

IN THE HIGH COURT OF SOUTH AFRICA
NATAL PROVINCIAL DIVISION

CASE NO : CC358/05

In the matter of:

THE STATE

versus

JACOB GEDLEYIHLEKISA ZUMA

ACCUSED NO. 1

THINT HOLDING (SOUTHERN AFRICA)

(PTY) LIMITED

ACCUSED NO. 2

THINT (PTY) LIMITED

ACCUSED NO. 3

**ANSWERING AFFIDAVIT:
THE ACCUSED'S COUNTER APPLICATIONS FOR
A PERMANENT STAY OF PROSECUTION**

I, the undersigned,

LEONARD FRANK McCARTHY,

do hereby make oath and state:

1. I am an adult male Advocate of the High Court, a Deputy National Director of Public Prosecutions and the head of the Directorate of Special Operations ('the DSO') of the National Prosecuting Authority of South Africa ('the NPA').
2. As will appear from this affidavit I have taken most of the formal decisions in terms of s 28 of the National Prosecuting Authority Act 32 of 1998 ('the NPA Act') relating to the investigation which has led to amongst other things the present prosecution against the accused ('the criminal case').
3. In this affidavit I set out the State's answer to the applications by the accused for a permanent stay of prosecution, alternatively the striking of this matter from the roll. I am duly authorised to make this affidavit.
4. The contents of this affidavit are true.
5. Most of the contents of this affidavit are within my personal knowledge or are based on documents under my control or to which I have access. In order to present the answer in a coherent way, however, at times I relate events involving others of which I do not bear personal knowledge. I do so on the basis that what I have to say will be affirmed by the persons in question. I refer to the accompanying affidavits of the National Director of Public Prosecutions ('NDPP') Mr Vusumzi Patrick Pikoli ('Pikoli'), the former NDPP Mr Bulelani Thandabantu Ngcuka ('Ngcuka'), the former Minister of Justice and Constitutional Development Dr Penuell Mpapa Maduna ('Maduna'), the head of the DSO investigation team Johan du

Plooy and two of the prosecutors in the criminal case, namely Adv. William John Downer SC ('Downer') and Adv. Anton Leonard John Steynberg ('Steynberg').

6. This affidavit is structured as follows:
 - 6.1. First I summarise the State's answer to the applications for the stay/striking-off.
 - 6.2. Secondly I relate the key events in chronological order.
 - 6.3. Thirdly I describe the State's proposed pre-trial timetable.
 - 6.4. Fourthly I deal in turn with the accused's main grounds for seeking the stay/striking-off.
 - 6.5. Finally I deal seriatim with the affidavits delivered by the accused in support of their applications for the stay/striking-off.

THE STATE'S ANSWER IN OUTLINE

7. The State has always regarded this case as one of the highest importance. That is so for obvious reasons. It is also a highly complex case and one which is vast in the scope of the evidence it traverses. The State and more particularly the NPA and the DSO have for these reasons from the outset dealt with this case at the highest level. They have also dedicated their best and most skilled and experienced officers and resources to the investigation and prosecution of this case. They have gone out of their way to maintain

the highest standards of integrity, professionalism, skill, impartiality, fairness and diligence. This case has accordingly been highly exceptional in the high level of attention it has always received, in the quality and quantity of the resources allocated to it and in the enduring efforts of the State to conduct this matter in the highest tradition of the administration of justice in this country.

8. The insults and slurs of the defence on the manner in which the State has conducted the investigation and prosecution of this case, are scurrilous and utterly unfounded. They are often purely gratuitous insults or based on a highly selective and self-serving distortion of the facts. The State regrets that it has not been able in the time allowed for this answer, to deal with all the defence's slurs and insults as fully as it might have wished. It has done the best it could in the time available to it and submits that it suffices to demonstrate that the defence's slurs and insults are gratuitous and unfounded.
9. Most of the complaints made by all three of the accused are in essence complaints, not so much about the manner in which their prosecution has been conducted, but about the fact that they are being prosecuted at all. They suggest that there is no *bona fide* cause for their prosecution and that it is being done in bad faith and for ulterior purposes. But nothing can be further from the truth. The decisions to prosecute them have been taken with scrupulous care, in good faith and on solid grounds. The State

believes and will demonstrate that it has a strong case against all three accused.

10. What they in effect seek to do, is to forestall and suppress a full public enquiry and judicial determination of the charges against them. They seek to do so by asking this court in effect to take the decisions to prosecute them under judicial review and to overturn them. But they are not entitled to do so. This court's powers of judicial review of administrative action are now circumscribed by the Promotion of Administrative Justice Act 3 of 2000. Paragraph (ff) of the definition of '*administrative action*' in s 1 expressly excludes any '*decision to institute or continue a prosecution*' from the court's powers of judicial review of administrative action. The defence attempt to stifle the prosecution against them by attacking the decisions to prosecute them is accordingly in any event bad in law.
11. The defence's complaints about delay are also unfounded. The State is as frustrated as the defence claims to be about the delays that have occurred in this matter. There is however no justification for the defence's attempts to blame the State for those delays. While it is always easy with the benefit of hindsight to be critical about the manner in which the case has been conducted, the State has at all times acted with due expedition. While the defence complains loudly about delay, they have also not done anything to expedite proceedings. Their application for a stay of their prosecution is a good example. They could have brought the application many months ago. The correspondence shows that they have indeed been threatening it for

some time. If they had brought it expeditiously, it would have been ripe for hearing on 31 July 2006 when the matter was set down trial. They waited instead until the very morning of the designated trial date to launch their application well knowing that it would then necessitate further delays before it could be heard. They failed to give any explanation for their delay. It belies their protestations of urgency.

12. The State submits that the appropriate way to deal with this matter is for the parties to co-operate to expedite the matter rather than to bicker every step of the way. If the parties were to work together towards expedition of the case, it should be possible to get the trial under way early in 2007. It is in the interests of all including the accused and the public interest that we all do so.

CHRONOLOGY OF KEY EVENTS

13. In Du Plooy's affidavit in support of the State's application for a postponement of the trial in this matter dated 19 July 2006, he described certain of the events which have made it necessary that the trial scheduled to start on 31 July 2006 be postponed to a suitable date in the first half of 2007. In view of the fact that the State's application has been met with a counter-application by all three accused for a permanent stay of prosecution, I have been advised and believe that it is necessary in this answering affidavit to provide a far more detailed chronological account of the key events. The more detailed chronology that follows includes the

events described in Du Plooy's first affidavit as well as references to numerous documents mentioned in or annexed to the affidavits delivered to date. The resulting duplication is unavoidable. For ease of reference, where I rely on such a document I shall annex a fresh copy. The only exception will be the documents annexed to Du Plooy's initial affidavit, to which I shall simply refer.

14. The investigations which ultimately led to the corruption charges against Schabir Shaik ('Shaik') and the ten companies in his Nkobi group ('Nkobi') in what became DCLD case number CC27/04 ('the Shaik trial') and to the corruption charges in this matter against the first accused ('Zuma'), the second accused THINT Holding (Southern Africa) (Pty) Ltd (formerly Thomson-CSF Holding (Southern Africa) (Pty) Ltd) ('Thomson Holdings') and THINT (Pty) Ltd (formerly Thomson-CSF (Pty) Ltd) ('Thomson (Pty)'), were not instigated by the NPA. They had their origins in very broad-ranging allegations of impropriety about the process for the acquisition of strategic armaments for the Department of Defence (which is now commonly referred to as the 'arms deal') made, *inter alia*, in September 1999 by a Member of Parliament, namely Patricia de Lille. The arms deal entailed contracts for a range of sophisticated military hardware, namely corvettes, submarines, light utility helicopters, maritime helicopters, lead in fighter trainers and advanced light fighter aircraft. Shaik, Nkobi, Zuma and the Thomson companies were merely some of the many persons and entities alleged to be party to the very broadest range of possible

irregularities, improprieties and offences. The arms deal contracts were signed in December 1999.

15. The initial course of the ensuing investigation is documented in the report of the Joint Investigation Team ('JIT'), described below, dated 14 November 2001. As the report is a very bulky document and much of it is irrelevant to the issues raised in the present matter, instead of annexing a copy I shall refer to the relevant paragraphs and ensure that a copy is in Court when this matter is heard. I also hereby tender a copy to the accused, although their legal teams probably have copies of their own. Briefly stated, what occurred initially was the following:

- 15.1. On 28 September 1999 the Minister of Defence, Mr M P G Lekota, approved the conduct by the Auditor-General of a special review audit of the arms deal process. On 15 September 2000 the Auditor-General finalised and signed the review.

- 15.2. In the meantime the Parliamentary Standing Committee on Public Accounts ('SCOPA') commenced an investigation into the arms deal, and on 2 November 2000 the National Assembly adopted SCOPA's 14th report in this connection. In that report SCOPA recommended, amongst other things, that a meeting between the Auditor-General, the Public Protector, the NPA and the Special Investigation Unit ('SIU') be convened to discuss the framework for a further independent and expert forensic investigation.

- 15.3. On 6 November 2000, in order to facilitate the lawful participation of the NPA in an investigation in accordance with the decision by the National Assembly, I formally decided to hold a preparatory investigation in terms of s 28(13) of the NPA Act into corruption and/or fraud in connection with the arms deal. At that stage I was the Director of the Investigating Directorate: Serious Economic Offences in the NPA. Section 28(13) empowers the Investigating Director to hear evidence in order to enable him to determine if there are reasonable grounds to conduct an investigation in terms of s 28(1)(a) of the Act. A copy of my decision is annexure ‘LM1’ hereto.
- 15.4. On 13 November 2000 the Auditor-General, the Public Protector and representatives of the NPA and the SIU met and decided to form the JIT to conduct a joint investigation between all the agencies mentioned.
- 15.5. In January 2001 the President decided that the SIU should not be involved in the investigation – the Special Investigating Units and Special Tribunals Act 74 of 1996 required the President’s formal sanction for the investigation – and that instead the NPA in its investigations should focus on allegations and suspicions of criminal conduct in accordance with its mandate and the authorisation of the preparatory investigation dated 6 November 2000.

- 15.6. Between January and November 2001 the JIT conducted a wide-ranging investigation into the arms deal.
- 15.7. On 14 November 2001 the JIT submitted its report, which was subsequently accepted and approved by Parliament. The key finding in the JIT report was that although there may have been irregularities and improprieties, they could not be ascribed to the President and the Ministers involved and consequently there were no grounds for suggesting that the Government's contracting position was flawed (see paragraph 14.1.1). This finding was articulated as follows in the body of the report (paragraph 1.3.2.3):

'Whilst there may have been individuals and institutions who used or attempted to use their positions improperly, within government departments, parastatal bodies and in private capacity, to obtain undue benefits in relation to these packages, up until now no evidence has emerged, to suggest that these activities affected the selection of the successful contractors/bidders, which may render the contracts questionable. As matters stand, there are presently no grounds to suggest that the Government's contracting position is flawed'.

- 15.8. The JIT report added however that investigations into possible criminal conduct were continuing and, due to the nature of the investigations, the JIT had decided not to make public the details of

the matters under investigation (paragraph 1.3.2.4). By the time of the report the NPA had issued more than 100 summonses in terms of s 28 of the NPA Act and pursuant thereto had obtained 57 statements from witnesses and numerous documents. In addition, various premises in France, Mauritius and South Africa had been searched and documents seized (paragraph 1.3.2.1).

16. In January 2001, during the course of the JIT investigation, the National Prosecuting Authority Amendment Act 61 of 2000 came into operation with the result that the Investigating Directorate: Serious Economic Offences in the NPA ceased to exist as a separate Investigating Directorate and become part of the DSO. Consequently, the DSO became the NPA agency involved in the investigation.
17. Despite the fact that the JIT investigation process was unique, from the time of the authorisation of the preparatory investigation onwards the DSO investigation (including the DSO component of the JIT investigation) has always been conducted in the normal course according to the legislation governing DSO investigations.
18. In keeping with the broad aim of the (then) proposed JIT investigation, the terms of my 6 November 2000 decision to hold a preparatory investigation in terms of s 28(13) of the NPA Act required a broad preparatory investigation by the DSO into possible offences connected to the arms procurement process. The mandate required an examination of, amongst

other things, the records of the relevant Thomson-CSF companies. One of the reasons for this was the existence of a conflict of interest with respect to the position held and role played by the Chief of Acquisitions of the Department of Defence, Shamin 'Chippy' Shaik, by virtue of his brother Schabir Shaik's interests in the Thomson-CSF group of companies and African Defence Systems (Pty) Ltd ('ADS'), which were involved in the bidding for arms deal contracts. Although Chippy Shaik had formally declared a conflict of interest to the arms deal project control board in December 1998, he did not recuse himself and took part in the process that led to the awarding of contracts to those companies. A company in the Thomson-CSF group was part of the consortium (the German Frigate Consortium) that was awarded the contract for the supply of corvettes to the SA Navy and ADS was the sub-contractor for the German Frigate Consortium for the supply of the corvette combat suite. On 15 September 1999 a company controlled by Schabir Shaik, namely Nkobi Investments (Pty) Ltd (at all material times Schabir Shaik held an effective shareholding of 75% in this company), had acquired an effective shareholding of 20% in ADS through a 25% shareholding in Thint (Pty) Ltd (named Thomson-CSF (Pty) Ltd up to 19/8/2003) which on that date acquired 80% of the shares in ADS from Thomson-CSF (International), a wholly-owned subsidiary of Thomson-CSF (France).

19. In the Thomson-CSF audit working papers that were obtained for purposes of the investigation of the records of the relevant Thomson-CSF companies,

the DSO discovered a reference to a report of bribery involving a senior government minister relating to the corvettes in the arms deal. The DSO investigators were obliged to direct their further investigations to explore this aspect, which at that stage was one of many other (mostly entirely unrelated) aspects requiring investigation that emerged as the matter proceeded.

20. As is usual practice in such cases the DSO investigators summoned to an examination in terms of s 28 of the NPA Act the members of the auditing firm Arthur Andersen who had conducted the annual Thomson-CSF audit. The auditors said under oath that during the audit conducted in the first quarter of 2000 they had received a report concerning the involvement in possible bribery of Alain Thétard ('Thétard'), the executive chairman of the board of directors and chief executive officer of Thomson Holdings and a director of Thomson (Pty). The auditors added that they had been told that the possible bribery also involved a senior government official, namely Zuma. The auditors said that during the audit they had confronted Thétard, who had denied that he was involved in bribery but had added that in the past he had been approached by persons seeking bribes. The auditors said that Thétard had told them that whenever that had occurred, he would tell the person seeking the bribe that he had to confer with his superiors; he would then correspond with Thomson-CSF in France seeking permission to pay the bribe, which as a matter of course would refuse permission whereupon he would report to the person seeking the bribe that he was

unable to pay him. The auditors said that Thétard had told them that he would follow this procedure as a delaying tactic and so as not to sour his relationship with the person seeking the bribe.

21. When the DSO investigators questioned Thétard, first informally and then under oath in terms of s 28 of the NPA Act, about what the auditors had said, he denied that he had ever been approached to pay a bribe and that he had told the auditors about being approached to pay bribes. As the DSO had no reason to doubt the honesty and credibility of the auditors and as the detail of Thétard's denials differed when questioned informally and later under oath, the DSO decided further to investigate Thomson Holdings, Thomson (Pty), Thétard and Zuma.
22. In mid 2001 the DSO's investigations led them to, amongst others, Thétard's secretary Sue Delique ('Delique'), who testified under oath that following the publication during February 2000 in the *City Press* newspaper of an article alleging corruption in the award of the corvette combat suite contract to ADS, there was a flurry of faxes between Thétard and his superiors in Paris about whether Thomson-CSF should respond and if so how. Delique said that during that period Schabir Shaik, who like Thétard was a director of ADS, requested a meeting of the ADS board in Durban. Delique then said that upon Thétard's return from a trip to Durban in March 2000 he had given her a letter handwritten by him in French to type and then fax in encrypted form to Yann de Jomaron of a Thomson-CSF company Thales International Africa Ltd in Mauritius and to Jean-Paul

Perrier of Thomson-CSF (International) in Paris. Although at the time when she was first interviewed by the DSO Delique could not find the handwritten letter (shortly afterwards she discovered the handwritten letter among her papers), she said she recalled the contents clearly. They were to the effect that Thétard, Shaik and Zuma had met in Durban and that during that meeting Zuma had given a coded indication (in a code established earlier by Thétard) which concluded an agreement to the effect that in exchange for a payment to Zuma of R500 000 per annum until ADS started paying dividends, Zuma would protect Thomson-CSF against the investigation into the arms deal and would support and lobby for Thomson-CSF in future projects. When in about June or July 2001 Delique handed the DSO Thétard's handwritten letter, it confirmed what she had earlier said. For ease of reference an English translation of a typed version of the letter (which became the encrypted fax) is attached marked '**LM2**'.

23. Delique's evidence, especially the presence of Shaik at the meeting with Thétard and Zuma and the agreement that the annual payments of R500 000 would stop when ADS started paying dividends, as well as the fact that Shaik had an effective shareholding of 20% in ADS, prompted the DSO to investigate closely the relationship between Shaik and Zuma. These investigations led them to, amongst others, Shaik's personal assistant, Bianca Singh, who then testified under oath that Shaik and Zuma had a close and long-standing friendship and that various payments had been made by Shaik on Zuma's behalf. The DSO obtained confirmation of a

number of these payments from documents obtained from the Nkobi group's auditors.

24. In the light of these investigations and certain others which are not relevant for present purposes, the DSO investigators decided to recommend that the general preparatory investigation in terms of s 28(13) of the NPA Act be converted into a formal investigation in terms of s 28(1)(a). On 24 August 2001 this recommendation was accepted by me. As appears from the copy of my decision attached marked '**LM3**', the terms of the investigation included suspected fraud or corruption involving, amongst others the German Frigate Consortium (which as stated included Thomson CSF (France)) for the supply of the corvettes, and ADS as sub-contractor for the Consortium for the supply of the corvette combat suite. The terms of reference specifically included the solicitation/payment/agreement of undue payments involving entities linked to Thomson.
25. The next major step in the investigation into Zuma, Shaik, the Nkobi companies, Thétard and the Thomson companies was a decision to apply for warrants for Thétard's arrest and to conduct the local and international searches and seizures that took place at various premises in South Africa, France and Mauritius on 9 October 2001. Although this was the next step clearly called for in the normal and diligent pursuit of the investigation, there was an unusual feature which resulted from the fact that one of persons under investigation – Zuma – was the incumbent Deputy President of South Africa. As explained on 23 August 2003 by the former NDPP

Ngcuka, when he announced the decision to prosecute Shaik but not Zuma on charges of corruption, mindful of the harm which media exposure might cause both to the integrity of the investigation and to the credibility of the incumbent Deputy President the NPA decided to proceed as discreetly as possible. In order to do so the DSO adopted a number of procedures which it did not normally use. In late 2001 these unusual procedures included drafting my s 28(1)(a) decision of 24 August 2001 in such a way that it omitted any reference to Zuma, avoiding any reference to Zuma in the applications for South African search and arrest warrants and for mutual legal assistance from the other countries involved (instead the phrase '*a high-ranking official called Mr X*' was used) and excluding Zuma's residences and offices from the premises to be searched – these were confined to the premises of Shaik and companies in the Nkobi and Thomson groups. A copy of Ngcuka's media statement of 23 August 2003 is attached marked '**LM4**'.

26. In order both to illustrate the approach adopted in the applications for South African warrants and for mutual legal assistance from the other countries involved and because of their relevance to later events described in this chronology of key events, I also attach the following documents:

26.1. As annexure '**LM5**' a copy of the Affidavit by Downer dated 24 August 2001 in support of the application for warrants to search, amongst other things, the office of Shaik and companies in the Nkobi group in Durban.

- 26.2. As annexure **'LM6'** a copy of the affidavit by Downer dated 2 October 2001 in support of the application for warrants for the arrest of Thétard on suspicion of corruption and lying under oath when questioned in terms of s 28 of the NPA Act.
- 26.3. As annexures **'LM7'** and **'LM8'** respectively, copies of the warrant for the arrest of Thétard on suspicion of a contravention of s 28(10)(c)(ii) of the NPA Act, issued by the Magistrate, Pretoria on 2 October 2001 and the warrant for the arrest of Thétard on suspicion of corruption, issued by the Magistrate, Durban on 8 October 2001. As is apparent, both of these warrants of arrest were subsequently cancelled on 17 May 2004. I explain below the facts giving rise to the cancellation.
- 26.4. As annexure **'LM9'** a copy of the affidavit by Adv. Gerda Ferreira of the DSO (who at that stage was in charge of the investigation) dated 8 September 2001 in the application for a letter requesting mutual legal assistance from the Mauritian authorities. The application was granted on 2 October 2001. As was the case with all the other applications for letters requesting mutual legal assistance from foreign countries in the investigation, this application was made in terms of the International Co-operation in Criminal Matters Act 75 of 1996 ('ICCMA'). The assistance sought from the Mauritian authorities included searches of the business premises of Thales International Africa Ltd and its registered office at Valmet

Mauritius Ltd (since renamed Mutual Trust Management Mauritius Ltd ('MTMM')), and the residences of Thétard and De Jomaron to find and seize *'any correspondence or documentation which may provide evidence of or which refers to the payment of or requests received to pay bribes to persons or entities in relation to the arms acquisition process of the South African government'*. I attach marked 'LM10' a copy of the warrant issued by the Supreme Court of Mauritius on 5 October 2001 in terms of s 30 of the Economic Crime and Anti-Money Laundering Act 2000 for the search and seizure operations at the premises of Thales International Africa Ltd and Valmet Mauritius Ltd (i.e. MTMM), and the residences of Thétard and De Jomaron. Immediately after the searches and seizures in Mauritius two members of the DSO who were present at the police headquarters there, namely Downer and an investigator Carla Da Silva-Nel, identified the relevant documents from among those seized, which were then copied, certified as true copies and sealed in envelopes. Downer and Da Silva-Nel brought the copies back to South Africa with them on 11 October 2001.

27. During the 9 October 2001 searches of premises in South Africa occupied by Shaik and companies in the Nkobi group, and premises in France and Mauritius occupied by companies in the Thomson group and certain of their officers (including the residences of Thétard and De Jomaron in Mauritius and the residences of Thétard and Perrier in France), many thousands of

relevant documents and much computer data were seized and later analysed. In South Africa the originals of the documents and computer data seized (which included materials obtained in South Africa from the Thomson companies by consent) were kept by the DSO.

28. As explained above, immediately after the Mauritian search and seizure operation the DSO was given and brought back to South Africa certified copies of the 14 relevant documents seized there. These included Thétard's diary for the year 2000 which contains an entry relating to his meeting with Zuma on 11 March 2000.
29. On 17 October 2001 Thales International Africa Ltd, Valmet Mauritius Ltd (which by then had changed its name to MTMM) and Thétard launched an application in the Supreme Court of Mauritius for, amongst other things, orders requiring the Director of the Mauritian Economic Crime Office to state whether copies of the materials seized had been made and prohibiting the Director from communicating to the SA authorities any document not related strictly to the warrant and the request on which it was based. Thétard made an affidavit in support of the application saying that the documents and computer disks relating to Thales seized included information unrelated to the SA authorities' request and in respect of which no-one at the Economic Crime Office could say for certain whether or not copies had been made. As is apparent from this affidavit and the relief sought, the applicants did not take issue with the Mauritian authorities' right to seize and deliver to the South African authorities information

related to latter's request. It appears that the hearing of the application was postponed from time to time until 27 March 2003, when it was finally settled and the Supreme Court of Mauritius made an order by agreement recording that the Mauritian authorities had undertaken not to communicate to anyone else any of the material or documents seized during the searches on 9 October 2001 unless, after notice to the applicants, a court order in Mauritius authorising the communication was first obtained. The preamble to the order records that in the earlier proceedings the Mauritian authorities had undertaken that none of the seized material or documents (or copies) would be communicated or sent to the South African authorities and had given an assurance that there was no record of any copies of the seized documents. (As regards this last aspect, the Mauritian authorities' records must have been defective because, as stated, shortly after the search copies of the seized documents that were relevant were indeed made and given to Downer and Da Silva-Nel.) Copies of the application in the Supreme Court of Mauritius, Thétard's supporting affidavit and the order eventually made by agreement on 27 March 2003 are attached marked '**LM11**', '**LM12**' and '**LM13**' respectively.

30. Returning to the chronology of events in South Africa, in addition to the searches and seizures in October 2001 described above, the usual further pursuit of the investigation by way of summoning witnesses and obtaining as much relevant documentation by whatever appropriate methods that are available to investigators, continued apace, as in any investigation. As the

investigation was by now very complex, these processes were very time-consuming.

31. By 2002 the picture which had emerged from these various sources of information and types of investigation was of a financial relationship between Shaik and Zuma that was far more extensive than the investigators initially thought based on the terms of the encrypted fax and the documents obtained from the Nkobi group's auditors. Furthermore, it now appeared that Zuma was connected to some of Shaik's private business dealings, not all related to the arms deal. The DSO investigators inferred from the wider financial relationship between Shaik and Zuma and from Zuma's suspected involvement in some of Shaik's private business dealings, that Shaik's payments to Zuma might constitute corruption unrelated to the arms deal. As a result, the DSO investigators decided to recommend that the terms of reference for the investigation be expanded to cover this new aspect.
32. On 22 October 2002 I accepted this recommendation and formally extended the investigation to encompass the suspected general corruption between Shaik and Zuma that was not connected in any way to the arms deal. As is apparent from the copy of my decision which is attached marked '**LM14**', the extended scope of the investigation included: the suspected commission of offences of fraud and/or corruption, or the attempted commission of those offences, arising out of payments to or on behalf of or for the benefit of Zuma by Shaik, the Nkobi group of companies and/or the Thomson/Thales group of companies; and Zuma's protection of, wielding

of influence for and/or using public office unduly to benefit Shaik, the Nkobi group of companies and/or the Thomson/Thales group of companies.

33. The fact that the DSO's investigations included an investigation of Zuma was first stated publicly on 26 September 2002 by Shaik in an affidavit in an application by him in the Durban High Court challenging a summons by the DSO for his questioning in terms of s 28 of the NPA Act. Shaik had been summoned to appear before the investigators for questioning on 26 June 2002. He objected and on 6 September 2002 launched an application against the NPA questioning the validity of s 26(8) of the NPA Act. In his founding affidavit Shaik made certain allegations to the effect that Zuma might be one of the persons under investigation. In its answering papers delivered on 14 November 2002 the NPA did not dispute that Zuma was under investigation. The application was eventually dismissed on 18 July 2003, by which stage the investigation into Shaik was nearing completion. As a result and because Shaik was formally charged in August 2003, the DSO was never able to question Shaik in terms of s 28 of the NPA Act. (Shaik applied to the Constitutional Court for leave to appeal against the Durban High Court's decision. The Constitutional Court dismissed that application on 2 December 2003.)
34. Mindful of the fact that Shaik's naming of Zuma as a subject of the investigation in his affidavit would eventually emerge in the public arena (at the latest when Shaik's application was heard, but probably sooner), the NPA immediately asked the Minister of Justice and Constitutional

Development, Maduna, to tell Zuma what Shaik had done so that Zuma could take whatever action he deemed necessary. During September 2002 Maduna duly told Zuma what Shaik had done.

35. On 29 November 2002, while the DSO's investigation was continuing in accordance with its expanded mandate, the *Mail and Guardian* newspaper, citing Shaik's application and an earlier affidavit by Downer in an application for mutual legal assistance (in which, as explained, Zuma was referred to as 'Mr X'), published an article entitled '*Scorpions probe Jacob Zuma*'. This was the first media report about the investigation into Zuma, more specifically his attempt to secure a R500 000 bribe from Thomson in exchange for his protection during the investigations into the arms deal and his support for future Thomson projects in South Africa. A copy of the first part of this report as published and an internet copy of the whole report, is attached marked '**LM15**'.
36. The publication of the *Mail and Guardian* report lead to a flurry of further media reports.
37. On 11 December 2002 an attorney then acting for Zuma wrote to Ngcuka requesting a written confirmation or denial of the reports that the DSO was investigating Zuma and pointing out that recent media reports about the investigation had relied, at least in part, on affidavits produced by officers of the DSO in the course of its investigations. A copy of this letter is attached marked '**LM16**'.

38. On 17 December 2002 Ngcuka responded to Zuma's attorney's letter, refusing the request because the NPA did not disclose prematurely the substance and subjects of an investigation other than through legal processes (to do otherwise could defeat the object of the investigation), and saying that neither the NPA nor its organs were responsible for the media leaks. A copy of this letter is attached marked '**LM17**'.

39. On 17 January 2003 the Deputy Commissioner of the Mauritian Independent Commission against Corruption ('ICAC') wrote to Downer saying that as the South African authorities' original request of 1 October 2001 did not specify to whom the seized documents or materials must be produced, they should send a fresh request specifying that. A copy of this letter is attached marked '**LM18**'. I would add that due to an institutional re-organisation in Mauritius the ICAC had taken over the work of the Economic Crime Office. As explained below, on 9 December 2005 the State applied in the Durban High Court for the issuing of a letter of request to the Attorney-General of Mauritius for further assistance in terms of the ICCMA, namely the release to the South African High Commissioner in Mauritius of the documents seized from the premises of accused 2 and 3 in Mauritius on 9 October 2001.

40. On 20 March 2003 the NPA applied successfully in the Pretoria Regional Court in terms of the ICCMA for a letter of request for mutual legal assistance addressed to the Ministry of Justice in France. The assistance sought was for the French authorities to record, through interrogatories, the

statements of certain employees of companies in the Thomson-CSF group, including Thétard and Perrier. The application was granted but, to date, the French authorities have not provided the assistance requested.

41. On 9 May 2003 a second attorney acting for Zuma wrote a letter to Ngcuka in which, amongst other things, he complained about the NPA's silence about the investigation despite the media speculation about it with the result that Zuma was being left in limbo and was unable to defend his good name and reputation. Despite Zuma having been told earlier, the attorney demanded that Ngcuka tell Zuma whether or not he was being investigated and attached a formal request in terms of the Promotion of Access to Information Act 2 of 2000 ('PAIA') about the investigation. A copy of this letter is attached marked '**LM19**'.
42. Shortly after the letter of 9 May 2003 a senior advocate then acting for Zuma, Adv H K Naidu SC ('Naidu'), requested a meeting with Ngcuka. At that meeting Naidu wanted to know how long the investigation was going to last and whether anything could be done to expedite it. Ngcuka explained to Naidu that the DSO's difficulty was that it was awaiting the outcome of the application launched in September 2002 by Shaik in the Durban High Court challenging the summons by the DSO for his questioning in terms of s 28 of the NPA Act. Ngcuka also told Naidu that it would be difficult for the DSO to finalise the investigation without speaking to Zuma. Ngcuka then asked Naidu whether it would be possible for the DSO to question Zuma at a time and place suitable to him. Naidu

said that may not be a problem, but that he did not want junior members of the DSO and NPA to question Zuma. Ngcuka told Naidu that he personally would lead the questioning and he also offered to send Zuma a list of written questions in advance. Naidu then asked whether the whole process could not be done in writing – both the questions and Zuma’s responses. As Ngcuka was reluctant to agree with the writing-only proposal at that stage, the meeting ended without any agreement being reached. Approximately two weeks later Naidu reverted to Ngcuka, having apparently discussed Ngcuka’s offer with Zuma. Naidu said that Zuma had rejected the offer, had said that Ngcuka knew that he (Zuma) was not involved in any arms deal corruption and had requested that Ngcuka close the investigation into him.

43. Consequently on 30 May 2003 Ngcuka responded to Zuma’s attorney’s letter of 9 May 2003. In this letter Ngcuka, amongst other things: outlined in general terms the matters under investigation and attached the written authorisations for the investigation; and confirmed that (through his counsel) Zuma had refused the NPA’s offer to provide him with a set of written questions to which his answers were required. In this letter Ngcuka also refused Zuma’s request for access to information. He did so because at that stage the investigation had not been completed and it is undesirable to provide a potential accused with particulars of the investigation prematurely. Ngcuka concluded the letter by requesting an indication from Zuma after the outcome of *‘the Durban litigation scheduled for 27 June*

2003' whether he would then be ready to place his version before the NPA. The '*Durban litigation*' referred to is the application launched in September 2002 by Shaik in the Durban High Court described above. A copy of this letter is attached marked '**LM20**'.

44. On 17 June 2003 Zuma's attorney responded to Ngcuka's letter of 30 May 2003 saying, much to Ngcuka's amazement, that Zuma had not briefed Naidu to approach him (Ngcuka) and that Zuma had never received or rejected an offer to answer a set of written questions. The letter continued by saying, amongst other things, that Zuma welcomed and accepted the offer, and that Zuma did not think it necessary to wait for the outcome of the Durban litigation because he was not a party to the litigation and was not currently challenging the NPA's investigatory powers or methods. Despite this, the attorney requested an undertaking from Ngcuka that none of the respondents would request an adjournment without giving Zuma notice so that he could protect his rights. A copy of this letter is attached marked '**LM21**'.
45. On 9 July 2003 the NPA sent to Zuma a list of 35 questions to which answers were required. As is apparent, all of the questions were relevant to the DSO's investigation in accordance with its expanded mandate. A copy of the list is attached marked '**LM22**'.
46. On 29 July 2003 Zuma issued a media statement regarding the 35 questions sent to him by the NPA, saying that although he regarded many as

insulting, invasive of his privacy and unrelated to any conceivable investigation into the arms procurement process, he had nevertheless decided to answer the questions and would do so at his earliest convenience. A copy of this media statement is attached marked 'LM23'.

47. On 7 August 2003 Zuma's attorney sent to the DSO a letter requesting copies of the handwritten and typed French version of the encrypted fax annexed to Downer's affidavit of 24 August 2001 (annexure 'LM5'). A copy of this letter is attached marked 'LM24'.
48. On 13 August 2003 Zuma sent to the DSO a statement in response to the 35 questions. Zuma's statement included a detailed attempt to refute the case against him (as he understood it) and answers to those of the 35 questions which, he said, he had been advised were relevant to the investigation. In the statement Zuma, amongst other things, denied soliciting or taking any bribe; asserted that there was *'no evidence at all that Thomson/Thales had anything to fear from an investigation into the corvette contract'* and *'thus no conceivable motive'* for them to have solicited or entertained solicitations for protection against such an investigation; asserted that there was no evidence that he attended a meeting with Shaik and Thétard on 11 March 2000 in Durban; denied that he had attended such a meeting; denied that he had ever undertaken to protect Thomson-CSF or to support Thomson projects; denied that he had any relationship with any of companies in the Thomson-CSF group or with ADS; and submitted *'that there is, even on the NPA's own version, no prospect whatsoever that any*

case can be established against me, even after three years of investigation'.

A copy of Zuma's statement in response to the 35 questions is attached marked **'LM25'**.

49. On 15 August 2003 I sent to Zuma's attorney the English and French typed versions of the encrypted fax, saying that the DSO had decided '*at least for now*' not to provide him with the handwritten version. It appears that this letter may not have been received by Zuma's attorney. On 26 August 2003 a copy was faxed to Zuma's attorney. A copy of this letter is attached marked **'LM26'**.
50. On 21 August 2003 Zuma's attorney sent to Maduna a letter in which, amongst other things: he complained about the manner in which the investigation was being conducted, including the '*inordinate delay*' in concluding it and leaks to the media; he complained about an alleged attempt by Ngcuka to get Cyril Ramaphosa to mediate between the NPA and Zuma (and others) (something which Ngcuka denies); he rejected any mediation or negotiation; he requested copies of any French originals of the encrypted fax, and attaching a PAIA request to that effect; and he requested Maduna's response to Zuma's complaints about Ngcuka, saying that Maduna had to exercise political oversight over Ngcuka in terms of s 179(6) of the Constitution. A copy of this letter is attached marked **'LM27'**.

51. On the same day Zuma's attorney forwarded to Ngcuka his letter to Maduna, under cover of a letter saying, amongst other things, that Ngcuka wanted to '*justify*' his '*conduct*' he should do so by no later than 26 August 2003. A copy of this letter is attached marked '**LM28**'. Under cover of a separate letter Zuma's attorney also sent to Ngcuka a copy of Zuma's PAIA request for the handwritten and typed French version of the encrypted fax.
52. The DSO investigation team carefully considered the information, denials and submissions in Zuma's statement of 23 August 2003 (annexure '**LM25**'), and concluded that despite his protestations of innocence the evidence gathered during the investigations had tended to confirm that the contents of the encrypted fax were true and also showed that Zuma and Shaik had a generally corrupt relationship and that Shaik's payments to or on behalf of Zuma had been made corruptly. The investigation team accordingly recommended that the NPA institute a criminal prosecution against Zuma.
53. Ngcuka and I did not accept the investigation team's recommendation. After having been given a detailed briefing by the investigation team, Ngcuka stated that whilst there was a *prima facie* case of corruption against Zuma the NPA's '*prospects of success are not strong enough. That means that we are not sure if we have a winnable case*'. Ngcuka tested his decision with a senior counsel in private practice who is very skilled in these types of matters, and he concurred with the decision. In view of the

fact that Zuma is now to be tried for corruption and a more detailed explanation in this affidavit of Ngcuka's reasons for the decision may prejudice the prosecution, I shall refrain from saying anything further about those reasons. After reaching the decision Ngcuka told Zuma about it and reported on the investigation to Maduna.

54. On 23 August 2003 Ngcuka and Maduna held a media conference at which Ngcuka announced the NPA's decision not to prosecute Zuma. Ngcuka felt it best to announce the decision in this way because by then the investigation had become a matter of intense public interest and debate. As appears from the attached copy of Ngcuka's media statement (annexure 'LM4'), Ngcuka said that that whilst there was a *prima facie* case of corruption against Zuma the NPA had decided not to prosecute him because it was not sure that its prospects of success were strong enough for a winnable case. He went on to say, amongst other things, that the NPA would be prosecuting Shaik on various charges, including corruption, that the NPA would also be prosecuting the Nkobi group of companies and Thomson-CSF and that the NPA would be referring to Parliament for its consideration the issue of the declaration of gifts and donations received by Zuma. In the concluding section of the media statement Ngcuka said that the NPA could not continue with a prolonged investigation casting a shadow over Zuma, whilst it was not sure of the outcome. After Ngcuka had made the statement the members of the media asked him a range of questions. In answer to one Ngcuka said that the decision not to prosecute

Zuma would be reviewed should any further evidence come to light. Ngcuka answered in this way because he knew that although the decisions to prosecute Shaik and the others and not to prosecute Zuma had been taken, the investigation concerning the arms deal had not been closed. There were also further issues to be established in relation to the matters then to be prosecuted in the Shaik trial.

55. On 25 August 2003 Shaik appeared in the Magistrate's Court in Durban and was presented with a draft charge sheet containing various charges, including the two charges of corruption described above. Needless to say these charges referred to benefits given to Zuma by Shaik and companies in the Nkobi group over several years (the period 1 October 1995 to 30 September 2002) and to the R500 000 for Zuma from Thomson-CSF. A copy of the draft charge sheet is attached marked '**LM29**'.
56. As explained above on 26 August 2003 the DSO faxed its 15 August 2003 response to Zuma's 7 August 2003 request for copies of the handwritten and typed French version of the encrypted fax annexed to Downer's affidavit of 24 August 2001. The DSO again did not provide Zuma with the handwritten version because it believed that the release of the handwritten version prior to it having been dealt with in the criminal trial against Shaik and his co-accused, may prejudice the further investigation of the matter and may impede the prosecution or even result in a miscarriage of justice. The encrypted fax would be an important item of evidence in the upcoming trial of Shaik and his co-accused. As explained above, the

investigating team had received the handwritten version of the encrypted fax from Delique (Thétard's secretary), who at that stage was a very scared and reluctant witness. The DSO believed that the disclosure of the handwritten version would probably result in its publication in the media and that in turn might lead to Delique's identification as its source and in her being intimidated or exposed to danger. The NPA's view was that any interest that Zuma might have had in seeing a copy of the handwritten version at that stage, was outweighed by the risks to the prosecution posed by its disclosure.

57. On 30 August 2003 Zuma launched an urgent application in the Pretoria High Court under case number 24517/03 against the NDPP, NPA and DSO for an order directing them to give him immediate access to the handwritten French version of the encrypted fax. I shall not burden the present matter with a copy of the papers in that application. For the present, suffice it to say that despite the fact that the respondents delivered answering papers and the applicant replied, the matter has never been heard. I presume that is because in the Shaik trial the State tendered the handwritten French version of the encrypted fax in evidence and in that way a copy found its way into Zuma's hands or those of his legal representatives.
58. On 30 October 2003 Zuma lodged with the Public Protector a complaint about the manner in which the NPA had conducted the investigation into him. This culminated in a report by the Public Protector on 28 May 2004, the findings of which included that Ngcuka had unjustifiably infringed

Zuma's right to dignity and acted unfairly and improperly in making the media statement on 23 August 2003 to the effect that Zuma would not be prosecuted despite there being a *prima facie* case against him. As the complaint and the report are both lengthy and not relevant to the present matter (constituting as they do proceedings of an institution established by Chapter 9 of the Constitution) and are already annexures to Zuma's founding affidavit, I shall not annex them to this affidavit or deal with them at any length. For the present, suffice it to say that shortly after the Public Protector delivered his report the NPA and Maduna prepared a response rejecting his criticisms of its handling of the investigation. If requested by the Court the NPA will deliver copies of that response to the Court and the accused. The facts of the matter, set out in this affidavit and in Ngcuka's affidavit, speak for themselves.

59. In November 2003 Shaik and nine companies in the Nkobi group represented by Shaik were indicted in the Durban High Court on charges of, amongst other things, corruption and fraud. Shaik was accused number 1 and the Nkobi group companies he represented accused numbers 2 to 10. A company in the Thomson-CSF group – Thomson (Pty) – was indicted as accused number 11 on charges of corruption. In what follows, I shall refer to the ensuing trial as 'the Shaik trial'. A copy of the final version of the indictment dated 12 August 2004 is attached marked '**LM30**'.
60. In the latter half of 2003 an intermediary acting for the Thomson-CSF group contacted Maduna saying that Thomson-CSF wanted to meet with

him and Ngcuka because they were ready to furnish the NPA with information it was looking for. This approach was made against the backdrop of the request by the SA authorities to the French authorities, then pending in France, for the French authorities to interrogate employees of companies in the Thomson-CSF group, including Thétard and Perrier. Pursuant to this approach Ngcuka and I travelled to Paris for an off-the-record meeting with Thomson-CSF executives in about July 2003, which was followed by a second trip by Ngcuka to France for that purpose in about September 2003. Nothing came of those discussions.

61. In early 2004 Maduna was contacted by a South African attorney acting for Thomson-CSF, namely Robert Driman ('Driman') of the firm Deneys Reitz Attorneys of Johannesburg. Driman requested another meeting between the South African authorities and representatives of Thomson-CSF, saying that Thomson-CSF was now ready to co-operate. After discussing the matter with Ngcuka, Maduna agreed and the meeting was held at his house in April 2004. Aside from Maduna and Ngcuka, those present were the Thomson-CSF delegation comprising Driman, the managing director of accused 2 in these proceedings (Thomson Holdings) and a director of accused 11 in the Shaik trial and accused 3 in these proceedings (Thomson (Pty)) Pierre Moynot ('Moynot'), the attorney of record of those accused in these proceedings Ajay Sooklal ('Sooklal') and a lawyer from Thomson-CSF in France Christine Guerrier ('Guerrier'). During the meeting the Thomson-CSF delegation said that they were willing to co-operate and, as

Ngcuka and Maduna accepted their *bona fides*, it was agreed that they would contact Ngcuka's office to discuss the parameters for their co-operation.

62. On 19 April 2004 Ngcuka and I met with Naidu (who was now acting for Thomson-CSF), Driman and Guerrier. The meeting resulted in an agreement, which was recorded in a letter by Ngcuka to Naidu delivered to the latter later that day. In the letter Ngcuka confirmed that if Thétard made an affidavit verily to the effect that he was the author of the encrypted fax, the NPA would retract the subpoena and two warrants of arrest against Thétard and withdraw the prosecution against accused 11 in the Shaik trial (accused 3 in Zuma trial). A copy of this letter is attached marked '**LM31**'. I should add that the idea was that Thétard's making of the affidavit would be accepted by the NPA as proof of Thomson-CSF's *bona fides* and would lay the basis for further discussions with Thomson-CSF and consultations with Thétard aimed at his testifying in the criminal trial if that became necessary, in exchange for which he would be formally indemnified should he give satisfactory evidence and the NPA would withdraw the prosecution against accused number 11.
63. On 20 April 2004 Thétard made an affidavit confirming that he was the author of the encrypted fax, which Naidu then forwarded to Ngcuka. A copy of this affidavit is attached marked '**LM32**'.

64. On 4 May 2004 Ngcuka wrote to Naidu thanking Naidu for the copy of the affidavit from Thétard in which Thétard confirmed that he was the author of the encrypted fax. Ngcuka said that as a result, the State would withdraw the charges against accused 11 in the Shaik trial (Thomson (Pty)) on the date of next appearance and that he had instructed the investigating team to withdraw the warrants and subpoenas against Thétard. Finally Ngcuka said that provided that Thétard submitted to questioning by the prosecuting advocates and was prepared to testify in the criminal trial should it become necessary, the prosecuting advocates would provide him (Naidu) with the relevant documents to assist him in further consultations. A copy of this letter is attached marked '**LM33**'.
65. On 10 May 2004 Downer instructed Du Plooy (who as stated is the lead investigator in the investigation team) to cancel the warrants for Thétard's arrest, which he duly did on 17 May 2004.
66. On 10 May 2004 however Thétard made a further affidavit, which had not been solicited by the South African authorities. As explained below, the NPA received it only on 22 May 2004. In this affidavit Thétard said, amongst other things: that the encrypted fax was '*a rough draft of a document in which I intended to record my thoughts on separate issues in a manner which was not only disjointed but also lacked circumspection*'; that he had never faxed the document or directed that it be faxed but rather crumpled it up and thrown it in a waste paper basket from where it was possibly retrieved and handed to the State; that he refused to be interviewed

or to testify in SA or any other country outside France; but that he was prepared to be interviewed in France by Ngcuka and me on the issues described in the affidavit. A copy of this affidavit is attached marked 'LM34'. I would add that the NPA has always regarded the main assertions in this affidavit about the encrypted fax as untruthful and its unsolicited and unheralded production as cynical manoeuvre aimed at disrupting the prosecution in the Shaik trial and discrediting the encrypted fax. The evidence in the Shaik trial proved conclusively that Thétard was lying in this affidavit about the encrypted fax. Forensic evidence showed that the handwritten version was never crumpled up and that it was indeed typed and printed on 17 March 2000. Delique's evidence that the typed version was faxed to Paris, was accepted. It was corroborated by Telkom records which showed that shortly after 17 March 2000 faxes were sent to France from the offices of Thomson (Pty).

67. On 22 May 2004 I met with Naidu in Durban at Naidu's request. At this meeting Naidu handed me Thétard's affidavit of 10 May 2004. If I recall correctly, it was in a sealed envelope. I did not read it until after the meeting. At the meeting, after giving me the affidavit, Naidu told me that the affidavit was what Thétard had come up with thus far, but that Thétard was teetering on the edge of making a full disclosure and Naidu thought that with a little more prompting Thétard might make a clean breast of it. Naidu said if we were able to agree on a permanent indemnity from prosecution, this might provide the necessary catalyst for Thétard making a

full disclosure. In response I told Naidu that the NPA would only consider an indemnity if Thomson-CSF made a full and frank disclosure. Naidu then proceeded to make a report to me that he (Naidu) said was in the strictest confidence. Despite the fact that in his affidavit in this matter the representative of Thomson (Pty) gives an incomplete and consequently misleading picture of what in fact occurred during this period, after anxious consideration I have decided to respect Naidu's confidence.

68. After my meeting with Naidu I returned to my hotel with Thétard's affidavit. There I read the affidavit for the first time. I was shocked by its contents. It repudiated the contents of the encrypted fax, which in his first affidavit Thétard had admitted having written without in any way qualifying what he had said.
69. On 26 May 2004 another attorney acting for Thomson-CSF, namely Pravesh Diplall ('Diplall') of Fathima Karodia Attorneys, wrote to me: pointing out that the Shaik trial was due to commence on 11 October 2004, saying that accused 11 in that case was one of his clients; recording that Ngcuka had conveyed to Naidu his intention to withdraw the charges against accused 11 on the date of the next appearance (11 October 2004); asserting that as the charges had not been withdrawn yet, accused 11 was still an accused in the Shaik trial; stating that he had been instructed to represent Thomson-CSF's interests in the Shaik trial and for that purpose wanted to acquaint himself with the documents that were likely to be presented as evidence; recording that the State had refused to provide him

with a copy of a forensic report prepared for purposes of the trial by KPMG; stating that he had subsequently managed to obtain a copy of the report from Shaik's attorneys; and requesting that the State provide him with copies of the annexures to the report. A copy of this letter is attached marked '**LM35**'. (On 31 May 2004 Diplall sent a further letter to me requesting a response to his letter of 26 May 2004 by 3 June 2004.)

70. On 1 June 2004 Diplall wrote to me requesting copies of all documents and evidence seized during the searches in Durban, France and Mauritius, and copies of all evidence obtained by the DSO during its preliminary investigation and its investigation in terms of s 28 of the NPA Act. A copy of this letter is attached marked '**LM36**'.
71. On 1 June 2004 Diplall also wrote to Ngcuka saying that the reference to '*subpoenas*' in Ngcuka's letters to Naidu of 19 April 2004 and 4 May 2004 was to the letter of request issued on 20 March 2003 in terms of s 2(2)(c) of the ICCMA (as to which see paragraph 39 above), saying that the prosecutors had thus far failed to withdraw the letter of request with the result that the Thales (Thomson-CSF) group was being prejudiced, and requesting urgent confirmation that steps to withdraw the letter of request had been initiated. A copy of this letter is attached marked '**LM37**'.
72. At around this time Naidu approached Downer and Steynberg (who were prosecutors in the Shaik trial and as stated are prosecutors in this matter) with an offer that he would obtain a further affidavit from Thétard in return

for an indemnity from prosecution for accused number 11 and several of its senior personnel. This offer was declined because the investigating team wished itself to interview Thétard. Naidu said that there should be no objection from Thétard to an interview in France with Downer and Steynberg (instead of Ngcuka and me as indicated in Thétard's affidavit of 10 May 2004)

73. On 7 June 2004 Steynberg wrote to Diplall. In this letter Steynberg referred to the various telephone conversations he had had with Naidu in which Naidu said there should be no objection from Thétard to an interview in France with Downer and Steynberg (instead of Ngcuka and me). Steynberg requested a formal interview '*on record and preferably under oath*' at the SA Embassy in Paris on 8 July 2004. A copy of this letter is attached marked '**LM38**'.
74. On 8 June 2004 I wrote to Diplall in response to his letters of 26 and 31 May and 1 June 2004. In this letter I refused Diplall's request for access to documents because, amongst other things, on 4 May 2004 the NDPP had undertaken that all charges against accused 11 in the Shaik case would be withdrawn at the next appearance. He said that Diplall could ask Shaik's attorney for copies of the documents, which had already been supplied to him. A copy of this letter is attached marked '**LM39**'.
75. On 8 June 2004 Ngcuka wrote to Diplall in response to his letter of 1 June 2004 about the '*subpoenas*'. In this letter Ngcuka said that that neither he

nor I had consented to the withdrawal of the letter of request. Ngcuka said that when he made the proposal to Naidu on 19 April 2004 he was under the mistaken impression that Thétard had been subpoenaed in terms of s 28 of the NPA Act. In the letter Ngcuka nevertheless offered that if Thétard submitted to an interview by Downer and Steynberg the record would not be used against Thétard in any criminal proceedings and he (Ngcuka) would ensure that the letter of request would be withdrawn forthwith. A copy of this letter is attached marked '**LM40**'.

76. On 21 June 2004 Diplall wrote to Ngcuka saying that there was no real reason to wait until 11 October 2004 (the date of the next appearance in the Shaik trial) for the withdrawal of the charge against accused number 11 and proposing that the prosecution do all things necessary to set the matter down in the High Court in the interim for the sole purposes of withdrawing the charges against accused number 11 and postponing the matter for trial on 11 October 2004. A copy of this letter is attached marked '**LM41**'.
77. On 1 July 2004 Diplall wrote to Ngcuka refusing Ngcuka's offer in his letter of 8 June 2004. Diplall gave the following reasons, which the NPA regarded as insincere. He said that Ngcuka's offer amounted to a circumvention of the provisions of the ICCMA; that the offer may amount to a contravention of '*French law and practice concerning the furnishing of evidence that may be used in a foreign court*'; and that Ngcuka's proposed indemnity of Thétard implied that the NPA was still investigating companies in the Thomson-CSF group, including accused 11 in the Shaik

case, despite the undertaking to withdraw charges against accused 11. Diplall said that all Thétard was willing to do was to submit to an interview with Ngcuka and me in France, as proposed in his affidavit of 10 May 2004. A copy of this letter is attached marked 'LM42'. I should add that there was nothing underhand or unlawful to avoid having to rely on the ICCMA process by way of an agreement between the parties, Diplall was vague as to how there might be a possible violation of French law and in any event that all Diplall's reasons for Thétard's refusal to meet with Downer and Steynberg, if genuine, would apply equally to a meeting with Ngcuka and me (with whom Thétard was willing to meet). Upon receipt of this letter the NPA concluded that Thomson-CSF was negotiating in bad faith and no good purpose would be served by pursuing the negotiations about a possible indemnity any further. Despite this, the NPA resolved to honour its side of the agreement that Ngcuka had concluded with Naidu, i.e. to withdraw the charges against Thomson (Pty) when the Shaik trial commenced on 11 October 2004. Aside from the fact that the NPA had agreed to do so, there were pragmatic factors which led to the NPA sticking to the original agreement despite Thomson-CSF's conduct in the intervening period. These included that Shaik and his related companies, practically speaking, was the main focus of the prosecution at that stage and the NPA was concerned about the trial being delayed by possible arguments by Thomson (Pty) to the effect that the joinder of Thomson (Pty) as an accused was a misjoinder and that Shaik (who was a director of Thomson

(Pty)) should not be its nominal representative in terms of s 332 of the Criminal Procedure Act 51 of 1977 ('the CPA'). I would emphasize that the agreement and ensuing withdrawal against Thomson (Pty) were not the result of an assessment of the strength of the State's case against it. The agreement related only to the Shaik trial and did not amount to a permanent indemnity from prosecution.

78. On 5 July 2004 I wrote to Diplall in response to his letter of 21 June 2004, saying that I had been directed by Ngcuka to say that the charges against accused number 11 in the Shaik trial would only be withdrawn on the date of the next court appearance (i.e. 11 October 2004) because the prosecution had been unable to arrange the requested earlier appearance. A copy of this letter is attached marked '**LM43**'. I should add that, as explained in my answering affidavit in case number 6262/04 in this Court (which is discussed below), although in this letter I said that '*we have been unable to arrange an earlier appearance as per your request*', I did not intend to imply thereby that an attempt had been made to arrange an earlier appearance and that the attempt had been unsuccessful. What I intended to say was '*we are unable to accede to your request*' in the sense that the NPA was unwilling to do so and therefore unwilling to arrange an earlier appearance, as requested. As further stated in that affidavit, on 21 July 2004 Ngcuka and I met with Naidu (who as stated was, and still is, representing accused number 3) and explained to him why the NPA had been unable to accede to his client's request. Our stated reasons included

that the Shaik case was a sensitive and controversial one and the NPA wanted there to be just one trial, with no unnecessary proceedings which might attract undue media attention and speculation.

79. On 16 July 2004 Steynberg wrote to Diplall saying that in the light of Diplall's letter of 1 July 2004 there appeared to be little purpose in pursuing the meeting with Thétard and the NPA had instead decided to pursue the formal request with the French authorities. Steynberg added that although the undertaking to withdraw charges against accused 11 in the Shaik case stood (i.e. the NPA would honour it), nothing in the undertaking should be presumed to amount to an indemnity from prosecution for any of Diplall's clients. Steynberg said that any such indemnity was predicated upon a full and frank disclosure of evidence by Diplall's clients '*which, on the basis of the affidavits of Mr Thétard to date, we are not persuaded is their intention*'. A copy of this letter is attached marked '**LM44**'.
80. On 12 August 2004 Thomson (Pty), which as stated was at that stage accused number 11 in the Shaik trial and is now accused number 3 in the present matter, launched an urgent application in this Court under case number 6262/04 for an order directing the prosecution to set down the Shaik criminal before 11 October 2004 '*for the single and specific purpose of the State withdrawing the charges against Accused No. 11 (i.e. the Applicant), and to postpone the matter to 11 October 2004*'. The prosecution opposed this application and it was dismissed.

81. On 11 October 2004 the Shaik trial commenced in the Durban High Court before Squires J and two assessors. While it was running the trial consumed almost all of the prosecutors' and investigators' time. In all, it ran for about 75 court days. The transcript of what was said during the proceedings comprises almost 6 700 pages. The documentary exhibits filled more than 25 lever arch files.
82. On 2 June 2005 the Durban High Court convicted Shaik on two counts of corruption. Shaik was also convicted on count of fraud. On 8 June 2005 the Durban High Court sentenced Shaik to 15 years' imprisonment on the two counts of corruption and 3 years' imprisonment of the count of fraud, which are to run concurrently. Several of the Nkoki group accused were also convicted and sentenced to pay substantial fines or suspended fines. Copies of the Durban High Court's judgments on the convictions and the sentences are attached marked '**LM45**' and '**LM46**'.
83. In its judgment on the merits the Durban High Court said the following about Zuma and the relationship between Shaik and Zuma:
- 83.1. *'Over those years [1994-1999] a total sum of R1 340 078 was so paid to Jacob Zuma, and the State claims that this was done corruptly, the object being to influence Zuma to use his name and political influence for the benefit of Shaik's business enterprises or as an ongoing reward for having done so from time to time'* (Shaik trial record p. 6466).

83.2. *‘From the full result of all this additional information, it emerges that the State case is not the usual corruption charge of one payment for one act or omission in the line of the recipient’s duty. It is that the payments made by the accused effectively constituted a type of retainer by which accused No 1 agreed, expressly or impliedly, to pay these many expenses over this period to Zuma or for his benefit or to make cash payments to him as and when he needed such financial help, while he, in return, would render such assistance as he could to further the accused’s interests, as and when asked. It is not alleged that there was any particular payment for any particular act or omission of duty. It is the same kind of activity that is penalised by the Act but carried out in this particular way in this case. That must be an offence under the Act, otherwise it would be too easy to avoid its provisions’ (Shaik trial record pp. 6466-7).*

83.3. *‘These four episodes show in our view that Zuma did in fact intervene to try and assist Shaik’s business interests. While it may be accepted that his intervention on behalf of Shaik to relieve the threatened exclusion of Nkobi interest in ADS and the munitions suite contract, was undertaken as Deputy President of the ANC and would not, in the absence of any alleged and known duty vested in that office that was discharged or subverted for Shaik’s benefit, constitute a contravention of Act 94 of 1992. But it clearly shows, as do those in the Renong, Eco-Tourism and Venson situations, a*

readiness in both Shaik to turn to Zuma for his help, and Zuma's readiness to give it' (Shaik trial record p. 6539).

83.4. *'As Zuma had no shares or interest in any Nkobi company and was in no position to lend any money to help Shaik's enterprise, the only help that he could give to 'land any deal', would be the influence and weight of his political office' (Shaik trial record p. 6540).*

83.5. *'It would be flying in the face of commonsense and ordinary human nature to think that he [Shaik] did not realise the advantages to him of continuing to enjoy Zuma's goodwill to an even greater extent than before 1997; and even if nothing was ever said between them to establish the mutually beneficial symbiosis that the evidence shows existed, the circumstances of the commencement and the sustained continuation thereafter of these payments, can only have generated a sense of obligation in the recipient' (Shaik trial record p. 6548).*

83.6. *'If Zuma could not repay money, how else could he do so than by providing the help of his name and political office as and when it was asked, particularly in the field of government contracted work, which is what Shaik was hoping to benefit from. And Shaik must have foreseen and, by inference, did foresee that if he made these payments, Zuma would respond in that way. The conclusion that he realised this, even if only after he started the dependency of Zuma*

upon his contributions, seems to us to be irresistible' (Shaik trial record pp. 6548-9).

83.7. *'It seems an inescapable conclusion that he embarked on this never ending series of payments when he realised the extent of Zuma's indebtedness to Mangerah and the extent to which Zuma was living beyond his income; and he also realised the possible advantages to his business interests of providing the means to retain Zuma's goodwill by helping him to support a lifestyle beyond what he could afford on his Minister's remuneration'* (Shaik trial record p. 6549).

83.8. *'The continuation of such payments after this [i.e. after 1999 when Zuma became Executive Deputy President and leader of government business in Parliament] can only have been to allow Zuma to live at an even higher standard of material comfort than his official remuneration provided and can only have been to continue the existence of a sense of obligation towards Shaik in return'* (Shaik trial record p. 6556).

84. As there is a suggestion in the accused's affidavits in this matter that the new NDPP, Pikoli, who had succeeded Ngcuka, discussed the judgment of the Durban High Court in the Shaik trial with the President during an official visit by the President to Chile between 6 and 9 June 2005, I should mention at this juncture that the President and Pikoli travelled separately to Chile and back and their interactions during the trip were very limited.

Pikoli went to Chile for the signing of a memorandum of understanding between the prosecuting authorities of South Africa and Chile. Pikoli states categorically that at no stage during that trip, or before 20 June 2005, did he discuss with the President the question whether or not Zuma should be charged.

85. On 14 June 2005 the President announced in Parliament his decision to dismiss Zuma as Deputy President. In the President's statement to Parliament he said amongst other things that after his return from Chile he had carefully studied the Durban High Court's judgment in the Shaik case because the relationship between Zuma and Shaik had been canvassed in the trial, that although Zuma had *'the right to be presumed innocent until proven otherwise'* and had *'yet to have his day in court'* Squires J had categorically concluded that the relationship between Zuma and Shaik was an unsavoury one. A copy of the President's statement is attached marked **'LM47'**.
86. On 17 June 2005 the prosecution and members of the investigation team in the Shaik case briefed Pikoli and me on the prospects of a successful prosecution of Zuma on charges of corruption related to those on which Shaik and the Nkobi companies had been convicted by the Durban High Court.
87. On 20 June 2005 Pikoli announced that the NPA had decided to charge Zuma on those charges. Earlier that day, before making the announcement,

Pikoli had visited both the President and Zuma and informed them of his decision. He also informed the Minister of Justice and Constitutional Development.

88. The following features of the Shaik trial contributed to a re-appraisal of the admissible evidence against Zuma and led to the decision that he should be prosecuted:

88.1. Much of the evidence against Shaik was documentary. Each piece of relevant documentary evidence appeared to fit a comprehensive puzzle that supported the State case on all the charges. Generally speaking, Shaik and/or Thétard were best placed to explain the contents of the crucial documents. Despite the State's efforts to obtain an explanation from Shaik during the investigation, he refused and even went so far as to institute the proceedings in the Durban High Court challenging his summons to testify in terms of s 28 of the NPA Act. Similarly, Thétard absented himself from the country at an early stage of the investigation and refused to cooperate any further. His initial interview in terms of s 28 of the NPA Act had occurred even before the copy of the encrypted fax had been obtained. Consequently, at the time when Ngcuka took his decision not to prosecute Zuma, the State had been unable to obtain confirmation of crucial documents from the persons best placed to explain them.

- 88.2. Shaik subsequently testified at his trial. Generally speaking, he confirmed almost all the documents that the State had previously been unable to confirm. It became apparent that the State had correctly relied on the relevant documents as reflecting the truth of the matters that the documents appeared to refer to.
- 88.3. As a result, after the Shaik trial it was clear that the documents as a whole supported the State's case on each count. Shaik had been best placed to provide an innocent explanation for the conclusions that appeared, on the face of the documents, to be incriminating. In general, Shaik's innocent explanations were futile and lacking in credibility. The Court's judgment confirmed this. The lack of credible innocent explanations from the person best placed to provide such, further confirmed the State's case on each count.
- 88.4. In his testimony Shaik also introduced new documents and described events that had previously been unknown to the State. Generally speaking, these new aspects were all in accordance with the State's case. In this sense too, Shaik's evidence strengthened the State's version of events.
- 88.5. Almost without exception, Shaik's testimony confirmed the forensic evidence of the payments that Shaik had made to or on behalf of Zuma. It was novel and illuminating to learn from Shaik that the

series of payments to Zuma was the product of a deliberate agreement between them to keep Zuma in politics.

88.6. Shaik's attempted innocent explanation that the payments were loans, and that there were written loan agreements to substantiate this, was rejected by the court. In particular, the so-called revolving loan agreement that was introduced as part of the defence case, was found to be unreliable.

88.7. Generally speaking the defence witnesses did nothing to detract from the State's case and in many instances, they supported the State's case. Moynot, a defence witness, had earlier stopped cooperating with the State. His version had thus been unavailable previously. His ultimate version supported the State's case. He also confirmed many documents that were peculiarly within his knowledge.

88.8. The admissibility of some crucial documents was disputed, including the encrypted fax. The Court ruled that most of the crucial documents were admissible.

88.9. The credibility of crucial State witnesses was in issue. The court accepted, virtually without exception, that the State witnesses told the truth and that they were credible.

88.10. Generally speaking the Court accepted the version that the State urged the court to accept. The State's version included an appraisal

of many strands of evidence. The court accepted the State's argument that all the circumstantial and direct evidence made up a compelling and irrefutable whole that supported the State's case.

88.11. On count 1, the court accepted that the State had proved, in effect, that there was a generally corrupt relationship between Shaik and Zuma.

88.12. On count 3, the court accepted that the contents of the encrypted fax reflected the truth of the matter.

89. On 29 July 2005 the Durban High Court granted Shaik and several of the Nkobi group companies leave to appeal to the Supreme Court of Appeal ('SCA') on a limited basis against their conviction on one of the counts of corruption. Shaik was granted leave to appeal against his conviction on the count of fraud. The Court refused them leave to appeal against the first count of corruption. Pursuant to an application by the accused, the SCA lifted the limitations imposed by the Durban High Court on the appeal against the conviction on corruption and directed that argument be heard on the application for leave to appeal against the conviction on the remaining count of corruption together with the appeal against the convictions on the remaining counts. The appeal was initially set down for hearing in the SCA from 21-25 August 2006. However, on 7 August 2006 the parties were informed that one of the Judges of Appeal assigned to the case was

seriously ill and consequently that the hearing of the appeal had been shifted to 25-29 September 2006.

90. In addition to the Shaik criminal trial and criminal appeal, on 3 June 2005 the Durban High Court granted a restraint order in terms of section 26 of the Prevention of Organised Crime Act 121 of 1998 ('POCA'). The restraint order was granted by agreement between the NDPP and the defendants. The parties then agreed on a time frame for the exchange of statements in terms of section 21 of POCA. The NDPP filed his statement on 12 October 2005. The defendants filed their answering statement on 4 November 2005. The NDPP filed a replying statement on 11 November 2005. The defendants then indicated that they needed time to prepare an affidavit in rejoinder, and this led to postponement of the hearing scheduled to take place before Squires J. The defendants filed their affidavit in rejoinder on 13 December 2005. The NDPP filed a response on 11 January 2006. The application for a confiscation order in terms of section 18 of POCA was then argued before the Durban High Court on 18 January 2006. The Court granted a confiscation order, but granted the accused leave to appeal to the SCA against the confiscation order. This appeal will be heard together with the appeal against the accused's convictions and sentences.
91. Returning to the chronology, on 29 June 2005 Zuma appeared for the first time in the Durban Magistrate's Court and the case was postponed to 11 October 2005 for further investigation, including a forensic investigation and report. Zuma was released on bail of R1 000 on condition that he did

not interfere with witnesses and that if he intends travelling overseas he must tell his attorney, who in turn must tell the investigating officer (Du Plooy).

92. On 19 July 2005 Shaik's attorney Reeves Parsee wrote to Downer and Steynberg saying that on 11 July 2005 Shaik had resigned as Zuma's financial advisor and his power of attorney over Zuma's banking account had been cancelled, and that as a result all Zuma's documents held by Shaik or the Nkobi group of companies had been forward to Zuma's attorney Michael Hulley ('Hulley'). A copy of this letter is attached marked '**LM48**'.
93. On 8 August 2005 Adv. Aubrey Thanda Mngwengwe, the Acting Investigating Director of the DSO, decided in consultation with me in terms of s 28(1) of the NPA Act further to extend the investigation to include the suspected or attempted commission of fraud by Zuma pertaining to his declarations to the Registrar of Parliamentary Members Interests, the Secretary for the Cabinet of the Government of South Africa and the South African Revenue Service ('SARS') in respect of benefits received from Shaik and/or companies associated with Shaik, as well as contraventions of the Income Tax Act 58 of 1962 in respect of those declarations. A copy of this decision is attached marked '**LM49**'.
94. On 12, 15 and 18 August 2005 the DSO obtained from the Judge President of the Transvaal Provincial Division of the High Court a series of 22 search

warrants for various premises including Zuma's residences in Forest Town and Killarney in Johannesburg, Zuma's residence at Nkandla in KwaZulu-Natal, Zuma's office and those of his former secretaries and assistants at the Union Buildings in Pretoria and Tuynhuys in Cape Town, the offices of the Kwazulu-Natal Department of Economic Development and Tourism in Durban, the office of Zuma's attorney Hulley in Durban, the office and residence of Zuma's attorney Julekha Mahomed ('Mahomed') in Johannesburg, the business premises of Thomson Holdings and Thomson (Pty) and the residence of Moynot. The majority of these searches were conducted on 18 August 2005 and computers and a very large quantity of documents (93 000) and other materials were seized. The reasons for the searches included the fact that the October 2001 searches had deliberately excluded Zuma's offices and residences, for the reasons given above. Another reason was that Shaik's attorney had told the NPA that all Zuma's documents held by Shaik or the Nkobi group of companies had been forwarded to Zuma's new attorney Hulley. There was also evidence that Mahomed, the other attorney whose offices were searched, had amongst other things liaised with the Thomson-CSF group on Zuma's behalf. Then there was the fact that the investigations preceding Shaik's trial in 2004 into the alleged corrupt payments by Shaik and his companies to Zuma, had only covered the period up to November 2002. In his evidence during his trial in 2005, however, Shaik testified that the payments, which he claimed (falsely, in the opinion of the trial court) to be in the nature of loans, had

continued long after that date and indeed were still continuing. He however refused to provide any details or documentation concerning the payments after late 2002. Shaik also claimed that there had been substantial repayments by Zuma. It was thus considered vital that fresh evidence be obtained regarding amongst other things the financial dealings between Shaik and Zuma to date.

95. On 26 August 2005 Mahomed applied in the Johannesburg High Court under case number 19104/2005 to have the search warrants pertaining to her office and residence set aside.
96. On 7 September 2005 Downer wrote to Hulley suggesting that on 11 October 2005 the matter be postponed for trial in the High Court to a mutually agreeable date. A copy of this letter is annexure '**JDP3**' to Du Plooy's affidavit.
97. On 14 September 2005 the Johannesburg High Court upheld the application by Mahomed for the setting aside of the warrants for the search of her office and her home, but on 24 October 2005 leave to appeal to the SCA was granted and the appeal is still pending. A copy of the Johannesburg High Court's judgment of 14 September 2005 is attached marked '**LM50**'. The NPA has made a settlement proposal to Mahomed, to which a final response has not been received.
98. On 19 September 2005 Hulley wrote to NDPP asserting Zuma's right to a fair and speedy trial and saying that Zuma would not consent to any

adjournment for further investigation. A copy of this letter is attached marked 'LM51'.

99. On 23 September 2005 Hulley wrote to Director of Public Prosecutions in KwaZulu-Natal saying that the trial will be inordinately lengthy and require detailed preparation on Zuma's team's part, and accordingly requesting that a joint approach be made to the Judge President to make arrangements suitable to all parties. A copy of this letter is attached marked 'LM52'.
100. On 29 September 2005 Steynberg wrote to Hulley saying that the State had no option but to apply for a further adjournment, for the following reasons: after the former NDPP's decision not to prosecute Zuma the DSO's investigations had focussed on Shaik and his companies; when announcing the decision not to prosecute Zuma with Shaik the NDPP had said that the decision would be reviewed should any new evidence come to light; the investigation into Zuma had resumed after Shaik's conviction and the NDPP's ensuing decision to prosecute Zuma; the investigation included a forensic investigation into Zuma's financial situation and his financial relationship with Shaik; the investigation extended beyond the period up to September 2002 covered in the Shaik trial, and included Shaik's evidence of a 'revolving loan agreement', an examination of the more than 93 000 documents and other computer information which had been recently seized; and the investigation had been delayed by Ms Mohamed's challenge to the search and seizure operation and would probably be further delayed by other impending challenges including one by Zuma. Steynberg proposed

that the matter be enrolled in High Court for a date towards the end of March 2006, when the State would give the defence the 'docket' and the forensic report, whereupon the matter would be further adjourned to allow the State and the defence a reasonable time to prepare for the trial. A copy of this letter is annexure '**JDP1**' to Du Plooy's affidavit.

101. On 10 October 2005 Hulley wrote to Steynberg rejecting the State's request for a postponement. A copy of this letter is annexure '**JDP2**' to Du Plooy's affidavit.
102. On 10 October 2005 Zuma and Hulley applied in the Durban High Court under case number 14116/05 for, amongst other things: the setting aside of the seven search warrants for Zuma's residences in Forest Town and Killarney in Johannesburg, Zuma's residence at Nkandla in KwaZulu-Natal, Zuma's office and those of his former secretaries and assistants at the Union Buildings in Pretoria and Tuynhuys in Cape Town, the offices of the Kwazulu-Natal Department of Economic Development and Tourism in Durban and the offices of Hulley and Associates in Durban; and for the return of all the items seized in the ensuing searches and seizures on 18 August 2005 and any copies thereof.
103. On 11 October 2005 Zuma appeared for the second time in the Durban Magistrates' Court. The State applied for the matter to be transferred to the High Court before the indictment was served, but this was opposed by the defence and an agreement was eventually reached between the State and the

defence which entailed, amongst other things, that the case was postponed to 12 November 2005 in order for the State to serve on Zuma a provisional indictment based on the evidence available to the State at the end of the Shaik trial. At the time the State told the defence that the provisional indictment may well be amended in the light of the new evidence under investigation, including the documents and materials seized on 18 August 2005. The State said that it would endeavour to deliver the amended indictment by the end of March 2006. The record of the proceedings on 11 October 2005 forms part of annexure '**JDP4**' to Du Plooy's affidavit.

104. The NPA decided to indict THINT Holding (Southern Africa) (Pty) Ltd (i.e. Thomson Holding) and THINT (Pty) Ltd (i.e Thomson (Pty)) together with Zuma as accused numbers 2 and 3.
105. On 14 October 2005 Shaik and two companies in the Nkobi group applied in the Durban High Court under case number 14550/2005 for the setting aside of the search warrants pertaining to the searches of their premises on 18 August 2005. The affidavits have been exchanged but the applicants have not yet set the matter down for hearing.
106. On 3 November 2005 Steynberg wrote to Hulley enclosing a copy of the provisional indictment. In this letter Steynberg said that the provisional indictment may well be amended, in which case a proper application will be made. He confirmed that on 12 October 2005 the parties had arranged with the Judge President of this Court a trial date of 31 July 2006 and that at the

Magistrates' Court hearing on 12 November 2005 the matter would be transferred to the High Court for trial. He added that the State had decided to arraign Thomson Holdings and Thomson (Pty) and they would be brought before the Court by a separate process. A copy of this letter is annexure 'JDP3' to Du Plooy's affidavit. A copy of the provisional indictment is attached marked 'LM53'.

107. On 4 November 2005 the provisional indictment was served on Thomson Holdings and Thomson (Pty) and they were summonsed for trial in the Durban High Court on 31 July 2006 as accused 2 and 3.
108. On 17 November 2005 Jurgen Kogl and his company Cay Nominees (Pty) Ltd, whose premises were also searched on 18 August 2005, applied in the Pretoria High Court under case number 37058/2005 for the setting aside of the search warrants pertaining to those premises. The NPA's answer has been delivered, but the applicants have not replied or set the matter down for hearing.
109. On 9 December 2005 the State applied in the Durban High Court for the issuing of a letter of request to the Attorney-General of Mauritius for further assistance in terms of the ICCMA, namely the release to the South African High Commissioner in Mauritius of the documents seized from the premises of Thomson Holdings and Thomson (Pty) in Mauritius on 9 October 2001. The need for this application arose because on 27 March 2003 the Supreme Court of Mauritius had ordered that the Mauritian

authorities could not release the documents without the court's sanction (see paragraph 28 above) and on 17 January 2003 the Mauritian ICAC had said that as the original request did not specify to whom the seized documents should be produced the South African authorities should send a fresh request specifying that (see paragraph 39 above). In a judgment handed down on 22 March 2006 the Durban High Court adjourned the ICCMA application to a date to be arranged with the Court hearing the criminal trial, saying that the criminal trial Court was the only one with jurisdiction to hear the application and that the application should wait until after the accused had pleaded. A copy of this judgment is attached marked '**LM54**'.

110. On 15 February 2006 the Durban High Court granted the application made by Zuma and Hulley on 5 October 2005 (case number 14116/05) for the setting aside of the search warrants relating to them. A copy of the Durban High Court's judgment is attached marked '**LM55**'. On 28 February 2006 the NPA applied for leave to appeal but the application has not been heard yet because thereafter the parties engaged in negotiations aimed at settling the application.
111. On 5 January 2006 Thomson Holdings, Thomson (Pty), Moynot and his wife, whose premises were searched on 18 August 2005, applied in the Pretoria High Court under case number 268/2006 for the setting aside of the search warrants pertaining to those premises.

112. On 24 March 2006 the State received from Thomson Holdings and Thomson (Pty) a request for further particulars to the provisional indictment. A copy of the request is attached marked '**LM56**'.
113. On 7 April 2006 the State replied to the request by Thomson Holdings and Thomson (Pty) for further particulars, saying in effect that instead it will provide the final indictment once the search warrant cases have been finally determined and the application in terms of the ICCMA for a request for assistance from the Mauritian authorities has been determined. In a covering letter Steynberg told Sooklal that the State would provide electronic copies of the documents requested. He added that in the light of the delay caused by the search warrant cases to the finalisation of the investigations and the indictment, the agreed trial date of 31 July 2006 was becoming increasingly unrealistic. Copies of the covering letter and the State's formal reply to the request for further particulars are attached marked '**LM57**' and '**LM58**'.
114. On 12 May 2006 Thomson Holdings and Thomson (Pty) applied in the Durban High Court under the case number in this matter for an order compelling the State to provide a substantive answer to their request for further particulars on the provisional indictment.
115. On 15 May 2006 the Durban High Court gave judgment refusing to compel the State to give Thomson Holdings and Thomson (Pty) further particulars to the provisional indictment because it would be futile given the State's

stated intention to amend the indictment. The Court said that the applications for the setting aside of the search warrants created a dilemma for the State because if the State amended the indictment using the documents seized under the warrants and the SCA later confirmed their unlawfulness, the State would have to return the documents and the facts gleaned from them would not be admissible against the accused. A copy of this judgment is annexure '**JDP7**' to Du Plooy's affidavit.

116. On 23 May 2006, in the light of the progress then being made in the settlement discussions with the applicants in the search warrant applications, the NPA decided to instruct KPMG to prepare and finalise the forensic report using all the documentation in the NPA's possession as a result of the searches and seizures on 18 August 2005 (save for those in respect of which privilege has been claimed or which have remained sealed) on the basis that any disputes about the admissibility of the seized documents referred to in the report would be dealt with at the trial.
117. On 8 June 2006 Sooklal wrote to Pikoli requesting written reasons for the NDPP's decision to withdraw the charges against Thomson (Pty) in the Shaik trial on 11 October 2004 (when it was accused 11) and for the NDPP's subsequent decision to '*repudiate the agreement*' and re-institute the charges against it (as accused 3 in the present trial). A copy of this letter is attached marked '**LM59**'.

118. On 9 June 2006 Pikoli wrote to Sooklal stating that, amongst other things: the agreement to withdraw the charges was limited to the Shaik trial; the agreement did not concern Thomson Holdings (accused 2 in the present trial) at all; the NDPP made it clear on 12 July 2004 that the undertaking to withdraw should not be presumed to be an indemnity from prosecution; in the Shaik trial the State did not rely on the contents of Thétard's affidavit of 20 April 2004 because it was obtained solely to prove that Thétard was the author of the encrypted fax (something which the defence formally admitted); Thomson-CSF representatives subsequently presented a second affidavit by Thétard dated 12 May 2004, which was false and calculated to destroy any evidentiary value that might otherwise have been attached to the first affidavit; the NDPP's view was therefore that it was Thomson-CSF which had repudiated the agreement; notwithstanding the repudiation the charges were withdrawn on 11 October 2004 and the NPA had thus performed as agreed; the conviction of Shaik and the terms of Squires J's judgment made it clear that Thomson (Pty) has a case to answer and that its prosecution, together with Thomson Holdings, is in the interests of justice. A copy of this letter is attached marked '**LM60**'.

119. On 26 June 2006 Downer wrote to Hulley, Sooklal and the Judge President saying: that the prosecution could not start on 31 July 2006 and that a realistic date would be February 2007; that the State was being hindered in its efforts to produce a final forensic report by the search warrant cases but would endeavour to provide the final forensic report and an amended

indictment by 31 July 2006; that the State intended to apply in Mauritius for the release of the documents seized there from the local Thomson-CSF company; that the prosecution team was involved in the Shaik appeal then set down for 21-15 August 2006; that the Shaik appeal judgment would resolve many legal issues that would be contentious in the present matter; and consequently that the present matter should start after the Shaik appeal judgment had been handed down. A copy of this letter is annexure '**JDP8**' to Du Plooy's affidavit.

120. On 4 July 2006 the Pretoria High Court dismissed as far as Thomson Holdings and Thomson (Pty) are concerned, the application against the NPA brought on 5 January 2006 for the setting aside of the search warrants pertaining to their premises. A copy of the Pretoria High Court's judgment is attached marked '**LM61**'.
121. On 12 July 2006, despite the Durban High Court's judgment of 15 May 2006 refusing to compel the State to give Thomson Holdings and Thomson (Pty) further particulars, Zuma also requested further particulars to the provisional indictment. A copy of Zuma's request is attached marked '**LM62**'
122. As the State could not reach agreement with the accused regarding the postponement, on 19 July 2006 the State applied for the postponement of the trial to a suitable date in the first half of 2007. By agreement between the parties the application was made on affidavit, and was to be answered

by affidavit. The reasons for that application are summarised in Du Plooy's affidavit. I shall not repeat them here.

123. On 31 July 2006, shortly before the commencement of the hearing, the accused delivered their answer papers to the State's application for a postponement, which also served as the founding papers in their applications for a permanent stay of prosecution. After hearing submissions, this Court adjourned the matter to 5 September 2006 and fixed a timetable for the delivery of the State's answering papers and the accused's replying papers in the applications for a permanent stay and for the exchange of heads of argument in all the applications to be heard on 5 September 2006.

124. On 1 August 2006, without seeking the sanction of the Court and without notice to the State, Thomson Holding and Thomson (Pty) delivered supplementary papers in this matter which were almost as voluminous as the set of papers they had delivered the day before.

THE STATE'S PROPOSED TIMETABLE

125. In the period since the hearing on 31 July 2006 the KPMG forensic auditors have been working on their report, which the NPA is informed is now nearing completion and will be handed to the State and the defence by the next hearing of this matter on 5 September 2006.

126. As soon as the State receives the KPMG report it will revise the indictment in the light of the report. The amended indictment will be handed to the defence by Monday 15 October 2006 at the latest.
127. The State proposes that the trial commence in the first term of 2007. This should allow sufficient time for the accused to request further particulars (if they so decide) and the State to furnish them, and for the accused to prepare for the trial. The materials and documents which the State has already provided to the defence, are described in paragraph 158 below.

THE ACCUSED'S MAIN GROUNDS FOR SEEKING THE PERMANENT STAY/STRIKING-OFF

ZUMA

Past delay

128. Zuma complains about the delay in starting his trial. In this regard he relies mainly on the fact that the DSO investigation started six years ago, the fact that he was not prosecuted with Shaik and the fact that the State is not ready to proceed despite his having been charged a year ago shortly after Shaik was convicted and sentenced.
129. The reasons why the State was not ready to proceed on 31 July 2006 and suggests that the trial be postponed to a date in the first term of 2007 emerge from this affidavit and are summarised in Du Plooy's founding affidavit. I shall not repeat them here. For the present, suffice it to say that

the chronology shows that the combination of factors beyond the State's control, especially the search warrant cases, have delayed the finalisation of the KPMG forensic report and the amendment of the indictment.

Likely future delay

130. Zuma also contends that a future lengthy delay is likely. He says that the State will not be in a position to start the trial in the foreseeable future, and for that matter may never be able to do so because of the difficulty it is having in marshalling and mastering the evidence which is too vast and complicated. Zuma adds that if the State does provide the forensic auditors' report and amend the indictment as it has said it intends doing, he will need an adjournment for a period equal to the State's preparation – some 5 to 7 years.
131. Zuma's contentions in this regard are far fetched. If the trial starts at the beginning of the first term in 2007 the defence will have five months to study the KPMG forensic report and three and a half months to study the amended indictment and request and obtain such further particulars as may be necessary for their preparation for trial. This should be sufficient, but the State accepts that the Court may decide that the trial should start later in the first term or even in the second term. For this reason, the application for a postponement referred to a date in the first half of 2007.

Political conspiracy

132. Zuma's complaints are not limited to the State's delay. He alleges that the manner in which the investigation and prosecution have been conducted shows that throughout those involved have conspired with the ulterior motive of destroying his reputation and removing him as a role-player in South African politics. He says that although the State is obliged to investigate both facts which point to the accused's guilt and facts which point to his innocence, in his case the State has focused on the former to the exclusion of the latter. He also says that the NPA deliberately leaked information to the media about the investigation and has generally endeavoured to discredit him through the media, such as when Ngcuka gave an off-the-record briefing to certain black newspaper editors on 24 July 2003 and when Ngcuka announced at a media conference on 23 August 2003 that whilst there is a *prima facie* case of corruption against him the NPA had decided not to prosecute him because it was not sure that its prospects of success were strong enough for a winnable case.
133. Zuma's allegation that in his case the investigation has focused on facts which point to his guilt to the exclusion of facts which point to his innocence, is devoid of any factual foundation, and is denied. The following is clear from the description above of how the investigation unfolded:

133.1. The investigation began to focus on Zuma when the investigators received information about bribery at Thomson-CSF and the encrypted fax and then received the encrypted fax. However, no person who initiated the investigation, or who had any part or influence in the course of the investigation, knew about the existence of the encrypted fax, let alone its precise terms or that it would be found. There could thus have been no conspiracy directed against Zuma aimed at finding and exploiting the fax. On the contrary it was discovered in the normal course of a legitimate investigation.

133.2. The 22 October 2002 extension of the investigation to encompass the suspected general corruption between Shaik and Zuma that was not connected in any way to the arms deal, was the obvious next step and was in accordance with the duties of the NPA. No conspirator could have manufactured all the objective records of a very wide-ranging nature obtained by the NPA from a plethora of different, unrelated sources, including the extensive searches and seizure operations on 9 October 2001, or have coached tens of witnesses, many of whom did not know each other.

133.3. In mid 2003 the investigation team decided that their investigations had yielded more than sufficient admissible evidence to prosecute Zuma on charges of corruption arising from his relationship with Shaik generally (which, as stated, the investigation team believed was a fundamentally corrupt relationship) and his agreement to

accept the R500 000 per year from Thomson-CSF in exchange for protection and support. The investigation team accordingly recommended that there was a reasonable prospect of a prosecution of Zuma being successful. Ngcuka, I and the senior counsel consulted however differed from the investigation team in their assessment of the sufficiency of the admissible evidence for a successful prosecution of Zuma. Consequently Ngcuka announced the NPA's decision not to prosecute Zuma. The investigation team comprised solely career investigators and prosecutors in the DSO and NPA. Yet it was the investigation team, not Ngcuka, who prior to his appointment as NDPP had been a senior Member of Parliament, which pressed for Zuma's prosecution. Ngcuka, the former politician, decided against it. Had the investigation team recommended that Zuma should not be prosecuted because in their view there was insufficient admissible evidence for a successful prosecution, and had Ngcuka nevertheless decided that Zuma should be prosecuted, then the decision to prosecute might have provided some basis for Zuma's political conspiracy theory.

133.4. Given that it was Ngcuka who took the decision not to prosecute Zuma in August 2003, the only possible bases for Zuma's political conspiracy theory in relation to this decision are Zuma's off-the-record briefing to certain black newspaper editors on 24 July 2003 (which is dealt with in Ngcuka's accompanying affidavit) and

Ngcuka's statement in his 23 August 2003 media statement (annexure 'LM4') that he had taken the decision not to prosecute despite the existence of a *prima facie* case of corruption against Zuma. But whatever Ngcuka might have said or believed about Zuma's personality and fitness for high public office, the fact remains that he assessed the admissible evidence against Zuma at the time and decided that it was insufficient for a successful prosecution and hence that Zuma should not be prosecuted. When announcing the NPA's decision Ngcuka referred to a *prima facie* case of corruption against Zuma because the NPA had also decided that Shaik should be prosecuted (because there was sufficient admissible evidence to ensure a successful prosecution) and he knew that Shaik would shortly be charged with having a generally corrupt relationship with Zuma and with corruptly arranging the R500 000 per year from Thomson-CSF in exchange for Zuma's protection and support.

133.5. At the conclusion of the Shaik trial in June 2005, the NPA, headed by a new NDPP, Pikoli, re-appraised the evidence against Zuma in the light of the developments during the trial and the contents of the judgment of the Durban High Court. This was in accordance with the statement of the previous NDPP (Ngcuka) when he announced the NPA's decision not to prosecute Zuma in August 2003, that the decision would be reviewed in the light of any new evidence. As

explained earlier in this affidavit, new evidence did indeed arise during the Shaik trial that had previously been unavailable to the State. Moreover, the evidence led in the trial on both sides (especially Shaik's own evidence and that of certain other witnesses for the defence such as Moynot), which was accepted or relied on by the Court, led the NPA to decide that there was now more than sufficient admissible evidence for a reasonable prospect of a successful prosecution of Zuma on charges of corruption. The NPA's decision to prosecute Zuma therefore accords strictly with the dictates of its duty.

133.6. The reason why on 8 August 2005 the investigation into Zuma was extended, was because the evidence gathered by the investigation team suggested that Zuma had committed fraud in his declarations to the Registrar of Parliamentary Members Interests, the Secretary for the Cabinet and the SARS in respect of benefits received from Shaik and/or companies associated with Shaik, as well as contraventions of the Income Tax Act 58 of 1962 in respect of those benefits. The investigation was expanded in this way because the evidence suggests that Zuma made false declarations to Parliament and the Government about the benefits he had received from Shaik and companies in the Nkobi group, and he had dishonestly failed to declare those benefits to the SARS in his income tax returns.

134. As the chronology of key events above and Ngcuka's affidavit show, Zuma's allegation that the NPA deliberately leaked information to the media about the investigation and has generally endeavoured to discredit him through the media, is also devoid of any factual foundation, and is denied.

THOMSON HOLDINGS & THOMSON (PTY)

135. It is a well established principle that the courts will not interfere with a *bona fide* decision of the prosecuting authority to institute a prosecution. Thomson Holdings and Thomson (Pty) have not made out any case that the present NDPP acted otherwise than in good faith when he decided to charge them. In any event what they are in effect seeking to do is to have this court review the decision of the NDPP to prosecute them. As explained at the beginning of this affidavit, this is not permissible.

The withdrawal of the charges against Thomson (Pty) – not an 'indemnity'

136. Thomson Holdings and Thomson (Pty) point out that the latter was originally indicted with Shaik on the same charges in 2004, but that the charges were withdrawn by the State in accordance with an agreement that Thétard would provide an affidavit confirming that he was the author of the encrypted fax. It is now claimed that they were under the impression that they would never be charged again.

137. They say that they had first approached the then Minister of Justice and Constitutional Development, Maduna, and he was one of the State parties who led them to believe that they were permanently off the hook.

138. For the reasons given elsewhere in this affidavit and for the following reasons, this claim that the accused had been granted an indemnity against prosecution is incorrect:

138.1. The agreement went no further than that the matter would be withdrawn at the Shaik trial. It did not include any future trials.

138.2. There was no agreement at all involving Thomson Holdings, as it had not been indicted.

138.3. The impression could not have come from Maduna as they have claimed, because it is well known that the decision to prosecute or to discontinue a prosecution is one which vests in the NDPP or his delegate in the NPA. The Minister of Justice and Constitutional Development, although exercising ultimate political responsibility for the NPA, is not authorised to interfere with decisions of the NDPP. In any event Maduna denies this claim.

138.4. Thétard did provide an affidavit confirming that he was the author of the encrypted fax. However, less than a month later he provided an unsolicited, second affidavit that completely destroyed whatever value the first affidavit may have had.

139. The State is therefore entitled to re-charge Thomson (Pty) and to charge Thomson Holdings.

The decision to charge Thomson Holdings and to re-charge Thomson (Pty)

140. As stated in the founding affidavit of Du Plooy, and further explained in this affidavit, the withdrawal of the charges against Thomson (Pty) had nothing to do with the strength of the case against it. The NDPP was of the opinion that the State had a reasonable prospect of a successful prosecution against Thomson (Pty) when he announced his decision to prosecute on 23 August 2003, and nothing detracted from that view until the time when charges were withdrawn against it on 11 October 2004, as described above.
141. The State has always been of the view that a similar prospect of a successful prosecution existed against Thomson Holdings. Although it was not indicted in the Shaik matter, the fact that Thomson Holdings was not charged originally along with Thomson (Pty) was entirely due to practical considerations, such as the fact that Shaik was no longer a director of Thomson Holdings and hence could not represent the company at the trial in terms of s 332 of the CPA. This gave rise to a possible issue of misjoinder. Furthermore, Thomson Holdings' director, Thétard, had fled the country leaving only junior staff to represent it. In the circumstances, it was decided that the balance of convenience dictated that Thomson (Pty) only would be charged.

142. At the conclusion of the Shaik trial the State's belief that it had a good case against Thomson Holdings and Thomson (Pty) has been fortified, *inter alia*, by the following facts and circumstances which had emerged during the trial:

142.1. The evidence of the State witnesses regarding Thomson Holdings and Thomson (Pty) was thoroughly tested in cross examination and almost without exception found to be credible and reliable.

142.2. The vast majority of the documentary evidence tendered by the State, including company documents of Thomson Holdings and Thomson (Pty), as well as their associated companies in Mauritius, was held to be admissible.

142.3. The inferences that the State sought to draw from the documentary evidence were overwhelmingly confirmed.

142.4. The details of the State's version regarding the relationship between Thomson Holdings and Thomson (Pty) and Shaik and his companies were largely confirmed, both by Shaik and by Moynot, who is and was previously (prior to Thétard) a director of Thomson Holdings and Thomson (Pty).

142.5. The payments by Shaik and Nkobi to and on behalf of Zuma were overwhelmingly confirmed.

- 142.6. The attempt to explain away the payments as innocent loans was comprehensively rejected and the Court confirmed the State's contention that the payments were corrupt.
- 142.7. The Court confirmed the State's contention that the various instances of assistance given by Zuma to Shaik and his companies were corrupt. In the case of Zuma's intervention on behalf of Shaik in the Thomson/ADS dispute, the court found that the State had not proved this to be corrupt activity only because Zuma had acted in his capacity as Deputy President of the ANC and not in his capacity as MEC, as alleged by the State. This was due to a technical omission in the charge and not because the actions of Zuma were not unlawful.
- 142.8. The encrypted fax was found to be admissible on more than one legal basis and the Court accepted the truth of its contents and that it recorded a bribe agreement between Shaik, Zuma and Thétard, a director of Thomson Holdings and Thomson (Pty).
- 142.9. Shaik confirmed the fact of a meeting between himself, Thétard and Zuma, albeit he said on the day before the date alleged by the State. He confirmed the meeting was connected to the various items of correspondence leading up to it. His attempt to give an innocent explanation of the meeting was rejected by the Court.

142.10. In a letter written by Thétard and handed in by the defence, Thétard also admits that such a meeting occurred, but denied that any bribe was discussed. This is but one of several contradictory explanations given by Thétard, which fortifies the State's view that he is not to be believed and that no innocent explanation exists for the encrypted fax or the meeting with Zuma that preceded it.

142.11. Although the Court did not have the benefit of hearing Thétard's evidence (he has chosen to absent himself from its jurisdiction and refuses to return), Moynot did testify for the defence. He was unable to provide any acceptable explanation for the fax.

142.12. The so-called '*service provider agreement*' entered into between Shaik and the Mauritian sister company of Thomson Holdings and Thomson (Pty) was found to be a sham, created for the purposes of laundering the bribe payments to Zuma.

143. In summary, the State's evidence has been confirmed, and throughout a long and intensive trial no reliable evidence has emerged which might cause the State to doubt its earlier view. In the circumstances, the decision to re-charge was both justified and indeed unavoidable. In general, where a *prima facie* case exists and there are reasonable prospects of a successful prosecution, the prosecuting authority is under a duty to prosecute, unless

there are compelling reasons not to or unless public interest demands otherwise.

Delay

144. No inferences regarding the State's attitude to the strength or otherwise of its case against Thomson Holdings and Thomson (Pty) should be drawn from the fact that they were indicted in November 2005, some 4 months after Zuma was charged in late June 2005. The delay between June and November 2005 was due to the fact that the NDPP had to be briefed on the previous agreement with Thomson (Pty) and to consider its implications for his decision to prosecute.
145. In addition, as far as Thomson (Pty) is concerned, it cannot be correct that it can now complain that it has been indicted too late, when it itself requested the original withdrawal of essentially the same charge against it in the Shaik trial.
146. The accused also complain that the delay in bringing the matter to trial after they were indicted is too long. This too is unjustified. As explained elsewhere in this affidavit, the State would have been ready for trial if it were not for pre-trial litigation that was commenced or opposed by the accused and others. In the case of Thomson Holdings and Thomson (Pty), it was only in July 2006 that judgment was handed down against them and in favour of the State in respect of their application to have search warrants set aside. This application significantly delayed the preparation of the

KPMG forensic report and delayed the completion of the further investigation. The State is entitled to complete its reasonable further investigation before the trial starts.

147. The causes and consequences of the delay in this matter are dealt with extensively in my answers to the affidavits delivered by the accused, to which I now turn.

THE AFFIDAVIT OF JACOB GEDLEYIHLEKISA ZUMA

148. **Ad paragraph 4(a)**

This is admitted.

149. **Ad paragraphs 4(b) to (i)**

The contents of these paragraphs are disputed. The history of the investigation and prosecution against Zuma, and the State's answers to the allegations in this paragraph, appear fully from the main body of my affidavit and those of Ngcuka, Maduna and Pikoli. The reasons why the State is seeking the adjournment are set out in Du Plooy's affidavit. The appropriate order is one dismissing the accused's application for a permanent stay and postponing the matter to a date in the first term of 2007.

150. **Ad paragraph 5**

It is correct that the State seeks an adjournment until some time in the first half of 2007. The State is unaware of how much time the defence will need

to prepare for trial after it receives the forensic report. The State will obviously not object to any reasonable defence application for sufficient time to prepare for trial. The State's attempts to reach consensus regarding a suitable next trial date have been in vain.

151. **Ad paragraph 6**

It is disputed that the adjournment is '*to enable the State to take certain steps to possibly further its case against*' Zuma. The adjournment sought is to complete the investigation as is proper in the interests of justice (by 5 September 2006 this will largely have been done with the delivery of the forensic report), to revise the indictment (which the State has undertaken to deliver by mid October 2006), to allow the defence sufficient time to prepare and to request and obtain such further particulars to the indictment as may be necessary and to allow the State to present as complete a case to the court as possible.

152. **Ad paragraph 6(a)**

The forensic report will have been delivered by 5 September 2006 and the amended indictment will be delivered by mid October 2006. Those time periods are accordingly not 'wholly uncertain'. By contrast the time periods for the steps relating to the search warrant applications are indeed uncertain. Hence the State's attempts to settle the pending appeals and allow the trial court to determine the admissibility of the documents seized on 18 August 2005. If the search warrant applications have not been settled

by the time of trial in this matter, then the State will proceed with all the evidence that is not subject to an operative order that prohibits it from doing so (the orders setting aside the search warrants in the Mahomed and Zuma/Hulley applications having been suspended by the appeals, and the application by Thomson Holdings/Thomson (Pty) having been dismissed). If the Mauritius application has not been settled by the time of trial, then the State will proceed on the same basis as it did in the Shaik trial (i.e. with the copies of the documents that were obtained shortly after the search on 9 October 2001), or proceed with whatever application in relation to those documents which it may deem appropriate as the trial unfolds.

153. **Ad paragraph 6(b)**

As stated the State cannot say for certain what time the defence requires to prepare for trial. From the State's side, it will have complied with its obligations to the defence regarding trial preparation when the following have occurred:

153.1. when the 'final' indictment, summary of facts and list of State witnesses has been supplied – this will be done after the imminent completion of the forensic report, and will be completed by mid October 2006; and

153.2. when the defence has been supplied with all the documents it requires. The State has already supplied all documents that are not the subject of disputes.

154. **Ad paragraph 6(c)**

154.1. The allegations in this paragraph are denied.

154.2. I deny that the State will wait until the final conclusion of each and every application that has held up the completion of the forensic report and the final indictment. The forensic report is almost ready (and as stated will be ready by 5 September 2006) and the indictment will be ready by mid October 2006. The State has proposed a realistic timetable in the light of the need to commence with the trial as soon as reasonably possible.

154.3. With specific reference to the litigation regarding the search warrants, the State's attitude is that the trial cannot be allowed to be held up indefinitely by litigation regarding the searches. The proper forum to determine the admissibility of what was seized is the trial court. Hence the State attempts to settle the appeals. It is unlikely that any appeal proceedings will be disposed of in time to change this situation before the commencement of the trial.

154.4. As regards the December 2005 Mauritius mutual legal assistance application, I dispute the accuracy of Zuma's summation of the events, inferences and legal conclusions relating to this application. I refer to what I have said above about the events in and in relation to Mauritius. In addition, in what follows, I give an accurate summary of relevant events in this connection.

154.5. During the searches in Mauritius on 9 October 2001, the Mauritius police seized certain relevant documents from the Thales premises. The originals remained with the office of the Economic Crime Office in Mauritius. In accordance with the terms of the request from South Africa, copies were made and handed to the South African officials who were in Mauritius to assist the Mauritius authorities. These copies were returned to South Africa on 11 October 2001 and they formed part of the material relating to the investigation.

154.6. The Mauritius police authorities declared at the time of the searches in 2001 that the relevant police witnesses involved in the searches were willing to travel to South Africa for the purposes of any trial. In particular, Detective Chief Inspector Dharmendra Jugoo ('Jugoo'), who had conducted the search at the Thales premises, indicated that he was willing to testify in South Africa. He could identify the copies that had been made of the Thales documents, if not bring with him the original documents. Further mutual legal assistance steps, which might have included a specific request for the originals, were thus not considered necessary at that stage.

154.7. On 25 September 2002, we were informed by Navin Beekary, the Commissioner of the ICAC, that the ICAC had taken over the Economic Crime Office. He informed us that Thales International Africa Ltd, Alain Thétard and MTMM had applied for an injunction

before the Supreme Court to return the seized documents to them. We had not known anything of this before then. We followed up this information by means of the further correspondence that is detailed in the affidavit of Downer in the Shaik criminal trial dated 4 February 2005, a copy of which is attached marked 'LM63'. Such correspondence indicates that there was no response from the Mauritius authorities to our further request for mutual legal assistance, which had in turn been sent at their request. It was only on 2 April 2004 that we were finally informed that the ICAC is no longer responsible for mutual legal assistance and that any further application should now be directed to the Mauritian Attorney-General.

154.8. Arrangements were then made for Jugoo (and his colleague Inspector Coret) to testify at the Shaik trial in November 2004. Jugoo informed us during the week of 18 October 2004 that he was willing to come to South Africa and to testify according to his statement that had been obtained at the time of the searches. We were informed on 30 October 2004, however, that Jugoo had suddenly died on 26 October 2004, which was after the commencement of the Shaik trial on 11 October 2004. When the Shaik trial commenced, it was thus likely that the State would be able to prove, during the trial, the copies of the Mauritius Thales documents that had been obtained, without further mutual legal

assistance steps regarding them or the originals. This was particularly so as Jugoo, before he died unexpectedly, was available to testify. Nevertheless, it was decided to compose a formal mutual legal assistance application in terms of section 2(1) of the ICCMA. It was thought that such application should be made to the trial court in the Shaik matter, as the matter was already on the High Court roll. The application could not have been made earlier, because as explained it was only on 2 April 2004 that the Mauritius authorities finally responded to the issue of any further mutual legal assistance. When notice of such application was served on the defence prior to the commencement of the trial, counsel for the defence indicated that he would object to the application. The argument apparently was that the court did not have jurisdiction to hear the application until the trial had started. The State accordingly decided not to pursue the matter any further at that stage, because further argument would have delayed the trial. It was in any event probable that the copies could be proved, as described, and especially with the evidence of Jugoo.

154.9. A further consideration hampering the State in persisting with the application at that stage was the following. Counsel for Zuma and Thint held watching briefs at the Shaik trial. Legal representatives for both Zuma and Thint had indicated long prior to the commencement of the Shaik trial that they required notice of any

application concerning the Mauritius documents. Accordingly, the State informed them of the proposed application. Their responses suggested that a protracted application, also opposed by these non-parties to the prosecution, would in all likelihood have ensued

154.10. As it happened, Insp Jugoo died during the trial before he could be called as a witness. Despite this setback, the State succeeded in proving the copies of the Thales documents. Consequently, it was not necessary to proceed at that stage with any further steps regarding the Mauritius mutual legal assistance.

154.11. The focus of the investigation returned to Zuma and Thint after the conclusion of the Shaik trial on 8 June 2005. The State had to investigate a range of new matters and investigate or reconsider some outstanding matters. One outstanding matter requiring reconsideration was the question of the original Mauritius documents. Given the fact that there would now inevitably be some delay before the start of the trial, it was thought to be appropriate to send a request to Mauritius to obtain the original documents. Otherwise than at the start of the Shaik trial, the State now knew that Jugoo had died. The possibility of proving the copies, as had been done at the Shaik trial, remained. Obviously the originals as the best evidence would be preferable, given that the State now had an opportunity to attempt to obtain them, and given the defence's attitude (as displayed at the time of the Shaik trial).

154.12. The above synopsis explains why the formal application was accordingly launched only in 2005 after the decisions had been taken to charge Zuma, Thomson Holdings and Thomson (Pty). The application was opposed by Thomson Holdings and Thomson (Pty) on the grounds, *inter alia*, that this matter fell to be decided by the trial judge. Combrink J heard the application in 2006, and ruled on 26 March 2006 that the matter could only be heard by the trial judge. See paragraph 109 above. The application consequently could not have been made any earlier than 31 July 2006. In the light of the defence applications on 31 July 2006 for a stay of prosecution, this matter must now stand over pending the court's determination.

154.13. As explained above, the court in the Shaik trial ruled that the copies of the documents obtained in Mauritius were admissible in evidence. It is now claimed in the present application that the State had sight of the Mauritius documents, that these were the subject of '*the injunction*' in Mauritius and that this is '*just another aspect of the unfair trial*'. These allegations are ludicrous and do not accord with the facts. In a judgment on the admissibility of documents the Court in the Shaik trial found in this regard as follows: '*The agreement reflected in the Court order of March 2003 [the injunction]*' applies to such documents and copies that the ICAC in Mauritius presently has, or had in March 2003, when the order was made. It could not reasonably be advanced as a bar to the State

tendering in evidence the documents properly and lawfully obtained in October 2001 by order of the High Court of Mauritius for this very purpose.’ (I shall not burden this affidavit with a copy of this judgment.)

155. **Ad paragraph 6(d)**

The State is entitled to conduct necessary further investigations in order properly to present all available and relevant evidence at the trial. The State has made every effort to expedite the further investigation. It is the accused who have delayed matters by initiating the various obstructing applications concerning the searches, opposing the Mauritius mutual legal assistance application, pressing for further particulars to the provisional indictment, etc.

156. **Ad paragraph 7**

The trial cannot proceed at present, given the delays in accessing the new evidence. This does not mean that the matter will not be able to proceed once the State has been granted a reasonable adjournment.

157. **Ad paragraph 7(a)**

The State has indicated clearly at all times that the indictment is by nature provisional. This was specifically recorded by the magistrate on 11 October 2005 when postponing the case to 12 November 2005 (see paragraph 103 above), and specifically recorded by the State when

delivering the provisional indictment on 3 November 2005 (see paragraph 106 above). It would have been dishonest not to indicate this, given the fact that there was outstanding investigation. Given sufficient time, the indictment will be finalized in accordance with the new evidence and the necessary application made to amend it. The State has indicated at all times that the amendments will largely reflect the new investigation that covers the period after 2002 and that has probed new matters that arose during the Shaik trial.

158. **Ad paragraph 7(b)**

The relevance of this paragraph to the application is disputed. Nevertheless, in order to dispel the unnecessary innuendos against the State contained in this paragraph, the following facts and considerations are relevant:

158.1. The State understands the issues traversed in this sub-paragraph as a signal by Zuma that his legal representatives will require time beyond the proposed trial date in the first half of 2007 to prepare for trial, apparently because the material that has to be traversed is too voluminous. I reiterate that the State will attempt to accommodate any reasonable request by the defence for an adjournment for this purpose. This is not, however any reason to refuse the present State request for an adjournment. This issue illustrates that, had the State

been ready to proceed, it is very probable that the defence would in any case have asked for an adjournment to prepare for trial.

158.2. On 12 July 2006 Zuma filed a request for further particulars dated 11 July 2006, which like the similar request by Thomson Holdings and Thomson (Pty) related to the provisional indictment. The State did not supply those particulars for the same reasons as those applicable to the Thomson accused's request. Nevertheless, and in order to assist the defence in its preparation for trial, it was decided to provide the defence with all the material in the possession of the State that had been obtained during the investigation thus far. This includes mirror images of computers that were seized at various stages of the investigation. The defence is at liberty to determine what documents it may consider relevant to the defence and to ignore or discard what it considers to be irrelevant. There would be controversy if the State were to attempt to make such a determination for the defence regarding all the documents in its possession.

158.3. The defence apparently regards the State's claim that some 200 000 to 300 000 pages are 'really' relevant to the charges, as unreliable. This is presumably a reference to the documents obtained during the August 2005 searches. Such attitude illustrates that it would be futile for the State to make a determination regarding relevance that

would suit the defence, and why it is preferable to provide the defence with all documents.

158.4. I deny that the State '*considers only material pointing to, or of use in, advancing a case of guilt, as relevant.*'

158.5. The mirror-images of computers that were provided to the defence, are effectively exactly what the State seized. Should they contain pornography, viruses or any other offensive data, this is beyond the control of the State given that the data is exactly (a mirror image of) what was seized. Should the State have attempted to interfere with the composition of the hard drives or the mirror images, such as for instance by identifying and deleting any viruses or pornography, the State would doubtless have been criticized for compromising or manipulating the integrity of the data. Indeed, by a letter dated 30 March 2006, Thomson Holdings and Thomson (Pty)'s representatives rejected the State's tender to provide them with a CD of deleted files that had been restored by the State's computer experts and insisted that they themselves would make a mirror-image of the entire hard-drive for examination. A copy of this letter is attached marked '**LM64**'.

158.6. The other material provided to the defence also includes the following:

- 158.6.1. witness statements obtained to date, and all the documents appended to such statements;
 - 158.6.2. transcripts of all interviews to date with witnesses whose evidence was recorded in terms of section 28 of the NPA Act, and the documents referred to during such interviews;
 - 158.6.3. all documentary evidence and exhibits that were handed in at the Shaik trial, including the forensic report and its exhibits; and
 - 158.6.4. transcripts of the proceedings at the Shaik trial.
- 158.7. If regard is had to the provisional indictment, summary of facts and list of State witnesses, it is obvious that the abovementioned material will form the basis of the State's case. There is thus a wealth of centrally relevant material available to the defence to enable it to progress substantially with its trial preparations. When the new auditors' report and indictment are served on the defence before the next trial date, the preparation could then be finalized to encompass the new material.
- 158.8. Finally in this regard I should mention that when the State received an application for further particulars dated 24 March 2006 from Thomson Holdings and Thomson (Pty) (annexure **LM56**), one of the requests was for '*All documents that the State has in its possession*

which relate to or are connected with, either directly or indirectly, the investigations from the date of commencement thereof to the date hereof, even if the State does not intend to prove or rely on such at the trial' (para 2(e)(ii)). The State was not (and is not) in a position to make a determination regarding relevance on the abovementioned basis, other than to regard all documents that were seized during the investigations from the commencement thereof as being '*connected with, either directly or indirectly, the investigations*'. Consequently, the State provided Thomson Holdings and Thomson (Pty) with all seized material that was not the subject of dispute. It is only fair and logical that Zuma should be provided with the same, as he has been.

159. **Ad paragraph 7(c)**

159.1. I admit that the State received the requests for further particulars from the accused referred to in this paragraph and that the State has been unable to supply the particulars as envisaged in section 87 of the CPA because the indictment has not been finalized.

159.2. Generally speaking the defence is entitled to request copies of the statements and documents that comprise the investigation in order for it to prepare for trial, even if the indictment has not been finalised. This is not a request for further particulars of the charge in terms of section 87 of the CPA, and it is not dependent on whether the indictment has been finalized. Consequently, the defence was

entitled to request documentation from the State at any time. Of course whether or not such a request will be granted at the time when it is made depends on whether disclosure at that juncture would be premature in the sense that it could seriously prejudice the course of justice. For instance, the investigation may still be far from complete and witnesses whose identities and whereabouts were thus revealed could be intimidated or even eliminated. In the present case however the requests, when made, were acceded to.

159.3. It is disingenuous to contend that the State would not respond to any request for further particulars, being a request for documentation. Zuma's legal representatives should also be very well aware of the following:

159.3.1. Thomson Holdings and Thomson (Pty) requested documentation in March 2006 and it was immediately supplied as described;

159.3.2. When Zuma requested such as part of the request for further particulars in July 2006, it was immediately supplied as described.

159.4. Both the Thomson companies and Zuma appointed counsel to conduct watching briefs at the Shaik trial. All of the accused are thus well aware of the extent of the documentation which the State could provide, assuming their counsel watching the proceedings had

not in fact already obtained the documentation from Shaik's representatives during the trial.

159.5. The point is that a very substantial amount of obviously relevant documentation was there for the asking at any time. It is no argument to contend that the State is causing undue delay to the defence in this way. If the defence is delayed in perusing documentation that has been available to it since the time of charge, then the State is not to be blamed for this.

160. **Ad paragraph 6(d)**

160.1. Counsel for the State at the hearing before Levinsohn J of the application by Thomson Holdings and Thomson (Pty) for an order directing the State to provide further particulars to the draft indictment, indicated that it was possible that the forensic report could be completed before the end of June 2006, if agreement was reached concerning the disputed documents. As it happens, agreement has not been reached yet, despite there being at least a likelihood that agreement could be reached. In respect of both the Zuma/Hulley matter and Mahomed matter, the State is awaiting a further response from both opposing parties.

160.2. The TPD delivered judgment in favour of the State in the Thomson Holdings and Thomson (Pty) application to set aside the search warrants only on 4 July 2006, thus allowing the auditors to use the

Thomson Holdings and Thomson (Pty) documentation seized on 18 August 2005.

160.3. The auditors have been working at full capacity compiling the report since the instruction to proceed on 23 May 2006. It was not possible to complete the task within the original time frame (i.e. by the end of June 2006). Given the fact that the defence would in any case have had to ask for an adjournment in order to consider the report, the further delay from the notional date of the end of June 2006 is not the proximate cause of the adjournment of the trial on 31 July 2006.

161. **Ad paragraph 8**

161.1. It is common cause that the trial could not proceed on 31 July 2006.

That does not mean that it could not proceed at a reasonable and suitable adjourned date as the State proposes.

161.2. The State has at all times indicated clearly why the provisional indictment is regarded as such and why it will be amended in the light of the further investigation. The relevant application will be made at the adjourned trial date. This is no reason for saying that the trial cannot proceed at all.

161.3. As matters now stand, there is no effective court order that prevents the State from using the material obtained during the 2005 searches. The Zuma/Hulley and Mahomed matters are subject to appeal

procedures (if they are not settled), and the Thomson Holdings and Thomson (Pty) matter has been decided in favour of the State. Appeal procedures by Thomson Holdings and Thomson (Pty) do not at present affect the State's right to use the Thomson Holdings and Thomson (Pty) documentation.

161.4. The defence has been supplied with all the documentation in the State's possession that is not the subject of dispute.

161.5. Particulars will be supplied to the defence as soon as the report and indictment are finalized. The trial can then proceed.

162. Ad paragraph 9

162.1. This paragraph does not make sense. Zuma's rights to prepare to challenge and adduce evidence at the trial have not been infringed by any delay in commencing with the trial. Obviously, Zuma will be entitled to sufficient time to prepare after he receives the final indictment and forensic report. If the final indictment had been served on him in April 2006 and the forensic report in May 2006, as originally envisaged, the period of preparation available up to 31 July 2006 would have been four months at the most. By agreement between all the parties, this was apparently sufficient and it would not have led to any speedy trial objections. Similarly, should the final indictment and forensic report be served as soon as possible after 31 July 2006, even as late as 5 September 2006, then

the period of preparation available to Zuma would be as much as 5 months, if a trial date of February 2007 were to be allocated, and 6 months if a trial date of March 2007 were to be allocated. This is longer than the previous period, which was apparently unobjectionable.

162.2. I would further point out that the complaints in this paragraph contradict Zuma's claim in paragraph 13(c) of his affidavit that he would need 5 to 7 years to prepare, should the State amend the indictment as it intends to, as he would need a period equal to the time spent by the State in investigating the matter. This cannot be correct, for the following reasons:

162.2.1. The State has only had since, at the earliest, June 2005 to commence the further investigation relating to Zuma and Thomson Holdings and Thomson (Pty) that will affect the final indictment. This is a period of just more than 1 year – not 5 to 7 years.

162.2.2. It cannot be correct that Zuma requires time to prepare the defence equal to the time it took the State to investigate the matter. Much of the time spent on the investigation of a matter such as this is spent on collecting and arranging the evidence. By the time the State is ready to hand to the defence all the material it has collected, the focus of the

issues will be clear and the defence will usually not be faced with collecting all the relevant information from scratch. Obviously the defence may wish to collect and analyse its own evidence, but this will not usually take anything like the length of time it takes the State to marshall all the evidence from scratch. By way of example, the defence in the Shaik matter was satisfied with a period of preparation of some 5 months after receiving the forensic report. Should the defence wish, for some peculiar reason, to spend a longer than usual time in preparation, then this would have to be motivated. As stated above, the State would obviously consent to any reasonable request.

162.3. It remains unreasonable to claim that the defence will need years to prepare, and for this reason that an adjournment of the matter should be refused. If the defence requires an inordinately long time to prepare, then the State is surely entitled to insist that the matter remain enrolled until the defence is ready.

163. **Ad paragraph 10**

This assertion does not make sense and it is disputed. The usual remedy for a well-founded complaint that an accused is being denied the right to a trial

within a reasonable time is an order expediting the trial and not one that aborts the trial.

164. **Ad paragraph 11**

This paragraph is disputed. The orders sought are not the appropriate remedies to deal with the unavoidable delays that have occurred in this matter.

165. **Ad paragraphs 13(a) to (b)**

165.1. This paragraph is disputed.

165.2. Zuma was charged at the earliest possible opportunity.

165.3. The investigation was completed prior to the commencement of the Shaik trial. After the Shaik trial, it was necessary to investigate further in the light of the new developments at the Shaik trial and in the light of the passage of time since 2002, when the investigation effectively ended.

165.4. The State is entitled to place before the court all relevant evidence relating to the accused, including evidence that was discovered by further investigation after the Shaik trial.

165.5. It is correct that the State has employed a full complement of investigators to investigate this matter properly. It is not correct, however, to contend that this must mean that the State cannot be

allowed to conduct further investigation where such is warranted. Such further investigation would be necessary, whatever the resources at the disposal of the State.

166. **Ad paragraph 13(c)**

It is disputed that Zuma could reasonably require a period of some 5 to 7 years to prepare for trial, if the State were to be granted an adjournment in order to finish the further investigation and amend the indictment accordingly. The argument does not make sense. Zuma's contention starkly illustrates that the trial would have had to be adjourned on 31 July 2006 in any event, even if the accused had been supplied with the final indictment and forensic report. I refer also to paragraph 162.2 above.

167. **Ad paragraph 14(a)**

167.1. The dates that are alleged in the provisional indictment are admitted.

The further comments and arguments are disputed.

167.2. The commission of the offences cannot be limited, as Zuma seeks to do, to 1995. The provisional indictment clearly alleges that the offences on the general count of corruption continued until at least July 2005. It is an unavoidable consequence of this that the investigation must include the most recent period during which the offences were committed. This most recent date is therefore relevant to the question of reasonable delay.

168. **Ad paragraph 14(b)**

The date of commission of the specific corruption, even if it is limited to the period 1999 to 2001, does not detract from the relevance of the most recent financial and other information concerning the parties to the corruption. I should also mention the following:

168.1. The DSO's official investigations concerning the arms deal, including the present, have not been concluded to date. Protection against such investigations, according to the agreement, would thus continue to date.

168.2. The specific *quid pro quo* for receiving the money to be paid as a bribe was to be support for future Thomson projects. No final date for the cessation of such support was agreed.

168.3. Investigation that covers the most recent period to date is thus relevant to the charges.

169. **Ad paragraph 15**

It is admitted that the provisional indictment is annexure C to Zuma's affidavit.

170. **Ad paragraphs 16 to 30 generally**

I have dealt in some detail with Zuma's allegation that his prosecution is the result of a political conspiracy against him. These paragraphs contain

this allegation and related allegations of ulterior motives on the part of the NPA and others. I reiterate in the strongest terms that these allegations are devoid of any factual foundation, and they are denied.

171. **Ad paragraph 16**

This paragraph is not disputed as a general observation about the duties of investigators and the disadvantageous effect that a prosecution may have upon an accused person.

172. **Ad paragraph 17**

The contents of this paragraph are denied.

173. **Ad paragraph 18**

The speculations and expectations mentioned in this paragraph are irrelevant to the present application. I can only reiterate that the NPA is constitutionally obliged to exercise its functions without fear, favour or prejudice. We are thus obliged to treat all persons equally, irrespective of whatever office they might hold now or in the future.

174. **Ad paragraph 19**

Zuma's personal history and present position mentioned in this paragraph are irrelevant to the present application.

175. **Ad paragraph 20**

175.1. The State has no knowledge of any political conspiracy against Zuma.

175.2. I deny that that the charges against Zuma have been initiated or fuelled by a political conspiracy.

176. **Ad paragraph 21**

This paragraph is admitted.

177. **Ad paragraphs 22 to 35: the relevance of the arms deal to the prosecution of Zuma**

177.1. The relevance of these paragraphs to the present application is disputed.

177.2. Should Zuma wish to contest the validity of the investigation against him or the decision to prosecute him, this should be done by way of a substantive application. These matters are not properly before this court.

177.3. Nevertheless, the allegations in these paragraphs are so patently selective, incomplete and incorrect, that I am compelled to indicate what the correct facts are.

177.4. Zuma makes much of the following supposed facts:

- That the investigation concerned the arms deal.
- That he had no role in the arms deal.
- That the charges with which he is indicted do not relate to the arms deal.
- That it has been found that there were no irregularities in the awarding of the arms deal contracts.
- That the State has not investigated or properly considered Zuma's allegedly innocent or non-existent role in the arms deal.

177.5. The course of the DSO investigation has been detailed at length above. It is true that the preliminary investigation concerned the arms deal. During the investigation, however, evidence also emerged of offences that were not related to the arms deal. These were investigated in terms of the proper mandates mentioned above.

177.6. In the result, the charges relating to Zuma do relate in some respects to aspects of the arms deal. In other respects, the charges do not relate at all to the arms deal. Such is the nature of the evidence that was properly discovered during the investigations.

177.7. It is consequently irrelevant in determining the propriety of the charges against Zuma, whether they do or do not relate to the arms deal.

177.8. The JIT report found that, in general, there were no irregularities concerning the awarding of contracts at government level. In general, the State has accepted this finding. It is thus apparent that:

- This aspect has been investigated.
- The charges against Zuma have been framed on this basis in his favour.
- It is false to allege that the State has ignored this aspect to Zuma's prejudice, or that the State's so-called failings in this respect are evidence of some wider conspiracy against Zuma.

177.9. Finally in this respect, where the charges do indeed relate to the arms deal, Zuma's participation in such charges is supported by the evidence. It is no answer for Zuma simply to allege that he had nothing to do with the arms deal and then to claim that this exculpates him on the present charges.

178. **Ad paragraph 22**

178.1. It is admitted that the authorizations concerning this matter were issued. They are attached as annexures to my affidavit.

178.2. I reiterate that the investigation was duly conducted in accordance with the terms of the various authorizations. The charges are in accordance with the evidence duly obtained.

178.3. It is disputed that only '*Count 3 on the present indictment*' falls within the parameters of the investigation into the arms deal. As I have stated, the investigation was broader than just an investigation concerning the arms deal.

179. **Ad paragraph 23**

This paragraph is denied. The most cursory reading of the synopsis of events concerning this investigation clearly indicates the contrary.

180. **Ad paragraph 24**

180.1. The State has no knowledge of Zuma's apparent beliefs.

180.2. If it is alleged that Zuma's beliefs reflect the truth, then this is denied.

180.3. The prosecution and investigating team has no knowledge of any activities of the State's intelligence services. It is denied that the investigation was aimed at finding some aspect that could be used against Zuma. No member of the intelligence services played any role in the investigation and prosecution. I notice that Zuma provides no basis for his assertion to the contrary.

181. **Ad paragraph 25**

This paragraph is not disputed, save to reiterate that Zuma was one of a number of persons who and entities which became the subjects of

investigation. It is denied that Zuma played no part in the arms deal process, or that it was a known fact that he played no such part.

182. **Ad paragraph 26: general**

182.1. It is a futile exercise to choose selected snippets of evidence, press reports and general references to, for instance, the JIT report, and then to urge that a conclusion that Zuma is innocent of any wrongdoing, is warranted.

182.2. An appraisal of all the evidence and its ultimate relevance to the guilt or innocence of the accused is properly a matter for the trial court, as it was in the Shaik trial.

182.3. The facts on which the State case is based are complex. They are infinitely more extensive and nuanced than any superficial reference to one or other fact here or there might indicate. The most superficial reading of the judgment in the Shaik matter will confirm this.

182.4. In the light of the above, it is denied that the references to these selected aspects of some evidence support Zuma's theory that he is being prosecuted with an ulterior motive. These references are consequently irrelevant to the present application.

183. **Ad paragraph 26(a)**

It is disputed that this extract from Woods' evidence correctly reflects the import of his evidence in totality. The court in the Shaik matter duly

considered the impact on the evidence of this snippet of evidence, which was in any event hearsay.

184. **Ad paragraph 26(b)**

This paragraph is disputed. I have related the conclusions of the JIT report above, which specifically indicated that criminal investigations were continuing. The findings of the JIT report are not directly relevant to the present charges. Griesel's evidence was presented by the State in the Shaik trial. The court duly considered Griesel's evidence and relied on it as part of the State's case incriminating Shaik.

185. **Ad paragraph 27**

185.1. This paragraph is disputed.

185.2. It is not part of the State's case in the present matter that there was any demonstrable corruption in the awarding of the prime contracts.

185.3. Zuma wrongly describes the charge relating to corruption concerning the arms deal investigation as '*corruption in the form of an undertaking to cover up corrupt awards of the arms deal contracts*'. The most superficial reading of the provisional indictment reveals that the relevant allegation is that Zuma agreed to provide protection to Thomson-CSF against the investigation concerning the corvettes programme.

186. **Ad paragraph 28**

These allegations are irrelevant and, in any event, simplistic. It is futile to challenge the prosecution to produce witnesses to testify to facts that are not alleged in the indictment.

187. **Ad paragraph 29**

These allegations are irrelevant. It is not alleged in the provisional indictment or summary of facts that there was discernible corruption in the award of the prime contracts in the arms deal.

188. **Ad paragraphs 30 to 31**

The contents of these paragraphs are noted. This debate is irrelevant to the present application.

189. **Ad paragraphs 32 to 34**

Ngcuka has dealt with the issues in this paragraph in his affidavit.

190. **Ad paragraph 35**

I refer to paragraph 58 above.

191. **Ad paragraph 36**

The contents of this paragraph are not disputed, save to mention again that Zuma was merely one of many persons and entities investigated in this investigation.

192. **Ad paragraphs 37 to 40**

The contents of these paragraphs are dealt with in the affidavits of Maduna and Ngcuka.

193. **Ad paragraphs 41 to 42**

These paragraphs are irrelevant to the present application. The fact is that litigation concerning the encrypted fax took its course. Zuma's application was indeed ruled not urgent. As detailed above, the State had good reason to withhold the original copy of the encrypted fax at that stage of the investigation and prosecution. Also as detailed above, Zuma was provided with a typewritten copy of the fax. It is denied that there was any ulterior motive for withholding a copy of the original fax.

194. **Ad paragraph 43**

This paragraph is admitted, save to point out that the judgment on the merits was delivered over three days.

195. **Ad paragraph 44**

This paragraph is admitted.

196. **Ad paragraph 45**

The prosecution has no further knowledge of the President's actions and reasons, other than what has appeared in the press. This paragraph can neither be admitted nor denied.

197. **Ad paragraph 46**

197.1. The contents of this paragraph are denied.

197.2. It is incorrect that Zuma was dismissed as a result of the charges brought against him. That much is clear from the date sequence. The President relieved him of his duties on 14 June 2005. The decision to prosecute Zuma was made and announced on 20 June 2005. The President had no prior knowledge of the NDPP's decision. This is confirmed in Pikoli's affidavit.

197.3. The reasons for deciding to prosecute Zuma have been dealt with. The test underlying such decision is not '*guilt beyond reasonable doubt*' as alleged. It is '*reasonable prospects of success*', as is apparent from Ngcuka's media of 23 August 2003 (annexure 'LM4').

197.4. The 'old' evidence was sufficient to constitute a *prima facie* case against Zuma, although not sufficient for there to be a reasonable prospect of a successful prosecution. This evidence was indeed supplemented by the developments and evidence in the Shaik trial (this has been explained above). There was thus cause for the National Director to consider that the evidence, after the Shaik trial, was sufficient for there then to be a reasonable prospect of a successful prosecution against Zuma.

197.5. The decision to arrest or prosecute must inevitably adversely affect any accused person.

197.6. Zuma was invited to respond to a range of questions relating to the investigation in 2003, as mentioned above. His answers did not assist the investigation. It would have been futile to elicit a further response from him after the Shaik trial (as evidenced now by his reiteration in his affidavit of many of the answers given in 2003).

197.7. It is denied that the decision not to prosecute Zuma in 2003 could have engendered any legitimate expectation that he would never be prosecuted again – Ngcuka said that he might well be.

198. **Ad paragraph 47**

198.1. The contents of this paragraph are denied. This matter is dealt with in Pikoli's affidavit, wherein he specifically denies that the President had any prior knowledge of his decision to prosecute Zuma, which in any event was only made and published after the President had relieved Zuma of his duties.

198.2. It is noted that Zuma's allegations are based on supposition and a press report.

199. **Ad paragraph 48**

199.1. It is denied that the charges lost Zuma the Deputy Presidency. He was dismissed before he was charged and before the President knew that the NPA had decided to charge him.

199.2. The decision to arrest or prosecute must inevitably adversely affect any accused person.

200. **Ad paragraph 49**

It is correct that Pikoli discussed the impending decision to prosecute Zuma with him. It is also correct that the NPA fully expects that the trial should be commenced and concluded as speedily as possible. This is the case with all trials. Zuma is entitled to expectations no more than any other accused person who is facing serious and complex charges. It is denied that he was promised anything further.

201. **Ad paragraphs 50 to 55**

201.1. The issue of the search and seizure warrants is a matter for the trial court to determine during the trial, in the light of all the evidence.

201.2. Nevertheless, it is appropriate to provide the following general responses to Zuma' allegations contained in these paragraphs.

201.3. The search and seizure warrants and operations were conducted in accordance with the applicable legislation and were duly authorized

by Ngoepe, JP. The merits of these are the subject of separate litigation. The effect of such on the trial will be a matter for the trial court to determine.

201.4. The searches and seizures were conducted in the normal course. The terms of the applications for the warrants indicated in detail why they were considered necessary. In summary, the investigation was considered to be incomplete without them and there was a reasonable expectation that relevant information would be found on the premises, as indeed it was.

201.5. It is denied that there was any motive other than this.

201.6. The persons who conducted the searches did so in accordance with their statutory powers, and as authorized by the terms of the warrants.

201.7. It is denied that the State has intended to find or rely on any privileged information. The State has not acquired knowledge of the content of any privileged information.

202. **Ad paragraph 56**

202.1. The tax and fraud investigation was authorised in the normal course on the reasonable basis that such investigations had become necessary.

202.2. The allegations in this paragraph to the contrary are disputed.

202.3. It is denied that there was any motive other than investigation in the normal course.

203. **Ad paragraph 58**

203.1. It was at all times made apparent to all parties that the provisional indictment was based on the evidence as it stood in the light of the investigation for the purposes of the Shaik trial, and also taking into account some of the developments during the Shaik trial. It was expressly provisional because the investigation relating to Zuma was still continuing and it had not been completed. In addition, the new forensic report necessary for the investigation relating to Zuma had also not been completed.

203.2. The provisional indictment specifically excluded the further investigation that was being conducted after the Shaik trial and the findings of the new forensic report, because neither of these were available.

203.3. It is thus a futile exercise to compare the Shaik and Zuma indictments with a view to drawing any meaningful conclusions about the nature of the further investigation.

204. **Ad paragraph 59**

This paragraph is disputed.

205. **Ad paragraphs 60 to 65**

205.1. Woods identified this letter during the investigation. It was addressed to him and he received the original. It was apparently signed by Zuma.

205.2. The State has at no stage had any admissible evidence regarding who may have had a hand in composing the letter, other than what appears from the letter itself. It stands on its own terms.

205.3. The basis of the State's arguments concerning the letter, as reflected in the court's findings, was that it may well be that Zuma did not compose the letter. It was sufficient that he signed it. This was sufficient for the purpose of the Shaik trial and sufficient for the purposes of the conviction. It would have made no difference to either who composed the letter.

205.4. Nothing turns on any difference in the wording concerning the letter in the Shaik or Zuma indictments.

205.5. It was open to Shaik (with or without Zuma's assistance) to have called any evidence he wished concerning the letter. He did not do so. It is likewise open to Zuma to present whatever evidence he might wish about the letter and to urge whatever conclusions he seeks the court to make.

205.6. The reference to the letter in the provisional indictment is of a status and significance no different from any other allegation in the indictment.

205.7. It is denied that any part of the indictment is designed with any ulterior motive against Zuma. All the allegations are in accordance with the evidence.

205.8. The State has no knowledge of private discussions between the President and Zuma, nor is it able to rely on the accuracy of press reports as evidence.

206. **Ad paragraph 66: the effect of the adjournment**

206.1. It is denied that an adjournment will destroy Zuma's right to a fair trial.

206.2. Zuma is entitled to the treatment that would be accorded to any accused who faces an application for an adjournment. The application turns on its own merits. Should it be justified, as the present application is, it is inevitable that this will encompass some personal prejudice to the accused. As against this, the adjournment sought will allow Zuma and his legal representatives adequate time to prepare for what is bound to be complex and taxing trial.

207. **Ad paragraph 66(a)**

The State seeks an adjournment until the first quarter of 2007, not for 2 years. The effect of an adjournment on the evidence would not render the quality of the evidence appreciably different from evidence that might have been delivered mere months previously.

208. **Ad paragraph 66(b)**

208.1. I reiterate that a political conspiracy against Zuma is denied. It is denied that an adjournment of the trial has anything to do with a political conspiracy.

208.2. Given Zuma's attitude regarding the time that he will need to prepare for the trial, an adjournment at the request of the defence was inevitable.

208.3. The State and the Court cannot be held hostage to fortuitous future political events that might affect Zuma's career. The prosecution and the judiciary are constitutionally bound to act without fear, favour or prejudice and accord all accused persons equal treatment.

209. **Ad paragraph 66(c)**

The State has no knowledge of Zuma's negotiations regarding legal assistance. Given the time that the defence requires to prepare its defence, the delay occasioned by the adjournment was inevitable. The defence would in any event have been taken up in preparation.

210. **Ad paragraph 67 to 76**

210.1. These paragraphs are irrelevant for the purposes of the present application.

210.2. The present investigating and prosecuting team had no knowledge of or involvement in the rape trial and it is irrelevant for the purposes of the present trial. This team is unaware of any steps that the prosecution in that case may or may not have undertaken during the prosecution.

211. **Ad paragraphs 75 to 76**

I again deny that there is any ulterior motive in seeking the adjournment. It is necessitated in order to complete the further investigation. The State seeks to obtain the evidence of all relevant witnesses, whoever they may be. Any supposed strategy to use the adjournment to obtain the evidence of so-called defence witnesses is denied with contempt.

212. **Ad paragraph 77**

212.1. It has been detailed extensively why Zuma could not be charged earlier and why he was charged in June 2005. Given the circumstances, the situation could not have been different.

212.2. The State has done everything within its power to commence with the trial on the trial date. It has been prevented from doing so by circumstances beyond its control.

213. **Ad paragraphs 77(a) to (g)**

Subject to what follows, these paragraphs are not disputed. As regards Zuma's discussion with Pikoli, I refer to Pikoli's affidavit and to paragraph 200 above. I shall not traverse herein the contents of Zuma's affidavit in the application for further particulars of Thomson Holdings and Thomson (Pty). That application was dismissed.

214. **Ad paragraph 79**

The contents of this paragraph are noted.

215. **Ad paragraph 80(a)**

The remedy to an infringement of speedy trial rights is more appropriately an order expediting the trial rather than one aborting it.

216. **Ad paragraph 80(b)**

This paragraph is denied.

217. **Ad paragraph 81**

217.1. This paragraph is disputed.

217.2. Zuma has never been '*the target of the investigation*'. Since the discovery of the circumstances surrounding the encrypted fax in mid 2001, the State has been obliged to investigate all the offences that

might arise from this evidence. Zuma was obviously one of the parties implicated by this and other evidence.

218. Ad paragraph 82

218.1. This paragraph is disputed.

218.2. Zuma was not targeted from the outset of the investigation, or at any stage.

218.3. It is irrelevant whether any other parties have been prosecuted in connection with the arms deal. As it happens, the prosecution against Yengeni was also one connected to the arms deal.

218.4. The allegations concerning Zuma's role in the alleged corruption are detailed in the provisional indictment. It is pointless for Zuma to attempt to answer in general the supposed mystery concerning what influence he exercised in the arms deal. The allegations are no less and no more than those detailed in the indictment and summary of facts, all of which are supported by the evidence.

219. Ad paragraph 83

219.1. The State's averments regarding the Shaik trial are exactly correct. There was no need to mention that Zuma was not charged as this is obvious and it is mentioned elsewhere when pertinent. It is denied that it is significant that the State did not mention Zuma when mentioning that Shaik was charged.

219.2. The reasons for not initially prosecuting Zuma have been dealt with above.

220. Ad paragraph 84

220.1. Given Ngcuka's view of the evidence, the NPA was duty bound not to prosecute Zuma, irrespective of the views of the investigators.

220.2. Ngcuka's view was not that there was not sufficient evidence '*beyond reasonable doubt*' to prosecute Zuma.

221. Ad paragraph 85

221.1. The relevance of this paragraph to the application is disputed.

221.2. It is denied that Ngcuka's statement was a '*character assassination*'.

221.3. The phrase '*beyond reasonable doubt*' is incorrect.

222. Ad paragraph 86

The NPA has consistently disputed the findings of the Public Protector.

223. Ad paragraph 87

The inference urged is disputed.

224. Ad paragraphs 88 and 89

224.1. The progress of the prosecution against Thomson (Pty) has been dealt with elsewhere. It is evident that there is no written agreement,

in the sense of one signed by both parties. Ngcuka did however write to Naidu the letters of 19 April 2004 and 4 May 2004 (see paragraphs 62 to 64 above).

224.2. The full details of Thomson (Pty)'s breach of the agreement appear from what is stated above and in the affidavits of Maduna and Ngcuka.

225. Ad paragraph 90

Save that Thomson (Pty) has never had an indemnity, this paragraph is admitted.

226. Ad paragraph 91

226.1. As explained earlier, the delay between June and November 2005 in charging Thomson Holdings and Thomson (Pty) was merely procedural – the NDPP had to be briefed on the previous agreement with Thomson (Pty) and to consider its implications for his decision to prosecute.

226.2. Any 'personal targeting' of Zuma is denied.

227. Ad paragraph 92

227.1. Zuma's acceptance is noted.

227.2. The court's findings on points of law are binding on another court.

227.3. It is obvious that the State may and will have regard to credibility findings of a High Court. Such findings were reached after a lengthy trial and extensive argument. It hardly needs to be mentioned that the accused in that matter was free to call any rebutting evidence that he might have seen fit to call. In general, however, the quality of his and the defence witnesses' evidence was alternatively unconvincing or supportive of the State's case. This fact is itself significant, as was the fact that nothing was heard from Zuma even though he was uniquely placed to give evidence exonerating Shaik and it now appears that he considers the State to have presented incorrect evidence. This is more surprising, given the fact that Zuma instructed counsel to hold a watching brief throughout the trial.

228. **Ad paragraph 93**

228.1. The contents of this paragraph are noted.

228.2. I reiterate that matters of law to be decided by the SCA will indeed be significant for the purposes of the present matter.

229. **Ad paragraph 94**

229.1. I have dealt in detail with the effect of the Shaik trial upon the present matter.

229.2. I reiterate that 20 June 2005 is the correct date on which the decision to prosecute Zuma was made and published. This is confirmed in the affidavit of Pikoli.

229.3. I deny that there was a '*deliberate stratagem*' directed against Zuma, either by Ngcuka or Pikoli or both. The considerations relating to the decisions not to prosecute and then to prosecute are detailed elsewhere.

230. Ad paragraph 95

The decision to prosecute or not to prosecute was taken irrespective of Zuma's high political office. The NPA is obliged to exercise its functions without fear, favour or prejudice.

231. Ad paragraph 96

The extension to the investigation was indeed duly effected. It is denied that it was not done. A copy of the authorization is an annexure to this affidavit (see paragraph 93 above).

232. Ad paragraphs 97 and 98

232.1. It is denied that the extension was a ruse. The fact that the provisional indictment does not contain a charge reflecting the extension of the investigation is obvious – the State has not been able to complete the further investigation as a result of the

challenges to the searches. As stated above, the provisional indictment does not reflect the further investigation.

232.2. Apart from this, and as stated above, it is not necessarily so that all aspects that are investigated will lead to charges that reflect that investigation. Initial leads that appear reasonably promising may come to nothing, and the expected evidence may later turn out to be unavailable.

233. Ad paragraphs 100 to 104

233.1. Just as the defence for Zuma indicted their eagerness to commence with the trial, so too did the State indicate clearly the following:

- that the investigation was not yet complete,
- that the evidence recovered during the searches could not yet be analysed, *inter alia*, because of the litigation concerning them,
- that the forensic report was not yet complete and that this could only be delivered in some 5 months hence, depending on the outcome of the litigation,
- that the indictment was provisional in the sense that it did not and could not yet encompass all of the further evidence discovered as a result of the further investigations completed and still to be completed,

- that, all-in-all, the State required time to continue and complete the further investigations.

233.2. It was on the common understanding above that the parties reached agreement: the provisional indictment would be provided to the defence but the State would be permitted to continue with the investigation.

233.3. The only point of dispute presently is thus whether the subsequent delay, recognizing that the State would and could continue the investigation, is such that a postponement of the trial should be granted. Given that the State has had little control over the unforeseen delays that are not of its making, the postponement of the trial has become inevitable and justifiable.

234. **Ad paragraph 105**

234.1. The meeting with the Judge President was held shortly after the court appearance of 11 October 2005. According to Downer and Steynberg the only matter settled at this meeting was the trial date, in accordance with the agreement reached on 11 October that this would be so arranged with the Judge President. The agreement reached at the court appearance of 11 October 2005 thus remained, as Du Plooy indicated in paragraph 15 of his founding affidavit and as reflected in '**JDP4**' and '**JDP5**' thereto. It was central to the agreement that the State must be accorded the opportunity to

complete the further investigation and amend the indictment accordingly. The agreement concerning the envisaged timetable was thus conditional, both in its express terms (*'the State would endeavour to comply with the timetable'*) and in effect.

234.2. Inasmuch as the above contradicts annexure 'T' to Zuma's affidavit, annexure 'T' is disputed.

235. **Ad paragraph 106**

235.1. This paragraph is disputed.

235.2. It would be in no party's interests to withdraw the charges.

235.3. The accused would face the certainty of being indicted afresh, after which they would inevitably raise again the present arguments. The matter would be removed from the control of the court.

235.4. From the point of view of the State, it is entitled to effect arrests on the basis of the reasonable suspicion that crimes have been committed and to ask the court for reasonable adjournments to enable it to complete any necessary investigations. Such is the case at present. The policy considerations supporting the decision to arrest and place the matter on the role pending further investigations are fortified when the reasonable suspicion of the commission of offences has itself been unusually tested by the prior court proceedings.

235.5. I refer to my detailed explanation above concerning the legal and policy considerations that govern the NDPP's duty to institute a prosecution – it is not required that investigations must first be concluded before the matter is enrolled.

235.6. I again deny that there is any ulterior motive in the State's seeking a reasonable adjournment.

236. **Ad paragraph 107**

This paragraph is disputed.

237. **Ad paragraph 108**

The contents of this paragraph are noted, although the significance of who represented Zuma at that stage is not apparent. It is accordingly common cause between the State and the defence that the matter was adjourned from 29 June 2005 to 11 October 2005 for further investigation.

238. **Ad paragraph 109**

238.1. I reiterate that the NDPP is entitled to charge an accused person prior to the completion of further investigation. Any motive for charging Zuma, other than the due execution of the duties of the NPA, is denied.

238.2. I must mention again that the further investigation encompasses more than merely the search and seizure operations that were conducted.

239. **Ad paragraph 110**

This paragraph is not disputed.

240. **Ad paragraph 111**

This is disputed.

241. **Ad paragraph 112**

241.1. The merits of these allegations and Zuma's *mens rea* will be tested in the trial.

241.2. The evidence surrounding the payments to Zuma clearly indicates that they were designed to keep Zuma in politics for the mutual advantage of at least Shaik and Zuma. It is not improbable that the payments continued on this basis until 2005.

242. **Ad paragraph 113**

242.1. The contents of this paragraph are disputed.

242.2. It is incorrect that the State did not attempt to traverse the later payments with Shaik in the witness stand. He refused to expand on this issue or to provide any documents, other than to admit that the

payments were continuing. He claimed that they were diminishing. Consequently, this had to be investigated.

242.3. Whether or not the later payments themselves form the basis for further charges, such payments are in any event relevant to the State's case and they require to be investigated.

242.4. It is specifically denied that the search and seizure operations were conducted with any purpose other than to obtain evidence relevant to the charges.

243. **Ad paragraph 114**

243.1. The arguments in this paragraph are disputed.

243.2. It is denied that the further investigation that must reasonably be completed is a '*cloak*' for any ulterior purpose.

243.3. The contention that the State may not investigate the accused's defence is surprising in the light of the defence's contradictory claim that the State is obliged to investigate all relevant aspects, whether incriminating or exculpatory.

243.4. It is illuminating, by way of example, that an accused person is obliged to give notice to the State of his or her intention to rely on an alibi, precisely to enable the State to investigate such alibi.

243.5. The investigation of the circumstances of the revolving loan agreement remains relevant and current.

244. **Ad paragraph 115**

244.1. The argument raised in this paragraph is disputed.

244.2. I reiterate that the State is entitled to investigate this matter fully.

245. **Ad paragraph 116**

The argument raised in this paragraph is disputed.

246. **Ad paragraph 117**

246.1. The argument raised in this paragraph is disputed.

246.2. Whether or not Shaik is listed as a State witness, his evidence at his trial was delivered under oath and it is not hearsay. Nor was it elicited under the NPA's powers of interrogation. The State is entitled to investigate all the relevant circumstances surrounding Shaik's and Zuma's meeting with Thétard in March 2000 that Zuma apparently denies.

246.3. Zuma's answers to questions were not obtained in terms of the NPA's powers of interrogation.

247. **Ad paragraph 118**

247.1. This paragraph is disputed.

247.2. The State is entitled to investigate the matter properly.

248. **Ad paragraph 119**

The State is entitled to rely on all objective circumstances that have hindered the investigation. It is not contended that Zuma has been responsible for the delays – this is not the test. Nevertheless, the documents seized at the Union Buildings in Pretoria formed part of Zuma’s application to have the search warrants set aside.

249. **Ad paragraph 120**

249.1. The analysis of the thousands of documents and the computer data is a lengthy and time-consuming process. It was indeed commenced as soon after the search and seizure operations as possible, but it has been hampered by the litigation.

249.2. I can only reiterate my description of the obvious process of further investigation arising, *inter alia*, from documentation. As relevant documents are identified, so are the witnesses relevant to those documents. It is impossible to name these witnesses, as they are unknown before the documents are identified.

249.3. Perhaps the process may be better understood by referring to the investigation of Shaik’s payments to Zuma:

- Each potential payment must be identified as relevant to the investigation

- Supporting bank documents from both Shaik's and Zuma's side must be identified and requested
- Once these are analysed, supporting documents to the particular transaction must be identified and requested
- The relevant payees must be identified and traced. Preparatory interviews must be conducted with a view to identifying relevant documents in the possession of the payee. The payee must then provide an affidavit or be questioned under oath.
- This process is replicated, *mutatis mutandis*, regarding any relevant new document.

249.4. I deny that my description of the investigation should carry no weight. My description is true.

250. **Ad paragraph 121**

250.1. This paragraph is disputed.

250.2. As I have stated, the State attempted, without success, to obtain the information from Shaik during his trial.

250.3. The relevant records have indeed been subpoenaed from financial institutions. This once again is a very time-consuming process. Once the records have been identified and obtained, they must be

analyzed. This again takes time. All of this has contributed to the fact that the forensic report is not yet complete.

251. **Ad paragraph 122**

251.1. This paragraph is disputed.

251.2. It is specifically denied that legitimate further investigation can be typified as '*a mandate to rescue*' the charges.

251.3. It is obvious that the production of the forensic report, conducted in accordance with the broad mandate described, is time consuming and dependant on the availability of documentation.

251.4. I once again deny that Du Plooy's description of the investigative process '*has no factual import*'. It is noted that Zuma is not able to produce evidence that contradicts my description of the process. His assertion to the contrary is merely argumentative.

252. **Ad paragraph 123**

252.1. The arguments tendered in this paragraph are disputed.

252.2. I dispute the anecdotal synopsis of the events described.

253. **Ad paragraph 124**

The State has proposed herewith a reasonable timetable which indicates that Zuma will not be '*told what the charges actually are*' years hence.

254. **Ad paragraph 125**

This paragraph is disputed.

255. **Ad paragraph 126**

255.1. This paragraph is disputed.

255.2. I deny that my statements are misleading. The process of obtaining the relevant information from Kogl has been, and remains, extraordinarily difficult throughout the investigation. This is a relevant consideration contributing to the delay and it is largely beyond the control of the State, despite its best efforts.

256. **Ad paragraph 127**

256.1. It is correct that the payments from Reddy and Fakude-Nkuna were identified during the initial investigation. They were duly investigated. Nevertheless, it was reasonably thought that further relevant documentation would be obtained by way of the search and seizure operations that were authorized.

256.2. It is denied that it was impermissible to indicate the circumstances surrounding these payments in the applications for the search warrants.

256.3. Zuma's response to the invitation to reply to questions was specifically not covered by the provisions of section 28 of the NPA Act.

257. Ad paragraph 128

257.1. The meaning and relevance of this paragraph is unclear. It is in any event disputed.

257.2. If it is meant to imply that the search and seizure operations that were conducted were either not authorized or that they did not fall within the mandate of the investigations, then this is specifically denied.

257.3. I have mentioned above the irrelevance of the argument that attempts to say that this investigation should only be about the arms deal.

258. Ad paragraph 129

258.1. It is admitted that dates of the Kogl affidavits are 15 June 2002 and 8 March 2004. This may give some indication of the difficulty that was encountered in obtaining the affidavits. It is also an indication that Kogl was unwilling to be interviewed. This matter remained unresolved, necessitating the search of his premises in 2005.

258.2. Despite filing papers to have the search warrants set aside, Kogl has not taken steps to enrol the matter and the State is entitled to act in accordance with the valid terms of the search warrants.

259. **Ad paragraph 130**

This paragraph is not disputed.

260. **Ad paragraph 131**

The contents of this paragraph are noted.

261. **Ad paragraphs 132 and 133**

261.1. The contents of these paragraphs are noted.

261.2. It remains an inescapable fact that the various court procedures relating to the search and seizure operations have delayed the course of the investigation, whatever effect they may have in the future.

261.3. It is denied that the State has approached any of the court procedures with any lack of urgency.

262. **Ad paragraph 134**

It has been explained above that the request for documentation is not related to the request for further particulars. Also as explained, all the documentation that could be provided was provided as soon as the State received the requests from the accused.

263. **Ad paragraph 135**

The contents of this paragraph are noted.

264. **Ad paragraph 136**

264.1. It is quite impossible for the State to provide the defence with hard copies of all the millions of documents that appear on all the computer hard drives.

264.2. The State is not in possession of such hard copies and it can only provide the defence with what it has, namely the hard drives, as it has.

264.3. The virus cannot be removed because that is how the hard drives were received and the State must not tamper with the hard drives provided.

264.4. When the forensic report and its annexures are available, these will be provided in hard copy to the defence.

265. **Ad paragraph 137**

265.1. Insofar as this paragraph is argumentative, it is denied.

265.2. The State indeed provided Shaik with further particulars. The request was received very shortly before the trial was due to commence and some 6 months after the final indictment and the forensic report had been provided to him. There was no significant

further investigation holding up the completion of the forensic report and the indictment.

266. **Ad paragraph 138**

While it is correct that the State had regard to whatever documents became available after the searches, the investigation of such was interrupted by the legal challenges. This was the case with the Zuma/Hulley documents and the report could not be finalized without progress regarding the appeal or settlement. In the circumstances, the auditors could not be instructed prior to 23 May 2006 to complete the report.

267. **Ad paragraph 139**

267.1. The contents of this paragraph are noted.

267.2. It will be for the defence to determine in what manner it wishes to conduct its preparation for trial.

268. **Ad paragraph 140**

268.1. A timetable is proposed with this reply.

268.2. The State cannot commit itself to any date without the intervention of the defence and the Court.

269. **Ad paragraph 141**

269.1. The forensic report in respect of Zuma is different from that in the Shaik matter.

269.2. It is significant that the forensic report in the Shaik matter was produced well after he had been charged and the matter enrolled. The defence reasonably allowed the State time to complete its investigation and produce the forensic report, other than in the present matter.

269.3. It is denied that there was any ulterior motive for charging Zuma.

270. **Ad paragraphs 142 to 143**

These paragraphs are disputed.

271. **Ad paragraph 144**

This paragraph is argumentative and it is disputed.

272. **Ad paragraph 145 to 157**

These paragraphs are disputed.

273. **Ad paragraph 158**

273.1. The NDPP did refer to the fact that the decision not to prosecute was subject to review. This is invariably the case when a decision is made not to prosecute.

273.2. It is disputed that there was anything improper in the decision to prosecute Shaik and not to prosecute Zuma.

274. **Ad paragraph 159**

I reiterate my contentions regarding the Shaik appeal. This is only one factor amongst the others that affected the trial date. The timetable now proposed does not take account of a judgment in the Shaik appeal.

275. **Ad paragraphs 160 to 163**

The contents of these paragraphs are noted

276. **Ad paragraph 164**

This paragraph is disputed.

277. **Ad paragraph 165**

277.1. There is in principle no difference in the nature of the evidence that the State obtained in the Shaik and the present matters, although this matter encompasses a great deal more documents. As I have stated, the defence would in any case have had to request an adjournment to prepare for trial.

277.2. The conduct of the pre-trial proceedings in the Shaik matter were similar to the present. He was provided with a provisional charge sheet, the matter was postponed for further investigation and the forensic report. The final indictment and the forensic report were

provided when the investigation was effectively complete for this purpose. Just as in the present case, the charges were only finalized when the final indictment was served.

THE FIRST AFFIDAVIT OF PIERRE JEAN MARIE ROBERT MOYNOT

278. Ad paragraphs 3.1 and 3.2

It is admitted that the State and accused have agreed, on the suggestion of the legal representatives of Zuma dated 11 July 2006, that the State's application for an adjournment would be made by means of an '*exchange of affidavits in advance of the application*'. The legal representatives of Thomson Holdings and Thomson (Pty) indicated that they were agreeable to this procedure.

279. Ad paragraphs 3.3 and 3.4

279.1. If it is suggested that these contents of these paragraphs reflect the agreement between the parties, this is denied. The terms of the agreement are set out in the abovementioned correspondence.

279.2. It is furthermore disputed that the accused '*will be entitled to insist*' that the State call the evidence of witnesses in support of its application for an adjournment. It is admitted, however, the Court has a discretion to call for *viva voce* evidence in accordance with section 342A of the CPA. In the present case, it is submitted, there

is no need for *viva voce* evidence and indeed it would be undesirable.

280. **Ad paragraphs 4 and 5**

These are admitted.

281. **Ad paragraph 6**

The contents of this paragraph are disputed. It is specifically denied that the State has conducted itself with '*tardiness, ineptitude and indecisiveness*' and that the investigations and prosecution '*were conducted with little or no regard for the duties and obligations imposed upon the National Prosecuting Authority*'.

282. **Ad paragraphs 7.1 to 7.3**

These are admitted.

283. **Ad paragraph 7.4**

This is strenuously disputed. As will appear more fully below, it is alleged that, if anything, it is the conduct of Thomson Holdings and Thomson (Pty) which has fallen short of the requisite standards.

284. **Ad paragraphs 8 to 9**

These are admitted.

285. **Ad paragraph 10**

This is disputed

286. **Ad paragraph 11**

This is noted.

287. **Ad paragraphs 13 to 16**

These are admitted.

288. **Ad paragraph 17.1**

This is admitted.

289. **Ad paragraph 17.2**

This is noted.

290. **Ad paragraph 18**

Save that it is admitted that being subjected to a search may in certain circumstances lead to negative publicity, the rest of this paragraph is disputed. The deponent is typically vague regarding the precise nature of the alleged prejudice suffered.

291. **Ad paragraph 19**

This is admitted.

292. **Ad paragraph 20**

This is admitted, save that the date of the announcement was 23 August 2003.

293. **Ad paragraph 21**

This is admitted.

294. **Ad paragraph 22**

It is admitted that such a meeting was arranged by Driman. It is recorded that this was not the first time that the Minister and the NDPP had been approached on behalf of Thomson Holdings and Thomson (Pty) and/or Thales International. The remainder of the paragraph is not admitted.

295. **Ad paragraphs 23 to 28**

295.1. It is admitted that such a meeting occurred and that the parties described were present. It is admitted that representations were made to Maduna and Ngcuka. Save for this the contents of this paragraph are disputed. It is specifically disputed that any agreement was reached at this meeting to withdraw the charges.

295.2. In Moynot's answering affidavit dated 23 August 2004, he explicitly admits that '*[i]t is correct that this first meeting did not result in any agreement.*' It is significant that he makes no mention of any '*legitimate expectation*' that was allegedly created at this meeting. It

is apparent that, having realised that the correspondence between the parties which recorded the progress of the negotiations and the agreements reached does not support their version of events, Thomson Holdings and Thomson (Pty) have changed tack by seeking to rely on alleged events of which no accurate records exist.

295.3. I note that Thomson Holdings and Thomson (Pty) have not put up an affidavit by Driman confirming their version of the events and disputing the version put forward by the State.

295.4. The events of this meeting are set out in more detail in the confirmatory affidavits of Maduna and Ngcuka and elsewhere in this affidavit.

296. **Ad paragraph 29**

This is admitted to the extent that it is consistent with the events described above. It is noted that it is inherent in the assertion that Driman's instructed senior counsel to '*conclude the agreement*', that there had been no agreement prior to this.

297. **Ad paragraph 30**

It is admitted that senior counsel was engaged to meet with Ngcuka. It is disputed that the terms of the agreement had previously been '*agreed*' with Maduna and Ngcuka.

298. **Ad paragraph 31**

It is admitted that such a meeting took place.

299. **Ad paragraphs 32.1 and 32.2**

This is admitted, save that the *ipsissima verba* of the correspondence appears more fully from annexures PM1 and PM2. It is recorded that the reference in PM2 to the case number as 'PC 27/04' is a typing error. The case number was in fact 'CC 27/04'

300. **Ad paragraph 32.3**

This is admitted, save that it is recorded that the State decided to honour its side of the agreement despite the fact that it was of the view that Thomson (Pty) had breached the agreement. The reasons for this decision are set out elsewhere in this affidavit.

301. **Ad paragraph 33**

301.1. It is admitted that the terms of the agreement did not have the effect of an indemnity against prosecution of Thales International, Thomson Holdings and Thomson (Pty), or any of their employees, including Thétard. I do not know why Moynot was '*confident ... that Thomson (Pty) would never be re-indicted*' and dispute that he had any reason to be so. It is specifically denied that the State created any legitimate expectation to this effect.

301.2. It is furthermore alleged that had Moynot been labouring under such a misapprehension, this must have been dispelled by the subsequent events set out elsewhere in this affidavit.

301.3. The fact that a subsequent prosecution was anticipated even prior to the withdrawal of charges against Thomson Holdings is evident from the contents of Sooklal's letter dated 1 July 2004 where the following is said: *'Also of concern to our clients is the undertaking ... that the record of the proposed interview will not be used against MR THÉTARD or any of our other clients if he cooperates. Implicit in this undertaking is an indication that you are still conducting investigations against our client, including Zuma1 [the present Thomson (Pty)] for a possible prosecution against one or other of our clients...'* (annexure 'LM42').

301.4. It is clear from the above that Moynot's claims that he never entertained the possibility of his company being recharged are disingenuous.

301.5. This conclusion is supported by various assertions made by Moynot in his affidavit dated 11 August 2004 which was filed in support of its application to compel the NDPP to withdraw the charges before the agreed date of 11 October 2004 (see paragraph 80 above).

302. **Ad paragraph 33.1**

This is disputed. In any event it is alleged that any assurances that might have been given by any of the parties during the negotiation were rendered null and void by the cynical and *mala fide* breach of the agreement by Thomson (Pty).

303. **Ad paragraph 33.2**

This is disputed.

304. **Ad paragraph 33.3**

304.1. The conclusions reached in this paragraph are disputed. It is admitted, however, that the State had other means of proving that the encrypted fax was written by Thétard. Of course, the best evidence of this remains the confirmation by the author himself.

304.2. It is noted that the assertion that Thétard's affidavit '*did not contain evidence which was required by the State to prove its case concerning the draft encrypted fax*', is inconsistent with the assertions made in the letter of Sooklal dated 8 June 2006 in which he states that '*[t]he document was relied on in the Shaik trial and, together with other evidence, contributed to the finding of guilt against Shaik and the other corporate accused*' (annexure 'LM59').

305. **Ad paragraph 33.4**

305.1. The assertions by Moynot display an ignorance of the status of a statement provided by a suspect pursuant to negotiation with the State for the withdrawal of charges which is irreconcilable with the legal advice at his disposal. It is a frequent occurrence that a suspect or accused might submit such a statement in the hope of escaping prosecution, only to find that he is, for one or other reason, eventually charged (such as where a court refuses him indemnity in terms of section 204 of the CPA). In such circumstances, any statement that he made during the course of such negotiations would be inadmissible against him at the subsequent prosecution. Therefore, the fact that such a statement was required could never legitimately have given rise to the expectation that Thomson (Pty) would never again be charged.

305.2. It is specifically disputed that the State abandoned its duty to act ethically and consistently. It is alleged that it is the accused who acted unethically in repudiating the agreement. In so far as consistency is concerned, the prosecuting authority is entitled to reconsider its decisions to institute or abandon prosecutions when circumstances require it.

306. **Ad paragraph 33.6**

306.1. It is admitted that the letter annexed as PM3 was sent. It is recorded, however, that the '*junior member of the prosecuting team*' referred to (Steynberg) was in fact a Deputy Director of Public Prosecutions and the Deputy Regional Head of the DSO in KwaZulu-Natal who was, to the knowledge of the legal representatives of Thomson (Pty), authorised to negotiate and speak on behalf of the prosecuting team and the NDPP in this matter. It is in fact explicitly recorded in this letter that Steynberg had been '*instructed by the National Director to reply on his behalf and to advise you that all further correspondence on this matter should be directed to [him].*'

306.2. Moynot admits in paragraph 33 that the agreement did not amount to an indemnity from prosecution, so the contents of the letter should not have come as a surprise. Indeed, the negotiations that had preceded this letter were aimed specifically at securing such an indemnity. This was explicitly stated in PM3 where it is stated that '*[t]his much is in fact clear from discussions with Mr Naidu SC in which he intimated his intentions to make further representations regarding immunity from prosecution ...*'.

306.3. Any lingering doubts that might conceivably have remained in this regard must have been removed by the final paragraph of PM3 which states explicitly that '*[s]uch indemnity could, however, only*

be predicated upon a full and frank disclosure of evidence by your clients which, on the basis of the affidavits of Mr Thétard to date, we are not persuaded is their intention’.

306.4. It is significant that Sooklal never responded to this letter nor took issue with any of its contents.

306.5. It is further significant that Thomson (Pty) and/or its parent company felt it necessary to incur the expense of having an attorney and senior counsel sit through virtually the entirety of the Shaik trial. It is extremely unlikely that they would have incurred this expense if they were convinced that there was absolutely no prospect of charges ever again being preferred against them.

307. **Ad paragraph 33.7**

The conclusion reached by Moynot is disputed. The agreement was reached on the basis of Thomson (Pty)’s good faith and with the expectation of further cooperation from Thétard. As is clear from the confirmatory affidavit of Maduna, no promises or undertakings were given at the initial meeting at Maduna’s house that could conceivably have brought Thomson (Pty) or its representatives under the misapprehension that Thomson (Pty) would never be charged in future. Indeed, I reiterate that no agreement was reached at that meeting, save that Thomson (Pty) would meet with Ngcuka to discuss the matter further.

308. **Ad paragraph 33.8**

308.1. Moynot's understanding of the circumstances is indeed disputed.

Confirmatory affidavits by Maduna and Ngcuka to this effect accompany this affidavit.

308.2. It is specifically disputed that any such expectation was created.

308.3. It is confirmed that the reason why charges were withdrawn was due to the agreement, but as explained above there were also pragmatic considerations. When Nguka announced the decision to prosecute Thomson (Pty) on 23 August 2003, he was of the opinion that there was a reasonable prospect of a successful prosecution against it. If this were not so, it would have been improper to charge it in the first place. Nothing had changed by April 2004 to alter that view.

308.4. The full reasons why it was decided to withdraw the charges are fully set out elsewhere in this affidavit.

309. **Ad paragraph 34.1**

The contents of this paragraph are disputed. The reasons for the decision to reinstitute charges against Thomson (Pty) are fully set out elsewhere in this affidavit.

310. **Ad paragraphs 34.2 and 34.3**

310.1. Du Plooy merely states that ‘*the State remained convinced that a prosecution against [Thomson (Pty)] was merited on the strength of the evidence against it.*’ It is notorious that the test to be applied is whether there is a reasonable prospect of a successful prosecution. This is not the same as a belief that the prosecution will definitely succeed. Indeed, there is no such thing as a certain case. To this extent, the conviction of Shaik and his companies and the terms of the court’s findings regarding the involvement of Thomson Holdings and Thomson (Pty) provided an important judicial confirmation of the State’s views regarding the prospects of a successful prosecution.

310.2. It is vehemently denied that the decision to prosecute Thomson Holdings and Thomson (Pty) was prompted by *mala fides* or that the State was of the view that it could not succeed against Zuma without joining Thomson Holdings and Thomson (Pty). In this regard, the following facts and considerations are relevant:

310.2.1. The mere fact that Thomson Holdings and Thomson (Pty) are joined as co-accused will not render admissible any evidence against Zuma that would otherwise have been inadmissible against him.

310.2.2. As demonstrated in the trial of Shaik and others, various statutory and common law provisions exist by which the

relevant documentary evidence may be admitted against Zuma, with or without the presence of Thomson Holdings and Thomson (Pty).

310.2.3. That said, it is disputed that considerations of ease of proof would amount to *mala fides*, provided the State is of the view that a prosecution of Thomson Holdings and Thomson (Pty) is warranted on the merits.

311. Ad paragraphs 35 and 36

311.1. I reiterate my statement that Thomson (Pty) breached the terms of the agreement. Furthermore, I contend that Thomson (Pty) and its representatives must have been fully aware of this fact. Therefore, they cannot hide behind the fact that the State did not explicitly inform them of this at the time. In any event, provided the repudiation is objectively established, it is entirely irrelevant for present purposes whether and when the State informed Thomson (Pty) of its views.

311.2. The breach of the agreement relied upon is the fact that, having provided the State with the affidavit confirming his authorship of the encrypted fax, Thétard (with the knowledge of the legal representatives of Thomson (Pty)) deposed to a second, unsolicited affidavit aimed at destroying the evidential value of this important piece of evidence. It is noted that Moynot makes no reference to this

document in his affidavit. Thomson (Pty) must have known that if it had tendered this affidavit at the time when the agreement to withdraw was under consideration, the State would never have agreed to withdraw the charges. This is confirmed in the supplementary affidavits of Maduna and Ngcuka.

311.3. It is clear from the correspondence that the State expected further cooperation from Thétard. The only conclusion that I can reach is that Thomson (Pty) was negotiating in bad faith and with the intention that, having once obtained an undertaking to withdraw charges on the pretext of assisting the State's case, it would then proceed to do everything in their power to destroy it.

311.4. For the reasons set out elsewhere in this affidavit and in what follows, it is apparent that the second affidavit was entirely false and disingenuous:

- Forensic evidence has established that the note was never 'crumpled' as alleged by Thétard.
- The evidence of Delique that it was typed, signed by Thétard and faxed to Paris contradicts this version. Delique's evidence has already been tested in cross examination and found to be reliable.
- The evidence of computer experts confirms that the document was typed and printed at the relevant time.

- Telkom records are consistent with the document being faxed to the relevant numbers at the relevant time.

312. **Ad paragraph 36.1**

It is admitted that at the time when PM2 was written, the State was satisfied that Thomson (Pty) had complied with the terms of the agreement. Thétard's second affidavit had not yet come to its attention and it was still under the impression that Thomson (Pty) was negotiating in good faith.

313. **Ad paragraph 36.2**

Save that it is averred that it was a term of the agreement that Thétard's affidavit should be truthful, this paragraph is admitted.

314. **Ad paragraph 36.3**

314.1. While it may not have been explicitly stated that the second affidavit was regarded as amounting to a breach, it is clear from paragraph 22 of my opposing affidavit that I rejected Moynot's explanation for the filing of Thétard's second affidavit and regarded that affidavit as 'contrived'. Furthermore, I stated that '*[t]he undertaking that was given by [Ngcuka] was that charges would be withdrawn if Thétard executed an affidavit to the effect that he was the author of the encrypted fax. No further affidavit was solicited and no affidavit would have been accepted in return for an indemnification of the applicant against prosecution.*'

314.2. It was also stated in Steynberg's letter PM3 that on the basis of Thétard's affidavits, the State was not persuaded that it was Thomson (Pty)'s intention to make a full and frank disclosure of evidence.

314.3. For these reasons, it cannot have come as any surprise to Thomson (Pty) that the State regarded it as having repudiated on the agreement.

315. Ad paragraph 36.4

315.1. It is disputed that Downer's statement should be interpreted as a confirmation of compliance with the agreement by Thomson (Pty). The reasons why the State decided to honour its agreement despite Thomson (Pty)'s breach are set out in detail elsewhere. Practically speaking the focus at that time was on the impending trial of Shaik and his companies and not on Thomson (Pty). It would have served no useful purpose at that time to become embroiled in an argument regarding Thomson (Pty)'s performance of the terms of the agreement. Indeed, in light of the State's (and Moynot's) understanding that the agreement to withdraw did not amount to a permanent indemnity from prosecution, the issue of breach was then largely irrelevant.

316. **Ad paragraph 36.5**

The contents of Isak Du Plooy's statement are admitted. It is disputed that any inference can be drawn from this regarding the fact of the alleged breach.

317. **Ad paragraph 36.6**

This is disputed.

318. **Ad paragraph 36.7**

318.1. It is admitted that the State filed the document in question in support of an application for a warrant of arrest for Thétard. However, this is entirely irrelevant for the purposes of the present applications. It is, nevertheless deemed to be necessary to deal with various allegations made by Moynot in regard to this application.

318.2. This application for the re-issuing of the warrant of arrest is in line with the State's contention that there was no permanent indemnity given either to Thomson (Pty) or its employees. I emphasise that Thétard was and is still regarded as a fugitive from justice and, in the absence of any agreement to the contrary, he remains subject to arrest should he return to South Africa. I deny that the State has acted improperly in applying for the warrant. The State freely provided the defence with a copy of these papers.

318.3. I point out, furthermore, that the State pertinently drew Ms Justice Pillay's attention to the fact that a warrant had previously been issued and to the prior agreement to withdraw the charges and warrants (see paragraphs 6 to 11 of Du Plooy's affidavit (annexure PM4)).

319. **Ad paragraph 36.8**

This paragraph is admitted, save that it is averred that the timing of the application was based solely on the information received that Thétard was in the country and had no connection whatsoever with the proceedings in the Shaik trial.

320. **Ad paragraph 36.9**

This paragraph is admitted.

321. **Ad paragraph 36.10**

321.1. I can categorically state that the decision to apply for a warrant of arrest for Thétard had nothing to do with any apprehension that he might be called as a defence witness in the Shaik trial. The instruction to apply for the warrant came from me. I had no knowledge of the trip to Paris by the defence and my decision was based solely on the consideration that Thétard was a fugitive from justice wanted for an extremely serious offence. As appears from paragraph 11 of Du Plooy's affidavit (annexure PM4), the

information at hand was simply that he was in Johannesburg and attending a function at the Rand Club. Investigators who subsequently attended the scene were unable to confirm this, other than to establish that his name did not appear on the guest list of the function.

321.2. I can state further that, from early on in the State's case, it was apparent that the defence's strategy was to discredit Thétard as a witness and to argue that the contents of his encrypted fax could not be relied on. In these circumstances it would have been incomprehensible that the defence would then decide to call him as a witness.

321.3. If, however, the defence was of a mind to call Thétard, I would have expected them to approach the prosecution to make specific arrangements for him to testify without being arrested. Section 12 of the ICCMA specifically provides that a foreign resident attending court as a witness may not be arrested while in South Africa for the purpose of attending such court. No such approach was made and no inkling was given to the prosecution team that the defence had any intention to call Thétard as a witness. In the circumstances, it did not even occur to Du Plooy, or any other member of the team, that Thétard's presence in Johannesburg had any connection with the Shaik trial and hence to make any such 'disclosure' to Ms Justice Pillay.

322. **Ad paragraph 36.11**

Thétard had already fled the jurisdiction of the Court once and was regarded as a fugitive from justice. For these reasons it would have been inappropriate to give notice to the legal representatives of Thomson Holdings and Thomson (Pty) that the State intended to apply for the reissue of a warrant of arrest for him. This would undoubtedly have frustrated the very purpose of the application.

323. **Ad paragraph 36.12**

This paragraph is noted. I am not in a position to dispute this. All I can say is that the State acted in good faith and upon information received that was believed to be reliable.

324. **Ad paragraph 37**

I reiterate that Thétard was regarded as a fugitive from justice and it would be quite proper to arrest him should he return to the country, except in the circumstances contemplated in section 12 of the ICCMA or in accordance with a specific agreement to the contrary.

325. **Ad paragraph 38**

325.1. I repeat that this matter has nothing whatsoever to do with the issue of whether there has been an unreasonable delay in the prosecution. It will be argued that this is just another example of gratuitous mudslinging which should be ignored by the Court.

325.2. I repeat that any such witnesses may invoke section 12 of the ICCMA to protect themselves against arrest in the event that Thomson Holdings and Thomson (Pty) should wish to call them as witnesses in the present matter. Such protection is a matter of law and not dependant upon any assurances from the NPA. Should their concerns still not be assuaged by this provision, it is always open to Thomson Holdings and Thomson (Pty) to apply to have their evidence heard on commission in France.

326. **Ad paragraph 39**

The withdrawal of charges in 2004 was done as a result of representations by Thomson (Pty) itself. It hardly lies in its mouth to complain that it has been prejudiced thereby.

327. **Ad paragraph 39.1**

327.1. This paragraph is noted. I reiterate that the present uncertainty is a direct result of the various applications brought by the accused and persons associated with them. The State sought to reach agreement with the defence as long ago as April this year regarding a realistic starting date for the trial, which suggestion was rebuffed. Had the defence not adopted such an obstructive attitude, dates could have been agreed upon and the defence would have been in a position to mitigate any financial loss caused by an adjournment.

327.2. In any event both sets of defence have complained of the considerable amount of preparation that they will need to do in order to prepare for the trial. I am accordingly advised that the period set down for the trial could be put to good use for this purpose. Accordingly, the time set aside should not be wasted.

328. Ad paragraph 39.2

328.1. The prejudice complained of is entirely speculative. No details are provided as to what evidence, documents or records have been lost. While it is true that the State has not yet provided its final indictment, Thomson Holdings and Thomson (Pty) have a very good idea what the case against them is and have done so since Thomson (Pty) was first indicted in 2004. Thomson (Pty)'s legal representatives obtained copies of all the State's documents in the Shaik trial from Shaik's defence team. Furthermore, senior counsel for Thomson Holdings and Thomson (Pty) and his attorney sat through almost the whole duration of the evidence of that matter. They should by now have an excellent grasp of the issues.

328.2. In the result, Thomson Holdings and Thomson (Pty) have known since 2004 that they were suspects and what the issues in dispute are. They would have been in a position since then to preserve any relevant documentation that might later be required for a criminal prosecution.

328.3. By now the accused have been provided with all documents presently in the State's possession, save those which we have hitherto been unable to provide by reason of pending litigation.

328.4. The anticipated changes to the indictment chiefly concern events that took place after the period investigated for the Shaik trial (i.e. up until October 2002). It would therefore appear to be unlikely that documents concerning this period would be destroyed prior to the anticipated starting date of this trial.

329. **Ad paragraph 39.3**

This is again typically vague and speculative. No mention is made of which witnesses are alleged to be afflicted by this problem or in what respects. The State will face the same problems with its witnesses. Bearing in mind the nature of the onus, this is a factor which would normally be expected to work in an accused's favour.

330. **Ad paragraph 39.4**

This is once again typically vague and speculative. No details are given as to what '*vital computer evidence*' is expected to be unavailable, lost or destroyed, more especially between now and the suggested adjournment date.

331. **Ad paragraph 39.5**

This is yet again typically vague and speculative. No mention is made of which potential defence witnesses are no longer in the employ of the accused or the Thales Group. It is not suggested that any such potential witnesses will become unavailable for this reason between now and the suggested adjournment date. The difficulties in securing the attendance of the defence's witnesses appear to be unconnected with the State's application for an adjournment.

332. **Ad paragraph 40**

The charges contained in the provisional indictment are virtually the same as those preferred against Shaik. As noted elsewhere, these are expected to be amended and updated as a result of the further investigation conducted since the conclusion of the Shaik trial.

333. **Ad paragraph 41**

333.1. The State has provided a detailed chronology of events elsewhere in this affidavit. To the extent that Moynot's chronology is consistent with the State's, it is admitted, and to the extent it is not, it is denied.

333.2. I wish, therefore, to deal specifically with only certain sub-paragraphs

334. **Ad paragraphs 41.4 to 41.5**

This is admitted, save to point out that the period between 8 June and 20 June is 12 days, and not 5 days.

335. **Ad paragraph 41.13**

335.1. While it is correct that Thomson Holdings and Thomson (Pty) were not actual parties to the agreement as to the trial date, it was specifically raised by the prosecution that it was anticipated that they might be joined as accused. The senior counsel presently representing these accused indicated at that meeting that he held a watching brief for Thomson Holdings and Thomson (Pty) and that the date would be suitable, given the lengthy notice (see the penultimate paragraph of annexure '**JDP5**' to Du Plooy's affidavit). Since the service of summons on Thomson Holdings and Thomson (Pty), they have never indicated anything to the contrary.

335.2. It is correct that the application of Zuma and Hulley had just been filed, although it was not yet known when the matter would be set down. The State pertinently warned Hulley in a letter dated 29 September 2005 (annexure '**JDP1**' to Du Plooy's affidavit) that '*[f]urther threatened applications, including one by your client, will invariably lead to further delays*'. Subsequent events have proven this assessment to be accurate.

336. **Ad paragraph 42**

It is correct that the State agreed to the trial date. However, it remains open to the State to apply for an adjournment should it subsequently appear that the agreed date is no longer feasible due to factors outside the State's control.

337. **Ad paragraph 43.1**

This paragraph is admitted.

338. **Ad paragraph 43.2**

The *ratio* for His Lordship's decision was his view that the order ought to be made by the trial court. The remark about the establishment of the *lis* was clearly an *obiter dictum*, and this will be a matter to be determined by the trial court as and when it is seized with the matter.

339. **Ad paragraph 43.3**

This paragraph is noted.

340. **Ad paragraph 43.4**

340.1. The reasons for this are more fully set out elsewhere in this affidavit.

Suffice to say that it was not ultimately necessary for the purposes of the Shaik trial since, *inter alia*, it was agreed with the defence that they would not object to the documents on the grounds of originality. Other objections were raised which were subsequently

decided in the State's favour. These will become relevant when I deal with Moynot's supplementary affidavit and the new cause of action raised therein.

340.2. The relevance of the quotation from counsel's argument in the 2004 application is not understood. He is clearly referring to previous applications for mutual legal assistance. It also appears to be more a reference to the pending request to France to question various employees of Thomson/Thales.

340.3. It is in any event abundantly clear from the detailed synopsis of the request for mutual legal assistance to Mauritius, that the State did indeed bring applications in terms of the ICCMA earlier than December 2005:

340.4. As explained in paragraph 154 above, after the copies of the documents were obtained in October 2001, further MLA steps, which might have included a specific request for the originals, were not considered necessary at that stage. It was expected that the Mauritius police witnesses would travel to South Africa and bring the originals or identify the copies. I refer in particular to paragraphs 154.5 to 154.13 above.

341. **Ad paragraph 43.5**

This paragraph is disputed

342. **Ad paragraph 43.6**

342.1. His Lordship's remarks in paragraph 8 were also made *obiter* and were not regarded as sufficient authority on which to embark upon such a course of action, especially since this issue was not properly argued before him. It was felt that it would be more appropriate to obtain the direction of the trial court in this regard.

342.2. I regard the implied criticism of the State by Moynot for not pursuing such an extra-curial approach as entirely hypocritical. I believe, in light of the obstructive attitude adopted to date, that any attempt to follow such an approach would have been met by howls of protest from Thomson Holdings and Thomson (Pty). If it is indeed the case that they would be amenable to such a course of action, this would assist in considerably curtailing the delay in obtaining the necessary documents.

343. **Ad paragraph 44**

This paragraph is noted. I reiterate that the reason why the State was unable to provide the final indictment in the time envisaged was chiefly due to the litigation instituted by the accused and persons associated with the accused.

344. **Ad paragraph 45**

This paragraph is admitted.

345. **Ad paragraph 46**

I reiterate that the State had warned Zuma's attorney, to the knowledge of senior counsel for Thomson Holdings and Thomson (Pty), that the prospect of a multiplicity of applications regarding the searches would inevitably have the effect of delaying the investigation. The statement referred to in PM10 merely served to confirm that the predicted results had indeed come to fruition. This should not have come as any surprise to Thomson Holdings and Thomson (Pty).

346. **Ad paragraph 47**

This paragraph is noted. For the reasons stated in PM10 and PM11, and accepted by Mr Justice Levinsohn, it was not reasonably possible for the State to respond otherwise to the request, which was regarded as premature.

347. **Ad paragraph 48**

347.1. It is disputed that there is any mystery surrounding the proposed date for the commencement of the case. The date of February 2007 was proposed for the purposes of reaching an agreement with the defence on a new trial date. It was earlier than the State would ideally have liked, but in the spirit of negotiation it was felt that the State should attempt, as far as possible, to be flexible. This is apparent from the fact that in the letter of 26 June (annexure '**JDP8**' to Du Plooy's affidavit) the State also invited the defence to indicate their views

regarding both the fact of the proposed adjournment as well as the suitability of the date proposed. This was also against the backdrop of the proposed settlement agreements with Mahomed and Zuma.

347.2. In light of the defence's complete opposition to any postponement, the matter now fell to be decided by the court. The State was of the view that it would be inappropriate to prescribe to the court exact dates or time periods without the necessary inputs from the trial judge (who was unknown at that time) and the Judge President regarding the availability of the judge and a suitable court. The State was also of the view that the defence would not be able to be ready for trial by the date originally proposed of February 2007, a view which appears to be borne out by the submissions on behalf of the various accused in these papers.

347.3. Should the State's application for a postponement be successful, an appropriate way forward would be for the parties to agree, with the concurrence of the Honourable Court, on a realistic and reasonable timetable for the delivery of all outstanding documents and trial preparation and so to determine an appropriate trial date. In this regard I refer to the State's proposed timetable set out earlier in my affidavit.

348. **Ad paragraphs 49.1 and 49.2**

These paragraphs are disputed. They are essentially argumentative and will be addressed in argument.

349. **Ad paragraph 49.3**

This paragraph is noted and will be addressed in argument.

350. **Ad paragraph 49.4**

350.1. As explained earlier, for reasons beyond the State's control the President of the SCA has decided to postpone the argument of the appeal by one month until the week commencing 25 September. In the circumstances, and in the interests of expediting the proceedings, the State does not persist in saying that the indictment should not be finalised until judgement is handed down by the SCA.

350.2. Regarding the final submission in this paragraph, however, to expect the State to abdicate the responsibility for an appeal of this importance to private counsel who have not had the benefit of involvement in the criminal trial and who have not been steeped in the history of the investigation dating back to 2000, is grossly unreasonable. Where the State has engaged the services of private counsel in the present matter, it has been for the purposes of dealing with collateral issues, such as the search warrant applications. This has been done, insofar as possible, to avoid the prosecutors

becoming completely bogged down in such matters so that they could be available to direct the further investigations and trial preparations. Unfortunately, due to the long and complex history of this matter, it has been unavoidable that key members of the prosecution team have had to become involved to a greater or lesser extent in all these matters.

351. **Ad paragraph 49.5**

This paragraph is noted. Once again, the length of time that such an application in Mauritius would take would be largely in the hands of Thomson Holdings and Thomson (Pty) and their sister company in Mauritius.

352. **Ad paragraphs 49.6 and 46.7**

These paragraphs are entirely speculative. The present application is for an adjournment to a date in the first half of 2007, to be determined in consultation with the Judge President and the trial court. Should the State not be in a position to proceed on that date for this or any other reason, then the court will be able to take the appropriate action based upon the circumstances prevailing at that time.

353. **Ad paragraph 49.8**

This statement is entirely without foundation and is strenuously disputed. If the State did not want to proceed with the prosecution at all it would simply have withdrawn the charges, as it is entitled to do.

354. **Ad paragraph 49.9**

354.1. It appears that Thomson Holdings and Thomson (Pty) wish the court to embark upon a 'mini-trial' prior to the accused even having pleaded at which they wish to assume the role of prosecutor. Although they have not explicitly said so, it appears that the accused are also intent on seeking to try to compel potential State witnesses such as Maduna, Ngcuka and Du Plooy to testify *viva voce*. This procedure is entirely inappropriate in the present circumstances.

354.2. The issues complained of in this paragraph on which Thomson Holdings and Thomson (Pty) seek to cross examine the NDPP relate primarily to his decision to prosecute the accused. It is apparent that the accused seek, via the back door as it were, to compel this court to engage in a quasi-review of this exercise of the NDPP's discretion, which is inappropriate and impermissible.

354.3. Should the court accede to the accused's request to direct that oral evidence be led to resolve the various disputes of facts on the papers, the State would be entitled to insist that the persons who have

deposed to affidavits on behalf of the accused should also testify and be subject to cross examination. The dangers of such a procedure are manifest. The court would in all likelihood be required to make findings of fact and credibility that would almost certainly disqualify it from presiding over any subsequent trial.

354.4. An enquiry in terms of section 342A into allegations of an unreasonable delay in a prosecution is primarily aimed at expediting the prosecution and not aborting it. It is apparent that the procedure that Thomson Holdings and Thomson (Pty) appear to advocate would be a difficult and time consuming one. Involving as it would the prosecution team, as well as the both investigators as a potential witnesses, it would once again have the effect that investigations and the production of the final indictment would be considerably further delayed.

354.5. Many of the issues traversed in the accused's papers regarding the fairness of their trial are matters that would most appropriately be dealt with during the course of the trial, during which oral evidence will be led in the normal course which the defence can then test in cross examination.

354.6. With regard to the complaint that Thomson Holdings and Thomson (Pty) were charged at a time when *'it was clear that much investigation still had to be done'*, it was the view of the prosecution

team, which was confirmed by me and Pikoli, that it would be in the interests of justice for the various suspects to be prosecuted together. This being the case, once the decision was taken to charge Thomson Holdings and Thomson (Pty) it was regarded as imperative that that be done as soon as possible, to allow them to commence their preparations. It would have been improper to delay the charging of Thomson Holdings and Thomson (Pty) until the investigations were finalised.

354.7. It should also be noted that it was not until Thomson Holdings and Thomson (Pty) had been charged that they decided to institute an application challenging the legality of the searches. By delaying the decision to charge them, this process itself would have been delayed, and hence in all likelihood the eventual trial date.

355. Ad paragraph 50

This paragraph is disputed.

356. Ad paragraph 51

This paragraph is disputed.

357. Ad Moynot's seriatim replies

I do not intend to deal with each and every reply, many of which are matters for argument. I will confine myself, insofar as possible, to dealing with factual matters.

358. **Ad paragraph 53**

The details of Thétard's breach were not set out in Du Plooy's affidavit since this was not regarded as relevant to the State's application for a postponement. This has now been fully addressed in this affidavit.

359. **Ad paragraph 54**

359.1. The contents of this paragraph are manifestly factually incorrect and disputed.

359.2. The letter (annexure '**JDP2**' to Du Plooy's affidavit) was written in response to the State's letter dated 29 September 2005 (annexure '**JDP1**' to Du Plooy's affidavit), which was in turn a response to Hulley's letter dated 19 September 2005 giving the State notice of its intention to object to any further postponement for investigations (annexure **LM51**). In '**JDP1**' the State set out reasons why it believed that the matter had to be postponed for further investigations, and proposed in paragraph 4 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'*.

359.3. This proposal was rejected in '**JDP2**'. It was only subsequent to and as a result of this attitude adopted by Zuma that the State decided to remove the matter from the magistrates court in terms of section 75

of the CPA, in order that any applications such as the present could be determined in a higher jurisdiction.

359.4. The balance of this paragraph is vexatious and argumentative and should be struck out.

360. **Ad paragraph 55**

The terms of the agreement and the circumstances in which it was reached are dealt with fully elsewhere in this affidavit and in Du Plooy's founding affidavit. To the extent that this paragraph is consistent with the above, it is admitted, and to the extent that it differs, it is denied.

361. **Ad paragraph 56**

This paragraph is disputed. As noted above, the State pertinently brought to the attention of the defence team that the multiplicity of applications, if persisted with, would inevitably have a delaying effect. It was certainly the State's hope, however, that it would nevertheless be in a position to proceed on the dates agreed. That this is not so is chiefly the result of the litigation instituted by the accused and others associated with them.

362. **Ad paragraph 57**

362.1. I do not understand how the timing of the State's decision to prosecute Zuma is relevant to the present application of Thomson Holdings and Thomson (Pty).

362.2. The State is not obliged to wait until all investigations are finalised before charging an accused. To do so would, in most cases, serve to delay the eventual trial, rather than to expedite it. In most cases it is more expedient to both parties that the investigation and pre-trial appearances take place in parallel, rather than in series. At the time of the decision to charge Zuma, it was not yet appreciated how disruptive the cumulative effect of the various applications to set aside various search warrants would be to the completion of the investigation. I repeat that, but for the delays occasioned by the peripheral litigation, the State would have been ready to proceed on the date agreed.

363. **Ad paragraph 58**

This paragraph is noted.

364. **Ad paragraph 59**

364.1. This paragraph is noted. A proper reading of annexure ‘**JDP6**’ to Du Plooy’s affidavit reveals that the blanket claim of privilege in respect of all e-mails between the specified parties (which may or may not individually be privileged) was merely claimed ‘in the interim’ until all allegedly privileged documents can be properly identified. Paragraph 5 specifically refers to the delay in specifying such documents. I deny that the State has not responded to this letter – a response was sent on 17 July 2006. The determination of this issue

has of necessity had to take a back seat to dealing with the State's application for postponement and the accused's voluminous counter applications. As soon as certainty has been reached regarding the further conduct of the trial, we will take the necessary steps to resolve this issue, including, if necessary, seeking the direction of this Court.

364.2. It is stressed, however, that the critical step necessary for the resolution of this issue is for the Thomson Holdings and Thomson (Pty) to indicate specifically the documents in respect of which it claims privilege. Only then can the validity of the claim be established, through whatever mechanism is agreed or directed by the court, and the privileged material deleted, so that the State can have access to the remaining documents.

365. **Ad paragraph 60.1**

The distinction which Moynot seeks to draw is so fine as to make no practical difference. The request for all '*documents that the State has in its possession which relate to or are connected with, directly or indirectly, the investigation from the date of commencement thereof to the date hereof*' is so broad as to effectively encompass all evidential material gathered in the course of the investigation. For instance, it will be apparent that any document seized during one or other of the searches conducted during the course of the investigation, whether or not it has any bearing on the

eventual charges, must clearly be '*related to*' or '*connected with*' the investigation.

366. **Ad paragraph 60.2**

Again Moynot is indulging in semantics. Thomson Holdings and Thomson (Pty) were the applicants. The court declined to give them the relief they sought.

367. **Ad paragraph 62**

367.1. It seems that Moynot misunderstands the terms of paragraph 36 of Du Plooy's founding affidavit. The paragraph explicitly states that the forensic accountants were instructed to proceed with the finalisation of their report '*using all the available documentation...*'. This obviously excludes documents currently unavailable due to claims of privilege.

367.2. It would clearly have been preferable to wait until the status of all the documents has been determined before completing the report, but in light of the substantial delays occasioned by the litigation, the apparent prospect of settlement regarding the State's access to the majority of the disputed documents and the looming trial date, a decision was taken in principle that it was no longer practicable to await finality of all these outstanding issues before completing the report. The corollary of this decision, however, is that should

relevant documents subsequently emerge from those presently subject to claims of privilege, the possibility remains that these may affect the findings contained in the report.

367.3. It is on this basis, and on the instructions of the forensic auditors, that Du Plooy stated that the report was at an advanced stage of preparation. As stated, the report will be made available to the defence by the next date of appearance.

368. Ad paragraph 63

368.1. The answer to Moynot's conundrum is apparent from Du Plooy's founding affidavit. As stated previously, the report is at an advanced stage.

368.2. As to the second part of this paragraph, it appears that Moynot is being deliberately obtuse. Clearly the undertaking would be to provide the accused with such further particulars as they might see fit to request once the indictment is finalised. This is in line with argument presented by the State during Thomson Holdings and Thomson (Pty)'s unsuccessful application to compel delivery of these particulars.

368.3. The remainder of this paragraph is argumentative.

369. **Ad paragraph 64**

The contents of this paragraph are noted and will be addressed, if necessary, in argument.

370. **Ad paragraph 65**

370.1. I reiterate that the accused will be entitled to require a reasonable opportunity to prepare for trial. Thomson Holdings and Thomson (Pty) are invited to indicate in reply or in argument how long they require.

370.2. It is disputed that the accused would be in a better position if the charges were withdrawn than if the trial is adjourned to a reasonable date in the first half of 2007.

370.3. It is disputed that the *bona fides* of the request is not a relevant factor in the enquiry. It is noted that Thomson Holdings and Thomson (Pty) do not dispute the *bona fides* of the State's request.

371. **Ad paragraph 66**

This paragraph is disputed.

372. **Ad paragraph 67.1**

The reference to the '*commission of the offence*' in Du Plooy's affidavit was an error. The paragraph should read '*...the delay of approximately 18*

months between the accused being charged and the proposed adjournment date is not unusual...’.

373. **Ad paragraph 68**

This paragraph is disputed.

374. **Ad paragraph 69**

It is not disputed that the accused have a right to pursue these remedies. It is merely pointed out that, if time is of the essence to the accused, it may not ultimately be in their interests to do so in the light of the dilatory effect that this may have on the trial. Ultimately, it is the accused’s choice and they will have to live with the consequences of their decision.

375. **Ad paragraph 70**

It is disputed that the State should be obliged to withdraw its charges as a result of dilatory tactics employed by the accused.

376. **Ad paragraph 71**

This paragraph is disputed. This issue is addressed above.

377. **Ad paragraph 72**

377.1. Moynot appears to have misunderstood this paragraph. Put more fully, the decision by the State to conclude the agreement to

withdraw the charges against Thomson (Pty), was made because of reasons of convenience.

377.2. Lest my failure to deal specifically with Moynot's averment be misunderstood, however, the State is of the view that it would have been justified in refusing to withdraw the charges as a result of the breach of the agreement by Thomson (Pty). The reason why it did not invoke this remedy at the time of the Shaik trial was also due to, *inter alia*, considerations of convenience.

378. **Ad paragraph 73**

This paragraph is disputed. Findings of law by the SCA will be binding on the trial court. Due to the similarity of the charges and the facts upon which the trials are based, it would appear inevitable that many of these legal issues will be traversed in the present trial. It is a matter of obvious practicality and convenience to all concerned that these issues be authoritatively decided prior to the commencement of the trial. It will be submitted that the real reason that Thomson Holdings and Thomson (Pty) are so anxious that the trial proceed before the Shaik appeal is that, having had the benefit of counsel sitting in throughout the Shaik trial, they are concerned that these issues may be authoritatively decided against them.

379. **Ad paragraph 74**

This paragraph is disputed and the issue has been traversed above.

380. **Ad paragraph 75.1**

This paragraph is noted.

381. **Ad paragraph 71**

This paragraph is disputed.

382. **Ad paragraph 76**

This paragraph is noted.

383. **Ad the documents delivered to Thomson Holdings and Thomson (Pty)**

383.1. At the outset and in general, it appears that the complaints set out in the paragraphs that follow have little, if anything, to do with the State's application for an adjournment or the complaint that there has been an unreasonable delay in the prosecution.

383.2. What they do establish, firstly, is that the documentation related to the investigation in general and the evidential material upon which the prosecution is founded is voluminous and complex. This is precisely why the finalisation of the investigation, hampered further by the present uncertainty as to which of the thousands of documents the State is able to rely on and which not, is such a difficult task.

383.3. Secondly, it establishes that the defence would never have been ready to start the trial on 31 July 2006, even if the State had been in a position to provide the final indictment and auditors report in

March 2006, as originally anticipated. It is furthermore apparent that they will still require a considerable time to finalise their trial preparations. It appears that a trial date early in the first half of 2007 may not be feasible for the defence.

383.4. In short, these paragraphs in fact support the State's request for an adjournment.

383.5. Turning to the documents supplied by the State, they comprise both electronic copies of documents and hard copies of various documents.

383.6. The contents of the electronic files comprise of scanned copies of all evidential material gathered during the course of this investigation until approximately mid 2004. I refer in this regard to the affidavit of Isak du Plooy which has been supplied to Thomson Holdings and Thomson (Pty), a copy of which is attached marked 'LM65' (a similar affidavit was subsequently provided to Zuma). In summary, they include the following:

- Scanned copies of all documents seized during the 2001 searches of Shaik and his companies, Thomson-CSF, Thomson France and Mauritius, as well as evidential material subpoenaed in terms of section 28 of the NPA Act, such as financial records (contained in the folder 'Boxfiles');

- Mirror images of the hard drives seized from Shaik and his various companies during the 2001 searches (contained in the folder 'CDs');
- Scanned copies of all witness statements, including transcripts of interviews conducted in terms of section 28(6) of the NPA Act, together with relevant documents referred to by those witnesses (contained in the folder 'Docketfiles');
- Scanned copies of the KPMG report (contained in the folder 'KPMG Report');
- Scanned copies of Bank documentation compiled by KPMG (contained in the folder 'KPMG');
- Scanned copies of audit papers compiled by KPMG (contained in the folder 'Audit Documents');
- Scanned copies of the computer experts reports prepared for the Shaik trial and the relevant annexures (contained in the folder 'CSFS');
- Translations of various French documents obtained during the course of the investigation (contained in the folder 'Translated documents');

- Copies of various bank statements subpoenaed during the investigation(contained in the folder 'Bank Statements');
- Scanned copies of requests for Mutual legal Assistance (contained in the folder 'MLA');
- Scanned copies of the entire transcript of the Shaik trial and the documentary exhibits (contained in the folder 'S v Shaik').

383.7. The hard copies provided comprise, in summary, of copies of witness statements obtained since approximately mid 2004, together with relevant documents referred to by the witnesses. In addition copies of certain earlier requests for mutual legal assistance that were not scanned were included.

383.8. Furthermore, copies of all documents and hard drives seized from Thomson Holdings and Thomson (Pty) and Moynot have been provided separately.

384. Ad paragraph 77

384.1. As discussed above, all the documents provided to Thomson Holdings and Thomson (Pty) in response to their request for further particulars are regarded as being '*related to*' or '*connected with*' the investigation. The accused did not request '*all documents relevant to the charges*'. The documents that the State considers most relevant will form annexures to the forensic auditors report. However, even if

the accused's request had been couched in these terms, the State cannot be expected to take responsibility for determining which documents the defence may deem relevant to the charges. Indeed, without even knowing the basis of the accused's defence, this would be impossible.

384.2. Furthermore, if it transpired that the State erred in its assessment of the relevance of any particular document, it would lay itself open to protests that it was '*withholding vital evidence*' and the like. The State's position is that it will provide the defence with all evidential material which it deems to be relevant as part of its 'docket'. It should be mentioned that the exercise of identifying relevant evidence has been entrusted to an independent firm of auditors. Their mandate is to identify all relevant evidence and not only that helpful to the State's case.

384.3. However, if the defence wish to satisfy themselves that we have not overlooked (or indeed withheld) any evidence relevant to their case, the defence will have to perform the same exercise that the State was forced to perform.

384.4. I reiterate, therefore, that the State's position is that it has complied with the request insofar as it is able to do so.

385. **Ad paragraphs 77.1 to 77.4**

These are admitted.

386. **Ad paragraph 77.5**

This is not disputed

387. **Ad paragraph 77.6**

This is not understood.

388. **Ad paragraph 77.7**

This is not disputed.

389. **Ad paragraph 77.8**

This is noted. The following facts are germane:

389.1. The State has done its utmost to meet with counsel for Thomson Holdings and Thomson (Pty) to explain to them the structure and contents of these discs. I will address some of the more pertinent issues below.

389.2. As stated, the folder marked 'Boxfiles' contains scanned images of all the documents seized during the course of the 2001 searches. These documents are physically stored in boxfiles in the order in which they were seized and stamped with a serial number stamp. The first digits of each stamped number may be used to identify the

premises from which they were seized. These documents are the raw data from which those documents considered relevant to the eventual charges are culled. Many of them are therefore of little or no relevance to the eventual charges. No attempt has therefore been made to put them into any sort of order, as this would be fruitless. It would be impossible to describe the contents in any coherent manner, since the contents of each file are diverse and unconnected. It is accordingly not possible to index them in any manner that would be of any material assistance to the accused.

389.3. As stated, the folder labelled 'CDs' contains copies of the mirror images made of the hard drives seized during the 2001 searches of Shaik and his companies. Hence these documents are '*related to*' or '*connected with*' the investigation.

389.4. All the documents that were considered to be relevant to the charges in the Shaik case were extracted and form part of the court record of that case, a copy of which was freely provided to counsel for Thomson Holdings and Thomson (Pty). Any further documents considered relevant to the present case will similarly be provided to the defence.

389.5. The files were provided to the defence in exactly the same state as they were obtained by the State. We were advised by our computer experts that any attempts to edit or manipulate the files would have

the effect of compromising the integrity of the data and expose the State to criticism by the defence.

389.6. When the State offered to assist the defence by providing it with restored copies of previously deleted files on the hard drive of one Govender which was seized during the 2005 search of their premises, this tender was refused on the basis, *inter alia*, that the accused could not accept the integrity of files restored by the State's experts. They insisted, rather, on making their own mirror images and engaging their own experts to perform this task.

389.7. In the light of this attitude, the State understandably decided to provide the accused with the unmodified data from which their experts would presumably also cull the necessary data.

389.8. The State understood that Thomson Holdings and Thomson (Pty) had engaged computer experts who would presumably have been in the same position as the State's experts to perform this task. Now that it appears that they are not up to the task, the accused wish to blame this on the State!

389.9. It is disputed that this function has been 'left to the accused'. As stated above, the State has already performed this exercise and culled what, in our opinion, are the relevant documents from the vast mass of documents that are patently irrelevant to the charges.

389.10. It is the accused who, not trusting the ability or *bona fides* of the State to perform this task to their satisfaction, have taken this task upon themselves.

389.11. The existence of pornographic images on the hard drives is simply due to the fact that these were contained on the hard drives of certain computers seized during the raids. For the reasons outlined above, they could not be deleted without compromising the integrity of the data. The prospect of finding any relevant data in such temporary internet files is extremely slim. If counsel are offended by the pornography it is suggested that they ignore these files.

390. **Ad paragraph 77.9**

This is disputed.

391. **Ad paragraph 77.10**

391.1. The State was led to believe that Thomson Holdings and Thomson (Pty) had engaged the services of a computer expert. The accused cannot expect, on the one hand, to be provided with data that is unsullied and on the other hand to expect the State to 'sanitise' it.

391.2. The State's obligation is to provide the defence with all evidential material upon which it intends to rely and any other material it comes across during the course of its investigation which it might reasonably suspect to be relevant to the defence's case. However, it

is not the State's duty to undertake investigations on behalf of the defence or to assist it in building the defence case, more especially where the accused is a company with considerable resources and represented by a formidable team of defence lawyers and other experts.

391.3. It may be worth noting that information was provided to the defence in the Shaik trial in the same format (with the exception of the 'CD's' folder as the original hard drives were returned to them). They were apparently not unduly inconvenienced by the format of the data.

392. Ad paragraphs 77.12 to 77.18

392.1. With respect to witness statements and other documents forming part of the State's docket, this complaint is unfounded. The State has already provided Thomson Holdings and Thomson (Pty) with an index of the witness statements contained in each subfolder of the Docketfile folder by means of the affidavit of Isak Du Plooy (annexure 'LM65'). As noted in Moynot's affidavit, the State has also tendered and given its assistance to the defence whenever this has been requested, in order to facilitate their understanding of the documents. In short, we have bent over backwards to help them.

392.2. Furthermore, it is not a complex matter to find any particular witness's statement using a search engine, such as that contained in

Adobe Acrobat software, which is widely available. This is the method used by our investigators to trace documents.

392.3. If requested, however, the State will gladly provide the accused with hard copies of the various witness statements upon payment of the prescribed fee.

392.4. However, since these files are already in the defence's possession, it is suggested that a more convenient and cost effective solution would be for the defence to simply print out the contents of the 'Docketfile' folders and file them in according to whatever system they might wish to employ. It is not the State's duty to marshal the defences filing system.

393. **Ad paragraph 78**

393.1. As stated, it was agreed prior to the State's application for an adjournment that it would be conducted on the basis of an exchange of affidavits. It appears that Thomson Holdings and Thomson (Pty) now seek to renege on that agreement.

393.2. I reiterate that there are cogent reasons why this application should not be allowed to descend into a 'mini trial'. The appropriate time for the hearing of oral evidence is during the trial itself.

394. **Ad paragraph 80**

There is no basis whatsoever for a permanent stay of prosecution in this matter. In all the circumstances described above, I submit, this Honourable Court should exercise its discretion to grant the State an adjournment to a date which, upon consideration of the interests and obstacles relating to both the State and the accused, would be a reasonable one.

THE SECOND AFFIDAVIT OF PIERRE JEAN MARIE ROBERT MOYNOT

395. It was improper for Thomson Holdings and Thomson (Pty) to file supplementary affidavits without the leave of this Court, more especially when, to the knowledge of the accused, the State had been placed on very tight notice to submit its answering/replying papers. The Court would be quite entitled to disregard these affidavits and their contents. Further oral argument will be advanced in this regard.

396. I will nevertheless endeavour to respond to the averments therein to the extent that they have not already been addressed above.

397. **Ad the visit by Ngcuka to Paris**

397.1. This has been dealt with above and in the affidavits of Ngcuka and Maduna.

397.2. Moynot's version of events and in particular the implication that the approach came from the side of Ngcuka is disputed.

397.3. If this matter is in fact significant to the application of Thomson Holdings and Thomson (Pty), they should indicate the significance in their papers, rather than coyly stating that this will be addressed on 5 September.

398. **Ad the events in Mauritius**

398.1. This issue was never raised in Thomson Holdings and Thomson (Pty)'s first affidavit and appears to amount to an entirely new cause of action in respect of which the accused seek to justify a permanent stay.

398.2. The lawfulness or otherwise of the method by which the State secured copies of the documents in question has absolutely no bearing on the fairness of the trial unless and until the State seeks to introduce these documents into evidence. The appropriate remedy for the accused would then be to contest the admissibility of the documents in terms of the provisions of section 35(5) of the Constitution. The accused make much of the alleged impropriety of the State's actions, but fail dismally to explain how the mere possession of these documents by the State has any connection to their ability to receive a fair trial let alone the State's request for an adjournment.

398.3. In any event, as explained above, the documents in question were obtained entirely lawfully. The issue was pertinently raised during

the Shaik trial, including the accused's contentions that the removal of the copies of the documents was unlawful, contrary to the terms of the request for mutual legal assistance and contrary to the Mauritian court order authorising the search and seizure. The Shaik trial court found the complaint to be without basis. I refer to paragraph 154.13 above. If, however, Thomson Holdings and Thomson (Pty) are of the view that this ground has not been sufficiently well ploughed, then they are at liberty to raise it again at the trial, if and when the State seeks to tender any of the relevant documents as evidence.

398.4. The raising of the Mauritian documents issue in this application is yet another example of the transparent attempt of Thomson Holdings and Thomson (Pty) to obfuscate the real issue before the court, which is whether or not there has been any unreasonable delay in the accused's trial.

399. Ad the search operation of 18 August 2005

399.1. I point out that Thomson Holdings and Thomson (Pty) have yet to identify a single privileged document, establish that any such document has in fact come to the attention of the prosecution team or indicated the exact manner in which this might lead to the trial being unfair. Furthermore, it will be apparent from a perusal of the papers in the search application that there is a dispute of fact

regarding the alleged claim of privilege on behalf of the accused. I point out further that Court seized of this application resolved this dispute in favour of the State (annexure 'LM61').

399.2. This issue is best resolved by the court during the trial, which will be in a far better position to determine the effect, if any, of the disclosure of any such privileged documents as may be found to be in the State's possession.

THE AFFIDAVIT OF CHRISTINE GUERRIER

400. The events referred to herein have been dealt with above and in the confirmatory affidavit of Ngcuka and Maduna.

PRAYER

401. The State accordingly prays that its application for an adjournment of the trial be granted and that the accused's application for a permanent stay of prosecution be dismissed.

LEONARD FRANK McCARTHY

I certify that the Deponent acknowledged to me that he knows and understands the contents of this declaration, has no objection to taking the prescribed oath and considers the prescribed oath to be binding on his conscience. The Deponent thereafter uttered the words: 'I swear that the contents of this declaration are true, so help me God'.

The Deponent signed this declaration in my presence at
the day of 2006.

on this

FULL NAMES: _____

COMMISSIONER OF OATHS

EX OFFICIO: (eg: South African Police Service) _____

REPUBLIC OF SOUTH AFRICA

*RANK: _____

ADDRESS: _____
