

THE HEFER COMMISSION OF INQUIRY

REPORT

BACKGROUND

[1] Mr Bulelani Thandabantu Ngcuka graduated with a B. Proc degree from the University of Fort Hare during 1977. After serving articles of clerkship in Durban he was admitted as an attorney during 1980 and opened his own practice the next year. Throughout this period he was active in the underground activities of the African National Congress (the ANC) mainly in and around Durban. On 30 November 1981, shortly after the arrest of a comrade, Mr Patric Maqubela, he was detained in terms of section 31 of the Terrorism Act, 1997. At the subsequent trial of Mr Maqubela on a charge of high treason Mr Ngcuka refused to testify for the State. He was convicted under section 189 of the Criminal Procedure Act, 1977, sentenced to imprisonment for three years, and served his sentence mainly in the Helderstroom prison near Caledon in the Western Cape where he continued his studies and eventually obtained the LL. B degree. After his release during 1985 he left the country for Switzerland travelling on a South African passport which had been issued to him during 1981. He obtained employment from the International Labour Organisation and lived in Geneva

but travelled extensively in Europe in the furtherance of his continued ANC activities until his return to South Africa during 1987. Having joined a law firm in Cape Town he became active in United Democratic Front (UDF) projects. This led to his detention in terms of the Emergency Regulations. Upon his release he joined various UDF structures in the Western Cape and also became involved in the defiance campaign until he was detained yet again. He was released after about a month but immediately confined to Gugulethu. Thereafter he served as chairperson of the UDF in the Western Cape and in several ANC posts. After the unbanning of the latter his major focus shifted to the constitutional committee of the organisation as well as to his duties as deputy director of the Law Centre of the University of the Western Cape and member of the ANC delegation to CODESA and the Multiparty Negotiations in Kempton Park. Later, after serving in various capacities in the post- 1994 Senate, he became deputy chair of the National Council of Provinces. Since 1 August 1998 he has been the National Director of the National Prosecuting Authority. In that capacity he has overall control over the institution and conduct of criminal proceedings on behalf of the State, and of the Investigating Directorate established under section 7 of the National Prosecuting Authority Act 32 of 1998.

[2](a) Considering the role of the ANC in the struggle for democracy, it must have come as a rude shock to those who were acquainted with Mr Ngcuka's impressive career in the organisation to learn from a Sunday newspaper that he was once suspected of spying for the apartheid government. The story which appeared on 7 September 2003 in *City Press* under the heading '**Was Ngcuka a spy?**' ran

- that the ANC had investigated Mr Ngcuka during the 1980's to establish whether he was an 'apartheid spy';
- that documents leaked to *City Press* 'by a senior investigative journalist, which are said to have been sourced from the National Intelligence Agency (NIA) database, identify the head of the DPP as possibly, but not conclusively, an apartheid police spy nicknamed "Agent RS452"; and
- that, according to Mr Moe Shaik, a special advisor to the Minister of External Affairs, an intelligence unit of the ANC had come to the conclusion by late 1989 'that there was a basis for suspecting Bulelani Ngcuka as being RS452'.

(b) On 8 September 2003 Mr Mac Maharaj, a senior member of the ANC and former Minister of Transport, confirmed the contents of paragraph

(a) (iii) in a radio interview and added that he still supported the conclusion arrived at in 1989.

APPOINTMENT OF THE COMMISSION AND ITS TERMS OF REFERENCE

[3] (a) On 19 September 2003 the President appointed me as the chairperson and sole member of a commission of inquiry to

‘inquire into, make findings, report on and make recommendations concerning the following:

Whether at any stage prior to 1994 the National Director of Public Prosecutions, Mr BT Ngcuka, was -

(a) registered with the security branch or any other security service of any pre-1994 government as an agent under the code name RS452 or under any other code name;

(b) acting as an agent for the Security Police and/or National Intelligence Service of any pre-1994 government.’

(b) On 7 October 2003, the terms of reference were extended

‘to also inquire into, make findings, report on and make recommendations concerning the following:

Whether the National Director of Public Prosecutions, Mr BT Ngcuka, or the Minister referred to in section 33 of the National Prosecuting Authority Act, 1998 (Act No

32 of 1998) has improperly and in violation of the law, directly or indirectly, taken advantage of or misused the prosecuting authority and, in particular, abused, advanced, promoted, prejudiced or undermined the rights and/or interests of any person or organisation, due to past obligations to the apartheid regime.’

(c) It will be seen that concluding words of the extension limited the inquiry into the possible misuse of the prosecuting authority to cases where it could be ascribed to ‘past obligations to the apartheid regime’. That I had to examine Mr Ngcuka’s pre-1994 activities in order to determine whether he in fact had such obligations, was clear; but whether this also applied to the Minister, was not. The wording of the extension was capable of a construction which would include an inquiry into the latter’s past, but the intention could also have been that I should merely investigate his accountability as the political head of the department to which Mr Ngcuka belongs. I decided to proceed on the basis of the first construction and, for this reason, the question whether Minister Maduna could have been an apartheid spy was raised with some of the first witnesses.

(d) On 11 November 2003, however, the terms of reference were replaced with the following:

‘The Commission shall inquire into, make findings and report on the allegations by Messrs MAHARAJ and SHAIK that the National Director of Public Prosecutions was an agent of the security services of the pre-1994 government under Code name RS452 or any other code name and, as a result thereof, improperly and in violation of the law, taken advantage of or misused the prosecuting authority and, in particular, abused, advanced, promoted, prejudiced or undermined the rights and/or interests of any person or organisation.’

- (e) The amendment obviated any examination of the Minister’s conduct and, although there was later some debate in the commission about the precise scope of the inquiry into the possible misuse of office, I had no doubt that I had to determine
- (i) whether Mr Ngcuka had in fact been an agent of the pre-1994 security services, and, in the event of a positive finding,
 - (ii) whether, because he had been such an agent, he had misused the prosecuting authority. It was clear, therefore, that, in the event of a negative finding on the first question, the second question would fall away.

[4] The commission had to be conducted under the Commissions Act, 1947 (Act 8 of 1947), as amended, and the relevant regulations. In terms of to section 3(1) of the Act it accordingly had the power to summon witnesses,

to cause an oath or affirmation to be administered to them, to examine them, and to call for the production of books, documents and objects. The regulations further granted every witness the right to the assistance of an advocate or attorney.

PROGRAM

[5] To ensure that Mr Ngcuka would become aware of all the allegations against him and that he would have an opportunity to respond, I ruled at the outset that his evidence would be taken last.

[6] The article in *City Press* was written by Mr Elias Maluke but it emerged from subsequent articles in other newspapers that Mr Maluleke had obtained his information from Ms Ranjeni Munusamy, a journalist on the staff of *Sunday Times*.

[7] I decided to call Ms Munusamy and Messrs Maharaj and Shaik as the first witnesses. Subpoenas were issued and Messrs Maharaj and Schaik appeared on 15 October 2003 at the first public hearing of the commission. Their counsel informed me that both of them wished to assist me to the best of their ability but that they needed time for preparation. I agreed to stand

their evidence down until 17 November 2003 (the first date on which their counsel would be available again).

[8] On 16 October 2003 I heard representations by counsel for Ms Munusamy and by certain press and other organisations. Mr Raymond Louw who appeared on behalf of the SA National Editors Forum and certain other organisations, and Mr Simon Ndungu who appeared for the Anti-Censorship Programme of the Freedom of Expression Institute, requested me to excuse Ms Munusamy from testifying. Counsel for Ms Munusamy made a similar request coupled with an alternative plea that her evidence be heard after all other sources of information had been tapped. I refused to excuse her or to allow her to testify at a later stage.

[9] After my ruling Ms Munusamy's counsel sought an adjournment to enable her to bring review proceedings in an appropriate court. I had no option but to adjourn the inquiry to 22 October 2003. An urgent application to review my ruling was brought in the Free State Division of the High Court but was subsequently dismissed with costs.

[10] 22 and 23 October 2003 were devoted to the evidence of Messrs Patric Maqubela, Litha Jolobe and Glen Goosen; and 24 October 2003 to representations on behalf of the State intelligence and security services, and to the evidence of Me Moncebo Duma-Tutu and Mr Mbulelo Hongo. On 27 October 2003 I heard further argument on the accessibility of information and documents in possession of the State intelligence and security services. This led to subpoenas being issued to procure the appearance on 12, 13 and 14 November 2003 of various Police, Defence Force, and National Intelligence Agency officers and members of the pre-1994 State Security Services. On 12 November some of these prospective witnesses appeared represented by counsel but not a single one of them was willing to take the witness stand or to produce the documents which they had been subpoenaed to bring to the commission. Further legal argument on their behalf, coupled with the second amendment of my terms of reference and a letter received from the President's office, persuaded me that it would be futile to pursue this avenue of investigation. (The problems encountered in my efforts to procure information from the State intelligence and security services will be related in greater detail later in this report.)

[11] I heard the evidence of Messrs Maharaj and Shaik from 17 to 24 November and devoted 26, 27 and 28 November to the evidence of Messrs Krisch Naidoo and Vusi Mona, 1 December to the evidence of Mr Bazir Hoossein and 5 December to the evidence of Mr K E Malaba. Mr Bernard Ley testified on 8 December and Mr Willem Vorster on 9 December 2003. Mr Ngcuka's testimony from 10 to 11 December 2003 concluded the evidence.

[12] On 18 December 2003, after hearing argument (including a lengthy address by Mr Maharaj), I closed the public hearings of the commission.

DISCUSSION OF SOME OF THE ISSUES

[13] Before I review and evaluate the evidence it is convenient to mention certain matters which I regard as important.

The task of the commission as a matter of constitutional importance and public interest.

[14] Certain commentators believe that the inquiry is irrelevant and a waste of time and public money. On the one hand, there are those who hold the

view that the question whether Mr Ngcuka was or was not a pre-1994 government agent is of interest only to the ANC or of factions within the organisation; or that the commission was appointed to divert attention from more pressing matters like the ongoing debate about the integrity of the so-called 'arms deal'. On the other hand, there are those who find the terms of reference unduly restrictive in respect of the possible misuse of the Prosecuting Authority. They would have preferred an unlimited inquiry into the way in which Mr Ngcuka has been exercising his powers.

[15] None of this is of concern to me. Speculating about the reasons for the appointment of the commission and niggling about the terms of reference cannot change my task. My duty is simply to inquire into the facts and to report my findings to the President. In doing so, I cannot be swayed by rumours conveyed to me unofficially. Difficult though it may be to investigate something that occurred fourteen years ago, I can only act on relevant and acceptable evidence properly placed before me and on inferences which can, with due regard to the probabilities, justifiably be drawn therefrom.

[16] I do, however, want to make it quite clear that I do not share the view that the inquiry is merely of interest to the ANC or of certain political groupings within the organisation. The establishment of a single prosecuting authority as an institution and the appointment of a National Director of Public Prosecutions derive from the Constitution itself. From this it follows that anything which may discredit either the institution or the office of the National Director or the person holding the office, is manifestly of constitutional significance and indubitably of public importance. It also follows clearly that an inquiry into allegations of the misuse of power on the part of the National Director is of national interest. But one must also bear in mind the immense power which the National Director wields and that such a power should only be entrusted to a person of unquestionable proficiency and integrity. Accordingly, whenever there is even the slightest doubt that an incumbent possesses these attributes, he or she ought to be exposed to a transparent inquiry in which concerned members of the public may freely and openly state their perceptions. I have no doubt that the allegation that Mr Ngcuka acted as a so-called ‘apartheid spy’ has brought his integrity and fitness to occupy the office of National Director into question. For this reason alone, an investigation into the truth of the allegation affects the interests, not only of the ANC, but of the citizens of the country as a whole .

Ms Ranjeni Munusamy.

[17] Because the article in *City Press* was the genesis of the entire saga leading to the appointment of the commission and, since I wanted to concentrate initially on the publication of the article, I decided to call Ms Munusamy as one of the first witnesses. My decision to subpoena her was severely criticized in the press, and also by Ms Munusamy's counsel and Messrs Louw and Ndungu when they appeared before the commission. Although the fundamental impetus of the criticism was the view widely held in media circles that a journalist should not be compelled to reveal confidential sources of information, the argument went further and in effect suggested that journalists should never be called at all as witnesses in respect of information gathered in the pursuit of their profession.

[18] My view was that the constitutionally guaranteed freedom of expression (including the freedom of the press and other media and the freedom to gather and disseminate information) does not entail that every journalist is in all cases entitled to refuse to testify in a court of law or a commission of inquiry or to disclose relevant information gathered in the course of his or her profession. Unless other reasons exist which justify a

refusal to testify (Cf *Attorney General, Transvaal v Kader* 1991(4) SA 727 (A)) a journalist, like any other person, is obliged to testify and is only entitled to refuse to answer specific questions against which there is a valid objection. Admittedly, unless it is justifiable under section 33(1) of the Constitution, a witness cannot be compelled to answer a question if the compulsion would infringe any of his or her constitutional rights or freedoms (*Nel v Le Roux and Others* 1996(3) SA 562 (CC) at 569-570 par [7]). But whether the compulsion would indeed constitute such an infringement depends largely on the nature of the question; and this will only become manifest once the question is asked. This view, I may say, is not popular with the media, nor was it acceptable to Ms Munusamy's counsel during his argument in the commission. But it was eventually not questioned when my decision went on review.

[19] Ms Munusamy's counsel argued in the alternative that she should not have been called at such an early stage of the inquiry. A journalist, he submitted, should only be called as a last resort after all other avenues have proved to be abortive. Again I disagreed. In South Africa there is no rule regulating the sequence of witnesses in a commission. It is entirely a matter for the discretion of the commissioner and thus all I could do, was to

consider whether it would be inappropriate to call her so early in the proceedings. My conclusion that it was not was eventually accepted by the judges of the reviewing court.

[20] Lastly, Ms Munusamy's counsel relied on the fact that she had received threats to her personal safety aimed at preventing her from revealing confidential sources of information. I was not persuaded that there was a real threat to her safety against which she could not be safeguarded by appropriate rulings and measures during the course of her evidence.

[21] For these reasons I ruled that Ms Munusamy was compelled to testify but that she would be entitled during her testimony to object to any particular question to which she had a valid objection. I regarded her as a witness whose evidence might be material and useful. According to the newspaper reports based on information supplied by her, she was in possession of, or had at the very least seen important documents which would be difficult to procure elsewhere. Moreover, she had already revealed three sources of information and there was no reason why she could not at least be questioned about her interviews with them. Finally I suspected that the newspaper reports, and even her own press release published later, did

not reveal all the information that she had gathered. My suspicion was later confirmed.

[22] After judgment in the review proceedings in the Free State High Court had been delivered, Ms Munusamy's attorneys indicated that she was considering an application for leave to appeal to the Supreme Court of Appeal or to the Constitutional Court. An appropriate application was eventually filed in the Free State court and enrolled for hearing on 11 December 2003. But there the matter would not rest: if leave to appeal was granted, the appeal would have to be heard (probably during the second half of 2004) ; and if leave was refused, further applications to the Supreme Court of Appeal and/or to the Constitutional Court were anticipated. All this would inevitably have led to an indefinite delay in the commission's proceedings if I were to insist on Ms Munusamy's testimony. The question then was whether such a delay was really worthwhile. I decided that it was not. At that stage I had already received most of the evidence in support of the allegations against Mr Ngcuka and was able to make a preliminary assessment. As will be seen later, Messrs Maharaj and Shaik's evidence was most unconvincing and this persuaded me that Ms Munusamy's evidence would be of peripheral value only because her account could not possibly

affect the outcome in a material way. I accordingly decided to excuse her from testifying and announced my decision on 5 December 2003. The application for leave to appeal was subsequently removed from the roll and has not been re-enrolled since.

The problem with the State intelligence and security services.

[23] On 1 October 2003 I received a letter from the Crime Intelligence Division of the South African Police Services informing me that:

‘(1) The Commissioner of the South African Police Service noted the appointment and brief of the Commission of Enquiry referred to above. It is clear that the role of the Security Branch of the pre-1994 police force regarding the matter under investigation will be under the close scrutiny of the Commission of Enquiry.

(2) The South African Police Service intends to fully cooperate with the Commission of Enquiry in fulfilling its brief. Director P van Vuuren, a legal representative attached to the Crime Intelligence Division of the South African Police Service, has been mandated to liaise with the Commission in order to explore the administrative protocol that will ensure that such cooperation be achieved.

(3) In the mean time, we have already issued an instruction to all our offices to transfer all pre-1994 Security Branch informant files that could be in their possession to be kept under the strictest security in our Pretoria office.’

[24] Nothing came of this offer of cooperation save that, shortly after the receipt of the letter, I had discussions with Director van Vuuren in order to find suitable ways of working through the large number of Security Branch files which had already accumulated in Pretoria. Although definite arrangements were not made, Director van Vuuren left me with the distinct understanding that suitable ways would be found.

[25] Meanwhile I had caused letters to be addressed to the South African Police Services (**SAPS**), the National Intelligence Agency (the **NIA**) and Defence Intelligence, asking these agencies (collectively referred to herein as the **State intelligence and security services**) for their cooperation by nominating senior liaison representatives as a first step.

[26] By way of reply on behalf of the Director-General of the NIA and the Commissioner of Police I received a letter dated 18 October 2003 from a Pretoria firm of attorneys to the following effect:

‘We have been instructed to place on record that both our clients will cooperate with the Commission, its investigator and the leader of the evidence **subject to the provisions of the legislation which prohibits both past and present members and/or employees of the Intelligence and Security Service from disclosing any information relating to the security of the Republic without the necessary consent.**

Please convey our position and request to all persons concerned not to approach any present or past members and/or employees of the Intelligence and Security Services without informing us of the intention to do so and what information is required.’

(The last paragraph was probably inserted because the commission’s investigator had already taken statements from several past members of the erstwhile Security Branch and of the pre-1994 National Intelligence Service (the NIS.))

[27] At the session of the commission on 24 October 2003 counsel for the State intelligence and security services drew my attention to several pieces of legislation which prohibit the disclosure of classified and confidential information and documents. The essence of what I was told, was that no information or document would be disclosed which could reveal the identity of agent RS452.

[28] I was nevertheless of the view that all the information in the possession of the State intelligence and security services could not be of a classified or confidential nature. I accordingly caused subpoenas to be served upon several officers of the State intelligence and security services and on past members of the Security Branch and NIS, calling upon them to produce certain documents.

[29] On 12 November 2003 some of these officers appeared, represented by counsel. Arguing on the strength of affidavits filed at the time, their counsel informed me that the documents in question were classified and would not be produced.

[30] The situation thus created, was insufferable. At that stage I still had to ascertain whether Mr Ngcuka had been registered as an agent for the security branch or any other security service of the pre-1994 government and, although the obvious and most reliable source of his registration was the records in possession of the State intelligence and security services, I was consistently being refused access to the records.

[31] Just when it became apparent that the impasse thus reached was rapidly heading for the courts, a resolution came from an unexpected quarter.

(a) On 30 October 2003 I had addressed a letter to the Director-General in the Presidency in the following terms:

‘Dear Dr Chikane,
You are no doubt aware of the fact that, according to the terms of reference, the Commission is to inquire whether

Mr Ngcuka and Dr Maduna acted as agents for the apartheid regime.

According to the definition of “personnel list” in section 1 of the Intelligence Services Act, 2002 (Act 65 of 2002), a list was to be submitted to the President within seven days from the date on which the Intelligence Services Act 1994 (Act 38 of 1994) came into operation containing the names of persons who were members of the organisational components of the Intelligence Services.

It is important to know whether their names appear anywhere in the list. Will you please examine the list for this purpose and let me know as a matter of urgency the result of your examination.’

(b) On 11 November 2003 Dr Chikane replied as follows:

‘The personnel list referred to in the Intelligence Services Act (Act 38 of 1994) was submitted to the President as required by law. This list reflects the names of persons who would have become members of staff, not sources or agents, of the intelligence services in 1994. Neither the Minister of Justice nor the National Director of Public Prosecutions were members of staff of the intelligence services.

Regarding sources and agents, the President has unfettered access to all information in the possession of the State intelligence and security structures. These structures have made no allegations that bear on the matters being considered by the Commission.

The allegations that form the basis of the appointment of the Commission relate to information held by persons outside the State Security structures. There would be no point in the President appointing a Commission to pursue information to which the President already has access, in as much as the Commission’s mandate is to report to the same President.’

(c) As indicated before, my terms of reference were also amended on 11 November 2003. The affect of the amendment was that it was no longer necessary to establish whether or not Mr Ngcuka was registered as an agent with any pre-1994 security service, with the result that my dependence on the State intelligence and security services for information in this regard came to an end. Although I remained firmly convinced that these agencies were in possession of information that was still relevant and could be made available without transgressing any of the statutory prohibitions, it weighed with me that Dr Chikane had confirmed that the President had free access to the records. What I then had to consider, was whether it would be prudent to insist, at the risk of engaging in protracted and costly litigation, upon material that was in any event available to the President. I found that it was not. The focus of my new terms of reference had shifted to the allegations made by Messrs Maharaj and Shaik and I decided to delay further steps until I had heard what they would say. In the end, as will be explained later, it emerged that their allegations were ill-conceived and entirely unsubstantiated. It would serve no purpose to pursue my endeavours to obtain information from the state intelligence and security services.

[32] It cannot be denied, however, that my lack of access to this important source of information remained a handicap. Valuable leads might have been discovered and followed up, whilst other evidence could have been verified if access had not been denied.

The Deputy President, Mr J G Zuma.

[33] According to the article in *City Press* referred to earlier, the operations of the intelligence unit under Mr Shaik whose task it was to root out government agents in the ANC, were supervised by the present Deputy President - then Chief of Intelligence of the organisation – and it thus appeared to me initially that Mr Zuma’s evidence would be required. In addition, by the time of the appointment of the commission a series of press and other public reports had appeared from which it could be gathered that Mr Zuma was not pleased with the way in which Mr Ngcuka had dealt with an investigation into his possible involvement in transactions allegedly relating to the so-called ‘arms deal.’

[34] Anticipating that he could assist in my inquiry into the 1989 investigation and expecting that he would at least welcome an opportunity to

air his apparent grievance, I caused a letter to be written to Mr Zuma on 16 October 2003 informing him that I was

‘anxious to know whether you have any information that may be of assistance to the Commission having regard to its terms of reference and, if so, whether you are willing to provide such information by testifying before the Commission.’

[35] The reply dated 22 October 2003 was as follows:

‘The letter addressed to myself by the secretary of the Commission and dated 16 October 2003 refers

With regard to invitation for me to assist the Commission, I would like to indicate that when I was deployed by the ANC as Chief of Intelligence, I was tasked by my organisation, the ANC, to undertake this most sensitive duty. The information of various categories that I dealt with was the property of the ANC. I, as an individual, had no right or authority then, and still have no right, to discuss such matters outside the ANC.

I therefore regret that I will not be of any assistance to the Commission without the permission or instruction of my organisation.’

[36] On 28 October 2003 I responded as follows:

‘Thank you for your letter dated 22 October 2003.

When I read the letter it occurred to me that you may have overlooked my extended terms of reference which require me to investigate whether Mr Ngcuka or Minister Maduna misused the prosecuting authority.

Judging by what has been reported in the media you are not happy with the treatment you received from Mr Ngcuka in the very recent past and it occurred to me that you might want to air your apparent grievance in the Commission.

If you decide to do so please ask your secretary to arrange a suitable date with Mr Bacon, the secretary of the commission.’

[37] I received the following reply dated 7 November 2003:

‘I refer to your letter dated 28 October 2003. I have noted the extended terms of reference of the Commission and fully understand their implication. However, with due respect, I must re-iterate that for reasons stated in my previous letter to the Commission, I remain unable to participate.’

[38] The reasons advanced in the letter of 22 October 2003 for Mr Zuma’s reluctance to share his knowledge of the 1989 investigation with the commission were, of course, patently insufficient to justify a decision not to call him as a witness. However, I decided to withhold a subpoena until I had heard Mr Shaik’s evidence. When this gentleman later testified that Mr Zuma had merely received a report of the 1989 investigation, I thought that it would not be necessary to call Mr Zuma as a witness. But I became dubious when Mr Ngcuka’s counsel suggested in cross-examining Mr Shaik that the alleged 1989 investigation had in fact never occurred. For this reason I wrote to Mr Zuma on 24 November 2003:

‘I have noted your indication that you do not wish to testify before the commission. However, certain suggestions in the cross-examination of Mr Moe Shaik have convinced me that your evidence is necessary. Will you please inform the secretary of the commission today of the day during the current week on which you will be available to testify in Bloemfontein. I make this request because I would like to avoid issuing a subpoena.’

This letter was faxed through during the forenoon of 24 November 2003. However, later that same day, after I had ascertained from Mr Ngcuka's counsel that he would not persist in the suggestion that the 1989 investigation had never taken place, I sent a further facsimile to Mr Zuma. It read as follows:

‘Kindly be advised that the suggestions in cross-examination referred to in my facsimile earlier today have been withdrawn. My request that you should indicate when you would be available to testify accordingly falls away.’

[39] The next day, obviously in reply to my request during the forenoon of 24 November, I received the following facsimile dated 25 November 2003 from Mr Zuma:

‘Your letter dated 24 November has reference. I must from the outset state clearly that I respect and understand the mandate of your commission. Because of this, twice before when the commission extended the invitation for me to attend, I responded and explained to yourself fully the constraints that prevent me from being able to be of any assistance to the commission. The reason that I presented to the commission was that when I operated as the Chief of Intelligence, I was deployed by the African National Congress. All that I did in that capacity was to carry out very clear and specific instructions of my organisation, guided by a very specific code of conduct of my organisation and also a very specific code of the intelligence culture. When undertaking this task, I did not do it under my personal capacity. With regard to information accumulated during the time, you would appreciate that as Chief of Intelligence, I must have handled sensitive and delicate information, which I cannot divulge in any way without definite instructions from my organisation. In

response therefore to your latest invitation, unfortunately I have to re-iterate to the commission my earlier position that I am not at liberty to discuss that information, without the express mandate and direction of my organisation.

In your letter you indicate that the reason you wish me to attend is the result of evidence given by Mr Mo Shaik. I am aware that my name was mentioned and indeed, it was quite natural and predictable that Mr Shaik would have had to mention my name during the hearings, in view of the line of command with regard to reporting mechanisms within the structure of the organisation at the time.

That he mentioned my name in the commission with regard to the reporting procedures does not negate my reasons put to you for being unable to be of assistance to the commission.

I wish to also remind the chairperson that I did not make the allegations for which now I am requested to assist the commission. Therefore, I have never misused the information accumulated when I was the Chief of Intelligence for the African National Congress. I have always acted professionally in this regard. I therefore, with all due respect, appeal that I should not be made to deviate from the professional principles that govern intelligence officers, whether serving or no longer serving.

Lastly, I note your last sentence that expresses your wish not to have to reach the point where you may have resort to a subpoena. I am in full support of this sentiment and indeed hope that we do not have to reach that point as I also would not want to reach the point where I would be forced not to respect your subpoena.'

[40] On 26 November 2003, obviously in reply to me second facsimile of 24 November, I received a facsimile from Mr Zuma in the following terms:

'Your letter dated 24 November and received on 25 November has reference.

I note and thank you for your decision to withdraw your request for my attendance to the Commission.'

[41] I announced my decision not to call Mr Zuma at the session of the commission on 26 November 2003. I

- explained that, according to the available evidence, the deputy-president's knowledge of the so-called spying allegations was limited to a report that he had received from Mr Shaik; and
- added that he had lodged a complaint with the Public Protector arising from the way in which Mr Ngcuka had treated him and did not wish to pursue the matter in the commission.

[42] (a) On 27 November 2003 I received the following letter from the Deputy President:

‘I was disturbed today to read in the newspapers the reasons attributed to my non-appearance at the commission. According to the Business Day the chairperson is cited as having said that I had informed him that my only knowledge of the claim that Mr Ngcuka was a spy, arose from the report that Mr Shaik had handed to me. I am also informed that the chairperson, at the commencement of the proceedings yesterday, had indicated similar sentiments as now reported in the media.

I have conveyed my reasons for not appearing to the chairperson on three occasions and I attach all three letters for the chairperson's easy reference. The statement attributed to the chairperson in the media is not, as I am sure the chairperson will concede, a true reflection of my communication. I request that the chairperson set the record straight and accurately reflect our correspondence.

I trust that the chairperson will understand the importance with which I regard this matter and that he will urgently seek to correct what has obviously been a misunderstanding.’

(b) On 5 December 2003 I received yet another letter from the Deputy President. It read as follows:

‘This is a follow up to me earlier correspondence to yourself requesting you to correct what was reported in the news as being my reasons for not appearing in the commission. I am now even more concerned having had cite (*sic*) of the proceedings on the television. The explanation given by the chairperson does not accurately reflect the reasons that I have consistently forwarded to the commission and instead, makes presuppositions about what I may or not know. I got even more concerned when the chairperson stated as a matter of fact that I was not ‘part of the investigation at that stage’ and that I could ‘contribute very little to that part of the enquiry’ and furthermore, went on to claim that I had conveyed this to the chairperson.

In fact, discussion on any of the facts stated above with you, would be a direct contradiction of the reasons stated in my letter for being unable to assist the commission. I had clearly indicated that I was not at liberty to discuss this matter as I had served in the intelligence structures on behalf of the ANC and not in my personal capacity. However the chairperson in his utterances, implied that I had discussed these matters with him.

In my last correspondence to you, I had enclosed copies of my letters to the commission for easy reference. As the chairperson will see these facts do not appear anywhere in my correspondence with the commission. As we also have never spoken to each other, it is difficult to understand how the chairperson could have misunderstood the facts and reasoning in my correspondence to the commission.

I have not had a response to my earlier request to yourself for a correction. To the best of my knowledge, there has not been an attempt to correct these facts as reported by the chairperson during the proceedings. If this has happened, I kindly request the chairperson to advise me as such. If the chairperson has not yet corrected his statement, I kindly request the chairperson to do so.

I thank you in advance for your cooperation.'

[43] On 8 December I replied as follows to the letters quoted in the previous paragraph:

'Judging by your letters of 27 November 2003 and 5 December 2003 you are under the impression that I professed to list your reasons for not wanting to testify before the commission when I announced my decision not to call you. This is not what I did. The reasons which you advanced did not satisfy me that you would be entitled to refuse your testimony. I decided not to call you, not for those reasons, but for the ones stated when I announced my decision and thus the record requires no correction.'

[44] I have revealed the correspondence I had with the Deputy President because, as appears from paragraph [42], he has in effect requested this, and because it calls for the following observations:

- (a) In expressing his dissatisfaction with the reasons that I advanced for not calling him, Mr Zuma lost sight of the fact that I recorded my own reasons for my decision and not the reasons for his reluctance to appear. As mentioned earlier, his

reasons were insufficient to justify a decision not to issue a subpoena. There was no misunderstanding on my part. My reasons for not calling him were exactly those recorded *viz* (i) the fact that he could not contribute meaningfully to the inquiry into the spying allegations, and (ii) that he did not wish to pursue his grievance about the alleged misuse of Mr Ngcuka's office in the commission. He decided to take his complaint to the Public Protector and it was not for me to persuade or compel him to use the commission as his forum.

(b) In the same breath I must draw attention to the concluding remark in Mr Zuma's facsimile of 25 November 2002 quoted in paragraph [39] which seems to be an indication that he might not be averse to ignoring a subpoena. All I wish to say is that it would be a sad day if, for fear of incurring the wrath of a political organisation to which he belongs, the holder of one of the highest offices of State were to consider ignoring a subpoena issued by a commission appointed by the President under a power vested in him by the Constitution.

(c) For the sake of clarity it is recorded that Mr Zuma's statement in his letter of 5 December 2003 that he never

discussed the matter with me, is correct. But I said nothing in announcing my decision which could have created the impression that we had had discussions.

Agent RS453 - Vanessa Brereton

[45] The reference in my terms of reference to agent RS452 probably derives from the allegation in the article in *City Press* that the conclusion reached in the 1989 ANC investigation was that Mr Ngcuka could have operated under this code number.

[46] Not long after the appointment of the commission media reports began appearing to the effect that RS452 was in fact, not Mr Ngcuka, but Ms Vanessa Brereton who used to practise as an attorney in Port Elizabeth and is presently residing in the United Kingdom. The source of the reports was never discovered, but the secretary of the commission and the leader of the evidence communicated with Ms Brereton without any difficulty. She verified the reports and later sent the secretary an affidavit to the same effect. Still later she appeared on television where she again admitted to having been RS452. Moreover, the National Treasury has confirmed in a

letter dated 25 November 2003 that Ms Vanessa Jacinta Brereton was a member of the Government Employees Pension Fund from January 1987 to February 1991 and that her employer was the South African Police. Considering all this and the amount of the detail which Ms Brereton has provided, there can be no doubt that her claim is entirely genuine. Even Mr Shaik acknowledged this when he came to testify. Thus it was unnecessary for the commission to travel to England to take Ms Brereton's evidence or to call her former handler, Mr KZ Edwards. As will be seen later, however, Ms Brereton's revelation had a profound effect upon Mr Shaik's evidence.

Complaints that were not considered.

[47] Because I was only mandated to inquire into the possible misuse by Mr Ngcuka of his office where it could be shown that it was the result of his having been an agent of the security services of the pre-1994 government, certain complaints were left out of consideration. The first came from Messrs Roger and Brett Kebble, the second from Mr Vusi Mona, and the third from Mr Richard Young. The first two were forwarded to me by the Public Protector with whom they were initially lodged. Both dealt with matters which the complainants regarded as instances of the misuse of his

office by Mr Ngcuka. After discussing the Kebbles' complaint with their legal adviser it was agreed that the allegations fell outside the scope of my terms of reference for want of a causal link with any pre-1994 activities on the part of Mr Ngcuka. For the same reason, and others which will be mentioned later, I left Mr Mona's complaint out of consideration. Mr Young's complaint suffered the same fate.

[48] Mr Josias Boale, a magistrate employed by the Department of Justice and Constitutional Development, had a number of grievances relating in the main to the treatment he allegedly received from Minister Maduna, from Mr Ngcuka and from certain officials in the latter's office. His submission had every appearance of in-house cavilling but, essentially because the required causal link was missing again, I left his complaint out of consideration.

[49] Not unexpectedly I also received a number of letters and e-mails containing wide-ranging but plainly illusory grievances which revealed gross ignorance of my terms of reference. I did not concern myself with these and particularly not with the fanciful allegations made in some of them (for example that 'the legal professions are made up of attorneys, advocates, judges who are professional whores in legalised, organised crime').

Me Patricia De Lille MP

[50] Whilst the past activities of the Minister of Justice and Constitutional Development were still under scrutiny, I caused the secretary of the commission to inquire from Me Patricia de Lille whether she wanted to testify before the commission. I did so because I was aware of the fact that she had made certain allegations in Parliament. Her attorneys replied that:

‘We have taken instructions from our client regarding judge Hefer’s invitation to testify before the commission.

Our client regrettably advises that she is unfortunately not in a position to assist the commission in any manner with matters relevant to its terms of reference and accordingly has to decline the invitation.’

SURVEY OF THE EVIDENCE

[51] The evidence before the commission can conveniently be classified into six categories. The first relates to ANC operations in Durban and environments during the early 1980's; the second to Mr Ngcuka’s detention in goal; the third to the activities of ANC supporters in the Eastern province; the fourth to Mr Ngcuka’s identification documents and passport; the fifth to

the investigation by Mr Shaik during 1989; and the sixth to the alleged misuse of office.

[52] In the **first category** there is the evidence of Messrs Patric Maqubela, Litha Jolobe and Mbulelo Hongo which is of minor importance save that it revealed that

- Mr Ngcuka was arrested shortly after Mr Maqubela during November 1981;
- he refused to testify for the State in Mr Maqubela's trial in Pietermaritzburg on a charge of high treason and was sentenced during August 1982 to three years' imprisonment for doing so;
- he was never suspected of having betrayed his comrades; and
- there is no reason whatsoever to suspect that he was an agent of the apartheid regime at that stage.

[53] As far as the **second category** is concerned, there is no reason for suspicion during the time of Mr Ngcuka's detention in goal either. It was clearly established, mainly through Mr Hongo, that Mr Ngcuka was treated like any other prisoner and received no favours from the State. This was

later borne out by documents in his prison file which became available after Mr Shaik had testified and will be discussed later in greater detail. Admittedly, he was permitted to continue his studies and to sit for examinations; but so were many others, including Mr Hongo himself. Mr Shaik attempted to sow suspicion by referring to a letter written to the Prison authorities by the erstwhile Reference Bureau during August 1984 requesting that Mr Ngcuka be handed to the Commissioner of Cooperation and Development for identification by a representative from Ciskei. But he was unable to say what was really suspicious about the letter. (It has in any event emerged that the authorities considered deporting Mr Ngcuka to Ciskei upon his release. The need for his identification is thus perfectly understandable.)

[54] In the **third category** there is the evidence of Messrs Goosen, Naidoo and Hoossein from which it appears that

- a group of ‘white democrats’ (Mr Goosen’s expression) operated in close cooperation with the ANC in Port Elizabeth during the late 1980’s. Mr Goosen was one of the group; and so was Vanessa Brereton, in whose office Goosen served as a candidate attorney;

- at that time, Mr Ngcuka worked in the Western Cape *inter alia* in the context of the United Democratic Front and had no role in the Eastern Cape;
- a file for the Henk van Andel Trust was kept in Ms Brereton's office;
- although there is no evidence of any work which Ms Brereton personally did for the trust, the file was freely available to her; and
- whereas Ms Brereton attended a meeting of the National Association of Democratic Lawyers (NADEL) in Port Elizabeth at the end of January 1988, not one of the witnesses could recall that Mr Ngcuka also attended. (The relevance of the meeting and the significance of the Henk van Andel Trust will become clear when Mr Shaik's evidence is discussed.)

[55] The evidence of Mr Willem Vorster falls in the **fourth category**. Mr Vorster is an Assistant-Director in the Department of Home Affairs and a trained immigration officer with many years of experience and extensive knowledge of the systems employed in the department before and after 1994 in connection with identification documents and passports. He is an entirely disinterested witness who testified in straightforward and convincing terms

in a field in which he is plainly a master. There is not the slightest reason to doubt his word and I accept his evidence without reservation.

[56] Mr Shaik made numerous points about Mr Ngcuka's passport and identity documents but Mr Vorster has dispelled any suspicion that may have attached to them. I do not intend dealing with all the points and merely mention two of them by way of example. First, there is the fact that a passport was issued to Mr Ngcuka during December 1981 with apparently unseemly haste. According to Mr Vorster, this was by no means unusual. Then there is the fact that the Security Branch wrote a letter advising the Department of the Interior that there was no objection from a security point of view to the issue of a passport to Mr Ngcuka. But there is conclusive evidence showing that the letter was written before Mr Ngcuka's arrest, and no suggestion that the authorities were aware of his activities in the ANC underground at the time.

[57] I do not find it necessary to deal with Mr Vorster's evidence relating to the so-called 'stop list' formerly used by the Department of the Interior in order to restrict entrance by passport holders to certain countries; or with his explanation for the fact that Mr Ngcuka had multiple identity numbers.

Suffice it to say that I have been convinced beyond any measure of doubt that the sinister inferences for which Mr Shaik contended, in respect both of the passport and of the identity documents, are not justified. The same applies to the suspicion which Mr Shaik sought to cast on the renewal of Mr Ngcuka's passport during 1985 or 1986. Mr Ngcuka testified that he applied to the South African embassy in Switzerland for a renewal as a mere formality and that his application succeeded without ado. I find the renewal of the passport above all suspicion and the suggestion that it was an indication of government favouritism (for services rendered, one would suppose,) entirely gratuitous.

[58] In connection with Mr Ngcuka's passport there is also the evidence of Mr Bernard Ley who retired as a police colonel after serving *inter alia* in Security Branch Headquarters in Pretoria. On 16 September 2003, in an interview screened by a national television station, Mr Ley suggested that, while he was still a member of the Security Branch, he had arranged (at the request of Mr Gideon Niewoudt, who was also a member of the Security Branch) for a restriction to be placed on Mr Ngcuka's passport and later (at the request of a member of the NIS) for the removal of the restriction. In his evidence in the commission Mr Ley had an entirely different version and

was forced to admit that he had been untruthful on television. He was a hopeless witness to whose evidence no credence can be attached.

[59] Because his name had come up repeatedly in Mr Shaik's and Mr Ley's evidence, I considered calling Mr Niewoudt as a witness but decided against it. He is well-known in legal and political circles as someone who was refused amnesty by the amnesty committee of the TRC for failing to make full disclosure. Moreover, he plainly misled Mr Ley to take part in the television interview and has been paid R40000 by Mr Shaik for 'expenses'. It would have been a waste of time to hear a witness like this.

[60] The **fifth** is the most important category of evidence since it deals with Mr Shaik's 1989 investigation on which he and Mr Maharaj's present allegations are based. (In actual fact the investigation was conducted between 1989 and 1991 by a so-called MJK unit headed by Mr Shaik; but for convenience I will continue to refer to 1989 as the relevant year and, because this was the drift of his evidence, to discuss the investigation as if it had been conducted by Mr Shaik himself.)

[61] Mr Maharaj's evidence provides a useful broad outline of what happened during 1989. At that time he was head of 'operation Vula' which had been devised with the aim of infiltrating senior members of the ANC into South Africa in order to coordinate operations in this country. His orders included liaising closely with Mr Shaik to ensure that 'operation Vula' would not be compromised. Mr Maharaj came to know of Mr Ngcuka when he wanted to know whether he could safely make contact with NADEL and Shaik advised him not to do so as he thought that there was a government agent in NADEL and that he suspected Bulelani Ngcuka. To substantiate his suspicion Shaik first produced documents procured from Security Branch files; but he was only able to persuade Mr Maharaj later by pointing out suspicious features of Mr Ngcuka's passport and identification documents as well. In his evidence Mr Maharaj conceded that he has no independent knowledge of the facts on which Mr Shaik's suspicion was based. Although, as he repeatedly said, he has no expertise in intelligence matters, he supported the conclusion at the time and still believes that it was correct. But it is quite clear that he is entirely reliant on the validity of Mr Shaik's inferences and the adequacy of the latter's reasoning. For this reason he conceded in cross-examination that he does not really know whether Mr Ngcuka was an apartheid spy or not.

[62] Mr Shaik's evidence must be viewed in the light of the following introductory observations:

(a) After attending a brief training course in counterintelligence in the former East Germany, he infiltrated South Africa where he became head of an MJK unit and was tasked with tracing government agents in the ANC. He was a young man in his mid twenties with little experience of counterintelligence work.

(b) Mr Shaik was at pains to explain that he was operating in a war situation which, because people's lives often depended upon his judgment, obliged him to exercise great caution in rooting out government agents. For this reason, and because he would rather err on the side of caution, he maintained a low standard of suspicion entailing that he reported a suspect to his superiors in Lusaka whenever there was but a 'reasonable basis for investigation'.

(c) In accordance with this philosophy he reported in Mr Ngcuka's case that:

'All the above led us to the conclusion that there was a reasonable basis to suspect that [Bulelani Ngcuka] was most probably source RS452.'

(The quotation is from a reconstructed document prepared by Mr Shaik towards the end of 2002. The whereabouts of the original 1989 report are not known.)

(d) In the absence of any direct evidence of Mr Ngcuca's duplicity Mr Shaik had to rely upon inferences which he drew from documents stolen from Security Branch files and from peculiarities pertaining to Mr Ngcuka's passport and identity documents. He repeatedly stressed in his evidence that, in the event of one of his inferences or assumptions being shown to have been fallacious, he was prepared to concede the fallacy of his conclusion too.

(e) How Mr Shaik's report was received in Lusaka is not known. Attorneys acting for the ANC advised the secretary of the commission in a letter dated 21 October 2003 that

'... the Intelligence Unit of the ANC was disbanded in 1994 when all security structures of the ANC were integrated into the State security structures. All documents prepared by, and/or in the possession of the individuals concerned were taken with them when they were integrated and now form part of the documentation held by the state.'

But what we do know, is that neither Mr Maharaj nor Mr Shaik is aware of any steps taken in South Africa to follow up the latter's suspicion.

[63] Of course, the first problem which Mr Shaik had to face in his evidence was that, contrary to his 1989 conclusion, it is common knowledge now that Mr Ngcuka could not have been RS452. Ms Brereton's revelation that this was in fact her code number has obviously left Mr Shaik in a quandary. His suspicion was first aroused by two reports procured from Security Branch files. Both reports had been submitted by Lt K Z Edwards and both reflected RS452 as the source. For reasons that will soon appear, Mr Shaik wrongly came to the conclusion that RS452 could be Mr Ngcuka.

[64] Instead of conceding that he had made a mistake, Mr Shaik's has come up with a new theory. It has recently come to his knowledge, he says, that the Security Branch and the NIS resorted to what is known in the intelligence community as 'false flag' or 'stratkom' operations, by means of which information supplied by one source was attributed to another source. What he suggests, is that the information attributed in the two reports to RS452 did in fact not come from Ms Brereton, but from Mr Ngcuka.

[65] This is plainly an afterthought because during 1989 Mr Shaik knew nothing about 'false flag' operations; nor did he know about Ms Brereton. And there is in any event a patent fallacy in this reasoning. Mr Shaik is acting on untested hearsay when he says that 'false flag' operations occurred; but, assuming that it did occur, it has not been shown that it occurred in Ms Brereton's case or in respect of the reports in question. There is not an iota of evidence, nor the slightest reason to suspect that Lt Edwards performed a 'false flag' operation when he designated RS452 as his source in the reports. Had there been any evidence that the information in question could not have been supplied by Ms Brereton, the position might have been different. But there is none. On the contrary, the available information points the other way. One of the reports in question related to the Henk van Andel Trust of which Mr Ngcuka was a trustee, and the other to the NADEL meeting in Port Elizabeth at the end of January 1988 mentioned earlier. As already pointed out, Ms Brereton's office acted for the trust in Port Elizabeth and her access to the file would have enabled her to pass on information gathered therefrom. And that she also attended the NADEL meeting appears conclusively from a photograph taken in the Marine Hotel where the meeting was held, depicting Ms Brereton in the company of several other persons who were in attendance and have now identified her in the

photograph. That she could therefore have supplied the information reflected in both reports goes without saying.

[66] How then did Mr Shaik during 1989 latch on to Mr Ngcuka as the person who could have supplied the information? The fact that both reports reflected RS452 as the source led him to believe that one and the same informant was active in the trust and in NADEL as well. Then he discovered that Mr Ngcuka was a trustee of the trust. But in this regard he had a problem; for Mr Ngcuka was only one of several trustees and how could he eliminate Sibusiso Bengu, and Pius Langa, and Sheila Weinberg, and Ebrahim Mohamed who were the other trustees? He found the answer in the fact that the informant was probably an attorney who could in some way also be connected to NADEL. And this is where Mr Ngcuka came in: he was an attorney and Mr Shaik thought that his presence at the Port Elizabeth meeting linked him to NADEL. That he had no hard evidence of Mr Ngcuka's presence at the meeting did not deter him; for he simply **assumed** that Ngcuka must have been present because he was co-opted as a member of the National Executive. It was in making this assumption that he plainly erred, firstly, because it is by no means clear that Mr Ngcuka was co-opted at the Port Elizabeth meeting and, secondly, because, even if he was co-

opted there, it is common experience that people are co-opted to committees in their absence. There were in fact no grounds for the assumption and the result is that the assumed link between Mr Ngcuka and NADEL must crumble. That being the case, the reasoning that he must have informed on the Henk van Andel Trust as well, must also founder. The true facts, I believe have now come to light. In his evidence Mr Ngcuka denied that he was present at the Port Elizabeth meeting; and there is no reason to doubt his denial: the minutes of the meeting do not reflect his name as a delegate and neither Mr Naidoo nor Mr Glen Goosen nor Mr Hoossein can recall his presence. Ms Brereton's involvement, on the other hand, is beyond doubt. Not only have her presence at the meeting and her ability to inform on the trust been established by independent evidence but she has also in her affidavit admitted her involvement.

[67] One may go yet one step further and argue that, given Ms Brereton's presence at the meeting, Mr Ngcuka should still not have been singled out for suspicion, even if we were to accept that he was also present. Mr Shaik's problem is that he never seems to have considered the possibility of another attorney being the informant. There is no way of avoiding the impression that, in so far as he relied on the information derived from the two Security

Branch reports, he was quite prepared to point the finger of suspicion at the first person who fitted the description of a high level source who was probably an attorney. Admittedly he was young and inexperienced and operated in a war situation which demanded a low threshold of suspicion. But he did not pause to consider whether there were other possibilities. Had he done so, he would most probably have become aware of the fact that Ms Brereton also fitted the description and that she was a much likelier candidate.

[68] The question now is whether any value can be attached to the 1989 investigation. I have shown that it was utterly unreliable in so far as it was based on the reports in the Security Branch files. During 1989 Mr Shaik bolstered his conclusion that RS452 could have been Mr Ngcuka by raking up what appeared to him to be peculiarities in the issue and renewal of Mr Ngcuka's passport and in his identity documents. But any suspicion that these documents might have attracted, has been dispelled. If only he had asked, the explanations that Mr Vorster has now provided would have been available to Mr Shaik too.

[69] For these reasons I have come to the conclusion that the 1989 investigation was fatally flawed by unwarranted assumptions and unjustifiable inferences and by the blatant failure to examine available avenues of inquiry.

[70] The final question is whether, considering everything exposed in 1989 as well as everything which has since been discovered, there is positive proof of Mr Ngcuka's duplicity. Neither Mr Maharaj nor Mr Shaik has broached anything worth mentioning that has occurred since the 1989 investigation to support the conclusion reached at that time. Both of them have been making further inquiries and Mr Shaik has also re-examined the information in his personal database; but neither of them has unearthed anything worthwhile. Nor has any other witness come forward with new information. In this regard I may mention that, according to Mr Shaik, he has information that Mr Ngcuka was recruited as a NIS agent during the 1970's by Mr Mauritz van Greunen. But he refused to reveal the name of his informant and no value can accordingly be attached to his assertion. In any event, an affidavit by Mr Van Greunen has been handed in as an exhibit. In it he states categorically that he has never met or communicated with Mr Ngcuka.

[71] Naturally, I cannot take a decision by applying Mr Shaik's low standard of persuasion. Whether or not Mr Ngcuka acted as a government agent before 1994 is a question of fact which has to be resolved, at the very least, upon a preponderance of probability which is the standard of proof regularly adopted by the courts in civil cases. What one has to do, is to weigh whatever probabilities there may be in favour of a conclusion that he was such an agent against those pointing the other way. I have not found anything showing, as a matter of probability, that he was a pre-1994 government agent. On the contrary, the probabilities heavily favour the opposite conclusion. I need only remind the reader that Mr Ngcuka was detained without trial on no less than three occasions (on one of which he went on a hunger strike) and thereafter restricted to Gugulethu. This is certainly not the kind of treatment meted out to government agents. And his experiences in goal whilst serving his sentence for his refusal to testify against Mr Maqubela speak volumes in similar vein. When he was detained the first time during 1981 he was on the point of marrying his present wife. Of course, nothing came of the intended marriage. It had to wait for several years. Whilst in goal, letters from his fiancée were intercepted and not delivered to him. She was refused permission to visit him because she was not regarded as a member of his family. And when he applied for permission

to marry her, it was refused. He was isolated from his fellow prisoners because the prison authorities considered him to be too militant and far too ideological. Thus when Mr PW Botha had made an offer to release Mr Mandela on condition that the ANC renounces violence, and Mr Ngcuka had joined other prisoners in expressing their dissidence, the prison authorities justified his isolation by insisting that he would probably influence other prisoners to reject the offer. I simply cannot believe as a matter of probability that he would have been treated in this way if he had been a government agent at the time; nor that he would have been amenable to become one after his ordeal. I have accordingly come to the conclusion that he probably never at any time before 1994 acted as an agent for a state security service. As I have shown, the suspicion which a small number of distrustful individuals harboured against him fourteen years ago was the unfortunate result of ill-founded inferences and groundless assumptions.

THE ALLEGED ABUSE OF THE PROSECUTING AUTHORITY

[72] In view of my restricted terms of reference and my finding that Mr Ngcuka has not been shown to have acted as an agent for a pre-1994

government security service, an investigation into the possible misuse of the Prosecuting Authority is not strictly necessary. Yet I regard it as a matter of public interest to deal briefly with the allegations made by Messrs Maharaj, Shaik and Mona. I will deal with each person separately.

Mr Maharaj

[73] Mr Maharaj's complaint relates to an investigation by Mr Ngcuka's office firstly, into two contracts awarded while he was still Minister of Transport and, secondly, into alleged transactions between him and Mr Schabir Shaik (Moe's brother) or some of the latter's companies. Section 41(6)(a) of the National Prosecuting Authority Act, 1998, expressly prohibits the disclosure, without the consent of the National Director, by any person of any information which came to his or her knowledge in the performance of his or her functions in terms of the Act. The essence of Mr Maharaj's complaint is that Mr Ngcuka has leaked, or has condoned the leaking of, information relating to the investigation contrary to the provisions of section 41(6)(a). The result, he claims, is that, although the investigation has not led to a prosecution, he and his wife have been vilified in the public eye. Moreover, he says, the same has happened to other well-

known individuals, including the Deputy President. In his view this reveals an unfair, and indeed unlawful, pattern in the use of the Prosecuting Authority.

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

[75] I am not prepared to accept that the guilty party was Mr Ngcuka himself. Mr Maharaj firmly believes that this was the case; but Mr Ngcuka

has denied it under oath and there is no evidence to contradict him, nor do the probabilities favour the conclusion that he supplied the information himself. Mr Maharaj's belief is based on Mr Mona's assertion that Mr Ngcuka besmirched him (Mr Maharaj) and his wife and several other individuals at a briefing of editors on 24 July 2003. I will deal with Mr Mona's evidence; but I may say at this stage already that I do not believe him. If his evidence is rejected as it must be, the basis for Mr Maharaj's belief is destroyed.

[76] Whether Mr Ngcuka has condoned the leak of information from his office is another matter. Mr Maharaj first received inquiries from Jessica Bezuidenhout from *Sunday Times* about certain transactions with Mr Schabir Shaik as early as February 2003. Although he immediately telephoned Mr Ngcuka and told him what had happened, the leak had not been plugged five months later when, on 31 July 2003, he received fresh inquiries from Jovial Rantao.

[77] As previously mentioned, Mr Ngcuka testified that he ordered an investigation into the leaking of sensitive information but that the outcome was inconclusive. His evidence in this regard was not particularly

informative and created the impression that he wanted to disclose as little as possible. Yet, I have his word that an investigation was indeed conducted and there is nothing to contradict it or render it improbable. I have to accept his word. And, that being the case, I cannot say that he condoned the leaks.

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

Prosecuting Authority is being used for the purpose for which it was intended.

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

[80] For the sake of completeness I must also mention that Mr Maharaj avers that Mr Ngcuka at one stage attempted to persuade him to become a party to a mediation process in order to bring the investigations against him, his wife, Mr Zuma and Mr Schabir Shaik to a satisfactory conclusion. Mr Ngcuka has denied the allegation and I am unable to make a finding.

Mr Moe Shaik

[81] I mention Mr Shaik in connection with the alleged misuse of the Prosecuting Authority, not because he has really contributed to this part of the inquiry, but in order to show his motive for raking up old scores.

[82] It is common knowledge that the newspapers and other media abounded a few months ago with reports about an investigation by Mr Ngcuka's office against the Deputy President arising from his association with Mr Schabir Shaik and the latter's suspected connection with the 'arms deal'. In a public interview held on 23 August 2003 Mr Ngcuka confirmed the investigation but also announced his decision not to prosecute the Deputy President.

[83] Mr Moe Shaik revealed in his evidence that, after many years, his interest in Mr Ngcuka was rekindled when he came to know of the investigation against Mr Zuma. His renewed interest, he says, stemmed from his complete faith in and undying loyalty to the latter. For this reason he re-examined the information about the 1989 investigation, proceeded to make further inquiries and eventually confided in Ms Munusamy in order to make the public aware of the 1989 investigation and findings. What he could not understand initially, was why Mr Ngcuka's office was investigating Mr Zuma at all. But later, when Mr Maharaj was also investigated, it dawned on him that Mr Ngcuka might have become aware of the 1989 investigation and might have resolved to investigate the persons who had investigated him. This notion is so implausible that it deserves no serious consideration. Apart

from anything else, if Mr Ngcuka were acting against those who had investigated him, one wonders why he has investigated Mr Maharaj who really had nothing to do with the 1989 investigation, and has left Mr Shaik alone. This supposition is in any event quite insufficient to bring Mr Shaik's complaint about the investigation against Mr Zuma within my terms of reference.

Mr Vusi Mona

[84] Mr Mona was the editor of *City Press* when the story that gave rise to the appointment of the commission was published. He was the person mainly responsible for the decision to publish the fruits of Ms Munusamy's research into the spying allegations. His evidence relates, however, to another incident - a meeting which was held in an hotel in Sandton on 24 July 2003 where Mr Ngcuka briefed certain newspaper editors *inter alia* about the investigations against Mr Maharaj and the Deputy President.

[85] For some time prior to the briefing an anonymous e-mail containing scurrilous remarks about Mr Ngcuka had been doing the rounds in newsrooms. Mr Mona then received an invitation from Mr Ngcuka to a

meeting where he and other editors would be informed about the e-mail. His evidence is to the effect that, upon arrival at the venue, he found a number of black editors in attendance; that Mr Ngcuka then commenced a lengthy harangue, telling his audience after a while that he was speaking off the record; and proceeded to launch a scathing attack upon various well-known personalities, including Mr and Mrs Maharaj and the Deputy President. Mr Mona left the meeting with a sense of discomfort: Mr Ngcuka, he thought, had abused his power and violated people's constitutional rights. After reflecting on the matter and discussing it with colleagues, he decided to reveal what Mr Ngcuka had said at the meeting in a document sent to the Chief Justice, to the Public Protector and to others.

[86] Mr Mona's cross-examination was severe. It is not necessary to dwell on particulars thereof save to say that the focus mainly fell on his allegations about what had been said at the briefing and his decision to disclose it. In the process he was forced to make one damning concession after the other until he admitted that his evidence had been untruthful in certain respects. The result was that, when the cross-examination ended, his credibility had been reduced to nil. Although Mr Ngcuka has denied his allegations in very

general terms, there is no need for any further discussion of his complaint. As far as I am concerned, one simply cannot accept its factual basis.

[87] I need to record that the leader of the evidence requested me to refer Mr Mona's evidence to the Provincial Director of Public Prosecutions with a view to a possible prosecution for perjury. I would rather not do so because his employer has relieved him from his duties and, although his dismissal arose from other causes, I am satisfied that he has discredited himself to such a degree in the newspaper community, that he will not find it easy to procure employment in that field again.

MAIN FINDINGS

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

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

THANK-YOU

[89] I wish to record my sincere appreciation to the leader of the evidence, advocate Kessie Naidu SC, for the competent way in which he executed a difficult task; and also to Mr John Bacon who served as the secretary and to Mr Solly Ngwenya who served as assistant-secretary of the commission, for the willing and competent manner in which they executed their duties. I am aware of the fact that both these gentlemen performed their tasks long before and after official office hours. In the process both of them have acquired remarkable rapport with legal advisers and representatives of the media all over the country. They are an asset to the Department of Justice and Constitutional Development.

I also wish to thank the President and staff of the Supreme Court of Appeal (particularly Me Aletta van den Bergh) for supplying accommodation and support services to the commission.

Signed at Bloemfontein on this 7th day of January 2004

J J F HEFER
Commissioner.