THE HIGH COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION

CASE NO.: CC358/05

In the matter between :

THE STATE

and

JACOB GEDLEYIHLEKISA ZUMA	**ACCUSED NO. 1**
THINT HOLDING (SOUTHERN AFRICA) (PTY) LTD	**ACCUSED NO. 2**
THINT (PTY) LTD	**ACCUSED NO. 3**

A F F I D A V I T

I, the undersigned,

PIERRE JEAN MARIE ROBERT MOYNOT

do hereby make oath and state :

1.

1.1. I am :

1.1.1. the Managing Director of Accused No. 2;

1.1.2. a Director of Accused No. 3;

1.1.3. duly authorized by Accused Nos. 2 and 3 to depose to this affidavit, the facts whereof are, save where the context indicates to the contrary or it is expressly stated otherwise, being true and correct and within my personal knowledge and belief;

1.1.4. dependent on and rely upon legal advice where I make legal submissions in this affidavit.

2.

I have read the Notice filed on behalf of the State indicating its intention to apply for an adjournment in terms of Section 168 of the Criminal Procedure Act 51 of 1977 ("the Act"), the affidavit of Senior Special Investigator Johan Du Plooy ("Du Plooy") filed in support of the application, and the annexures attached thereto.

3.

I have been advised that :

3.1. The State and the Accused have agreed that the State will record on affidavit the grounds upon which and the basis for its application for an adjournment in terms of Section 168 of the Act;

3.2. The Accused may, if so advised, file affidavits articulating their response to the State's intention to apply for an adjournment and motivating any other relief it may be advised to seek in these affidavits;

3.3. The State and the Accused may also rely on oral submissions during the hearing of the application for the adjournment and may extend, amplify or supplement the grounds and refer to facts/circumstances other than those reflected in the affidavits.

3.4. The Accused will be entitled to insist and the State might be directed by the Court to call the evidence of witnesses in support of its application for an adjournment and such witnesses will be subjected to cross-examination by the Defence.

4.

In support of the application for a postponement, the State relies on the affidavit of Du Plooy.

5.

He states, concerning this case, regarding the complexity thereof, its seriousness, significance and uniqueness, in paragraphs 39 and 40 of his affidavit:

> "***It is clear from the provisional indictment and from the facts set out above that this is an exceptionally serious and complex case. The corruption of a Government minister, let alone the Deputy President of the country, is in itself a matter of the utmost gravity. The fact that such corruption involved a multi-billion rand arms procurement company and an international arms company further compounds its seriousness. When one factors in the unprecedented public and political interest, I believe it can be stated without hyperbole that this is possibly one of the most serious and significant cases in the history of our democracy***."

> "***The complexity of the investigation of the offence and the preparations for trial can also hardly be over-stated. The sheer volume of the documentary evidence described above presents in itself a challenge that must be almost unique in the history of criminal prosecutions.***"

6.

6.1 It is not proposed to take issue with the State regarding its evaluation of the complexity of the investigations in this case and the other descriptions considered appropriate by it. Even accepting that the State is correct and means what it says about its estimation of the seriousness and uniqueness of the case, it is impossible to understand why the Prosecution has thus far conducted itself with such tardiness, ineptitude and indecisiveness. Even more startling is the State's endeavours to blame everyone else but itself for the predicament in which the Accused presently find themselves.

6.2 The manner in which the State has conducted itself, from as early as 2000 when the investigations began, to date hereof, drives one inevitably to the irresistible conclusion that the investigations and prosecution in this matter were conducted with little or no regard for the duties and obligations imposed upon the National Prosecuting Authority by the Constitution, the National Prosecuting Authority Act 32 of 1998 (the “NPA Act”), the Prosecution Policy, Policy Directives and Code of Conduct and the United Nations Guidelines of the Role of Prosecutors.

7.

7.1. I am informed that in terms of Clause 4.1 of the Code of Conduct framed by the National Director of Public Prosecutions ("NDPP") in terms of Section 22 (6) (a) of the NPA Act, prosecutors are expected to perform their duties fairly, consistently and expeditiously.

7.2. Furthermore, as I have been informed, Article 12 of the U.N. Guidelines on the Role of Prosecutors provides :

> "***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****"*.

7.3. Section 195 of the Constitution imposes upon the Public Administration the imperative to be governed by the democratic values and principles enshrined in the Constitution, including, *inter alia*, the promotion and maintenance of a high standard of professional ethics and the performance of its services to be impartial, fair, equitable and without bias.

7.4. I will endeavour to illustrate, by what follows hereunder, that the prosecution in this case has thus far been anything but fair, consistent and expeditious and, if anything, the conduct of the National Prosecuting

Authority does not display the high standards expected of it by the Constitution. In addition it has not afforded any or sufficient recognition to the Constitutional rights of Accused Nos. 2 and 3.

8.

I am advised, further, that it is incumbent upon the State, in every prosecution :-

8.1. to take all such reasonable measures to ensure maximum compliance with its constitutional obligations; and

8.2. not to act arbitrarily.

9.

The unpalatable truth about which I am confident all parties will be in agreement is that the trial cannot proceed, although scheduled by agreement between the State and the defence to have commenced on 31 July 2006, nor, it seems, can it in the near future.

10.

In my respectful submission, on the basis of the facts and circumstances set out hereunder and on the basis of what I have been informed will be dealt with in oral submissions :-

10.1. The conduct of the Prosecuting Authority in the way it has thus far dealt with the investigations and prosecution against Accused Nos. 2 and 3 (more particularly Accused No. 3); and

10.2. the substantial prejudice caused by the unreasonable, inordinate and inexcusable delay; and

10.3 the fact that the State is still unwilling to commence the trial;

10.4. will all severely impact on the rights of Accused Nos. 2 and 3 to a fair trial.

11.

By virtue of the contentions articulated in the previous paragraph hereof, I am advised that :

11.1 Accused Nos. 2 and 3 will seek a permanent stay of the prosecution on account of the delay which has resulted in the serious infringement of their Constitutional rights to a fair trial, more particularly their rights in terms of Section 35(3)(d) of the Constitution;

ALTERNATIVELY, and in the event of an Order for a permanent stay of the prosecution not being granted, then:-

11.2. The application for the adjournment will be opposed on behalf of Accused Nos. 2 and 3;

11.3. The Court hearing the application will be urged to make an order contemplated in Section 342A (3) of the Act :-

11.3.1. refusing the application for the adjournment;

11.3.2. striking the case off the roll;

11.3.3. ordering that the prosecution not be resumed or instituted *de novo* without the written instruction of the NDPP or his duly authorized representative;

11.3.4. ordering that, in the event of the prosecution being resumed or instituted *de novo*, that the State be obliged to comply with pre-determined requirements in accordance with its constitutional and statutory obligations concerning the service of an indictment, the supply of particulars and documents, and other related matters, so that the Accused, if so re-indicated, will be supplied with an indictment and such relevant material on such terms as to enable them to properly and timeously prepare for trial;

11.3.5. such further, other or alternative relief as to this Honourable Court deems fit in order to eliminate the delay and any prejudice arising from it and to prevent further delay.

12.

Before dealing *seriatim* with the averments in the affidavit of Du Plooy, I propose to highlight by way of introduction, certain salient features which in my respectful submission ought to have an important bearing on the relief which accused Nos. 2 and 3 will seek, in the main, and on their response to the State's application for an adjournment.

13.

According to the indictment which the State has thus far chosen to refer to as a "provisional indictment", there is no difference between Accused Nos. 2 and 3 regarding the acts allegedly attributed to each. They are "in the same boat" so to speak.

14.

During March to July 2001 and pursuant to summonses in terms of Section 28 of the NPA Act, employees of Accused Nos. 2 and 3 were questioned and literally trailer loads of documents had been seized at and removed from the premises of

the second and third accused and African Defence Systems ("ADS") in Pretoria, Midrand and Mount Edgecombe in KwaZulu-Natal.

15.

During October 2001 and pursuant to the provisions of the International Co-operation in Criminal Matters Act No. 75 of 1996 ("the ICCM Act"), the business premises of Thales International Africa Ltd (Mauritius), their accountants Mutual Trust Management (Mauritius) Ltd, formerly Valmet Mauritius and the residence of a Mr Alain Thetard (“Thetard”) were searched and documents, compact discs and stiffies had been seized and removed.

16.

On the same day the offices of Thales International and certain residential premises in Paris were searched and documents seized and removed also pursuant to the provisions of the ICCM Act.

17.

17.1. The above processes enabled the State to obtain, for the purposes of its investigation, voluminous documents and other information, some of which was used during the trial of Mr Schabir Shaik (“Shaik”), about which trial reference will be made later in this affidavit.

17.2. The lawfulness of the above proceedings, searches and seizures pursuant to the above processes is disputed.

18.

The inevitable consequence of the aforesaid searches and seizures was the wide-spread negative publicity both in South Africa and abroad. The reputations of the parent company, Thales International in Paris and its subsidiaries and associated companies in South Africa, Mauritius and in other parts of the world came under the spotlight and, as a result, became severely and adversely affected. The allegations of corruption with which the searches, seizures and investigations were associated seriously affected some of the business endeavours of the accused and the other entities aforesaid referred to, particularly in relation to the submission of tenders. The allegations of corruption were used by competitors, mischievously to prejudice the business pursuits and reputation of Thales International, the accused and the other entities referred to in Mauritius and in other parts of the world.

19.

19.1. In 2002, much media publicity was given to the existence of what has become known as the "encrypted fax", in respect of which it was alleged were contained details of an attempt by Accused No 1 and Shaik to solicit a bribe involving Thales International, Thetard and Accused Nos. 2 and 3.

19.2. It was alleged by the State in the trial involving Shaik that Thetard was the author of the encrypted fax which bore his handwriting and who, after preparing it instructed his secretary, one Sue Delique to type it and fax it in an encrypted form to Thetard's superiors abroad.

20.

On 19 August 2003 the previous NDPP, Mr Bulelani Ngcuka ("Ngcuka"), publicly announced his decision not to prosecute Accused No 1.

21.

On 2 February 2004, Accused No. 3 was indicted, as Accused No. 11 with Shaik and other corporate entities he controlled, on charges of corruption and money laundering. Charges relating to fraud pertained only to Shaik and some of the corporate accused.

22.

After being indicted, Accused Nos. 2 and 3 and Thales International became concerned about their reputations being tarnished by their involvement in the trial and their alleged complicity as set out in the indictment, and other related issues, which were impacting on their business in Mauritius, locally and abroad. Concern was also expressed about the warrants of arrest that the State had obtained in relation to Thetard. Arrangements were made through an attorney, Mr Robert Driman ("Driman") of the firm Deneys Reitz in Johannesburg for a

meeting with the former Minister of Justice, Dr PM Maduna ("Dr Maduna"). Driman acted for Thales International, Accused No. 3 and their employees from the time the investigations had commenced until May 2004.

23.

Present at this meeting which was held during April 2004 at the home of Dr Maduna, was Driman, a French Advocate Christine Guerrier representing Thales International, Mr Ajay Sooklal an attorney presently acting for Accused Nos. 2 and 3, Ncguka and I.

24.

The purpose of the meeting was to make formal representations to Dr Maduna in his capacity as the Minister who exercised final responsibility over the prosecuting authority in terms of Section 179(6) of the Constitution and Section 33 of the NPA Act, and Mr Ncguka in his capacity as NDPP, to withdraw the charges against Accused No 3 and, *inter alia*, to withdraw the warrants of arrest against Thetard.

25.

At the meeting, Driman articulated the representations on behalf of Thales International, Accused Nos. 2 and 3 and Thetard.

26.

Dr Maduna responded by stating that, in his view, the focus of the prosecution was not on Thales International or Accused No. 3 or, for that matter, on Thetard. The focus was really on Shaik and the corporate entities he controlled. This, according to him, was confirmed by reports he had been receiving from time to time from the prosecution. According to Dr Maduna, Thales International and Accused Nos. 2 and 3 were considered by the South African Government to be making a useful contribution to the development and improvement of the South African economy through their association with ADS and the furtherance of government's policy on Black Economic Empowerment. He said that, in his view, it was imperative for the "French" to pursue their business interests in South Africa and to continue to be encouraged to make major investments particularly in the defence sector in the country. He agreed with the contention that the publicity associated with the trial would negatively impact on these endeavours. He stated that he was therefore prepared, based on his assessment of the matter, to recommend to Ncguka to withdraw the charges and the warrants of arrest in relation to Thetard.

27.

He then referred to Ncguka and requested his view and response.

28.

Ncguka said that he agreed with the sentiments expressed by Dr Maduna regarding the “French” and his assessment of the matter but he would be prepared to withdraw the charges and the warrants of arrest if Accused No. 3 provided the State with an affidavit deposed to by Thetard in which he confirmed that he was the author of the “encrypted fax”.

29.

Driman requested an opportunity to first have sight of the “encrypted fax”, to consider the proposal made by Ngcuka in exchange for the withdrawal of the charges and warrants of arrest, to advise accordingly and to revert later.

30.

Subsequently, after having inspected the “encrypted fax” and having taken instructions, Driman instructed Senior Counsel, presently acting for Accused Nos. 2 and 3, to meet with Ncguka and to conclude the agreement with Ncguka on behalf of Accused No 3, on the terms that had previously been agreed with Dr Maduna and Ncguka.

31.

This was done at a meeting between Senior Counsel and Ncguka, in the presence of Adv LF McCarthy (“McCarthy”), the Deputy National Director of

Public Prosecutions, at Ncguka's offices in Pretoria. Also present were Driman, Sooklal and Adv Guerrier.

32.

Pursuant to the conclusion of the agreement:

32.1. Accused No. 3 complied thereto by providing the State with an affidavit by Thetard which simply stated:-

> "***I, the undersigned, Alain Thetard, care of Thales … , hereby attest the following :***
>
> ***1. I was born at … on 6 March 1948.***
>
> ***2. I have examined a copy of the document which is annexed hereto and initialled by me and marked "X".***
>
> ***3. I confirm that I am the author of the said Annexure "X".***
>
> ***Made in Paris on 20th April 2004.***"

Annexed hereto marked "PM1" is a copy of the said affidavit. The Annexure "X" referred to in the affidavit of Thetard is a copy of the handwritten "encrypted fax".

32.2. Ncguka confirming his undertaking to withdraw the charges and the warrants of arrest against Thetard in a letter dated 4 May 2004, in the following terms:-

> "***RE : A THETARD & THALES INTERNATIONAL***
>
> ***My earlier letter of 19 April 2004, in connection with this matter refers.***
>
> ***Thank you for the affidavit of Mr Thetard, in which he confirms that he is the author of the note in question.***
>
> ***In the result, we will withdraw the charges against Accused No. 11 in the matter of State v Shaik & Others, under Case No. PC 27/04, on the date of next appearance.***
>
> ***We have also instructed the investigating team to withdraw subpoenaes and warrants against Mr Thetard.***
>
> ***As regards your request for access to information, the prosecuting Advocates will provide you with the relevant documents, to assist you in further consultations.***
>
> ***The said access will be facilitated on the understanding that Mr Thetard will submit to questioning by the prosecuting***

Advocates, and be prepared to testify, in the criminal trial, should it become necessary.

Trusting that you find this in order.

_____

MR BULELANI T NGCUKA

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS"

Annexed hereto marked "PM2" is a copy of the said letter.

32.3. In compliance with the agreement, the State withdrew the charges against Accused No. 3 on 11 October 2004.

33.

Although I was advised that the agreement concluded with Ncguka did not have the effect of an indemnity against prosecution of Thales International, Accused Nos. 2 and 3 or any of their employees, including Thetard, I was confident, however, that Accused No. 3 would never be re-indicted. I say this for the following reasons :-

33.1. Dr Maduna assured us at the meeting at his home, that Accused No. 3 was encouraged to invest in South Africa and in the perpetuation of its business ventures with ADS in particular and in the arms industry

generally. He gave this assurance in the presence of Ngcuka. He would hardly, in my respectful submission, have encouraged Accused No. 3 to expand its business interests in South Africa had he and/or Ngcuka entertained the slightest intention or expectation of prosecuting Accused No. 3 in the future.

33.2. The fact that Ngcuka agreed to withdraw the warrants of arrest against Thetard was a clear confirmation of Dr Maduna's statement that the focus of the prosecution was not on Accused No. 3, Thales International or Thetard.

33.3. Common sense suggested that the affidavit which was required in exchange for the withdrawal of the charges and the withdrawal of the warrants of arrest, did not contain evidence which was required to enable the State to prove its case concerning the draft “encrypted fax” in the Shaik trial. I say this because, as it turned out during the Shaik trial, the State had other means to prove Thetard's handwriting on the “encrypted fax”, for example :-

(a) the evidence of Sue Delique, Thetard’s former secretary, did provide proof concerning Thetard’s handwriting.

(b) The evidence of handwriting experts.

33.4. To my way of thinking at that stage, it was unlikely in the extreme that the State would require Accused No. 3 to provide it with evidence containing an admission which could later be used against Accused No. 3 if it was at all contemplated at that stage that Accused No. 3 was later going to be charged. I was confident that the State, represented by its highest authority would not abandon its duty to act consistently and ethically.

33.5. Notwithstanding in a letter by a junior member of the prosecuting team dated 16 July 2004 and marked "without prejudice", a copy of which letter is annexed hereto marked "PM3" in which it was for the first time explicitly stated that "***nothing in the undertaking should be presumed, explicitly or impliedly, to amount to an indemnity from prosecution for one or other of your clients"***, nothing was specifically stated by Ngcuka or Dr Maduna during the meeting in April 2004 about the agreement not constituting an indemnity against prosecution. Nothing was stated by either of them, however, to suggest even the possibility of the prosecution being reinstituted against Accused No. 3.

33.6. On the contrary, in my respectful submission, the conduct of the Minister of Justice and the NDPP, both by word and deed, in my mind certainly brought the prosecution to a close, and I therefore regarded the letter, Annexure "PM3" as reflecting the views of a junior official in the National

Prosecuting Authority who did not have the power or authority to overrule the Minister of Justice and the NDPP.

The State, in the Shaik trial, has waived any privilege from disclosure it had in relation to Annexure “PM3” by referring to its contents during evidence adduced by it.

33.7. The very fact that the State, represented by Ngcuka, the highest authority in the National Prosecuting Authority at that stage, required an innocuous and most unhelpful piece of evidence in the prosecution of Shaik in exchange for the withdrawal of the charges against Accused No. 3, is in itself an indication that the charges were withdrawn because the decision was taken by Ngcuka in consultation with or on the recommendation of Dr Maduna that the State agreed with the views expressed by Dr Maduna that the focus of the prosecution was not on Accused No. 3 and that it would not charge Accused No. 3 in the future.

33.8. I challenge Dr Maduna and Ngcuka, to say so :-

33.8.1. if they differ with my understanding of the circumstances which, in my estimation resulted in the end of the prosecution against Accused No. 3;

33.8.2. to state whether at that stage a legitimate expectation was not created in the minds of those representing Accused No. 3, Thales International and Thetard that the prosecution against Accused No. 3 was not going to be reinstituted;

33.8.3. if, at the time Ncguka made the decision to withdraw the charges at Dr Maduna's home in April 2004, their estimation of the strength of the evidence against Accused No. 3 differed with Du Plooy's evidence given in proceedings in the Transvaal Provincial Division, which Accused Nos. 2 and 3 brought against the State in January 2006 for the setting aside of the search warrant (the "search warrant application") which authorised the search of its premises, that:-

> "***The company Thint (Pty) Ltd (formerly Thomson CSF (Pty) Ltd) was arraigned as Accused 11 but the charges against it were withdrawn at the commencement of the trial in terms of an agreement between its legal representatives and the National Director of Public Prosecutions. The State withdrew the charges <u>solely</u> as a result of the agreement and not because of any considerations of the merits of the charges***

against Thint (Pty) Ltd. The State remained convinced (and is still so convinced) that a prosecution against Thint (Pty) Ltd was merited on the strength of the evidence against it."

33.8.4. if they agree with Du Plooy's estimation of the strength of the evidence as it stood in April 2004, why then did Ncguka decide to withdraw the charges against Accused No. 3?

34.

34.1 That the State has chosen to reinstitute the prosecution against Accused No. 3 in November 2005, some twenty months after the decision by Ncguka to withdraw the charges against Accused No. 3 presents a shocking display of blatant arbitrariness, indecisiveness and a failure to act expeditiously, consistently and fairly.

34.2 If Du Plooy is correct in his assessment about the State's confidence at all times in the strength and merits of the case against Accused No. 3, then it must follow that the findings expressed in the judgment in the Shaik trial regarding the complicity of Accused No. 3 was not unexpected.

34.3 It is difficult, therefore, to understand what prompted the office of the NDPP to perform such a *volte face* after and as a result of the judgment in

the Shaik trial. It will be most interesting to note the response of the National Director. Reference later in this affidavit will be made to a letter by the National Director dated 9 June 2006 (annexure "PM12") in which he refers to some alleged repudiation by Accused No. 3 of the agreement concluded in April 2004. It is not clear in this letter whether the National Director is offering the alleged breach of the agreement as a reason for the reinstitution of the prosecution against Accused No. 3. What is somewhat disconcerting, however, is the statement by the National Director that, in spite of the alleged repudiation the NPA still complied with the agreement.

34.4. In annexure "PM12" the National Director makes it clear that the reinstitution of the prosecution against Accused No. 3 was as a result of the judgment in the Shaik trial. In paragraph 11 thereof he states:- " ***The conviction of Shaik and his companies and the terms of the Court's judgment made it abundantly clear that your client has a case to answer. In the circumstances I was, and remain, of the view that the prosecution of your client, together with Thint Holdings, is in the interest of justice***".

34.5 In my respectful submission the only inference that arises from the circumstances connected with the decision in April 2004 to withdraw the charges against Accused No. 3 and the decision in November 2005 to

reinstitute the prosecution against Accused No. 3 is that the State realised after acting so precipitately in deciding to prosecute Accused No. 1 realised after the dust had settled that they could not succeed in a prosecution against Accused No. 1 without prosecuting Accused Nos. 2 and 3. I am informed that during argument and by reference to the indictment it will be illustrated how evidence, especially of the documentary type which the State must prove in the prosecution against Accused No. 1, it could not succeed in having admitted as evidence without Accused Nos. 2 and 3 being joined as accused. In the circumstances, it will be contended on behalf of Accused No. 3 that the decision to prosecute was motivated by *mala fides*.

35.

In the last sentence of paragraph 8 of his affidavit, Du Plooy states, after referring to the agreement which resulted in the charges being withdrawn against Accused No. 3:

"***Furthermore, it is recorded that the State alleges that Thompson CSF (Pty) Ltd failed to comply with, alternatively breached, the terms of the agreement*.**"

36.

This statement by Du Plooy, which places on record the State's contention, is completely without any basis or substance. I say this for the following reasons:-

36.1 The terms of the letter by Ncguka dated 4 May 2004, (Annexure “PM2”) suggests that it could only have been written after compliance with the agreement by Accused No. 3. The only requirement for compliance by Accused No. 3 was to supply the State with an affidavit by Thetard in the terms specified by Ngcuka. In Annexure “PM2”, no mention is made of any repudiation or breach of or failure to comply with the agreement by Accused No. 3.

36.2 The letter dated 19 April 2004, and referred to in Annexure “PM2”, specified the terms agreed upon simply to be the supply by Accused No. 3 of the said affidavit of Thetard in exchange for an undertaking by the State to withdraw the charges against Accused No. 3 and the warrants of arrest in relation to Thetard. There were no other terms.

36.3. In affidavits filed by Ncguka and Adv McCarthy in answer to an application brought by Accused No. 3, during August 2004 in the High Court, Pietermaritzburg, for an order directing Ncguka to withdraw the charges on a date prior to 11 October 2004, no mention is made anywhere in the affidavits or in the attached correspondence that had been relied upon and filed on behalf of the State, of any alleged breach or failure to comply with the terms of the agreement. The office of the National Director was represented in the proceedings by Senior Counsel and I am confident that,

had there been any notion or perception that Accused No. 3 had reneged or breached the agreement, such would have been stated in the affidavits of Ngcuka or Adv McCarthy. I was present during the course of argument and confirm that no mention was made of any alleged breach or repudiation of or failure to comply with the terms of the agreement by Senior Counsel acting on behalf of the State.

36.4. To compound the problem arising from the State's rather belated accusation of the failure by Accused No. 3 to comply with the agreement is the statement by the lead prosecutor in the Shaik trial, Adv. W Downer S.C., on 11 October 2004, when the charges were withdrawn against Accused No. 3. He stated :-

> "***In respect of the criminal matter, I will ask that the matter against Accused No. 11, and that is Thint (Pty) Ltd – T.h.i.n.t. – I will ask that the matter be withdrawn against Accused No. 11, in accordance with an agreement reached between the National Prosecuting Authority and Accused No. 11, counsel for Accused No. 11***".

Advocate Downer's statement appeared to be an unequivocal acknowledgment that the withdrawal of the charges was pursuant to the agreement and compliance thereto by Accused No. 3.

36.5. In December 2005, the State brought an application in terms of Section 2 (2) of the ICCM Act. This application was opposed. In response to an allegation on behalf of Accused Nos. 2 and 3 that, pertaining to Mauritian law the re-indicting of Accused No. 3 could amount to "double jeopardy", the State filed an affidavit dated 2 March 2006, by Isak Jacobus Du Plooy, a special investigator involved with Du Plooy very closely with the investigations both in relation to the Shaik trial and the present proceedings, in which he responded as follows :-

> "***11.1.*** ***I am advised that the question of double jeopardy does not arise. The indicting of the Third Accused is not in conflict with any agreement between it and the erstwhile National Director of Public Prosecutions. The agreement to withdraw the charges was never intended or understood to amount to an indemnity from prosecution.***
>
> ***11.2.*** ***Also, such agreement was only in respect of the present Third Accused.***
>
> ***11.3.*** ***This is in any event a matter to be decided by the Mauritian Court.***"

Conspiciously silent in his response is any statement concerning an alleged breach or failure to comply with the agreement.

36.6. The first time that any suggestion regarding an alleged breach of or failure to comply with the terms of the agreement had been brought to the attention of Accused No. 3 or its legal representatives, was in an affidavit by Du Plooy dated 4 May 2006 filed in opposition to the application by Accused Nos. 2 and 3 to compel the State to deliver further particulars, which was heard by His Lordship, the Deputy Judge President, Mr Justice Levinsohn. In paragraph 9 of his affidavit, Du Plooy states, somewhat by the way and unrelated to the issues which required to be debated in the application, that :-

> "***Furthermore, it is recorded that the State disputes that Thomson CSF (Pty) Ltd complied with the terms of the agreement.***"

36.7. However, a more interesting and very significant development in this regard is the contents of an affidavit by Du Plooy dated 17 February 2005, a copy of which was included amongst documents contained in six lever arch files and provided to the defence of Accused Nos. 2 and 3, (also on 4 May 2006, i.e. the same date on which Du Plooy attested to the affidavit referred to in paragraph 36.6 above) pursuant to the request for particulars served on the State on 24 March 2006. A copy of this affidavit by Du

Plooy, together with the annexures thereto is annexed hereto marked "PM4".

36.8. In this affidavit, Du Plooy motivates an application for the re-issue of the warrants of arrest for Thetard. His affidavit which is dated 19 February 2005 refers to information received the day before about Thetard's presence in Johannesburg. The application was moved by Advocate A L J Steynberg, the junior prosecutor in the Shaik trial, (who is also involved in the present prosecution) before Mr Justice Pillay in the Durban High Court on 19 February 2005. It should be noted that the warrant of arrest was applied for two days after the date on which the State had closed its case, i.e., 17 February 2005.

36.9. Almost two weeks before the State closed its case, Counsel for Mr Shaik, Advocate F Van Zyl SC had informed prosecuting Counsel in the Shaik case in the presence of Shaik's attorney, Mr Reeves Parsee ("Parsee"), that he and Parsee intended to proceed to France on the evening of 4 February 2005 for consultations with witnesses to be conducted in Paris over the weekend of 5 and 6 February 2005 and, for this purpose they intended to request the Trial Judge for an indulgence to adjourn proceedings earlier on 4 February 2005 to facilitate timeous departure from Johannesburg to Paris. For this purpose, Counsel proceeded to the Judge's chambers and conferred with the Judge. Presumably pursuant to

the request for the indulgence the Trial Judge adjourned proceedings earlier on 4 February 2005, as reflected in a copy of the relevant extract of the record of the proceedings for that date, annexed hereto marked "PM5". I also refer to the affidavit of Parsee filed evenly herewith, from which it is apparent that it was clear to all by 4 February 2005 that the Counsel and attorney for Mr Shaik were proceeding to Paris to consult. In the circumstances, I have no doubt that Du Plooy, the lead investigator who was in court almost every day during the Shaik trial must have been aware of the intended trip by the defence team of Mr Shaik to Paris and the proposed consultations with witnesses there, including Thetard.

36.10 I challenge Du Plooy :

36.10.1. to state that it was not known to the State on or about 4 February 2005 that the Counsel and attorney for Mr Shaik were proceeding to Paris for consultations with witnesses during the weekend of 5 and 6 February 2005;

36.10.2. to state that, the State did not contemplate the possibility that the defence for Mr Shaik was going to consult with Thetard with a view to giving consideration to the possibility of calling him as a defence witness;

36.10.3. to state that, at the time he made the affidavit in support of the application for the warrant of arrest, the possibility was never contemplated by the State that Thetard might be called as a defence witness in the Shaik trial;

36.10.4. to state that, if it is true that he had information that Thetard was seen in Johannesburg the day before, that it was never contemplated by the State that Thetard was in fact being called as a defence witness in the Shaik trial and that his very presence in Johannesburg was possibly associated with his so being called;

36.10.5. Why was it not considered appropriate in the interests of full disclosure to inform his lordship, Mr Justice Pillay that Thetard's presence in Johannesburg might have been connected with his being called as a witness on behalf of Shaik.

I am advised that once Du Plooy and the State respond to the challenges presented in this paragraph, further submissions will be made concerning this application by the State for the re-issue of the warrant of arrest for Thetard.

36.11 In the search warrant application, referred to above, Du Plooy admitted knowledge that Senior Counsel and Mr Ajay Sooklal had been present on watching brief for Accused No. 3 on almost every occasion during the Shaik trial. That being so, it is difficult to understand why neither the prosecution nor the investigators considered it appropriate to inform the legal representatives of Accused No. 3 that Accused No. 3 was regarded by the State to have failed to comply with, alternatively repudiated, alternatively breached, alternatively reneged on the terms of the agreement, and that the State therefore considered it necessary to apply for the reissue of the warrant of arrest for Thetard.

36.12 I can state quite positively that Thetard had not returned to South Africa since October 2001. Had he done so, I would have been informed in my capacity as the most senior official of the Thales Group in Southern Africa. The fact that he had not been in South Africa between October 2001 and 2 February 2005, is clear from the evidence of Du Plooy given on 2 February 2005 in the Shaik trial, an extract of which is annexed hereto marked “PM6”.

37.

What is clear, however, is that if Thetard (who had no knowledge of the re-issue of the warrant of arrest until after 4 May 2006 when the copy of the application for the warrant was supplied to the defence of Accused Nos. 2

and 3) had been called by Shaik's Counsel to testify for the defence, he would have been promptly arrested, without prior warning the moment he stepped off the aeroplane upon his arrival in Johannesburg. One does not have to possess the genius of a rocket scientist to appreciate the debilitating effect such a state of affairs would have had on Thetard, if he was called to give evidence in South Africa on behalf of the defence in the Shaik trial.

38.

38.1. The prejudicial effect of the State's conduct in obtaining the reissue of the warrant of arrest for Thetard is the effect the news of such re-issue of the warrant of arrest has had on him. He has informed me and the executive management of Thales International that he has lost complete faith and trust in the South African Prosecuting Authorities. He believes that the re-issue of the warrant of arrest was a contrived effort to prevent him from being a useful witness for the defence, because if he was called as a witness, he would have been testifying "in prison clothes", to use his words. He has stated quite categorically that he will never testify in connection with this case.

38.2. The news of the re-issue of the warrant and the sentiments expressed by Thetard has been circulated amongst other prospective witnesses for Accused Nos. 2 and 3. They also share the same sentiment about the South African Prosecuting Authorities.

38.3. Some of these witnesses have been regarded by the State in the Shaik trial as accomplices. They are unwilling to testify in South Africa through fear of arrest.

38.4. Thetard is the only witness who can testify regarding the circumstances surrounding the handwritten encrypted fax.

38.5. No assurances or indemnity against prosecution is likely to assuage any of the concerns of these potential witnesses for the defence of Accused Nos. 2 and 3, least of all Thetard.

39.

In all the above circumstances, it is my respectful submission that the delay in the present prosecution is unreasonable and has resulted from the indecisiveness and prevarication of the State. Had the State not decided to withdraw the charges against Accused No 3 in May 2004, it would not have suffered such serious and substantial prejudice, the details of which, I am informed, will be addressed substantially in the course of argument. Suffice it however, at this stage to state such prejudice as follows :-

39.1. Advocates, attorneys and experts have been instructed and retained by Accused Nos. 2 and 3 on the basis of the agreement

concluded with the State on 12 October 2005 that the trial will commence on 31 July 2006 until the end of November 2006. Collapse fee arrangements will undoubtedly cause severe financial prejudice should the present state of uncertainty regarding the commencement of the prosecution persist.

39.2. Severe prejudice, both actual and potential, arises from the lapse of time between the commission of the alleged offences and the trial and the consequences arising, as a result thereof, from the unavailability of evidence, documents and records through loss and destruction. It is at this stage impossible even to assess the extent of the prejudice because the State has not yet provided the defence with an indictment (in respect of which it is prepared to respond to a Request for Further Particulars) or sufficient information, particulars, documents and reports to enable the Accused to assess what case it has to meet and what evidence, documents and records it will require to have regard to and, if necessary and so advised, present in support of its defence at a trial. There are several corporate entities locally and abroad which are not obliged to retain records after 5 years. The delay will undoubtedly prejudice the Accused regarding documents which will be necessary for their defence.

39.3. The effect of the lapse of time on the memory of potential defence witnesses, which must impact on the quality of their evidence, is no doubt a matter which will cause prejudice to the Accused. Its actual effect at this stage is inestimable by virtue of the same handicap as referred to in the previous sub-paragraph hereof.

39.4. The unavailability, destruction or loss of vital computer evidence will contribute to prejudice to the Accused.

39.5. The Accused will be severely prejudiced by virtue of the fact that certain potential defence witnesses are no longer employed by the Accused or the Thales Group. Furthermore, immense difficulties are likely to be occasioned in attempting to secure the evidence of material witnesses who live and work in various continents abroad, some of whom will be unwilling to come and testify in South Africa in the light of the State's conduct in relation to the re-issue of the warrant for the arrest of Thetard.

40.

I propose, by way of a chronology which I believe is not subject to dispute, to set out certain facts and circumstances in an endeavour to highlight that the unreasonableness of the delay in the prosecution of the trial. I preface these by stating that, according to Du Plooy in his affidavit in the search warrant

application, the charges against the accused in the present matter are, *mutatis mutandis*, virtually the same as those that had been preferred against Mr Shaik.

41.

The facts and circumstances I refer to are:

41.1. In regard to what has been found by the Court to have been "a generally corrupt relationship" in the trial of Shaik, Accused Nos. 2 and 3 are alleged to have been involved in events which occurred prior to and on 18 November 1998.

41.2. In relation to the alleged corruption in connection with events recorded in the so-called encrypted fax, the events are alleged by the State to have been committed prior to and on the weekend of 10 or 11 March 2000.

41.3. According to Du Plooy, the preparatory investigation which preceded the investigations leading up to the present trial was instituted on 6 November 2000. This investigation was extended on 22 October 2002 to include the offences referred to in the present indictment.

41.4. The trial of Mr Shaik and the corporate accused he represented commenced on 11 October 2004 and was concluded on 8 June 2005.

41.5. Five days later, i.e. on 20 June 2005, the NDPP decided to prosecute Accused No 1 on at least two counts of corruption in contravention of Section 1(1)(b) of the Corruption Act No 94 of 1992.

41.6. On 8 August 2005 the investigation was extended to include the offences of fraud or attempted fraud and contraventions of the Income Tax Act allegedly committed by Accused No 1.

41.7. Accused No 1 appeared in the Durban Magistrate's Court on 29 June 2005 and the matter was postponed to 11 October 2005 for further investigation.

41.8. On 18 August 2005 searches were conducted and a large volume of documents, both in hard copy and in electronic form, were seized during raids by officials representing the NDPP on several homes and offices, including the legal practices of two attorneys.

41.9. On 29 September 2005, the State addressed a letter to the legal representative of Accused No 1, a copy of which is Annexure "JDP.1" to Du Plooy's affidavit, in which it stated that almost 93 000 documents that had been seized during the raids on 18 August 2005 had to be scanned, copied and scrutinised, and had to be properly perused, analysed and incorporated into the forensic auditor's report.

41.10. Purportedly on the basis of the predicament in which the State appeared to have found itself, it was stated:

> "***3 In the light of the above, the State will have no option but to apply for a further adjournment of this matter.***
>
> ***4 It is appreciated that the matter cannot continue to be adjourned indefinitely. In order to circumscribe this process, it is proposed that the matter be adjourned to a suitable date towards the end of March 2006, on which date the State will serve the indictment on your client.***

5 In order to prevent a further lengthy delay before the trial, it is proposed that an appointment be made towards the end of this year with the Judge President of this Division (together with a representative of the DPP's office) to arrange a suitable trial date. The matter would then be adjourned from the appearance in the Magistrate's Court towards the end of March to the trial date agreed upon.

6 You will also appreciate that the dockets and the forensic report will only be able to be given to you at about the time of the proposed next (March 2006) adjournment. It is anticipated that the defence will require some time after this date to prepare for trial, as will the State. It is suggested that a reasonable time be allowed for this. You are requested to bear this in mind when arrangements for a trial date in the High Court are discussed.

7 Kindly indicate your attitude to these proposals by 7 October 2005."

The letter was signed by the Junior Counsel for the State, Advocate A L J Steynberg.

41.11. On 11 October 2005, after hearing argument and pursuant to an agreement between the legal representatives for Accused No 1 and the State, details of both of which will be referred to later in this affidavit, the matter was postponed to 12 November 2005.

41.12. On the next day, i.e. 12 October 2005, a meeting was convened with the Honourable the Judge President of the Province of KwaZulu-Natal, his Lordship Mr Justice V E M Tshabalala, and it was agreed that the trial of this matter would commence on 31 July 2006.

41.13. What is significant about the proceedings on 11 October 2005 in the Magistrate's Court and the agreement concluded between the State and the representatives of Accused No 1 in the presence of the Honourable the Judge President, is the following:-

41.13.1. Accused Nos. 2 and 3 who were not charged until 4 November 2005 could not have been party to any

agreement concluded with the State on 11 October 2005.

41.13.2. It was not expected that any point would be taken by Accused Nos. 2 and 3 in relation to the date agreed upon being unreasonable.

41.13.3. The State was aware when the trial date was agreed upon that the search warrant application brought on behalf of Juleka Mahomed for the setting aside of the search warrant in relation to her premises and her office had been successful and that the State had applied for leave to appeal to the Supreme Court of Appeal.

41.13.4. The State was also aware at that time, that Accused No. 1 and his attorney, Mr Michael Hulley, had launched an application on 6 October 2005 for the setting aside of the search warrants pertaining to searches conducted at the residence of Mr Zuma and the office premises of Mr Hulley.

41.13.5. The State must have appreciated by this time that similar applications for the setting aside of the search warrants and for declarations of unlawfulness of the searches conducted pursuant thereto would be brought on behalf of Accused Nos. 2 and 3 and other persons and entities whose homes and offices had been searched.

42.

In spite of all the facts and circumstances which were apparent to the State at the time it committed itself to the agreement concerning the trial date being 31 July 2006 in the High Court, which agreement was recorded in its letter dated 3 November 2005, which is Annexure "JDP.5" to the affidavit of Du Plooy.

43.

43.1. In December 2005, the State brought an application in terms of Section 2 (2) of the ICCM Act. Accused Nos. 2 and 3 opposed the application. The application was heard by His Lordship, Mr Justice P C Combrinck and was refused. A copy of His Lordship's judgment is annexed hereto marked "PM7".

43.2. His Lordship reasoned that both on account of the fact that no *lis* had by then been established between the State and the defence and that an

order in terms of Section 2 (2) of the ICCM Act ought appropriately to be made by the Court seized with the hearing of the criminal trial, he could not grant the application.

43.3. The State has given notice of its intention to renew the application in terms of Section 2 (2) of the ICCM Act on the 31 July 2006 or so soon thereafter as the matter might be heard. The State has further indicated its intention to rely on the same papers for the application as those relied upon before His Lordship, Mr Justice P C Combrinck. Accused Nos. 2 and 3 have given notice of their intention to oppose the application and will address argument thereto when the State brings this application.

43.4. It should be remarked at this juncture that the State has not provided any explanation about why it has not made any attempt to bring an application in terms of the ICCM Act any earlier than December 2005 concerning the documents and evidence in Mauritius. One of the grounds advanced in argument by Counsel for the NDPP in the application in the Pietermaritzburg High Court during August 2004 for the refusal to withdraw the charges against Accused No. 3 earlier than 11 October 2004, was the application in terms of the ICCM Act to the authorities in Mauritius. Counsel for the NDPP stated on page 6 of the Record :-

"***There is another reason (for refusing to withdraw the charges before 11 October 2004) and that is the one that has to do with the request made for mutual legal assistance. Now, M'Lord, it is only for as long as the Accused is nominally an Accused. The request for mutual legal assistance from other countries are valid and the National Director said that what he wants to do is to consider his position. With respect, the submission is he is fully entitled to do that. Your Lordship would have seen from the papers that there have been requests for assistance in Mauritius and also in France. The National Director wanted to consider what the effect would be on those requests if he withdrew charges any sooner than 11 October 2004…. If the effect of withdrawing charges soon, would have the result that the authorities in those countries would say : 'Well sorry this company is no longer an accused and therefore you are not entitled to make these enquiries' and the whole process falls apart, that is not in the interest of the criminal prosecution. …"***

Annexed hereto marked "PM8" is a copy of the relevant extract of the record of the proceedings reflecting the above submissions.

43.5. Even after the charges had been withdrawn against Accused No. 3 on 11 October 2004, nothing was done to pursue the State's efforts to secure

this evidence until December 2005. This is a further indication of the tardiness of the State's approach to the investigations and this prosecution.

43.6. Furthermore, there is no explanation as to why the State has not resorted to pursuing the extra-curial approach suggested by Combrinck J in paragraph 8 of His Lordship's judgment (Annexure "PM7").

44.

On the basis of the intimation by the State in paragraph 4 of its letter dated 29 September 2005 (Annexure "JDP1" to the affidavit of Du Plooy) and of the expectation that the State would be able to finalise the charges and the allegations upon which the charges were based by the end of March 2006, a request for particulars and documents, on behalf of Accused Nos. 2 and 3, was served on the State on 24 March 2006.

45.

The State responded in a manner which provoked an application to compel by Accused Nos. 2 and 3 being brought before and heard by Mr Justice Levinsohn who delivered judgment on 15 May 2006. A copy of the said judgment is annexed hereto marked "PM9".

46.

In response to the Request for Particulars, the State in a letter dated 7 April 2006, indicated, for the first time, that "***it would appear that the agreed trial date of 31 July 2006 is becoming increasingly unrealistic***". Annexed hereto marked "PM10" is a copy of this letter.

47.

The State provided what it deemed to be an appropriate reply to the request for further particulars and documents. Annexed hereto marked "PM11" is a copy of this reply. The application to compel the supply of the particulars and documents requested was brought because the State's response to the request was considered grossly insufficient.

48.

48.1. In the letter, Annexure "JDP8" to the affidavit of Du Plooy, the State adopts the position, somewhat unilaterally that it "***is of the view that it will not be possible to commence the prosecution in this matter on 31 July 2006***" and stated further that in its view "***a realistic date for the commencement of the trial would be February 2007***" for the reasons stated in that letter. This letter is dated 26 June 2006.

48.2. In paragraph 58 of his affidavit in support of the State's application for an adjournment, attested to on 19 July 2006, some three weeks after the letter of 26 June 2006, Du Plooy states :

> "***For all the reasons described above, I am advised that it will not be practically possible to commence the trial before the end of this year. I am accordingly advised that a suitable date for the commencement of the trial would be in the first half of 2007.***"

48.3. One is left to wonder what could have caused the State to shift so dramatically from its estimation specified in the letter of 26 June 2006 that the realistic date for commencement of the trial will be February 2007 to the suggestion, three weeks later, proposed by the State, that the trial commence anytime in the first half of 2007.

48.4. To heighten the mystery and compound the confusion created by the State, the Notice of its Intention to Apply for an Adjournment states :-

> "***The State will apply to the above Honourable Court on 31 July 2006 at 10am, or so soon thereafter as the matter may be heard, for an order in terms of Section 168 of Act 51 of 1977 that the above trial be adjourned to a date <u>in 2007</u> to be arranged in consultation with the Honourable Trial Judge and/or the Honourable Judge President.***"

49.

It is evident, in my respectful submission, that from the above facts and circumstances :-

49.1. The entire attitude of the State towards the Accused has been characterized by extreme tardiness and indecisiveness and a shocking disregard for the rights of the Accused concerning a speedy and fair trial and the ability to properly prepare their defences.

49.2. Its vacillation concerning the dates for the commencement of the trial and its endeavours to each time place blame on the Accused and other persons unconnected with the trial for the delay reflects a total disregard by the State for the rights of the Accused and the rules governing the conduct of criminal proceedings.

49.3. The applications which were brought as a challenge to the search warrants and the delays caused by the resolution of these applications constitute one of the major reasons for the delay which the State blames everyone but itself. As it stands none of these applications have been resolved. It is reasonable to assume that each of the applicants and the State may decide to exhaust their available remedies, even as far as the Constitutional Court.

49.4. The other reason which the State maintains as a reason for the delay is the Shaik Appeal, which is expected to be heard on 21st August 2006. Here again one or other party may decide to pursue their legal remedies, if so advised, as far as the Constitutional Court. The judgment on Appeal may or may not have any effect on the present indictment. To compound matters, in connection with the Shaik Appeal, the Prosecution team claims that its application for an adjournment may have to be adjourned solely for the purpose of facilitating their ability to prepare for and argue the Appeal. This presents a classic example of the State's cavalier attitude to this case. It knew from as early as August last year that leave to Appeal was granted to Shaik. It knew some time ago that the Appeal was set down for 21st August 2006. It has in the past utilised the services of private Counsel from the bar to act on its behalf. Shaik has employed Counsel that was not involved in the trial to argue his Appeal. The State could have done likewise.

49.5. The question of the State's endeavours to obtain the documents in Mauritius, necessarily requires an order of the Mauritian Court releasing the documents in the custody of the Attorney-General of Mauritius. The decision of the Mauritian High Court concerning this order could be the subject of an appeal or review, which I am informed may only be heard,

having regard to the Roll in the High Court of Mauritius, in some 4 or 5 years.

49.6. All the above suggests that, on the basis of the reasons proposed by the State for the delay, the State may only be ready to commence the prosecution some 3 to 5 years in the future.

49.7. The above circumstances indicate that the State could never be in a position to commence the prosecution in the near future and the various unpredictable events contribute to the uncertainty and make it impossible to estimate when.

49.8. The above circumstances seem to indicate that the State is reluctant to proceed with this prosecution at all.

49.9. The defence of Accused Nos. 2 and 3 will require the National Director to testify and subject himself to cross-examination concerning:-

49.9.1. his decision to re-institute the prosecution against Accused No. 3;

49.9.2. the reasons for his decision to indict the accused at a time when it was clear that much investigations still had to be

conducted and that the nature of the investigations and the Shaik Appeal was likely to severely impact on the prosecution and result in an unreasonable delay;

49.9.3. the date which he really expects the prosecution to commence.

49.9.4. Whether the decision to reinstitute the prosecution against Accused No. 3 and prosecute Accused No. 2 was not motivated primarily by the consideration that they needed to be joined in order to become a convenient vehicle for the proof of certain evidence against Accused No. 1.

50.

One would expect, at least at this stage, that the State would have had some certainty about when the trial against the Accused will commence. The fact that the Accused have not yet been provided with particulars, or the final details of the charges that the State intends to rely upon, or the Forensic Auditor's report, or the documents which it is entitled to in order to properly prepare for the trial, appears not to be of any moment to the State.

51.

In my respectful submission any indulgence granted to the State will have the effect of providing it with a licence to abuse the process and rules of this Honourable Court and the relevant provisions of the Criminal Procedure Act.

52.

I shall now proceed to deal *seriatim* with those averments of the affidavit of Du Plooy which necessitate a response. My failure to deal with any of the averments therein, ought not to be construed as an acceptance thereof. I am advised that the affidavit of Du Plooy will be further dealt with during argument on the date of the hearing of the State's application for an adjournment.

53.

AD PARA 8 :

I have dealt earlier in this affidavit with the circumstances leading up to and surrounding the withdrawal of the charges and the agreement which preceded such withdrawal. I deny that Accused No. 3 at any stage failed to comply with, alternatively breached, alternatively reneged on the terms of the agreement. It is noteworthy that Du Plooy does not state when and in what manner Accused No. 3 is alleged to have breached the agreement. The only indication of the manner in which Accused No. 3 is alleged to have breached, alternatively failed to comply with the agreement appears, for the first time in correspondence conveyed to the attorney for Accused Nos. 2 and 3 in a letter by the National

Director dated 9 June 2006, a copy of which is annexed hereto marked “PM12”. This letter is a response to a letter dated 8 June 2006, addressed to the National Director by the attorney for Accused Nos. 2 and 3, a copy of which is annexed hereto marked “PM13”.

54.

AD PARA 14 :

The approach of the defence for Accused No. 1 as articulated in Annexure “JDP2” and during argument on 11 October 2005, in the Durban Magistrate’s Court, was not to reject any proposal by the State to endeavour to supply the indictment by the end of March 2006. The approach adopted by the defence of Accused No. 1 was mainly in response to the State’s ill-conceived endeavours to transfer the matter from the Magistrate’s Court to the High Court and a total disregard for or an inexplicable ignorance of the provisions of the Criminal Procedure Act relating to the way in which proceedings become pending in the High Court. Du Plooy appears to reflect this apparent lack of understanding on the part of the State, in the final sentence in this paragraph.

55.

AD PARA 15 :

55.1. Regarding the terms of the agreement relating to the service of a so-called “provisional indictment”, I respectfully refer to page 36 of the Record of the proceedings before Magistrate Asmal in the Durban Magistrate’s Court on

11 October 2005. Counsel for the State indicated that the State would present what he referred to as a "provisional indictment", Counsel for Accused No. 1 stated :-

> "***Insofar as the question of it being a provisional indictment, we understand that the indictment will comply with the provisions of Section 144 of the Criminal Procedure Act and so as not to create the wrong impression about our acquiescence of the agreement, perhaps we should state that the amendment or amplification of the indictment will always be subject to any rights Mr Zuma may have to claim prejudice by the effect of the amendment or amplification****".*

55.2. The agreement in relation to the indictment being provisional in nature was clearly on the understanding that should the State endeavour to amend or amplify the indictment, such must be by way of a proper application having regard to the rights of the Accused and the requirements of an indictment in terms of Section 144 of the Criminal Procedure Act. This much is confirmed by the State in Annexure "JDP5" where it is stated :

> ***"It is confirmed, as you were informed on 11 October 2005, that the indictment, summary of facts and list of State witnesses may very well be amended or supplemented according to the further investigation that is presently being conducted. If this***

should be the case, <u>proper application will be made to this effect at the relevant time</u>".

55.3. The contention by Du Plooy in paragraph 15.2 of his affidavit to the effect that "***The State would continue with further investigation and amend the indictment in accordance with any new evidence at its disposal and in terms of the relevant legislation should the need arise*****" and the further statement at the end of that paragraph to the effect that "*****It was agreed that the State would endeavour to deliver such amended indictment to the defence by the end of March 2006*****"**, appears to completely ignore the State's commitment to make an application for an amendment should such need arise.

55.4. On the basis of what the State appears to be contending in this application for an adjournment and on the basis of submissions made during the hearing of the argument before His Lordship, Mr Justice Levinsohn, the State appears to be adopting the approach that the indictment in respect of which it was agreed on 11 October 2005, would be served on the Accused and which was eventually in fact served on the Accused, is a "provisional indictment" and not a "final indictment". Primarily for this reason, the State resisted the application by Accused Nos. 2 and 3 to compel the State to supply the further particulars.

55.5. In response to this, I must state :-

(a) Accused Nos. 2 and 3 were never party to the proceedings on 11 October 2005 and could not have been party to any agreement; and

(b) The apparent endeavour to differentiate between the indictment it presented to the Accused pursuant to the agreement concluded on 11 October 2005 and the indictment it intends to present to the Accused later, is an admission that it had resorted to nothing more than a trick or stratagem, inconsistent with the duty imposed upon the State to act ethically and fairly, and a means to circumvent the imperatives arising from the provisions of the Criminal Procedure Act relating to the process by which proceedings in the High Court are commenced.

55.6. Further oral submissions will be made at the hearing of this application.

55.7. It will be submitted during argument that our law does not recognise any difference between a so-called “provisional indictment” and a so-called “final indictment”.

56.

AD PARA 16 :

The fact that provision was made for the trial to run for at least four months, done in concurrence with the State at the meeting with the Judge President on 12 October 2005, is an indication that the State created the clear impression in the minds of the Accused that it would be in a position, having regard to all the circumstances that prevailed at that time, to commence and proceed with the trial on 31 July 2006 until 30 November 2006.

57.

AD PARAS 18 to 31 :

57.1. Oral submissions concerning these paragraphs will be addressed on the date of the hearing of the application by the State for an adjournment.

57.2. In accepting, for the purposes of this application, that there is a genuine need for further investigation in the respects set out in these paragraphs, it is difficult to understand why the National Director was so precipitate in making a decision to prosecute the Accused so soon after the judgment in the Shaik trial when it must have been apparent to the prosecution team that the State would require much more time (as indeed it now transpires) to conduct the further investigations referred to in these paragraphs.

57.3. I am informed that in a consideration of the unreasonableness or otherwise of a delay, the timing of the decision to prosecute in the light of the vastness and complexity of the investigations, the voluminous nature of the documents, the serious nature of the allegations and its importance to the public interests, could constitute very important considerations. Having regard to all which the State wants this Honourable Court to believe concerning issues around complexity, seriousness, etc., one can only raise rhetorically the question as to why the National Director found it necessary to make a decision to charge the Accused when all these investigations and circumstances presented themselves at the time the decision was made. Perhaps the National Director may answer this vexing question when he testifies.

58.

AD PARAS 33.1 AND 33.2

58.1. I note the contents hereof but have no knowledge of the settlement proposals referred to and cannot comment thereon.

58.2. As at the date of his affidavit, Du Plooy is not in a position to state with any degree of certainty what are the prospects of the matter with Julekha Mohamed being finalized and when such finality is likely to occur. What is clear, however, is that the State does not know. Considering the options

available to the State and Ms Mohamed and the remedies available to each, there is in fact no way of telling when finality could be reached.

58.3. One must, in the case of Ms Mohamed, have regard to the fact that she is not a party to the criminal proceedings and is not obliged to have any regard to any delays that might result from the State's Appeal in her matter not being resolved.

59.

AD PARA 33.4

59.1. I note the contents hereof and point out that the Third Accused has since lodged an application for leave to appeal in respect of the judgment delivered on 4 July 2006.

59.2. I deny that the Third Accused is "***still not in a position to indicate precisely in respect of what documents privilege is claimed***" and respectfully submit that Annexure "JDP6" clearly identifies that all e-mails in the category listed in paragraph 11 thereof are regarded as containing information of a legal professional privileged nature.

59.3. In addition, a procedure was suggested to the State in order to resolve this issue and to date hereof no response has been received from the State in this regard. The ball is squarely in the court of the State (in the light of the

suggestion made to it) to adopt the procedure suggested and finalise this aspect.

59.4. Once again, it should be noted that the State is unable to state how and when the issues relating to the Appeal and the documents is likely to be resolved.

60.

AD PARA 34

60.1. It is incorrect to state that the Second and Third Accused had requested, in their Request for Further Particulars, *"**all the evidential material**"* in the possession of the State. The Request for Further Particulars (in paragraph 2(e) thereof) requested all "***documents that the State intends to prove or rely upon at the trial*****" and "*****all documents that the State has in its possession which relate to or are connected with, directly or indirectly, the investigations from date of commencement thereof to the date hereof***".

60.2. It is further incorrect to say that the application to compel Further Particulars before Mr Justice Levinsohn was dismissed on 15 May 2006, as a reading of the last paragraph of His Lordship's judgment evidences that the Honourable Levinsohn J said that he was *"**not disposed to make any order on the application"*** before him.

61.

AD PARAGRAPH 36

The contents hereof are not understood when it is read in conjunction with paragraph 33 of Du Plooy's affidavit. In paragraph 33 Du Plooy claims in respect of:

61.1. **Mahomed** – "***even if a settlement is reached, I am advised that it will take some time to identify which of the documents seized are legitimately subject to attorney client privilege and which are not. Only then will the State be able to proceed with the analysis of the documents.*"**

61.2. **Zuma, Hulley** – "***Negotiations are currently underway to settle this matter by way of agreement and thereby allowing the State access to the documents…. Once again, however, the State will have to weight its options in the light of the response. The matter has not, therefore, been finalized.***"

61.3. **Thint Holdings/(Pty) Ltd** – "***The result is that the issue of precisely what documents the State is entitled to rely upon has still not been resolved.***"

61.4. The State successfully creates the impression in paragraph 33 that they are unable to finalise the indictment and the report because of uncertainty regarding the documents they may rely upon for purposes of trial.

61.5. It is wholly contradictory for Du Plooy to state herein that the forensic experts were instructed as early as 23 May 2006 to commence analysis of the documents in respect of Mohammed and Accused One and on 4 July 2006 in respect of Accused Three when viewed against the comments in paragraph 33.

61.6. It is, accordingly, inconceivable how it can legitimately be claimed that the forensic report is *"**at an advanced stage of preparation**"*. I respectfully submit that this aspect is crucial to the State's application for the adjournment and, with respect to this Honourable Court's decision of whether to grant the adjournment or not. Du Plooy ought therefore to be called upon to explain these material contradictions and be subjected to cross-examination thereon.

62.

AD PARAGRAPH 37

62.1. I do not understand how the forensic report can be complex and voluminous if same has not been finalised. The undertaking provided by the State herein in respect of the outstanding Further Particulars is, in any event, nonsensical. It follows as a matter of logic that the Request for Further Particulars would change substantially should the indictment change substantially. The undertaking, accordingly, does not make any sense.

62.2. The point concerning a probable change to the Request for Further Particulars when the Indictment is amended was argued extensively by Senior Counsel on behalf of the State before Levinsohn J. Senior Counsel for the State claimed that it would be an utterly futile exercise to supply Further Particulars on an Indictment that it was the State's avowed intention to amend and that confusion would arise from providing two sets of Further Particulars should the Court order the delivery of Further Particulars and a *"final"* indictment is thereafter served.

63.

AD PARAGRAPH 38

63.1 I repeat that Du Plooy is blowing both hot and cold. He first claims (in paragraph 33) that there is this vast amount of documents that are subject to dispute. He then claims that the forensic report is in an advanced stage of preparation and "***should be ready as soon as possible after 31 July 2006***"(paragraph 36). This latter statement i.e. that it should be ready as soon as possible after 31 July 2006 is of little comfort to the Accused if the State is unable to state when the report will be supplied to the Accused. The only thing clear about Du Plooy's averments in this paragraph is the uncertainty created by it.

63.2 In this paragraph Du Plooy alludes to the fact that a complex and time–consuming process is yet to be finalised. His averments, in fact, reinforces the argument by the Second and Third Accused that it would serve no useful purpose to continuously adjourn the matter in order for the State to get its house in order. The contentions by Du Plooy are of such a nature that it conveys very clearly that the State is simply not able to say when it would be in a position to finalise its indictment and its preparations for trial. The only clarity by Du Plooy is on the basis that the finalisation process would be

complex and time-consuming. Logic dictates that it makes no sense to continue on this uncertain course indefinitely.

64.

AD PARAS 39 AND 40 :

64.1. The contents hereof are noted. One would assume that the State, recognising the gravity of the matter including the unprecedented public and political interest, would have conducted themselves in such a way as to be in a position to commence the trial within a reasonable time after the Accused had been indicted.

64.2. What the State has rather chosen to do is to commence further investigations after the Accused (in particular, the First Accused) had been indicted. It is much rather a case of being unprecedented that the State would indict the Accused, thereby causing the public and political interest without having concluded its investigations and being uncertain as to the nature and extent of the charges to be brought against the Accused and finding itself unable to start a trial.

65.

AD PARA 41:

65.1. In the light of what is set out in the preceding paragraph I respectfully submit that this is not a situation of affording all parties adequate

opportunity to properly prepare themselves for trial. Our complaint has been, all along (with specific reference to the Application to Compel Further Particulars) that we are not able to prepare for trial as a result of the State's conduct.

65.2. Inasmuch as it is suggested in paragraph 45 of Du Plooy's affidavit, which is dealt with hereunder that the Accused had other, more suitable remedies available, so the State has other remedies available. One of such remedies would be to withdraw the charges (accepting that the Accused may be again indicted at a later stage) and then finalise their investigations, including the indictment. Such a process would benefit all parties concerned to a much greater extent than if this matter is dragged on unduly.

65.3. It is further to be noted that the State does not commit itself to a future trial date. The best it would do in the circumstances is to request for an adjournment to the first half of 2007.

65.4. The bona fides of the State in a request for an adjournment is, in my respectful submission, not a relevant consideration. It is in any event far outweighed by other considerations like indecisiveness, the unreasonableness of the delay and the substantial nature of the prejudice to the Accused.

66.

AD PARA 43.2 :

The factors referred to herein are quite irrelevant when viewed against the plethora of the circumstances of this case as a whole, and the predicament that the Accused find themselves in.

67.

AD PARA 43.3 :

67.1. The reference to the 18 months herein is factually incorrect. The delay between the alleged commission of the offences and the time when the State expects to commence the prosecution is between seven and nine years.

67.2. The delay referred to herein can certainly not be categorised as a systemic delay. The delay has come about as a result of the State's inability to finalise its indictment and the manner in which it chose to conduct its investigations after the Accused had been indicted.

68.

AD PARA 44 :

I deny that the various applications referred to are the proximate cause of the State's inability to finalise the investigation and aver that it is the manner in which the investigation was conducted and the manner and timing of the indicting of the Accused that is the direct cause of the State's inability to commence with the trial on 31 July 2006. The decision to investigate after service of the indictment was a matter peculiarly within the control of the State.

69.

AD PARA 45 :

I deny the contents hereof and submit that the proper way in which to challenge the legality of the search warrants is by following the procedure available in law which the Accused and others followed herein. The advice given to Du Plooy regarding "a more suitable remedy" ignores completely the serious violations of constitutional rights that are caused by illegal searches and seizures in a free and democratic society. As an example of the appropriateness of seeking the remedy chosen by those Applicants who challenged the legality of the search warrants is the success which my wife and I achieved in our challenge to the High Court in Pretoria regarding the legality of the search and seizures conducted at out home on 18 August 2005. The State conceded that the search

and seizures were unlawful, returned all the objects seized and tendered our costs of the application.

70.

AD PARA 48 :

The contentions herein are not understood. There is no obligation on the Accused (and the State does not seem to suggest that such obligation exists) to assist the State in its investigations. It was always open to the State, upon realising the extent of the delays caused by the various parties exercising their legitimate rights, to withdraw the charges until such stage as it had finalised its investigations and could provide a proper indictment to the Accused. It has chosen not to do so.

71.

AD PARA 49 :

The request made by the State in the notice in respect of a trial date is that it should be during 2007. As pointed out previously, the effect of the averments by Du Plooy is that the State is still entirely unclear as to when it would be in a position to commence the trial in this matter. The State, itself, makes out a compelling case that various other applications, including appeals, have to be finalised before they would be in a position to proceed to trial and that they have no idea when that would be The confidence expressed by the State herein is contradictory to the uncertainties expressed earlier in this affidavit.

72.

AD PARA 50 :

It is incorrect to state that the charges against the Third Accused (incorrectly referred to by Du Plooy as the Second Accused) in the Shaik trial were withdrawn for reasons that were convenient to the State. The withdrawal of the charges was pursuant to the agreement referred to earlier in this affidavit and consequent upon compliance thereto by Accused No. 3.

73.

AD PARA 51 :

The correct position is succinctly summarised by Du Plooy in sub-paragraph 51.3 where he states that the Shaik appeal *"**might not in itself be sufficient reason to postpone the matter**".* I agree with this contention and submit that the outcome of the Shaik appeal has no bearing on the commencement of the trial against the Accused.

74.

AD PARA 53 :

74.1. I deny that the State has no control over its attempts to secure possession of the original documents.

74.2. The State has clearly failed to take into account paragraph 8 of the judgment of his Lordship Mr Justice P C Combrinck delivered on 22 March 2006 (a copy of which is annexed hereto, marked “PM7”) where he questioned the need for the State to obtain an order from a South African Court in order to achieve the handing over of documents.

75.

AD PARA 55:

75.1. I admit that trial related prejudice is a factor to be considered by this Honourable Court in determining whether to allow or refuse an adjournment. It is, however, not the only factor that the Court has to take into account. Legal argument will be addressed hereon at the appropriate time.

75.2. I reiterate that it is very apparent from the case made out by the State that it is entirely unsure as to when it would be in a position to commence this trial considering that the suggested date of February 2007 is now considered optimistic.

76.

AD PARA 56:

I am advised that this Honourable Court has to weigh up various factors in its consideration of whether to grant an adjournment or not. It will be argued that

the interests of justice, in this particular case, demands, for the reasons set out above, that the State not be given a further adjournment to some date in the future in order to finalise its preparation for trial.

77.

AD PARA 57 :

77.1. The so-called *"**substantial volume of documents**"* delivered by the State was undertaken in the same haphazard manner as in which the investigation has been conducted. The State was requested, in paragraph 2(e) of the Request for Further Particulars for documents relevant to the investigation. It has chosen to respond in the manner set out hereunder.

77.2. On 4 May 2006 the State supplied a computer hard drive and 6 lever arch files to the legal representatives of the Second and Third Accused.

77.3. These items were supplied, according to the State, pursuant to the request for further particulars on behalf of Second and Third Accused.

77.4. It was contended, on behalf of the State at the hearing of the application to compel delivery of Further Particulars (before Levinsohn J on 10 May 2006) that the State had supplied all the necessary documents to the Defence. This contention is repeated on behalf of the State in this application for an adjournment.

77.5. It was pointed out in my replying affidavit to that application that the computer hard drive contained approximately 92 gigabytes of data which is contained in 254 159 files.

77.6. I further stated in that affidavit that it would take days, if not weeks as a result of the volume of data supplied, to verify that the information requested was indeed supplied.

77.7. Counsel for Second and Third Accused, during the course of argument in that matter, mentioned that it appeared that there were millions of pages of information on the hard drive. The State did not take issue with this statement.

77.8. The hard drive has, subsequently, been examined in more detail and the following, so I am informed, is apparent from that examination:

77.8.1 The information on the hard drive is contained in various folders. These folders have been allocated names which presumably correspond with their contents. They are:

(a) Audit Documents;

(b) Bank statements;

(c) Boxfiles;

(d) CDs;

(e) CSFS Reports;

(f) Docketfiles;

(g) KPMG;

(h) KPMG Report;

(i) MLA's;

(j) S vs Shaik;

(k) Translated Documents;

(l) Various.

77.8.2 Some folders have sub-folders. The folder "Boxfiles", for instance has two sub-folders named "Boxfiles01" and "Boxfiles02".

77.8.3 The sub-folder "Boxfiles01" contains a further 145 folders. Each of these 145 folders contains files marked with letters and a number, such as "DJ006440". Some folders contain in excess of 100 of these files. The sub-folder "Boxfiles02" contains folders marked from "00146" to "00384", each with individual files marked in the manner described above.

77.8.4 In all, the sub-folder “Boxfiles01” contain 3316 files. The folder “Boxfiles” contains 6841 files identified only in the matter described above.

77.8.5 No attempt has been made to identify the content of any of the files on the hard drive by way of allocating a file name in a manner so as to identify the contents thereof, or by providing an index as to the contents. This holds true for all but approximately 14 files on the hard drive.

77.8.6 As a result of the aforegoing junior counsel for the Second and Third Accused requested and attended a meeting with members of the prosecution and investigating team so as to identify the contents of the hard drive.

77.8.7 At the meeting the prosecution and investigating team broadly stated the category of information in each folder but indicated that they were not prepared to identify the contents of each file and that it was up to

the Accused to open each file to establish its contents.

77.8.8 After the meeting the investigating officer did provide some schedules to indicate that certain files refer to the location where the files were found by way of the numbering thereof. The schedule is silent as to the content of each file so numbered.

77.8.9 The hard drive contains another folder labelled “CDs” which folder contains some 245 000 files in approximately 9170 folders. The legal representatives of the Second and Third Accused were informed that this folder contains information of mirror images made of various computers and which information has been restored. We have established that information of at least 27 different computers is in this folder, partly through the assistance of the investigating officer and partly through our own efforts.

77.8.10 This folder contains information which appears to be of extreme importance to both the State and the

Accused for the reasons described later herein. This folder, at the same time is the most problematic.

77.8.11 An initial investigation of this folder has demonstrated that the files contained therein are riddled with computer viruses. In fact, the initial investigation of this folder caused the computer, on which the folder was being examined, to crash to the extent that it became unusable and its hard drive had to be formatted and re-loaded.

77.8.12 Further investigation has also demonstrated that a large number of the files in that folder are corrupted for reasons unknown to us. This renders the particular file useless but serves to slow down or crash the software (more fully referred to hereunder) used for an investigation of the contents of this folder.

77.8.13 The Second and Third Accused had to acquire specialised software and a dedicated computer to allow proper access to this data without corrupting and affecting the other computers which are used for other work. In effect, the Accused are required to

conduct forensic computer exercises normally associated with computer forensic experts to access the data.

77.8.14 The software referred to above are similar to that allegedly used by the State's computer forensic experts (CSFS), namely a program called "DT Search". This program, I am informed, requires an index to be created of the data before it can meaningfully search and access this data. The program itself creates the index.

77.8.15 It has proven impossible to coax "DT Search" into creating a single comprehensive index of the data supplied as a result of the large number of viruses and file corruptions. At most, partial indexes could be created.

77.8.16 It is not understood why this function is left to the Accused. We have undertaken the above processes with a view to get on with the job and prepare for trial as best as is possible but it has, in fact, caused more delay than it has derived benefits.

77.8.17 The Second and Third Accused have requested the documents that the State has in its possession with a view to prepare for trial and instead have been provided with a hard drive of the nature described above.

77.8.18 The Second and Third Accused have not had proper access to these documents notwithstanding the fact that reasonable efforts have been made to do so.

77.8.19 It has become clear, during the efforts expended to properly access all the data, that documents that featured materially in the Shaik trial are contained in the “CDs” folder. We do not know what else there may be and will only find out once the corrupted and irrelevant files have been removed.

77.8.20 I have been informed that many files are Windows “system files” and some files are temporary files which track the original computer user’s internet surfing habits and include explicit pornographic

material. It is entirely unclear why the Accused have been provided with these files.

77.9. As a result of the facts set out above and in exercising the right reserved at the time of the hearing of the application to compel Further Particulars, I submit that the State has in fact not supplied the Second and Third Accused with the documentation requested. Rather, it has attempted to pass its responsibilities to the Accused and to frustrate the Accused by acting as set out above.

77.10. I respectfully submit that it cannot be said to be the responsibility or the duty of the Accused to undertake the task of “sanitising” these files or to go to greater lengths than they have to identify the contents of the files. A “sanitisation” process, I am informed, can in any event only be undertaken by a suitably qualified computer technician. There can be no reason why the Accused should employ the services of such a person.

77.11. There can further be no reason why the State could not supply an index to the various folders, sub-folders (and their respective sub-folders) and files so as to identify the contents of the files. It is unreasonable to expect the Accuseds’ legal representatives to do

so (considering that in excess of 250 000 files have to be opened) and leads to untenable delays.

77.12. The State, having compiled (according to our understanding) all the information contained on the hard drive apart from the folder labelled “CDs”, are clearly in a position to, at least, identify the contents of each file compiled by them.

77.13. The practical implication of the failure to provide an index to the folders and files is the following:

77.13.1 Should I or the legal representatives of Accused Two or Three wish to view a witness’s statement our first point of departure is the suspicion that it may be contained in one of 7412 files (the number of files complied by the State - the total number of files less the contents of the “CDs” folder);

77.13.2 We would thereafter presume it to be in one of the files in the “Docketfiles” folder;

77.13.3 The “Docketfiles” folder contains 26 sub-folders each with a single file identified by a number;

77.13.4 The file in the first sub-folder contains 520 pages which appear to be a combination of various documents and statements;

77.13.5 The file in the second sub-folder contains 432 pages and appears to be section 28 proceedings;

77.13.6 We, effectively, have to search through 26 electronic files (each marked with only a number) and which is estimated to contain 7500 pages in the hope to find the statement.

77.14. The only practical way to find the statement within a reasonable period is to employ the software referred to above (provided an index can be built) and then every occurrence of that person's name in all the documents will be listed.

77.15. It should be stated that Du Plooy has offered his assistance on more than one occasion to attempt to clarify and respond to any queries. It must be stated however that it is neither practicable no desirable to contact the lead investigator of the prosecution every time assistance is required to obtain clarity or locate a file.

77.16. In any event, I am led to understand that an accused may request copies of all documents it considers relevant upon tendering payment of the costs consequent upon such copies being made. The Second and Third Accused may very well be forced into a position where it has to request same and then expend further considerable costs to access these documents.

77.17. I respectfully submit that an accused has the right to prepare by having access to the documents which are relevant to its trial and such access cannot be limited to electronic documents or documents that can only be accessed by experts employed by it or its legal representatives.

77.18. The State has indicated clearly, in various applications, that it has retained the services of computer forensic experts (CSFS) who were, in fact, responsible for the making of and restoration of all the mirror images.

77.19. I submit that the State ought therefore to be in a position so as:

77.19.1 to cause all the blatantly irrelevant electronic files (as listed above) to be removed including the corrupted files;

77.19.2 provide an index to the files compiled by it.

78.

Regarding its application for the adjournment, the State should call evidence to:-

78.1. explain when it is anticipated, with a reasonable degree of certainty, it will be able to obtain all such necessary evidence to enable it to provide the Accused with a complete indictment, forensic report and further particulars and documents;

78.2. state when precisely it is anticipated, with a reasonable degree of certainty, that the prosecution will commence;

78.3 state why Du Plooy states in paragraph 34 of his affidavit that:-

"***The State received a request for further particulars from Accused nos. 2 and 3 on 24 March 2006, and immediately thereafter commenced with steps to provide them with all the evidential material in its possession, as requested.***"

whereas the defence are confronted with the difficulties set out in the previous paragraph hereof;

78.4 justify the adjournment.

79.

In the light of the aforegoing and the onus being upon the State to justify the adjournment of these proceedings, it is my respectful submission that the State should call evidence, particularly that of Du Plooy and the National Director of Public Prosecutions to testify in support of the State's application and to resolve the many questions raised about and left unanswered by the State concerning the grounds upon which it relies.

80.

WHEREFORE, having regard to all the circumstances, Accused Nos. 2 and 3 humbly pray for an Order in the following terms:-

1. An Order granting a permanent stay of the prosecution against Accused Nos. 2 and 3;

ALTERNATIVELY

2. An Order:-

2.1. refusing the application for the adjournment;

2.2. striking the case of the roll

2.3. directing that the prosecution not be resumed or instituted *de novo* without the written instruction of the National Director of Public Prosecutions or his duly authorised representative;

2.4. directing that, in the event of the prosecution being resumed or instituted *de novo*, that the State be ordered to comply with pre-determined requirements in accordance with its constitutional and statutory obligations concerning the service of an indictment, the supply of particulars and documents, and other related matters, so that Accused Nos. 2 and 3, if so re-indicated, will be supplied with an indictment and such relevant material on such terms as to enable them to properly and timeously prepare for trial.

_____

D E P O N E N T

I CERTIFY that the Deponent has acknowledged to me that he/she knows and understands the contents of this affidavit which was SIGNED and SWORN to before me at DURBAN on this day of 2006, the Regulations contained in Government Notice Nos. R1258 dated 21 July 1972 and R1648 dated 16 August 1977, as amended, having been complied with.

_____

COMMISSIONER OF OATHS

NAME :

CAPACITY :

ADDRESS :

AREA :