

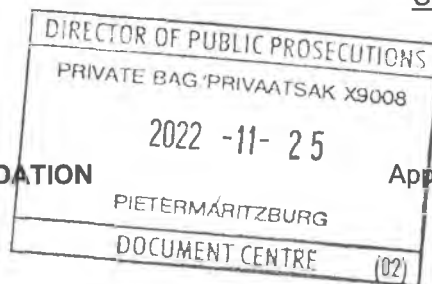
**IN THE HIGH COURT OF SOUTH AFRICA
KWA-ZULU NATAL DIVISION, PIETERMARITZBURG**

Case No.: 13062/22P

In the application of:

THE HELEN SUZMAN FOUNDATION

Applicant for Admission
as *Amicus Curiae*



In re the matter between:

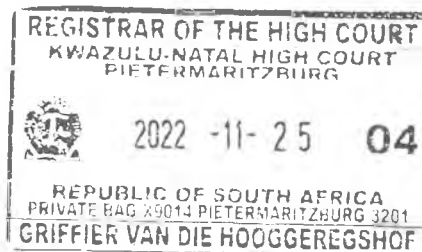
WILLIAM JOHN DOWNER

Applicant

and

JACOB GEDLEYIHLEKISA ZUMA

Respondent



NOTICE OF MOTION

KINDLY TAKE NOTICE that an application will be made on 8 December 2022 for an order in the following terms:

1. That the Helen Suzman Foundation is admitted as *amicus curiae* in the application to set aside the respondent's summons in the private prosecution proceedings to be conducted by him against the applicant (**the main application**).
2. The applicant for admission as *amicus curiae* is given leave to submit written and oral argument in the main application.

3. Costs in the event of opposition.
4. Further or alternative relief.

TAKE FURTHER NOTICE that the founding affidavit of **NICOLE FRITZ**, together with the annexes thereto, will be used in support of this application.

TAKE FURTHER NOTICE that should any party intend to oppose this application, they are required to deliver an answering affidavit within 5 days after receipt of this notice in terms of Uniform Rule 16A(7), failing which this matter will be heard on an unopposed basis.

TAKE FURTHER NOTICE that the applicant will accept service of all documents and proceedings in this matter at the address of its attorneys of record as set out below.

SIGNED AT JOHANNESBURG ON THIS 25th DAY OF NOVEMBER 2022



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C/O: SHEPSTONE & WYLIE

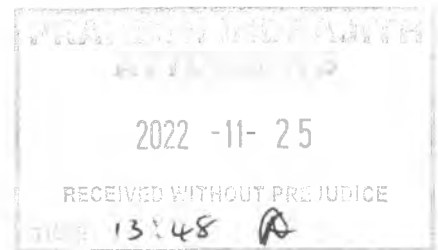
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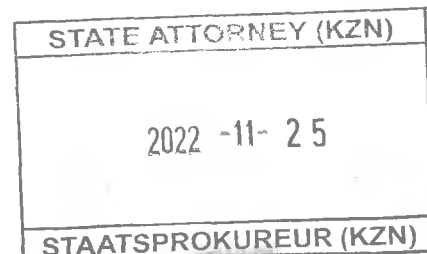
Ref: Josette Manuel

**TO: REGISTRAR OF THE
ABOVE HONOURABLE COURT**

AND TO: NTANGA NKUHLU INC.
Respondent's Attorneys
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AND TO: STATE ATTORNEY, DURBAN
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By email: ManoPillay@justice.gov.za



C/O Director of Public Prosecutions - KZN

286 Pietermaritz Street

Pietermaritzburg

Ref: Kelvin Singh

**IN THE HIGH COURT OF SOUTH AFRICA
KWA-ZULU NATAL DIVISION, PIETERMARITZBURG**

Case no. 13062/22P

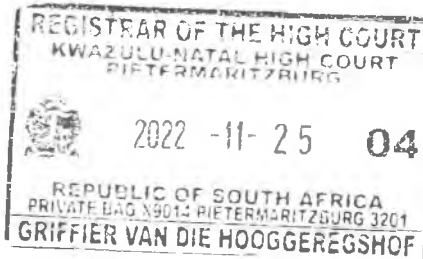
In the application of:

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Applicant

and

JACOB GEDLEYIHLEKISA ZUMA

Respondent

FOUNDING AFFIDAVIT FOR ADMISSION AS *AMICUS CURIAE*

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I, the undersigned,

NICOLE FRITZ

do hereby make the following statements under oath:

- 1 I am the Director of the Helen Suzman Foundation (*the HSF*), situated at 6 Sherborne Road, Parktown, Johannesburg, a non-governmental organisation whose objectives are to defend the values and institutions that underpin our constitutional democracy and to safeguard the rights of vulnerable persons who are unable to utilise the ordinary political process in order to do so.
- 2 I am duly authorised to represent HSF in this matter and to depose to this affidavit on its behalf.
- 3 The facts to which I depose are true and correct and are within my personal knowledge except where it is apparent from the context that they are not.
- 4 The submissions of law that I make in this affidavit are made on the advice of the HSF's lawyers.
- 5 This is an application seeking leave for the HSF to be admitted as *amicus curiae* in the application before this Court, under the above case number, instituted by Mr William John Downer. Mr Downer has made his application in order to prevent the respondent, Mr Jacob

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Gedleyihlekisa Zuma, from abusing this court's processes to pursue a baseless private prosecution against him.

BACKGROUND

- 6 Mr Downer is the applicant in the main application. He is an advocate, Senior Counsel, and Senior State Prosecutor stationed at the offices of the National Prosecuting Authority (NPA) in Cape Town.
- 7 The respondent is Mr Jacob Gedleyihlekisa Zuma, a former President of the Republic of South Africa, residing at KwaNxamalala Residence, Nkandla, KwaZulu-Natal.
- 8 Mr Downer is the lead prosecutor in the criminal proceedings against Mr Zuma. Those proceedings have been running for almost twenty years, and have involved numerous interlocutory applications and challenges. The latest instalment is the private prosecution brought by Mr Zuma against Mr Downer. In that matter, Mr Downer is the first accused and is charged, in a private prosecution, with contravening the National Prosecuting Authority Act 32 of 1998 (*the NPA Act*). Ms Karyn Maughan, a journalist, is the second accused.
- 9 In the main application, Mr Downer seeks to set aside the summons against him and to interdict Mr Zuma from pursuing further private prosecutions against him on the substantially the same charges as those pursued in the summons. It is in this application that the HSF seeks leave to intervene as *amicus curiae*.

- 10 In their book titled, *Lawfare*, authors Michelle le Roux and Dennis Davis note that "[a]buse of process and litigation undertaken not to resolve real disputes or to vindicate rights, but to avoid or delay politically unpalatable outcomes, should be discouraged."¹ Where the abuse of process and litigation are employed not only to secure improper outcomes but seeks to bring into disrepute our system of criminal justice, they must not only be discouraged. They must be stopped. This is such a case.
- 11 Mr Zuma's prosecution of Mr Downer is an explicit attempt to undermine the criminal justice system. Mr Zuma does not approach this court seeking adjudicative determination of the so-called criminality of Mr Downer's conduct. He comes to this court in bad faith and for an ulterior purpose: to pursue political ends and avoid accountability.
- 12 He seeks to achieve these improper and ulterior purposes by prosecuting his prosecutor. By prosecuting Mr Downer, Mr Zuma does no less than take aim at the National Prosecuting Authority itself - that institution which our Constitution singly endows with the power to institute criminal prosecutions on behalf of the state and whose powers Mr Zuma now seeks to appropriate.
- 13 In doing so, Mr Zuma leaves no doubt that his objective is not to hold Mr Downer accountable for any wrongdoing. He arrives with no actionable claim. He pursues three charges against his prosecutor and a journalist that the NPA, itself, has declined to prosecute. The very terms of his indictment gives Mr Zuma's game away. Indeed, one need only look to Mr Zuma's swollen witness list and prolix summary of facts to identify the sham he intends to stage.

¹ Le Roux, M and Davis, D "Lawfare: Judging Politics in South Africa" 2019, p 7.

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- 14 I submit that this court must turn Mr Zuma's abuse of its processes away at the door. Any other result would allow Mr Zuma to use the court's process for ulterior purposes and to further avoid accountability. It would also allow for the debasement of our criminal justice system.

REQUIREMENTS FOR ADMISSION AS AN AMICUS CURIAE

- 15 I am advised that an *amicus curiae* assists the Court by furnishing information or argument regarding questions of law or fact. It differs from an intervening party in the sense that it need not have a direct interest in the outcome of the litigation, and joins the proceedings as a friend of the Court because of its expertise on or interest in the matter before the Court.²

- 16 The Constitutional Court has explained the role of an amicus as follows:

*"The role of an amicus is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the Court. Ordinarily it is inappropriate for an amicus to try to introduce new contentions based on fresh evidence."*³

² *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at 27H–28B.

³ *In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC) at para 5.

17 In terms of Uniform Rule 16A, a party seeking admission as an *amicus curiae* must set out its interest in the proceedings. It must also show that the submissions it intends to make are relevant, will assist the court, and are different from those of the other parties.⁴

18 I shall address each of these requirements, in turn below.

HSF's INTEREST

19 The HSF is a non-governmental, public interest, organisation which has as its purpose the promotion of South African democracy and constitutionalism. Its objectives are "*to defend the values that underpin our liberal constitutional democracy and to promote respect for human rights*". These issues are directly implicated in this matter.

20 The HSF has a history of promoting South Africa's domestic and international law commitments to uphold democracy and the rule of law, constitutionalism and human rights, and to prevent abuse of or the undue interference with South Africa's law enforcement infrastructure. The HSF has specialised expertise and interest in national, regional and international law standards in relation to the issues before this Honourable Court.

21 The primary basis upon which the HSF seeks to intervene implicates the foundations of the rule of law and the Constitution. In particular, the HSF seeks to intervene to address specific aspects of the abuse of court processes and how our courts protect themselves and litigants against such abuses.

⁴ Uniform Rule 16A(6)(b).

- 22 As an organisation concerned with the principles of democracy and constitutionalism, as well as the rule of law, the HSF is concerned that Mr Zuma's prosecution is an abuse of the sort that this Court should not countenance. It seeks to raise issues beyond Mr Downer's application. The HSF's concerns go to (i) the use of private prosecution to achieve a purely political objective, unrelated to the charges levelled against Downer; (ii) avoiding the spectre of private prosecutions being used to undermine prosecutorial independence; and (iii) the role that this private prosecution plays in Mr Zuma's efforts to avoid accountability in a system governed by the rule of law.
- 23 The rule of law is one of the founding constitutional values. Section 34 of the Constitution accords to everyone the right of access to court, which is the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent impartial tribunal or forum. There is a duty upon those who invoke court processes to use them for their designed purpose, and not for ulterior purposes in bad faith. At least the same level of scrupulousness applies in the case of private prosecutions.
- 24 One of the most egregious abuses of court processes occurs when the court is used to serve political ends untethered to the resolution of a justiciable legal dispute. Disputes of this nature do not call upon the court to exercise its primary adjudicative function. These types of abuse risk drawing the court into what the United States courts have called "the political thicket". If courts allow their processes to be used for these purposes, it undermines their legitimacy in the public eye.
- 25 The HSF regards itself as under a duty to offer assistance to courts when cases come before them that raise rule of law issues. Mr Zuma's private prosecution of Mr Downer

threatens to undermine our constitutional order because, if it is permitted, it will result in the judiciary being used as a pawn in the pursuit of Mr Zuma's ulterior purposes. That is a rule of law issue because the courts' processes should be jealously guarded by all, and not least of all, by a former President of our country

- 26 An *amicus curiae* applicant is required to approach the parties to ask for their consent to being admitted. On 4 November 2022, the HSF's attorneys of record sent a letter to Mr Downer and Mr Zuma's representatives seeking their consent to intervene as *amicus curiae* in the application. I attach a copy of this letter as Annexure "FA1". In the letter, the HSF's attorneys indicated the HSF's interest in the matter and the submissions that it intends to make. The HSF's attorneys asked the parties' representatives to confirm whether their respective client's consent to its admission as *amicus curiae* by no later than 16h00 on 7 November 2022.
- 27 On 24 November 2022, Mr Downer consented to the HSF being admitted as an *amicus curiae*. I attach a copy of the correspondence indicating the consent as Annexure "FA2"
- 28 There has been no response to the request from Mr Zuma. In the absence of Mr Zuma's consent, it has been necessary for the HSF to prepare this application to be admitted as *amicus curiae*.
- 29 I understand that, pursuant to a directive issued on 26 October 2022, by the Acting Judge President of this Division, applications for admission as *amici curiae* have been set down for hearing on 8 December 2022. This application is therefore brought in good time for Mr Zuma to file an affidavit in accordance with Uniform Rule 16A(7) if he intends to oppose the application and to have the matter argued on 8 December 2022.

HSF's SUBMISSIONS

- 30 The submissions that the HSF intends to make are relevant and will assist the Court. They are also different to the submissions made by the parties.
- 31 Mr Downer dedicates considerable time in his affidavit towards demonstrating that the prosecution is part of Mr Zuma's Stalingrad defence. He narrates the history of the matter and the numerous collateral challenges in which Mr Zuma has engaged. Mr Downer approaches the abuse issue from the perspective that the private prosecution is but another piece of collateral litigation in Mr Zuma's Stalingrad strategy. Mr Downer's application also reveals that reasonable and probable grounds for prosecuting him are absent. The HSF does not propose to address these points. Instead, its submissions will focus on the use of a private prosecution to achieve ulterior purposes.
- 32 In the next section, I shall set out the essence of the HSF's proposed submissions.

The extraordinary power of a private prosecution

- 33 The HSF will submit that the power to conduct a private prosecution is extraordinary, uniquely susceptible to abuse against which the High Court's power to prevent abuse is the only meaningful bulwark.

34 In *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Others* 2017 (1) SACR 284 (CC), the Constitutional Court held that the power of prosecution takes three forms, namely: State, statutory, and on certificate *nolle prosequi*.⁵

35 The State power has its source in section 179 of the Constitution, which provides that the power to institute criminal proceedings on behalf of the State resides solely with the NPA. The NPA is required to exercise this function without fear, favour, or prejudice. The NPA conducts the prosecution on behalf of the State, and the power is exercised on behalf of the Republic. This power, along with the manner in which it is exercised, are regulated by the NPA Act, which contains protections to prevent abuse of the prosecutorial powers by the State.

36 At common law, a private individual has no right or power to prosecute an offence. A private person's power to prosecute is purely statutory, and is regulated by section 7 of the Criminal Procedure Act, 51 of 1977 (CPA), which permits a private prosecution in circumstances where the NPA has declined to prosecute that offence by issuing a certificate *nolle prosequi*. Three aspects are noteworthy.

36.1 First, the power to prosecute is extraordinary but the entry requirement is low. What is required is for the NPA to decline to prosecute an offence and issue a certificate *nolle prosequi*. This permits a "private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the said offence," to institute and conduct a

⁵ Para 31.

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prosecution in respect of that offence. Other jurisdictions that allow private prosecutions, such as the United Kingdom, Scotland, and New Zealand, require a preliminary judicial screening mechanism before the private prosecution is initiated. The screening mechanism is aimed at preventing abuses of the extraordinary power.

36.2 Second, in the absence of a judicial screening, the scope for abuse is high. This is so because the private prosecutor wields the ultimate threat of conviction and incarceration. The accused has no choice but to expend time and money in their defence. The consequences of not doing so are the severest that the law recognises. Because a private prosecutor is not accountable to the prosecuting authority, there are fewer inherent structural constraints on the conduct of a private prosecution. In the absence of these institutional constraints, there is very little that stands to prevent the abuse of the prosecutorial power to achieve goals that are extraneous to the actual prosecution and the attainment of justice.

36.3 Third, the CPA's internal mechanisms to prevent an abuse of private prosecutorial power are limited. They include the following:

- 36.3.1 an initial assessment of the private prosecutor's standing;
- 36.3.2 a requirement that security for costs be given;
- 36.3.3 the fact that the private prosecutor pays his own costs;
- 36.3.4 a prospect of costs being awarded against the private prosecutor at the end of an unsuccessful prosecution.

37 The difficulty with these mechanisms is that they do not, *per se*, prevent the abuse. While they may be effective in rendering abuse less likely, if a well-resourced private prosecutor is intent on using the criminal process for an ulterior purpose and in bad faith, none of these constraining factors will deter him.

38 In short, the only real protection against abuse of the private prosecutorial power in South Africa is the court's inherent, constitutionally-sourced power to prevent abuses of process. This Court is empowered to stay private prosecutions where they are an abuse of process. Two examples of where that may occur are:

38.1 a prosecution undertaken to achieve an ulterior purpose, extraneous to that proffered in the summon; and

38.2 a prosecution that is designed to enable the private prosecutor to avoid his own accountability.

The ulterior political motive

39 Mr Zuma served four documents on the accused: the summons, the indictment, the statement of substantial facts, and the list of witnesses he intends to call.

40 A simple analysis of these four documents reveals that this private prosecution is brought for an ulterior purpose and *mala fide*. I shall demonstrate this by reference to each document. In doing so, the HSF does not intend to pre-empt the evidence in the eventual

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trial should it proceed, nor does the HSF intend to engage in the merits of Mr Downer's defence.

41 The point of this exercise is simply to show that the prosecution is abusive *in its own terms*. So, the HSF proposes to take an approach similar to that used in an exception proceedings, which adopts the most generous construction of the documents. The HSF will demonstrate that, assuming the allegations in the statement of substantial facts are true, they bear no relevance to the charges in the indictment. On the contrary, the statement of substantial facts exposes Mr Zuma's ulterior purpose — a trial on the alleged political motives in prosecuting him.

42 The witness list confirms this ulterior purpose because it indicates that Mr Zuma intends to call witnesses at the trial who have no link at all to the charges that Mr Downer faces. On Mr Zuma's own documents, therefore, it is possible to show that he pursues this prosecution for an ulterior purpose and in bad faith.

43 The starting point is to consider the charges levelled against Mr Downer. Mr Zuma accuses Mr Downer contravening sections 41(6)(a) of the National Prosecuting Authority Act, 32 of 1998. The allegations hinge upon a breach of section 41(6) and (7) of the NPA Act. These provisions read as follows:

"(6) Notwithstanding any other law, no person shall without the permission of the National Director or a person authorised in writing by the National Director disclose to any other person—

(a) any information which came to his or her knowledge in the performance of his or her functions in terms of this Act or any other law;

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(b) the contents of any book or document or any other item in the possession of the prosecuting authority; or

(c) the record of any evidence given at an investigation as contemplated in section 28 (1), except—

(i) for the purpose of performing his or her functions in terms of this Act or any other law; or

(ii) when required to do so by order of a court of law.

(7) Any person who contravenes subsection (6) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 15 years or to both such fine and such imprisonment."

44 To succeed in the prosecution, Mr Zuma would have to allege and prove (beyond reasonable doubt):

44.1 Mr Downer disclosed the information to Mr Sole and/or Ms Maughan;

44.2 The information disclosed came to Mr Downer's attention in the exercise of his powers and functions as a prosecutor;

44.3 Mr Downer was not a person authorised by the NDPP in writing to disclose information, or the NDPP did not sanction the disclosure of such information;

44.4 Mr Downer acted with *mens rea*.

45 Only relevant evidence is admissible in this regard. Evidence is relevant when it tends to prove or disprove an issue in dispute. The only evidence that is relevant is that which

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tends to prove or disprove one or more of the elements of the charge. Evidence which does not tend to prove or disprove the elements of the charge is irrelevant.

46 The charges are narrow. Count 1 and 2 relate to the events of 9 August 2021 and General Mduywa's letter. Count 3 relates to the conversations with Mr Sole which allegedly occurred between 4 June 2008 and 13 June 2008. Although the charges relate to two different exchanges of information, the underlying claim is the same: Ms Downer acted in breach of section 41(6) of the NPA Act when he shared information with Mr Sole in 2008 and with Ms Maughan in 2021.

47 As I shall show in the next section, the statement of substantial facts, which accompanies the indictments, traverses facts with no relevance to the charges that Mr Downer or Ms Maughan face.

Statement of substantial facts

48 Count 3 alleges that Mr Downer disclosed information pertaining to the pending prosecution of Mr Zuma to Mr Sam Sole, a journalist for the *Mail & Guardian*. This is alleged to have occurred between 4 and 13 June 2008. The information came to Mr Downer's knowledge in the performance of his functions as a prosecutor and accordingly the allegation is that Mr Downer was not permitted to disclose that information without the NDPP's permission and thus contravened section 41(6)(a) of the NPA Act, and is liable for criminal sanction in terms of section 41(7) of the NPA Act.

49 The only allegation relevant to this count in the statement of substantial facts appears in paragraphs 24 and 25. These paragraphs read as follows:

"24. Between 4 and 13 June 2008, [Mr Downer] engaged in numerous telephonic discussions with [Mr Sole], a journalist for and [on] behalf of the Mail & Guardian, during which [Mr Downer] disclosed information in relation to the self-same prosecution of [Mr Zuma] which had come to his attention during the course and scope of the performance of his duties and functions as a member of the NPA, without the authority of the National Director

25. In this regard, [Mr Downer] specifically divulged to Mr Sole sensitive and/or confidential information, acquired in his capacity as prosecutor, without a written authorisation of the National Director."

50 In so far as the sharing of information with Ms Maughan is concerned, the charge alleges that Mr Downer, through Breitenbach SC disclosed a medical report to Ms Maughan which was prepared by Brigadier General Mdutywa about Mr Zuma's medical condition. The facts relevant to this charge are set out in ten paragraphs of the statement of substantial facts. They are paragraphs 38 to 48.

51 However, the majority of the paragraphs of the statement do not deal with facts relevant to the charges. Instead, they traverse the background leading up to Mr Zuma's first indictment on charges of corruption and to the decision not to prosecute him.

52 However, the questions whether or not Mr Zuma was correctly indicted; whether his prosecution was pursued for a political purpose; whether the decision not to prosecute him at a point was correctly made, are all entirely irrelevant to whether Mr Downer shared information with Mr Sole or Ms Maughan in breach of section 41(6) of the NPA Act.

53 The vast majority of the statement of substantial facts is devoted to running the well-trodden claim that there was a political conspiracy to prosecute Mr Zuma. But neither the

charges against Mr Downer nor those against Ms Maughan relate to any such alleged conspiracy. Neither of them is alleged even to have taken part in a conspiracy. And yet, paragraphs and paragraphs of the statement of substantial facts are devoted to this thesis.

54 The only plausible reason for Mr Zuma's focus on allegations of political interference in the decision on whether to prosecute him, is to run a trial on the alleged political motivation behind his prosecution. Mr Zuma seeks to lay a foundation to lead evidence about political interference in the criminal trial, and to cross-examine witnesses about matters concerning political influence in his trial.

55 However, because the political motivation behind his own prosecution is entirely irrelevant to the charges he pursues against Mr Downer, it is clear that Mr Zuma brings this prosecution not with the genuine intention of securing a conviction but with the intention to use the courtroom to advance his political interests. Mr Zuma's list of witnesses supports this contention.

The witness list

56 Mr Zuma concludes the statement of substantial facts by recording that he "intends to call the witnesses indicated in the attached witness list in support of his case".

57 But there are people identified on the witness list who are not even referred to in the statement of substantial facts and others who, although referred to, are not linked in any way to the charges that Mr Downer or Ms Maughan face.

The Political Figures

58 There are three witnesses on Mr Zuma's list who are not linked in any way to the charges against Mr Downer or Ms Maughan. The first, and most obvious is President Ramaphosa, who is listed as the second witness.

59 There is one passing reference to President Ramaphosa in the statement of substantial facts. It is in paragraph 46:

"46. As a result, the Private Prosecutor subsequently instructed his legal representatives in October 2021 to seek the NPA to remove [Mr Downer] as the prosecutor in his matter and subsequently laid a complaint with the President of the Republic in relation to the conduct of [Mr Downer] and the NPA, inter alia, in relation to the manner in which [Mr Downer] caused confidential information in relation to the Private Prosecutor as disclosed to [Ms Maughan], in violation of the Private Prosecutor's fair trial rights and in failing to maintain the requisite confidentiality." (emphasis added)

60 The only reference to President Ramaphosa in the entire statement is a sentence that records that Mr Zuma laid a complaint with President Ramaphosa about Mr Downer's conduct. But that complaint has nothing whatever to do with the charges that Mr Downer faces. It is entirely irrelevant to the question whether Mr Downer breached section 41(6) of the NPA Act by sharing Brigadier General Mdutywa's medical report with Ms Maughan, that Mr Zuma lodged a complaint with the President. And yet, *President Ramaphosa is Mr Zuma's second witness.*

61 Mr Zuma also intends calling the Minister of Justice, Mr Ronald Lamola. But Minister Lamola is not mentioned anywhere in the statement of substantial facts. The statement of

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substantial facts provides no indication that Minister Lamola can contribute anything relevant to the charges that Mr Downer and Ms Maughan face. And yet, Mr Zuma intends to call him as a witness.

- 62 Thirdly, Mr Zuma intends calling the Director-General of the State Security Agency, Thembisile Majola. Again, Director-General Majola is not mentioned anywhere in the statement of substantial facts. The statement provides no indication that Director-General Majola could provide any relevant evidence in the trial. And yet, Mr Zuma intends to call her as a witness.

Old Witnesses on political interference

- 63 The second category of witnesses to extend beyond the relevant confines of the charges against Mr Downer and Ms Maughan is that including individuals who were previously involved in Mr Zuma's criminal matter from an investigative, prosecutorial, or watchdog perspective. The statement of substantial facts indicates that these witnesses will likely be called to support the notion that there was a political conspiracy against Mr Zuma and that his prosecution is an instance of this. The following individuals fall in this category.

63.1 Mr William Andrew Hofmeyr, who is the former National Director of Public Prosecutions. The statement of substantial facts does not indicate that Mr Hofmeyr played any role in Mr Downer's sharing of information with either Mr Sole or Ms Maughan. Indeed, it does not refer to Mr Hofmeyr.

63.2 Mr Mokotedi Mpshe, who was the former Acting National Director of Public Prosecutions. According to the statement of substantial facts, Mr Mpshe decided to discontinue to the prosecution against Mr Zuma pursuant to representations made by Mr Zuma in this regard. In doing so, Mr Mpshe accepted the allegations that the

prosecution was tainted by political interference. But Mr Mpshe's decision not to prosecute Mr Zuma has nothing to do with whether Mr Downer unlawfully shared information with Mr Sole in 2008 and Ms Maughan in 2021.

63.3 Mr Lawrence Mushwana, who was the former Public Protector. Mr Mushwana is mentioned in the statement of substantial facts because he described Mr Ngcuka's comment regarding the *prima facie* evidence against Mr Zuma as "*unusual and contentious*," in that it opened the floodgates for public speculation against Mr Zuma. However, Mr Mushwana's comment is in no way connected to the question whether Mr Downer unlawfully shared information with Mr Sole in 2008 and Ms Maughan in 2021

64 In short, these three witnesses will be called in support of a theory that Mr Zuma is the victim of political persecution — an issue entirely irrelevant to the issues in the private prosecution.

65 If this private prosecution is not stopped in its tracks, it will become a trial about political interference, pursued for politically extraneous purposes and without any relevance to the complaint which Mr Zuma brought. Mr Zuma's own documents, with which he initiated this private prosecution, make it clear that he wishes to use the courtroom as a public forum from which to pursue political ends.

66 The statement of substantial facts and witness list reveal that Mr Zuma has no genuine interest in the question whether Mr Downer or Ms Maughan are guilty of the crimes he has levelled against them. His interest in this prosecution lies elsewhere, in the political battlefield. And Mr Zuma wishes to call witnesses and use the processes of the court to

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summons them to appear (which is a power of compulsion) so that he can question them about matters entirely irrelevant to whether Mr Downer acted in breach of section 41(6) of the NPA Act.

Prosecutorial independence

67 The HSF intends to argue that when the High Court considers whether to set aside the summons against Mr Downer, it should consider the peculiar features of this case. This is a private prosecution, brought by a criminal accused, against his prosecutor.

68 Mr Zuma's private prosecution of Mr Downer arises in circumstances where: Mr Downer is the lead prosecutor against Mr Zuma in the criminal trial, and has been since inception in that trial, 20 years ago. Mr Zuma has repeatedly, and unsuccessfully, tried to have Mr Downer disqualified from that role. Mr Zuma's latest attempt came in the form of a special plea in terms of section 106(1)(h) of the CPA. Mr Zuma pertinently raised the matters which underpin counts 1 and 2 as a basis for having Mr Downer removed as prosecutor. The Court dismissed the special plea.

69 In this private prosecution, Mr Zuma seeks to prosecute exactly the same allegations against the same person, involving the same complaint. Again, it appears manifest that Mr Zuma does so for an ulterior purpose and as an abuse of process. He brings the private prosecution in order to place pressure on his prosecutor.

- 70 Such conduct is an assault on prosecutorial independence. The NPA and its prosecutors should be able to prosecute without fear, favour or prejudice. They discharge duties that they owe not only the State but to the public at large when they prosecute those charged with crimes. It is antithetical to the proper conduct of the criminal process to have a criminal accused prosecute his prosecutor while his own criminal trial is underway.
- 71 The HSF will argue that the purpose behind this private prosecution is not to obtain justice but to hinder Mr Downer in his effective prosecution of Mr Zuma. It requires a reallocation of Mr Downer's time and resources. It puts a financial burden on the prosecuting authority. And it compromises Mr Downer's ability to discharge his functions as prosecutor without fear, favour or prejudice.
- 72 The HSF will submit that Mr Zuma's actions undermine prosecutorial independence. The International Instruments, to which Mr Zuma refers in his statement of substantial facts, speak directly to the protection of prosecutors in the proper exercise of their function.
- 73 The first are the United Nations Guidelines on the Role of Prosecutors ("**UN Guidelines**"). In his statement of substantial facts, Mr Zuma refers to this instrument in the context of the prosecutor's duties.⁶ Mr Downer relies upon the provisions in the UN Guidelines that authorise prosecutors to disclose matters that are necessary in the performance of their duties or when the needs of justice require such disclosure.⁷ The HSF intends to highlight the provisions of the UN Guidelines that protect prosecutors. In particular, Article 4 of the UN Guidelines provides:

⁶ Statement of Facts, paragraph 6

⁷ Downer FA, pp51-52, para 51

"States shall ensure that prosecutors are able to perform their professional functions without intimidation, hinderance, harassment, improper interference or unjust exposure to civil, penal or other liability."

- 74 This statement is echoed in the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors ("IAP Standards") adopted by the International Association of Prosecutors. Article 6 of the IAP Standards states:

"In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled:

6.1 to perform their professional functions without intimidation, hinderance, harassment, improper interference or unjustified exposure to civil, penal or other liability."

- 75 While prosecutors do not enjoy unqualified immunity, they must be spared unjustified exposure to civil or penal liability. If they were not, their ability to carry out their essential, but difficult, functions would be undermined. To be clear, the HSF does not say that there are no circumstances under which a prosecutor should be held liable for criminal or civil breaches in the course and scope of their duties.

- 76 The HSF's submission is simply that: (i) the court should be alive to the prospect of abuse, (ii) greater scrutiny is required when the proceedings are brought against the prosecutor in an ongoing prosecution, (iii) the court should not hesitate to quash criminal charges when they are abusive. That is the only way to secure and protect prosecutorial independence.

Impact on the rule of law

77 Finally, the HSF intends to submit the abuses set out above implicate the rule of law. This is so because the private prosecution is pursued for ulterior purposes, is in bad faith and undermines prosecutorial independence.

78 The rule of law requires that court processes be used for their designed function and that prosecutors are left to do their work without fear, favour or prejudice. If either of these requirements is undermined, then the rule of law and efficacy of our criminal justice system are compromised.

CONCLUSION

79 The HSF therefore seeks to be admitted as *amicus curiae* in Mr Downer's application to bring these rule of law arguments to the attention of the Court. I respectfully submit that they will be of assistance to the court when it decides whether to set aside the charges against Mr Downer. They bear directly on that question because they show that this private prosecution is an abuse of process. The submissions are also different from those of Mr Downer because they focus on the patently ulterior purposes and bad faith that can be discerned from Mr Zuma's own initiating documents and they highlight that the rule of law is compromised when prosecutorial independence is threatened.


DEPONENT

I hereby certify that the deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at Cape Town on this the 24th day of November 2022 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.


COMMISSIONER OF OATHS

FULL NAMES:

ILKE ANDREA BOSMAN

ADDRESS:

COMMISSIONER OF OATHS
PRACTICING ATTORNEY, R.S.A

EX OFFICIO:

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"FA1"

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Your reference

Our reference

Date

V Movshovich / P Dela / D Cron / D
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3057923

4 November 2022

Letter To Intervene As Amicus 04112022 (Final)

Senior Partner: JC Els **Managing Partner:** SJ Hutton **Partners:** BW Abraham RB Africa C Alexander AK Allie NG Alp RL Appelbaum TB Ball DC Bayman KL Beilings AE Bennett AP Blair K Blom AR Bowley MS Burger M Bux V Campos RI Carrim T Cassim SJ Chong ME Claassens C Collett KL Collier KM Colman KE Coster K Couzyn DB Cron PA Crosland R Cruywagen JH Davies KM Davis PM Daya ST Dias L de Bruyn PU Dela M Denenga DW de Villiers BEC Dickinson MA Diemont DA Dingley G Driver W Drue GP Duncan HJ du Preez CP du Toit SK Edmundson LF Egypt KH Eiser AE Esterhuizen K Fazel G Fitzmaurice JB Forman L Franca KL Gawith OH Geldenhuys MM Gibson C Gopal CI Gouws PD Grealy L Green S Haroun JM Harvey JS Henning KR Hillis Z Hlophe CM Hofeld PM Holloway J Howard KT Inglis ME Jarvis JC Jones CM Jonker S Jooste LA Kahn SJ Kalbskopf ACR Katzke M Kennedy KE Kilner A Keyser MD Kota JC Kraamwinkel J Lamb E Louw M Mahlangu M Mkhabela S Manley V Mannar L Marais MR Maredi G Masina T Masingi N Mbere MC McIntosh SJ McKenzie CS Meyer A Mhlongo AJ Mills D Milo NP Mngomezulu P Mohanjali M Moloi N Moodley L Moolman LE Mostert VM Movshovich C Murphy P Naidoo DC Nchabeleng A Ngubo C Ntshing ZN Ntshona M Nxumalo AN Nyatsumba MB Nzimande A October L Odendaal GJP Olivier N Paige AS Parry S Patel N Pather GR Penfold SE Phajane M Philippides BA Phillips MA Phillips CH Pienaar DJ Rafferty D Ramjetan GI Rapson K Rew G Richards-Smith SA Ritchie J Roberts Y Robbertse S Rule G Sader H Samsodien JW Scholtz KE Shepherd AJ Simpson N Singh N Singh-Nogueira P Singh S Sithole J Smit RS Smith MP Spalding PS Stein MW Straeuli LJ Swaine Z Swanepoel WV Tembedza A Thakor T Theessen TK Thekiso C Theodosiou T Theunissen R Tihavani G Truter PZ Vanda SE van der Meulen JP van der Poel CS Vanmali JE Veeran HM Venter B Versfeld MG Versfeld TA Versfeld DH Visagie EME Warrington J Watson AWR Westwood RH Wilson KD Wolmarans

Chief Operating Officer: SA Boyd

AP
NLF

Dear Sirs / Mesdames

Consent for leave to intervene as *amicus curiae* in the matter of William John Downer // Jacob Gedleyihlekisa Zuma (KZP case no 13062-22P)

1. Introduction

1.1 We act for the Helen Suzman Foundation ("the HSF" or "our client") and refer to the above matter.

1.2 Our client is aware that Mr William John Downer has brought an application in the High Court of South Africa, KwaZulu-Natal Division (Pietermaritzburg), in which he seeks the following relief:

1.2.1 setting aside the summons, by which the respondent (former President Zuma) instituted a private prosecution against Mr Downer in the KwaZulu-Natal High Court;

1.2.2 interdicting former President Zuma from pursuing any private prosecution of Mr Downer on substantially the same charges as those advanced in the summons;

1.2.3 requiring former President Zuma to pay Mr Downer's costs on a punitive scale.

("the application")

1.3 Having considered the application, our client submits that it has a substantial interest therein and is in a position to assist the Court with relevant and novel submissions. Our client's intended submissions are wholly distinct from the other parties'; they are new and may materially affect the outcome of this case; and the submissions will be of assistance to the Court hearing the application.

1.4 In the circumstances, our client seeks the parties' consent to intervene as *amicus curiae* in the application.

2. The HSF's interest and submissions

2.1 Our client is a non-governmental, public interest, organisation whose objectives are to "defend the values that underpin our liberal constitutional democracy and to promote respect for human rights". Our client is an organisation primarily concerned with the principles of democracy and constitutionalism, as well as the rule of law, all of which is implicated in this matter.

2.2 If our client is permitted to intervene as an *amicus*, it would make the following submissions:

2.2.1 Where a private party is afforded the rare and unusual power to institute a private prosecution, the power attracts concomitant responsibilities, including the obligations that the private prosecutorial power is not:

2.2.1.1 abused; and / or

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- 2.2.1.2 advanced for ulterior purpose.
- 2.2.2 Our client intends to submit that former President Zuma's private prosecution against Mr Downer is being advanced for an ulterior purpose. Our client will place reliance on, *inter alia*, the fact that former President Zuma intends to rely on evidence and call witnesses that have no relevance to, or bearing on, the allegations made against Mr Downer. This suggests that the private prosecution is being used for ulterior political purposes, unrelated to the prosecution itself.
- 2.2.3 Moreover, our client will submit that former President Zuma has brought the private prosecution in order to thwart the progress of his own prosecution in which Mr Downer is the lead prosecutor, and undermine prosecutorial independence. This is also ulterior to the proper administration of justice and the purpose for which the mechanism of private prosecutions exist in our law.
- 2.2.4 By embarking on litigation for these ulterior purposes, former President Zuma is abusing the processes of the courts because he employs them for his own illegitimate ends – to score political points and to undermine the prosecutorial process against him. Our courts have emphasised that prosecutions should be allowed to proceed to completion and not be hamstrung by a series of interlocutory stratagems: the key and only material question is whether the accused has a case to answer. Mr Zuma clearly does.
- 2.2.5 Our client intends to submit that the Court should invoke its inherent power to regulate its own process in order to prevent this type of abuse. This power is constitutionally protected in section 173 of the Constitution, which reads as follows: "*the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice*" (emphasis added).
- 2.2.6 HSF will argue that there is a duty on the courts to protect their own processes from abuse, including abusive private prosecutions. The abuse of court process is a constitutional matter, not only on account of section 173, but also because it engages section 165(3) of the Constitution which requires that no person interfere with the functioning of the Courts. As a result, the courts have a broad remedial discretion to craft a remedy when their processes are being abused in order to vindicate the Constitution.
- 2.2.7 In making submissions about the breadth of the court's remedial power, HSF will draw specific attention to the cases of *S v Mamabolo (E TV Intervening)* 2001 (5) SA 409 (CC) and *Mkhatshwa and Others v Mkhatshwa and Others* 2021 (5) SA 447 (CC).
- 2.2.8 Our client also intends to make submissions about the punitive costs order that Mr Downer seeks. However, its submissions will go further than those advanced by Mr Downer. HSF intends to draw the Court's attention to foreign jurisprudence that recognises an expanded scope for monetary awards which are designed to deter abusive litigation. Amongst the options available to the Court would be an order fully to compensate a litigant for all expenses incurred in defending litigation, and not merely on a tariffed and scaled basis that

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precludes full recovery. Although there would need to be some mechanism to assess the reasonableness of the costs incurred, the purpose behind such costs awards would be fully to restore the reasonable costs of litigation to the party against whom abusive proceedings have been brought. The court also has the power to order punitive damages.

2.2.9 HSF also intends to submit that the Court may use its inherent powers to regulate its own processes to order costs awards against legal representatives who act in circumstances which are knowingly abusive.

3. Conclusion

3.1 As is clear from what has been set out above, our client's interest in this matter derives directly from the emphasis that its mandate places on the rule of law. The submissions it intends to make will be of material benefit to the Court and differ from those of the parties.

3.2 Please confirm, in writing and by no later than 16:00 on 7 November 2022, whether your client consents to our client being admitted as an *amicus curiae* in this matter. Should you require any further information, please let us know.

3.3 Should the parties consent to our client's intervention as *amicus curiae*, our client undertakes to lodge such consent with the above Honourable Court, and to deliver its heads of argument simultaneously with the applicants.

3.4 If the parties do not consent to our client's admission as an *amicus curiae*, our client intends make an application to the Court in order to be admitted as such.

Yours faithfully

WEBBER WENTZEL

V Movshovich

Direct tel: +27 11 530 5867

Direct fax: +27 11 530 6867

Email: vlad.movshovich@webberwentzel.com

Letter sent electronically.

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"FA2"

DJ van Wyk

From: Pillay Manogaran <ManoPillay@justice.gov.za>
Sent: 24 November 2022 09:01
To: DJ van Wyk
Cc: Vlad Movshovich; Pooja Dela; Dylan Cron; Daniel Rafferty
Subject: RE: Downer // Zuma (KZP case no 13062-22P): Helen Suzman Foundation letter to intervene as amicus curiae [WW-WS_JHB.FID2555393]

Good morning,

We act for Mr WJ Downer.

We have no objections to the HSF being admitted as an amicus.

We trust that this is in order.

Regards,

Mr M P Pillay
Senior Assistant State Attorney
On behalf of the DOJ&CD
031 365 2559

From: DJ van Wyk [mailto:DJ.vanwyk@webberwentzel.com]
Sent: Thursday, 24 November 2022 08:56
To: Pillay Manogaran <ManoPillay@justice.gov.za>
Cc: Vlad Movshovich <vlad.movshovich@webberwentzel.com>; Pooja Dela <pooja.dela@webberwentzel.com>; Dylan Cron <dylan.cron@webberwentzel.com>; Daniel Rafferty <Daniel.Rafferty@webberwentzel.com>
Subject: FW: Downer // Zuma (KZP case no 13062-22P): Helen Suzman Foundation letter to intervene as amicus curiae [WW-WS_JHB.FID2555393]

Dear Sir

I refer to our recent telephone call and confirm that we represent the HSF (Helen Suzman Foundation).

We record that you have granted us consent to intervene as amicus curiae in the matter. As discussed, please could you provide us with written consent in that regard.

Kind regards

DJ van Wyk | Candidate Attorney | Webber Wentzel
T: +27115305688 | M: +27732094051 | dj.vanwyk@webberwentzel.com | www.webberwentzel.com

From: DJ van Wyk
Sent: 22 November 2022 11:46
To: ManoPillay@justice.gov.za
Cc: Vlad Movshovich <vlad.movshovich@webberwentzel.com>; Pooja Dela <pooja.dela@webberwentzel.com>; Dylan Cron <dylan.cron@webberwentzel.com>; Daniel Rafferty <Daniel.Rafferty@webberwentzel.com>
Subject: RE: Downer // Zuma (KZP case no 13062-22P): Helen Suzman Foundation letter to intervene as amicus curiae

MS
NLF

Dear Sirs / Mesdames

We are following up regarding the correspondence sent below. We re-attach it for ease of reference.

Kind regards

DJ van Wyk | Candidate Attorney | Webber Wentzel

T: +27115305688 | M: +27732094051 | dj.vanwyk@webberwentzel.com | www.webberwentzel.com

From: DJ van Wyk

Sent: 04 November 2022 13:53

To: ManoPillay@justice.gov.za; mongezi@ntanga.co.za; mail@pi-attorneys.co.za

Cc: Vlad Movshovich <vlad.movshovich@webberwentzel.com>; Pooja Dela <pooja.dela@webberwentzel.com>;

Dylan Cron <dylan.cron@webberwentzel.com>; Daniel Rafferty <Daniel.Rafferty@webberwentzel.com>

Subject: Downer // Zuma (KZP case no 13062-22P): Helen Suzman Foundation letter to intervene as amicus curiae

Importance: High

Dear Sirs / Mesdames

Please find attached correspondence for your urgent attention.

Kind regards

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