2.1 The contents of the complaint by the Deputy President fall within the ambit of the jurisdiction of the Public Protector.

23.2.2 The investigation was conducted in a manner that did not interfere, improperly or otherwise, with the performance of the powers and functions of the Prosecuting Authority.

23.2.3 Particular care and caution were taken not to traverse matters during the investigation that would cause the risk of the Public Protector having to make public statements in connection with the criminal case against Mr Shaik and others.

23.2.4 The merits and demerits of the decision by the National Director not to prosecute the Deputy President were not investigated. Care was also

⁶¹ See paragraph 10.4 above



taken not to create a perception that the Public Protector was questioning or reviewing this decision.

23.2.5 It is necessary and in the public interest that the findings of the investigation is reported to Parliament. Parliament is furthermore, implored to urgently consider the recommendations made in this report.

23.3 Was the Deputy President improperly prejudiced by the public statement by the National Director that there is a *prima facie* case of corruption against him, but that he would not be prosecuted?

23.3.1 From the investigation it was clear that the Prosecuting Authority faced many obstacles and challenges during their investigation of suspicions and allegations of criminal conduct relating to the arms deal. They had to deal with sensitive matters involving well-known and respected persons from different sectors of society, under, sometimes, very difficult circumstances.

23.3.2 The statement under consideration was most unusual and contentious. It opened the floodgates for varied speculations by several sectors of society, in particular the media and some parliamentarians, about the involvement of the Deputy President in criminal conduct, which was unjustified and not in the public interest.

23.3.3 Mr Zuma has a constitutional right to have his human dignity respected and protected. The value of human dignity includes “the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements.”



23.3.4 From the public response to the statement by the National Director and the contents of the complaint lodged by the Deputy President in this regard, it appears that his individual reputation and his reputation as Deputy President and a political leader was severely compromised. The general view was (and still is) that Mr Zuma is guilty of corruption, but that he is not being prosecuted because of his high profile and political interference. ("The implication is that the man is guilty but covered his tracks well."⁶²) There can be no doubt that the statement under consideration published by the National Director, infringed upon Mr Zuma's right to human dignity, as protected by the Bill of Rights.

23.3.5 In order to determine whether Mr Zuma was improperly prejudiced as a result of the violation of his right to human dignity, the Public Protector had to consider the provisions of sections 36 and 39 of the Constitution⁶³. What had to be established was whether Mr Zuma's right to human dignity was limited in a justified manner under the circumstances. In order to do so, the Public Protector (as a 'forum') had to interpret the relevant provisions of the Bill of Rights, taking into account the promotion of the values that underlie an open and democratic society based on human dignity, equality and freedom, and international law.

23.3.6 Mr Zuma's right to human dignity could only have been limited in terms of a law of general application, i.e. relevant legislation, the common law or customary law.

⁶² See paragraph 2.6.16 above

⁶³ See paragraph 22 above



23.3.7 The NPA Act is the law of general application that applies under the circumstances as it regulates the powers and functions of the Prosecuting Authority, including the National Director.

23.3.8 In terms of the NPA Act, the Prosecuting Authority has the power to institute criminal proceedings on behalf of the state. The prosecution process must be conducted in terms of the Prosecution Policy, which acknowledges the observance of international law in the form of the United Nations Guidelines on the Role of Prosecutors.

23.3.9 According to the Guidelines, prosecutors must, in the performance of their functions, respect and protect human dignity. They must act fairly, consistently and expeditiously.

23.3.10 The Prosecution Policy provides that it is the primary function and prerogative of members of the Prosecuting Authority to decide whether or not to institute criminal proceedings in a particular matter. In doing so, they must act impartially and in good faith.

23.3.11 In deciding whether or not to prosecute, the assessment made by the prosecutor should be whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. Once it has been determined, by means of these criteria, that there is a reasonable prospect of success, a prosecution should follow, unless the public interest demands otherwise. The public interest therefore, does not play a role in the decision as to whether or not there is a prospect of a successful prosecution. It is only considered when it is clear that there is a provable case that could be prosecuted.



23.3.12 Reasons provided for the decisions of the Prosecuting Authority in regard to prosecution should be handled with care not cause embarrassment or unnecessary debate. In terms of the Policy, prosecutors should refrain from making inappropriate media statements. In responding to the media, the Prosecuting Authority should assist the public in understanding the nature and course of criminal proceedings and not prejudice the parties involved.

23.3.13 In terms of the general principles of criminal law and procedure, it is for a court to determine whether or not a *prima facie* case has been established against the accused. This deduction is made on the basis of evidence submitted by the prosecution, contested by the accused and evaluated by the presiding officer, during a court hearing. Should it be found that there is a *prima facie* case against the accused, it means that there is, in the absence of rebuttal by the accused, sufficient evidence for a reasonable person to convict him or her.⁶⁴

23.3.14 In his press statement, the National Director clearly stated that the Prosecuting Authority, after having assessed the facts and the (admissible) evidence came to the conclusion that there is no prospect of a successful prosecution against the Deputy President. The decision was taken and this part of the statement was clearly made in compliance with the Policy.

23.3.15 However, in the same paragraph of the press statement, the National Director stated that the Prosecuting Authority concluded that there is a *prima facie* case of corruption against the Deputy President. This

⁶⁴ See paragraph 21 above



statement, made by the person in charge of criminal prosecutions in the country and made in relation to a criminal case, could only have meant and was generally understood to mean, that the Prosecuting Authority is in possession of sufficient facts and admissible evidence on which a reasonable person could convict Mr Zuma of corruption, hence the public outcry (“charge him then!”).

23.3.16 In making such a statement, the National Director actually pre-empted what a court would find, if the facts and admissible evidence were presented in a criminal case against Mr Zuma.

23.3.17 In the light of the decision not to prosecute Mr Zuma, the statement that there is a *prima facie* case of corruption against him was contradictory, confusing and gave rise to the embarrassment of the Deputy President and the Prosecuting Authority. No indication could be found that the statement was made in bad faith or with the intent to prejudice the Deputy President. On the other hand, there is also no indication why a statement that Mr Zuma would not be prosecuted because of a lack of sufficient and admissible evidence would not have sufficed under the circumstances. In the absence of any explanation by the Minister and the National Director in this regard, these questions remain unanswered.

23.3.18 The statement by the National Director that there is a *prima facie* case of corruption against the Deputy President did not comply with the provisions of the Guidelines and the Prosecution Policy in regard to the protection of and respect for human dignity. It deprived the Deputy President from an opportunity to state his case in public and to rebut the



finding of a *prima facie* case against him. It was therefore inappropriate and unnecessary.

23.3.19 Nothing in the Guidelines or the Prosecution Policy would justify a public statement regarding a person's apparent but not provable guilt. To the contrary, all these provisions appear to emphasize that prosecutors should stick to what it is that they have to assess and should not make statements beyond that. Prosecutors cannot perform the functions of a judge or a magistrate.

23.3.20 Neither the Guidelines, nor the NPA Act and the Prosecution Policy provide for the limitation of a person's constitutional right to dignity under circumstances where he or she is not prosecuted, as happened in the matter concerned.

23.3.21 Under the circumstances, a finding that Mr Zuma's right to human dignity was unjustifiably infringed upon by the statement by the National Director that there is a *prima facie* case of corruption against Mr Zuma, and that he has therefore been improperly prejudiced, is unavoidable.

23.4 Was the statement by the National Director that there is a *prima facie* case of corruption against the Deputy President, fair and proper under the circumstances?

23.4.1 The implication created against the Deputy President by the mentioned statement, is a very serious one. In essence it means that there is reliable evidence that indicates that Mr Zuma requested and received a bribe from one of the parties involved in the arms deal. It not only suggests that he might be guilty of a criminal offence, but also of a violation of his duties



and responsibilities under the Constitution, as a senior member of the Cabinet.

23.4.2 During the investigation by the Prosecuting Authority against him, Mr Zuma provided a comprehensive written response to questions put to him in regard to his alleged involvement in the arms deal and the alleged solicitation of a bribe. The Prosecuting Authority, in concluding their decision not to prosecute, had obviously considered his response. It was however, not referred to in the press statement. This left the impression that despite Mr Zuma's explanations, there was evidence on which a reasonable person might convict him of corruption. This impression was exacerbated by the statement by the National Director that "the investigating team recommended that we institute a criminal prosecution against Deputy President Zuma."

23.4.3 The Deputy President was deprived of the opportunity of having his rebuttal of the allegations against him published at the same time as when the decision that there is a *prima facie* case of corruption against him, was announced. The National Director, apparently, thought it appropriate to state that there is a *prima facie* case against Mr Zuma, without mentioning his defence against this contention.

23.4.4 In his claimed response on behalf of the Minister and the National Director, Adv McCarthy of the Prosecuting Authority stated in this regard:

"We note that you continue to raise your concerns regarding why we have elected not to make any references to the responses provided by the Deputy President, during the course of our investigation. We reiterate that these answers have been unhelpful. Moreover, they are protected by the



- provisions of Section 41(6) of the National Prosecuting Authority Act, No 32 of 1998. However, should they for any reason become relevant in the trial of S Shaik and Others, the State reserves the right to use them.”
- 23.4.5 Section 41(6) of the NPA Act prohibits the disclosure of any information obtained during the course of a criminal investigation, without the permission of the National Director.
- 23.4.6 The Guidelines clearly provide that prosecutors should, in the performance of their duties act fairly and keep matters in their possession confidential, unless the performance of duty or the needs of justice requires otherwise.
- 23.4.7 The Prosecution Policy provides for the prosecution of offenders to be fair, transparent and predictable.
- 23.4.8 Adv McCarthy’s explanation effectively means that the National Director can be selective in regard to what information in connection with a criminal case could and should be disclosed to the media. Such a view would be acceptable only as long as the selection is fair to the suspect or accused and other parties involved and relates to a prosecution.
- 23.4.9 It is accepted that the prosecution might rely on Mr Zuma’s explanations during the trial of Mr Shaik and others. It however, appears to be improbable as it was regarded as “unhelpful”. The reasons why it was so regarded were requested from the Minister and the National Director, but never provided.
- 23.4.10 In his report to the Minister on his decision not to prosecute the Deputy President, the National Director, in his analyses of the evidence, referred to the explanations provided by the Deputy President. He concluded that



although the explanations were not very helpful, it was clear that the Deputy President could “come to court and present a defence, which is reasonably possibly true”.

23.4.11 The decision by the National Director not to disclose the contents of Mr Zuma’s defence to the allegations against him to the media would have been justified, had he limited his announcement to the conclusion that there was insufficient admissible evidence to prosecute Mr Zuma. However, by stating that there is a *prima facie* case of corruption against Mr Zuma, without disclosing his defence, the Deputy President was treated unfairly. He was literally left for the media and the public to convict and sentence without having been given a proper opportunity to state his case. The basic rules of natural justice and the relevant provisions of the Guidelines and the Prosecution Policy were, therefore, violated in the process.

23.4.12 The statement by the National Director that there is a *prima facie* case of corruption against the Deputy President is therefore found to have been unfair and thus improper.

23.5 Was the Deputy President timeously informed of the criminal investigation against him?

23.5.1 In his complaint, Mr Zuma stated that he discovered from a report in the *Mail and Guardian* of 29 November 2002 that he was being investigated by the ‘Scorpions’ in regard to his alleged improper involvement in the arms deal. Subsequently, the investigation became a regular feature in the media.



23.5.2 As he had not been informed by the Prosecuting Authority of the investigation against him, Mr Zuma instructed his attorneys to approach the National Director for confirmation of such investigation. The attorneys wrote to the National Director in this regard on 11 December 2002.

23.5.3 The National Director responded in writing on 17 December 2002, stating that:

“It is not in the nature of our business to disclose prematurely the substance and subjects of an investigation other than through legal process.”

No confirmation or denial of the investigation against Mr Zuma was provided.

23.5.4 Mr Zuma’s attorneys approached the National Director again in this regard in a letter, dated 9 May 2003.

23.5.5 In his response, dated 30 May 2003, the National Director stated:

“It is not the policy of my office to inform persons under investigation that they are being investigated. However, in this case we made an exception. The Minister of Justice and Constitutional Development and I, have personally informed your client about the nature and the purpose of the investigation.”

The Deputy President denied this.



23.5.6 Early in December 2002, the Scorpions reportedly denied to the media that Mr Zuma was being investigated in connection with his alleged involvement in a bribe relating to the arms deal.⁶⁵

23.5.7 In his press statement of 23 August 2003, the National Director stated that both he and the Minister informed the Deputy President about the investigation shortly after it started, i.e. in 2001⁶⁶.

23.5.8 However, the Minister was reported widely by the media as having stated, early in February 2003, that he was not aware of the Scorpions investigating the Deputy President. "I know as much as the media have reported", he stated. He continued: "I am therefore not in a position to say whether there is a probe into the deputy president, or if there is one, when that will be concluded, I don't know".⁶⁷ It is most unlikely that the Minister was not informed, (by February 2003) of the investigation against the Deputy President, especially as the media was reporting on the matter regularly after the report by the *Mail and Guardian* of 29 November 2002.

23.5.9 During the investigation of the complaint of the Deputy President, the Minister and the National Director were requested to respond to the allegation that Mr Zuma had not been informed of the criminal investigation against him and to provide details as to when and how he was so informed, as claimed by the National Director in his press statement. Both the Minister and the National Director failed to respond, even after the intervention of the President.

⁶⁵ See paragraph 2.4.3 above

⁶⁶ See paragraph 13.4.6 above

⁶⁷ See paragraph 2.4.5 above



23.5.10 From the information obtained during the investigation, it appears that the Deputy President had probably not been informed of the criminal investigation against him, as claimed by the National Director. Whether such failure was proper and justified under the circumstances could not be determined because of the failure by the Minister and the National Director to cooperate during the investigation.

23.6 The complaint that confidential information relating to the criminal investigation against the Deputy President was leaked to the media by the Prosecuting Authority

23.6.1 The remarks made in the report of the Hefer Commission relating to the leaking by the Prosecuting Authority to the media of confidential information in regard to criminal investigations, were attended to by the Office of the President.⁶⁸

23.6.2 On 24 May 2004, the President informed the Public Protector that the internal investigation that he commissioned had been concluded. It found:

23.6.2.1 Nothing that suggested that the National Director could have been party to the leaks; and

23.6.2.2 Strong circumstantial evidence that privileged information in the possession of the Prosecuting Authority found its way to unauthorized persons outside its structures.

⁶⁸ See paragraph 6.7 above



23.6.3 In response to the recommendations made by the inquiry to prevent such leaks from occurring again, the President instructed the (new) Minister of Justice and Constitutional Development, together with the Justice, Crime Prevention and Security Cluster, to:

23.6.3.1 Develop, as a matter of urgency, a proper security management system that meets the accepted standards of information security. This should include guidelines to ensure that no privileged information lands in the hands of 'sources' used in the course of investigations;

23.6.3.2 Ensure that all personnel of the Prosecuting Authority, including external consultants are properly screened in terms of section 19B of the NPA Act and the Intelligence Services Act, 1994; and

23.6.3.3 Ensure that the Ministerial Coordinating Committee, established in terms of section 31 of the NPA Act urgently attend to all matters of relationships between the Directorate: Special Operations and other intelligence and security institutions to improve effective coordination in the performance of their functions.

23.7 Did the criminal investigation against the Deputy President continue after the decision not to prosecute him was announced by the National Director?

23.7.1 In his complaint the Deputy President raised his concern that it appeared from media reports that the criminal investigation against him might be continuing, even though the Prosecuting Authority had decided not to prosecute him. He also referred to a Summons, issued on 20 February 2004, in terms of section 28 of the NPA Act and served on Ms N Fakude-



Nkuna. From the contents of the Summons it appeared that Ms Fakude-Nkuna had to appear before the Prosecuting Authority to be questioned in regard to matters relating to the development and financing “of a traditional village for the Deputy President Jacob Zuma at Nkandla”.

23.7.2 During the meeting between the Public Protector and the National Director on 16 February 2004, the latter clearly indicated that the criminal investigation against Mr Zuma was not continuing⁶⁹. 4 Days later the Summons referred to above was issued. Both the Minister and the National Director subsequently failed to respond to the requests by the Public Protector to respond to the complaint by the Deputy President in this regard.

23.7.3 The only reply received from the Prosecuting Authority in relation to this matter was contained in the letter from Adv McCarthy⁷⁰ in which he stated:

“...there is nothing improper , in serving, as the National Prosecuting Authority has done, a summons on Ms Norah Fakude-Nkuna. If anything, under the law, the National Prosecuting Authority is entitled to question whomsoever it has cause to, whenever it wishes to do so, no matter their relationship with any person, including the Deputy-President of the Republic of South Africa. It is our understanding that Ms Fakude-Nkuna is not, under our law, bereft of remedies in her personal capacity. Should she personally feel aggrieved, she would be at liberty to challenge the relevant subpoena (sic) in a court of law.”

⁶⁹ See paragraph 16.3 above

⁷⁰ See paragraph 18 above



23.7.4 The uncalled for aggressive and defensive response by Adv McCarthy provided no answer to the very simple question as to whether or not the criminal investigation against the Deputy President was continuing.

23.7.5 As a result of the unfortunate failure by the Minister and the National Director to assist in the investigation, no finding could be made in regard to the claimed impropriety of continuing with a criminal investigation against a person after it has been publicly announced that he would not be prosecuted and without informing him.

24 . KEY FINDINGS

From the information obtained during the investigation of the complaints of the Deputy President against the National Director and the Prosecuting Authority, the following key findings were made:

- 24.1 The Prosecuting Authority is accountable to Parliament in respect of the exercising of its powers and the performance of its functions and duties;
- 24.2 The Prosecuting Authority is also accountable to Parliament for its decisions regarding the institution of prosecutions;
- 24.3 The Minister and the National Director were constitutionally obliged to cooperate with the Public Protector in the investigation of the complaints of the Deputy President;
- 24.4 The reluctance and failure by the Minister and the National Director to cooperate with the Public Protector in the investigation was improper and unconstitutional. It resulted in the Public Protector having to conclude the



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- investigation without the benefit of proper responses by those implicated by the complaints of the Deputy President;
- 24.5 The press statement made by the National Director on 23 August 2003, that there is a *prima facie* case of corruption against the Deputy President, but that he would not be prosecuted, unjustifiably infringed upon Mr Zuma's constitutional right to human dignity and caused him to be improperly prejudiced;
- 24.6 The press statement (referred to in paragraph 24.5 above) was unfair and improper;
- 24.7 The Deputy President had probably not been informed by the Minister and the National Director of the criminal investigation against him shortly after it commenced, as was publicly claimed by the National Director;
- 24.8 As the Minister was replaced in the Cabinet after the 2004 elections, it would serve no purpose to make any recommendations to Parliament in regard to his improper failure to cooperate with the Public Protector.
- 24.9 The provisions of section 31 of the NPA Act that established a Ministerial Coordinating Committee⁷¹ have not been implemented.
- 24.10 The steps taken by the President to attend to the remarks made by the Hefer Commission in regard to the leaking of confidential information by the Prosecuting Authority should be commended. The recommendations

⁷¹ See paragraph 5.4 above



made by the investigators and the instructions given by the President in this regard, are supported.

25. RECOMMENDATIONS

In terms of the provisions of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, it is recommended that Parliament take urgent steps to:

25.1 Ensure that the National Director and the Prosecuting Authority are held accountable, by virtue of the provisions of sections 41(1) and 181(3) of the Constitution and section 35 of the National Prosecuting Authority Act, 1998, for:

25.1.1 Failing to cooperate with the Public Protector in the investigation of the complaint of the Deputy President;

25.1.2 Infringing upon the Deputy President's constitutional right to human dignity and thereby causing him to be improperly prejudiced; and

25.1.3 Acting in an unfair and improper manner in regard to the Deputy President.

25.2 Ensure that the Ministerial Coordinating Committee contemplated by section 31 of the National Prosecuting Authority Act, 1998:

25.2.3 Convenes as a matter of urgency; and



25.2.4 Determines policy guidelines in respect of the functioning of the Directorate of Special Operations that would prevent a recurrence of the improprieties referred to in this report.

A handwritten signature in black ink, appearing to read 'M L MUSHWANA', is positioned above the printed name.

ADV M L MUSHWANA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

28 May 2004