EXHIBIT Z(h)

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EXHIBIT Z(i)

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EXHIBIT Z(j)

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EXHIBIT Z(k)

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EXHIBIT Z(l)

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EXHIBIT Z(m)

JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

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INDEX: EXHIBIT Z(h) to EXHIBIT Z(m)

Exhibit	Description	Pages
Z(h)	Memorandum from Adv M Noko dated 21 October 2014 re: Withdrawal of corruption charges against Mr T Panday and Col N Madoe.	01 to 08
Z(i)	Letter of response by Maj-Gen JW Booysen dated 19 November 2014 in reply to memorandum of Adv M Noko dated 21 October 2014.	09 to 19
Z(j)	Cover letter by Adv M Noko – Mashilo dated 14 August 2012 re: Application for authorization in terms of Section 2(4) of POCA Act 121 of 1998 – The State versus Booysen, Johan Wessel and others.	20 to 21
Z(k)	Enclosing letter by Adv M Noko to Adv SK Abrahams dated 19 August 2015 re: Application for authorization in terms of Section 2(4) of POCA Act 121 of 1998 – The State versus Booysen, Johan Wessel and others	22 to 28
Z(l)	Typed note of page 145 (Annexure "JWB 12") in Exhibit Z(a) as understood by Maj-Gen JW Booysen.	29 to 30
Z(m)	Freedom Under Law (RF) NPC v National Director of Public Prosecutions and Others 2018 (1) SACR 436 (GP) (21 December 2017) para 53 & 59	31 to 93

EXHIBIT Z(h)

MEMORANDUM BY
ADV M NOKO
DATED 21 OCTOBER 2014

DIRECTORATE OF PUBLIC PROSECUTIONS
KWAZULU NATAL

The National Prosecuting Authority of South Africa
Igunya Jikelele Labetshutshisi boMzantsi Afrika
Die Nasionale Vervolgingsgesag van Suid-Afrika

MEMORANDUM

TO: THE SAPS INVESTIGATING OFFICERS
DURBAN CENTRAL CAS 466/09/2011

FROM: ADV. MOIPONE NOKO
DIRECTOR OF PUBLIC PROSECUTIONS
KWAZULU-NATAL

SUBJECT: DURBAN CENTRAL CAS 466/09/2011
CORRUPTION AGAINST MR TOSHAN PANDAY AND COL. NAVIN MADOE

DATE: 21 OCTOBER 2014

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301 Church Street
PIETERMARITZBURG
3201

P/Bag X9008
PIETERMARITZBURG
3200

KwaZulu Natal
South Africa

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1. INTRODUCTION

I had previously provisionally withdrawn this matter on the basis that there were considerations of justice that I had to look into in order to arrive at a proper decision that is in the interests of justice. These have been so looked into and my decision is indicated hereunder with substantiation.

2. BACKGROUND

2.1 A case with Durban Central CAS 466/09/2011 (Case 466) originates from the alleged case with Durban Central CAS 781/06/2010 (Case 781) (the alleged 2010 FIFA World Cup R60 million Fraud at Durban SAPS) with allegations that, *inter alia*, Mr Thoshan Panday (a businessman and Col. Navin Madhoe (SAPS officer at Durban Headquarters at procurement services) committed fraud against the SAPS by

inflating accommodation costs for SAPS members who used Mr Panday's accommodation services in KZN during the FIFA World Cup in 2010.

2.2 Case 466 has allegations that both Mr Panday and Col. Madhoe bribed Maj. Gen. Johan Booysen by offering and giving him an amount of R2 million in exchange for a report in the 781 case which would have assisted both Mr Panday and Col. Madhoe to be exonerated from criminal liability in the 781 case.

2.3 Case 781 was dealt with by the Specialised Commercial Crime Unit (SCCU) in Durban and disposed of recently with a decision not to prosecute anyone as there was no evidence to prosecute any person with any offence. It has been revealed by the SCCU that the SAPS members who were charged with the investigation of this 781 case was gunning for the prosecution of a specific person (KZN SAPS Provincial Commissioner, Lt. Gen. Ngobeni) and Mr Panday and Col. Madhoe were being pressurised to falsely implicate her in the commission of criminal offences, with a promise that they will be exonerated in 781. When the SAPS investigators realised that the PC cannot be charged in this case (781), simply because there is no evidence against her, one I/O reportedly said that the SCCU prosecutor may as well just close this 781 case. It appears Mr Panday and Col. Madhoe featured nowhere in the 781 then as the focus was on the PC. One then may ask a question, why was Col. Madhoe arrested in 466 case. Was this a lawfully justified arrest or was it a way to pressurise him to implicate the PC, as he (Col. Madhoe) even mentions in his representation that he was being regularly interviewed by the I/Os so as he falsely incriminate the PC, which he flatly refused.

2.4 The SCCU revealed the scheming and intercepting of phone calls of, *inter alia*, Mr Panday, with a motive and agenda to falsely implicate certain people. They allegedly even went further to even boast to Mr Panday telling him that they know what his defence in the 781 case will be, as they heard his discussions with his legal representative through the intercepted calls.

2.5 Mr Panday was even promised by SAPS members in the 781 case that if he falsely implicate the PC, they would get rid of the 466 case. It was further explained to Mr Panday that the benefit of this sought incrimination of the PC for them (SAPS members) will be that the PC will be forced to resign and then Maj. Gen. Booysen will become the next KZN PC, further, Maj. Gen. Deena Moodley would remain in control of the secret fund.

2.6 The 781 matter which forms the basis and reason for the alleged corruption of Maj. Gen. Booysen by Col. Madhoe, was found to be non-existent by the SCCU.

2.7 Maj. Gen. Booysen is the complainant and the only witness in the 466 case against Mr Panday and Col. Madhoe.

The very Mr Panday and Col. Madhoe who allegedly refused to pave the way for him to become the next KZN SAPS PC by refusing to falsely implicate the current Provincial Commissioner Lt. Gen. Ngobeni.

2.8 The 466 case is investigated by the members of the police who fall under the command of Maj. Gen. Booysen, who is the complainant in the 466 case. Their objectivity in dealing with this case (466) becomes questionable, especially with the Cato Manor case cloud hanging over their heads. This, I believe, would shake their credibility and the court would view all these in favour of the two, Mr Panday and Col. Madhoe.

2.9 Maj. Gen. Booysen, being the complainant in the 466 case, interfered with and exercised control in this case even going to an extent of determining and deciding on who visits Col. Madhoe when he was detained in the Durban Central police cells in the 466 case. This is exhibited by the letter that was issued on his direct instruction to the Durban Central Police Station Commander, Brigadier VR. Stokes. This letter, dated 16 September 2011, addressed to All Relief Commanders and Cell Commander and titled " VISITATION, DURBAN CENTRAL CAS 466/09/2011 : N. MADHOE", provides that

:"On the direct instruction from Maj. Gen. Booysen, only the following persons will be allowed to visit him, - 1. Maj. Gen Booysen; 2. Maj. Gen. Moodley, *et cetera*.

What is amazing with this is that Maj. Gen. Booysen issues an instruction regarding who must visit a suspect in a case that he is a complainant in himself. Further, he also has a visitation right in this as it appears in the letter him being mentioned as number one among those who are allowed to visit Col. Madhoe. By the way, what would a complainant want to visit a suspect in their own case for? This is unheard of and smacks of an agenda.

2.10 The allegation that the accused in 466, Mr Panday and Col. Madhoe, wanted Maj. Gen. Booysen to predate a report in the 781 case in order to have the section 205 subpoenas set aside (subpoenas for access to the bank account records) and consequently bribed Maj. Gen. Booysen to do that, does not really hold water because the fact is that if there has been any corruption (bribing of Maj. Gen. Booysen) that took place, would not make the corruption and its successful prosecution impossible, as sections 3(b) and 4(1)(b) of the Prevention and Combating of Corrupt Activities Act 12 of 2004 state. The alleged report in the 781 case that it was alleged was to be predated to invalidate the section 205 subpoenas did not suffice to prove fraud or any offence against anyone, especially Col. Madhoe and Mr Panday, who are alleged to have bribed Maj. Gen. Booysen for the predating of this very report. This report is made out to be the evidence in the 781 case to prove Fraud against Mr Panday and Col. Madhoe, but one wonders why it could not be seen in this way by the SCCU. If then there is no fraud that could be proven by the SCCU in the 781 case, why would Col. Madhoe (and Mr Panday) bribe Maj. Gen. Booysen, or anyone for that matter, in respect of the 781 case using this report? One would expect that they would know what is contained in the 781 case against them as they are part of it, they would know what they did to even know what this report has against them, especially Col. Madhoe who was then a procurement official who processed the accommodation documents leading to the 781 case.

2.11 Col. Madhoe alleges to have met with Maj. Gen. Booysen approximately on eight (8) occasions at Maj. Gen. Booysen`s instance regarding the Cato Manor unit`s shooting incidents before the 466 case came into being. I will say no more regarding this issue as the Cato Manor matter is *sub judice*. This, however, indicates a history of some sort being shared by the two, Col. Madhoe and Maj. Gen. Booysen, Now they are complainant and the accused in the 466 case, respectively.

2.12 There is an assumption that is not substantiated by evidence that Mr Panday is part of the alleged bribing of Maj. Gen. Booysen by Col. Madhoe. This assumption is derived from the position that they both are suspects in the 781 case. This will not stand in court as evidence for corruption against them.

2.13 This is one of those "your word against mine" kind of cases as it is Maj. Gen. Booysen`s word against that of Col. Madhoe. However, section 208 of the Criminal Procedure Act 51 of 1977 provides that a conviction may follow on evidence of a single witness. The cautionary rules may be applied by the court in this case especially given the background of this case, and the challenge here is that Maj. Gen. Booysen himself is alleged to be hitting back at Col. Madhoe for the damning information that Col. Madhoe has against him relating to the Cato Manor case. Col. Madhoe alleges that Maj. Gen. Booysen is trying to silence him with the allegation of the R2 million corruption for the damning information that he has against him. A22, a former SAPS Constable Sandesh Dhaniram, confirms the possession of this information about Maj. Gen. Booysen by Col. Madhoe in the form of discs.

2.14 If the legal strength of the section 205 subpoenas was based on the date on the report, as it is alleged, hence Col. Madhoe wanted it predated to invalidate the subpoenas, it is inconceivable that any person, let alone a Colonel in the SAPS (a person of Col. Madhoe`s calibre who was working on these issues of procurement at SAPS) would not know that SAPS could simply obtain other section 205 subpoenas that would tally with the new predated date in the report. His problem would not have been resolved, therefore, one may ask why would he bribe Maj. Gen. Booysen when this would

not provide a permanent solution to his alleged problem. This dating of this report would not have caused any subpoena to be set aside because it is not evidence in the 781 case, neither does it have any bearing as far as the procedural steps and prerequisites for obtaining a section 205 subpoena is concerned. This was proven by the SCCU in the 781 case.

2.15 Further, it appears that Maj. Gen. Booysen was not the investigator in the 781 case, but Col. Van Loggerenberg and others were. Therefore, a question arises that why would a favour of the predating of the report that should be in possession of those who are investigating the 781 case be sought from Maj. Gen. Booysen, not the investigators.

2.16 The cell phone records purported to reflect the calls between Mr Panday and Col. Madhoe do not indicate any specific crime having been planned. It is haphazard conversations with slang and profane language between the two people that one cannot really make out what issue was being discussed as a lot of different issues were being spoken about. More especially, a criminal offence cannot be deduced as constituted by the facts from their conversations in the cell phone records available. A question may be asked that on what basis was an inference drawn by the police investigators that these conversations pertain to or constitute a criminal offence being planned by the couple, specifically that they were planning to bribe Maj.Gen. Booysen. The alleged authority to intercept the calls for which both Col.Madhoe and Mr Panday`s calls are alleged to have been recorded was issued during June 2011 for June to September 2011. This appears to go way before the 466 case. This then ties up with what the SCCU has revealed that people`s calls were being recorded and the period tallies with the 781 case rather than the 466. One then wonders if the 781 recordings are not utilised in another case, the 466 case, which is not permissible..

3. **CONCLUSION**

3.1 I have decided to decline to prosecute (*Nolle Prosequi*) both Col. Madhoe and Mr Panday for corruption or any offence in the 466 case. This is due to lack of reasonable prospects of a successful prosecution, as explained and substantiated *supra*. Further, there appears to be agendas among the parties and scores to be settled, unfortunately we appear to be used to assist whoever to settle those scores and push those agendas. We are expected to act impartially and ethically in the execution of our duties as officials of the National Prosecuting Authority, thus any indication that we are being used in a manner that flies in the face of our values, ethics and Code of Conduct, must be avoided and not be entertained at all, hence I hereby do by declining to prosecute in this case.

Kind regards

ADV. M. NOKO
DIRECTOR OF PUBLIC PROSECUTIONS
KWAZULU-NATAL

EXHIBIT Z(i)

LETTER OF RESPONSE BY MAJ GEN JW BOOYSEN DATED 19 NOVEMBER 2014

G.P.-S. 002-0222 SAP 21

SUID-AFRIKAANSE POLISIEDIENS SOUTH AFRICAN POLICE SERVICE

Reference : Durban Central CAS 466/09/2012
Enquiries : Maj Gen Booysen
Telephone : 031-3256069
E-Mail : BooysenJ2@saps.gov.za

OFFICE OF THE PROVINCIAL HEAD
DIRECTORATE FOR PRIORITY
CRIME INVESTIGATIONS
DURBAN

2014-11-19

National Director Public Prosecutions
Private Bag x 752
PRETORIA
0001

DURBAN CENTRAL CAS 466/09/2012 : CORRUPTION AGAINST MR THOSHAN PANDAY AND COLONEL NAVIN MADHOE :

1. I refer to a missive from the office of the DPP in KwaZulu-Natal, Advocate M Noko dated 21 October 2014. For your easy reference I attach a copy marked "Annexure A".

2. This missive from Advocate Noko is rather verbose. It is permeated with conjecture, innuendo, inaccuracies and in certain instances blatant untruths. Her assertions are an aberration which lacks substance supported by credible evidence.

3. I will deal with her assertions hereunder.

Ad par 2.3

I respectfully disagree with the submission by Advocate Noko that *"there was no evidence to prosecute any person with any offence"* in the main investigation pertaining to the R60M corruption. The reference number of this case is Durban Central CAS 781/09/2011. It is my submission that there is a *prima facie* case against Mr Thoshan Panday, Colonel Navin Madhoe as well as Captain Ashwin Narrainpersad.

For purposes of this submission I refrain from detailing the evidence in this matter save to say that it contains in excess of twenty (20) lever arch files of documents, more than two hundred (200) affidavits as well as a forensic audit report compiled by an independent group of auditors namely Price Waterhouse Cooper.

I find it objectionable that the Specialized Commercial Crimes Unit (SCCU) from her office seeks to entertain and attach credibility to the claims of the suspects in this matter. Quite how it has been "revealed" by the SCCU that SAPS members charged with the investigation of Durban Central CAS 781/09/2011 was gunning for KZN Provincial Commissioner, Lieutenant General Ngobeni – is unclear. This imputation is not supported by any evidence other than the contrived version of the suspects themselves. I, for one, have never expressed any desire to become the Provincial Commissioner of KZN and neither have I applied for this position before. In my view this is a fallacious argument since the irregularities that were investigated, occurred before the 2010 Soccer World Cup. The investigation focused on irregularities before her appointment as Provincial Commissioner. It is thus ludicrous to believe the suspects ie. Panday and Madhoe in this regard. The investigating officers could not have attempted to "falsely implicate" the Provincial Commissioner for a crime that took place before she assumed her post. Her involvement in the matter relates to attempts by her to interfere with the investigation after she assumed her position as Provincial Commissioner, and not with regard to the procurement irregularities *per se*.

The conclusion by Advocate Noko that neither Panday nor Madhoe features anywhere "no where" (sic) is manifestly wrong and this conclusion ought to be challenged. There is overwhelming evidence to support a converse conclusion.

The question by Advocate Noko as to why Madhoe was arrested in a subsequent attempt to bribe me is rather rhetorical. A reading of case 466/09/2011 will demonstrate beyond doubt that Advocate Noko's reasoning is fallacious and wrong. I find it reprehensible that the suspect's version of events is preferred by Advocate Noko. This is a worrying precedent.

Ad par 2.4

Quite how the SCCU *"revealed the scheming and intercepting of phone calls of, inter alia, Mr Panday, with a motive and agenda to falsely implicate certain people"* in my opinion is a mystery. The tenor and tone of Advocate Noko's assertions in this paragraph is indeed worrying and ought to be examined. In her own words there is no proof of Panday's claims as she refers to mere "allegations". Her preference of believing the suspect's version over the police's version raises to my mind a question of serious impropriety.

Ad par 2.5

Other than the claims by the suspects in this matter, who had much to lose, had the investigation led to a prosecution, and conversely much to gain should they have managed to derail the investigation, there is no evidence whatsoever to remotely support the claims contained in this paragraph. In any event, why would the Provincial Commissioner be forced to resign if she knew the evidence against her was contrived? Furthermore, there is no guarantee that I would succeed her as Provincial Commissioner. Pre-supposing that she had resigned, for this or any other reason, her vacant post would have been advertised and prospective candidates evaluated for possible appointment. It is my submission that Panday and company have failed to compromise me. They have attempted to have the investigation stopped. The Deputy National Commissioner for the HAWKS – Lieutenant General Dramat is *aux fait* with the detail. When this failed they brought in an unsuccessful application in the High Court to thwart the investigation. After they failed to bribe me with R2M in cash, they have obviously run out of ideas. To now suggest an agenda by myself to become Provincial Commissioner at the expense of Lieutenant General Ngobeni is not supported by any evidence and ought to be rejected.

Lieutenant General Ngobeni has no control over the Secret Fund. If I had to succeed her the situation would remain the same. To postulate that Major General Moodley would therefore remain in control of the Secret Fund makes no sense and is in any event irrelevant.

Ad par 2.6

I have dealt with Durban Central CAS 781/09/2011 in par 3 *(Ad par 2.3) supra.* This submission by Advocate Noko, I repeat, is based on a fallacious argument.

Ad par 2.7

I am not the complainant in the matter of Durban Central CAS 466/09/2011. This is a disingenuous proposition by Advocate Noko so as to build a legend for her imputations contained in par 2.8 and 2.9 *infra*. For one, the State is the complainant in the corruption matter. I am merely one of many witnesses. Advocate Noko clearly doesn't understand my role in this investigation. She also chooses to ignore the fact that the Durban Central CAS 781/09/2011 investigation was initiated by none other than the Financial Head in the province Brigadier Laurence Kemp. It is inconceivable that Brigadier Kemp knew about my "aspirations" as alleged by Advocate Noko, unless he obviously colluded with me to discredit the Provincial Commissioner. Had Advocate Noko however bothered to examine Brigadier Kemp's statement in Durban Central CAS 781/09/2011, she would have established the origin and source of this entire investigation.

Ad par 2.8

Advocate Noko is mendacious in stating that the investigating officers's objectivity are questionable, especially with the Cato Manor case cloud hanging over their heads. The investigating officers in these matters are as follows :

Durban Central CAS 781/09/2011	Colonel van Loggerenberg
Durban Central CAS 466/09/2011	Colonel du Plooy
Durban Central CAS 122/04/2012	Colonel Herbst

None of these investigating officers were ever attached to the Cato Manor Unit. They are not implicated in the Cato Manor issue at all, hence their credibility cannot be questioned as implied by Advocate Noko.

In any event, it would appear that Advocate Noko is usurping the function of the courts, as the credibility of witnesses ought to be pronounced upon by the courts.

Ad par 2.9

Advocate Noko is seriously misguided to suggest that I interfered with and exercised control in Durban Central CAS 466/09/2011. Had she complied with the NPA policy guidelines she was at liberty to consult with me to establish the facts which I shall detail now.

- As the Provincial Head – HAWKS, it is incumbent upon me to exercise control over all investigations conducted by the HAWKS in KZN.
- The National Directorate Head – HAWKS, were kept abreast of all developments in this investigation.
- To suggest that I "interfered" with the investigation is akin to suggest that Advocate Noko herself is interfering with the functions of her subordinates.
- There is nothing mysterious regarding my instruction with regard to visits to Madhoe. Initial investigations revealed complicity by officers within SAPS. This entry into the occurrence book was made to obviate attempts by officers with *mala fide* intentions.
- I have dealt with the matter regarding my being the complainant above *(see Ad par 2.7)*. Once again the tenor and tone of Advocate Noko's contentions appears to be that of a defense counsel rather than that of a Prosecutor. The fact that I had not visited Colonel Madhoe at all subsequent to his arrest, or that I have not personally communicated with him directly or indirectly demonstrates that Advocate Noko's assertion that it *"smacks of an agenda"* is misguided and I reject it with contempt.

Ad par 2.10

Advocate Noko chooses to be deliberately obtuse. For one, there is indeed a strong *prima facie* case against Colonel Madhoe and Mr Panday in Durban Central CAS 781/09/2011. The attempt by Colonel Madhoe and Mr Panday to derail the investigation in Durban Central CAS 781/09/2011 emanates from their unsuccessful application to have the Section 205 subpoenas set aside.

Although the report in question itself does not contain *prima facie* evidence of a crime being committed, pre dating the report to a date before the application for the Section 205's could have rendered the 205's and subsequent evidence obtained, inadmissible. Information in this report contained evidence gleaned as a result of the 205's. In other words, if I had predated this report it would have meant that the investigators had obtained the information illegally, before obtaining the Section 205 subpoenas.

Advocate Noko rightly indicates that Colonel Madhoe was from the procurement section. He has inadequate legal knowledge to argue the points raised by Advocate Noko. Her sentence : *"One would expect that they would know what is contained in the 781 case against them as they are part of it, they would know what they did to even know what this report has against them, especially Col Madhoe who was then a procurement official who processed the accommodation documents leading to the 781 case."(sic)* Is incoherent and difficult to understand ie. How and why would Panday and Madhoe know what is contained in 781? They were the suspects in the matter and not the investigators. Furthermore, they knew exactly what was contained in the report since they had illegally obtained it. Two copies of the report were found in Madhoe's vehicle on two separate occasions. A third copy of the report had fingerprints that matched those of Panday on it. All this evidence is contained in the dockets and for some unknown reason appears not to have been considered.

Ad par 2.11

Advocate Noko once again prefers to exclude reliable evidence in Durban Central CAS 466/09/2011 in favor of Colonel Madhoe's allegations who obviously stands to gain by making these false allegations. There is objective evidence in 466 such as cellphone tower and communication correlation analyses (obtained from the cellphone records of Colonel Madhoe and Mr Panday), sms's sent by Colonel Madhoe, affidavits from Brigadier Madonsela and Sergeant Govender as well as the cellphone records of Colonel Madhoe, Mr Panday and myself to prove that the converse is in fact true – it was Madhoe who in fact contacted myself on a number of occasions.

The objective evidence will also prove that the meetings took place before the so called Cato Manor matter. I would venture to suggest that by not considering the objective evidence and to favor unsubstantiated submissions by accused smacks of an agenda itself. If Advocate Noko had regard to all the available evidence at her disposal she would not have come to the conclusion she has.

Advocate Noko should be aware that my involvement in the Cato Manor matter is not *sub judice* and has been disposed of in my favor.

Once again the last sentence in this paragraph ie.:*"This, however indicates a history of some sort being shared by the two, Col. Madhoe and Maj. Gen. Booysen, Now they are complainant and the accused in the 466 case, respectively."* Is incoherent and difficult to understand

Ad par 2.12

Advocate Noko fails to ascribe these assumptions to anyone. Neither the investigators nor I have come to this assumption. If she herself is coming to this assumption she once again fails to consider *prima facie* evidence in 466. For instance the statement of the person who drew the money on behalf of Mr Panday, Mr Panday's fingerprints on the document in question, and the paper slips found amongst the money offered to myself which is linked to Panday's bank account, to name but a few.

Ad par 2.13

This is not a matter of *"your word against mine"* case. If Advocate Noko had regard to all the evidence it would be clear to her that there is not only direct witness evidence but also objective technical evidence and circumstantial evidence to support my version. No such evidence, other than false allegations by the suspects exist to support Madhoe's claims. The reference to Dhaniram's statement is rather surprising as a careful examination of this statement actually confirms my version.

Advocate Noko failed in her duty to study the outcome of my successful application in the High Court (see Booysen vs NDPP). Had she done so she would have realized that no such evidence as purported by Colonel Madhoe exist. I fail to understand how Advocate Noko seeks to accept an untested and unfounded allegation by a suspect who faces serious consequences. In this regard I also quote a passage of a finding by the Appeal Court in State vs Zuma - where the honorable Judges of the Appeal court held the following : ***"The court dealt at length with the non-contentious principle that the NPA must not be led by political considerations and that ministerial responsibility of the NPA does not imply a right to interfere with a decision to prosecute (para 88 et seq). This, however, does need some contextualization. A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent, something not alleged by Mr Zuma and which in any event can only be determined once criminal proceedings have been concluded. The motive behind the prosecution is irrelevant because, as Schreiner JA said in connection with arrest, the best motive does not cure an otherwise illegal arrest and the worst motive does not cure an otherwise legal arrest illegal. The same applies to prosecutions."***

Ad par 2.14

I have dealt with this adequately *supra.* I would like to add however that Advocate Noko wrongly assumes imputed knowledge of law by Madhoe, she herself points out that he works at Procurement who hardly if ever works with Section 205 subpoenas. What concerns me however of this paragraph is once again the tenor and tone of her assertions. She is once again deliberately obtuse and misconceives the allegation against Madhoe. I find it disquieting that the SCCU seeks to "prove" allegations by suspects.

Ad par 2.15

Advocate Noko once again demonstrates her ignorance of the evidence at her disposal. The report in question was undated when I received it. It is common practice in SAPS communication protocol for the recipient to date stamp and sign reports when they receive it. It is this date Madhoe wanted me to predate. The fact that I, as a potential witness in this regard, was not interviewed, is indeed worrying.

Ad par 2.16

Advocate Noko, I respectfully submit, could not have listened to all the recordings between Panday and Madhoe. Her conclusion otherwise would be irrational and subjective. It is evident that she has considered some of the recordings to the exclusion of others, which may very well have resulted in a wrong conclusion.

It is common cause that Panday's calls were intercepted prior to the 466 case. In any event, even if she would argue that the recordings are inadmissible, it does not render them illegal. Furthermore, there is enough *prima facie* evidence to secure a successful prosecution in 466 – without presenting the Act 70 interceptions as evidence. This, I understand, was the stance and view of the investigator.

In conclusion, it is unfortunate that Advocate Noko seeks to accuse me of having an "agenda" in these investigations. Even if it was true, and I deny this strenuously, the AD has pronounced itself adequately in this regard. (see par 2.13 *supra)*. I suspect that the converse is true. This matter had been outstanding for more than two years. I think it is no co-incidence that this missive co-insides with the renewal of the Provincial Commissioner's contract. The fact that Advocate Noko has failed to return the case docket to the investigating officers in spite of requests by them and the subsequent timing of this missive leaves me with this inescapable conclusion.

I hereby request you to summon all the relevant dockets to your office and to have same evaluated by an independent team from your office. This issue has been widely reported in the local media. It has drawn various negative remarks from the public and commerce. It is in the best interest of the Judicial System the National Prosecuting Authority, the South African Police Service, Mr Panday, Colonel Madhoe and Captain Narainpersad for these issues to be ventilated in an appropriate manner once and for all.

I trust that you will interpret my letter as a concern rather than a complaint.

Yours faithfully

MAJOR GENERAL
PROVINCIAL HEAD : DIRECTORATE PRIORITY CRIME INVESTIGATION
J W BOOYSEN

EXHIBIT Z(j)

COVER LETTER BY
ADV M NOKO - MASHILO
DATED 14 AUGUST 2012

Director of Public Prosecutions
KwaZulu-Natal

TO: ADV. N JIBA
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTONS

FROM: ADV. M NOKO - MASHILO
ACTING DIRECTOR OF PUBLIC PROSECUTIONS
KWAZULU-NATAL

DATE: 15 AUGUST 2012

SUBJECT: APPLICATION FOR AUTHORISATION IN TERMS OF SECTION 2 (4) OF POCA ACT 121 OF 1998

THE STATE VERSUS BOOYSEN, JOHAN WESSEL AND OTHERS

1. Herewith the following:

1.1 Application for authority in terms of section 2(4) of the Prevention of Organised Crime Act, 121 of 1998 for your consideration and approval

1.2 The proposed Indictment,

1.3 The draft authorisations for Section 2(1)(e) and 2(1)(f) respectively

2. I have perused the documents and recommend the Application.

3. The Accused have appeared in the Regional Court, Durban and the matter has been postponed to 24 August 2012 for the Racketeering Authorisation. Eighteen (18) of the accused persons are on bail and twelve (12) other accused persons will be added to the charge sheet.

ADV. M NOKO-MASHILO
ACTING DIRECTOR OF PUBLIC PROSECUTIONS
KWAZULU NATAL

EXHIBIT Z(k)

ENCLOSING LETTER BY
ADV M NOKO TO
ADV SK ABRAHAMS
DATED 19 AUGUST 2015

TO: ADV S K ABRAHAMS
NATIONAL DIRECTOR OF PUBLIC PROSECUTONS
NATIONAL PROSECUTING AUTHORITY

FROM: ADV. M NOKO
DIRECTOR OF PUBLIC PROSECUTIONS
KWAZULU NATAL

DATE: 18 AUGUST 2015

SUBJECT: **APPLICATION FOR AUTHORISATION IN TERMS OF SECTION 2 (4) OF POCA ACT 121 OF 1998**
THE STATE VERSUS BOOYSEN, JOHAN WESSEL AND OTHERS

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1 This is an application for fresh authorisation of racketeering charges against

- accused 1, Johan Booysen in respect of whom the case has in the meantime been withdrawn on the basis of Gorven J's judgment and

- accused 2 Gonasagren Padayachee;

accused 3 Adriaan Stoltz;

accused 4 Paul Mostert

accused 5 Eric Nel

accused 7 Adjithsigh Ghaness

accused 8 Phumelela Makhanya

accused 9 Willem Olivier

accused 10 Thembinkosi Mkhwanazi

accused 11 Thathayiphi Mdlalose

accused 13 Rubendran Naidoo

accused 14 Raymond Lee

accused 15 Anton Lockem

accused 16 Eugene van Tonder

accused 19 Feiokwakhe Thomas Dlamuka

accused 25 Charles John Smith

accused 26 Jeremy Martem

accused 27 Bruce David McInnes

who are presently bringing a motion application challenging the racketeering authorisations issued by Adv Jiba on 17 August 2012.

The following documents are enclosed herewith in support of the application:

1.1 Application for authority in terms of section 2(4) of the Prevention of Organised Crime Act, 121 of 1998 for your consideration and approval,

1.2 The fresh prosecution memorandum,

1.3 The proposed indictment,

1.4 The draft authorisations for section (2)(1)(e) and 2(1)(f) respectively.

2 The High Court Judgment in the matter of Booysen vs ANDPP, set aside the previous authorisations which were issued by the then ANDPP on 17 August 2012 and, further stated that the NPA is entitled to consider re-issuing a new certificate afresh, it is on that basis that I apply for the re-issue of the certificate. I refer to Page 23 Paragraph 39 of the judgment, a copy of which is also enclosed for easy reference.

The court stated:

"[39] It is important to note that the above findings do not amount to a finding that Mr Booysen is not guilty of the offences set out in counts one (1) to two (2) and eight (8) to (12). That can only be decided by way of a criminal trial. Setting aside the authorisations and decisions to prosecute also does not mean that fresh authorisations cannot be issued or fresh decisions taken to prosecute if there is a rational basis for these decisions."

3 I have perused the documents and recommend the fresh issue of racketeering authorisations; I am of the view that the prosecutors have made a good case for the re-issue of the racketeering authorisations in terms of section 2(4) of the Prevention of Organised Crime Act, 121 of 1998.

4 I have received full briefings from the prosecution team and resolved that the concessions made by counsel on behalf of the ANDPP during the hearing of Booysen's application, were incorrect.

a. In fact the content of the dockets do implicate Booysen in the commission of racketeering offences.

b. Furthermore the dockets did contain statements of Colonel Aiyer which were dated 3 August 2012 and Mr Ndlondlo dated 31 July 2012, which implicates Mr Booysen in the offences when the authorisation was granted on the 17th August 2012. There was also a draft unsigned statement of Mr Danikas which was alluding to the role of Mr Booysen in the SVC Cato Manor operation. (The process of having the statement signed through the Mutual Legal Assistance route, is already underway.)

c. The docket contained monetary awards where Mr Booysen was also a beneficiary who was rewarded for the killing of KwaMaphumulo Taxi

Association members and his presence in one of the scenes is supported by the statement of Andrew Carsen Cochrane dated 16 May 2012.

d. The docket also contained affidavits in a High Court application made by Mr Booysen defending the actions of the SVC Cato Manor Unit in the killing of the KwaMaphumulo Taxi Association members. Mr Shozi, the attorney of KwaMaphumulo Taxi Association members states that he had engaged police management and the then MEC (Bheki Cele) in vain to prevent the killings that Mr Booysen is defending in the High Court application, in his statements dated 3 August 2012 and 15 March 2013.

e. Subsequent to the issuing of authorisation of the certificate there were further statements from Colonel Aiyer dated 31 August 2012 and 13 March 2013 alluding to the direct involvement of Mr Booysen in the operations of SVC Cato Manor Unit.

f. The dockets now have the statements of Commissioner Brown, who was the direct supervisor of Mr Booysen dated 8 and 9 May 2013 wherein he explains the circumstances under which Mr Booysen managed the operations of Cato Manor SVC Unit.

g. The dockets also contain a statement of Mr Simphiwe Cyprian Mathonsi who was a bodyguard of members of Stanger Taxi Association dated 15 May 2013 wherein he explains the collusion of Stanger Taxi Association with Messrs Booysen and Mostert to protect their association against the KwaMaphumulo Taxi Association and payment made to these two police officials.

This statement circumstantially support a statement of Bongani Mandla Mkhize dated 1 August 2012, and statement of Bhekinkosi Mthiyane Ndlondlo dated 1 July 2012. These statements explain that there was an exchange of money between Stanger Executive and Cato Manor SCV section whenever the members of KwaMaphumulo Taxi Association were killed by Cato Manor SVC members.

5 The other accused except Accused 6 (Eva) and Accused 22 (Auerbach) who have in the meantime died, will be appearing in the Durban High Court on the 9th October 2015. The prosecuting team envisages re-arraigning Mr Booysen before the 9th October 2015 so that on the 9th October 2015, he will officially join others should the racketeering charges be authorised.

6 I attach copies of the following affidavits/ documents which are relevant to Booysen, Johan Wessel in so far as racketeering charges (1 – 2) and predicate charges (8 – 10) are concerned:

6.1 High Court application where Booysen is a respondent

6.2 Documents relating to the monetary awards

6.3 Statements of Colonel Aiyer dated 3 August 2012, 31 August 2012 and 13 March 2013

6.4 Statement of Bhekinkosi Mthiyane Ndlondlo dated 31 July 2012

6.5 Statement of Andrew Carsen Cochrane dated 16 May 2012

6.6 Statements of Commissioner Brown dated 8 and 9 May 2013

6.7 Statements of Nkosinathi Hopewell Shozi dated 3 August 2012 and 15 March 2013

6.8 Statement of Simphiwe Cypran Mathonsi dated 15 March 2013 and

6.9 Statement of Bongani Mandla Mkhize dated 1 August 2012.

7. In respect of the other accused who are also challenging the racketeering authorisations, we submit that there is sufficient evidence linking them to the racketeering and predicate offences as will be shown in the Fresh Prosecution Memo enclosed herewith.

6

8. Kindly indicate when you are available for a full briefing with the entire prosecution team.

ADV. M NOKO
DPP: KWAZULU NATAL
19/08/2015

EXHIBIT Z(l)

TYPED NOTE OF ANNEXURE "JWB 12" IN EXHIBIT Z(a)

8/3/12. Meeting with ICD

I Kgamanyana 083 780115

Glen Angus 083 5655320

Mr Khuba 084 7022741

1st Meeting- meeting with Min of Pol SAPS - Acting Nat Com Nhlanhla Vilakazi.

Merge two teams. Mandate –Matter pending since Dec 2011 – Hit Squad allegations – **Wants arrests by this week worked throughout weekend**

Challenge to rope in NPA pros – Not submit to KZN DPP but to NDPP

Gen Mabula met with Mhlotswa promise ..... (*him ?*) that 2 adv .....*(prov ?*) join only next week.

51 cases . Those J56 (19) Inquest dockets 12 .....*(courts ?)* convinced that

Now 6 cases that that are needing other inv outstanding.

Brought six cases which they want to bring here and feels .....? Case. Wants decision by tomorrow.

Suspects 12 in Unit – Booysen PC . OC.

Evidence of Photos with General Mabula's team. Need to get.

Way Forward: Whether an pros- will join next weekend. ICD offices DBN. Briefed NDPP

EXHIBIT Z(m)

FREEDOM UNDER LAW (RF) NPC

VERSUS

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS

2018 (1) SACR 436 (GP)

(21 DECEMBER 2017)

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 89849/2015
Reportable: Yes
Of interest to other judges: No
Revised.
21 December 2017

In the matter between:

FREEDOM UNDER LAW (RF) NPC	Applicant
and	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
REGIONAL HEAD: SPECIALISED COMMERCIAL CRIMES UNIT	Second Respondent
NOMGCOBO JIBA	Third Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fourth Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fifth Respondent
LAWRENCE SITHEMBISO MRWEBI	Sixth Respondent

Heard: **30 and 31 October 2017.**
Delivered:

Coram: **Tlhapi , Mothle JJ and Wright J**

Summary: Review-withdrawal of charges of fraud against Deputy National Director of Public Prosecutions-whether the decision to withdraw the charges is irrational on the grounds of the legality principle.
Review- Section 12 of the NPA Act- suspension and institution of inquiry against the Deputy National Director of Public Prosecution and Other- whether the decision by President of the Republic of South Africa not to exercise section 12 of the NPA Act powers is irrational on the grounds of legality -

JUDGMENT

Mothle *et* Tlhapi JJ (Wright J dissenting)

INTRODUCTION

1. Freedom Under Law (RF) NPC *("FUL")* has instituted a two- pronged application against several Respondents. In the first leg of the application , FUL seeks relief in the form of a review and setting aside of a decision taken on or about 18 August 2015 by the First Respondent, National Director of Public Prosecutions *("NDPP") ,* Advocate Shaun Abrahams SC, *("Abrahams") alternatively* by the Second Respondent , Mokgatlhe: Specialised Commercial Crimes Unit, Advocate Marshall Mokgatlhe ("*Mokgatlhe"),* to decline to prosecute and withdraw charges of perjury and fraud which have been brought against the Third Respondent, Deputy National Director of Public Prosecutions , Advocate Nomgcobo Jiba *("Jiba*").

2. In the second leg of the application, FUL seeks relief to have reviewed and set aside the decision by the Fifth Respondent, the President of the Republic of South Africa *("the President")* not to act in terms of section 12(6)(a) of the National Prosecuting Authority Act , 32 of 1998 *(" NPA*

Act"), to suspend Jiba and the Sixth Respondent, Special Director of Public Prosecutions, Advocate Lawrence Sithembiso Mrwebi *("Mrwebi"),* pending inquiries into their fitness to hold their respective offices in the National Prosecuting Authority *("NPA") ,* and to institute such inquiries.

3. FUL seeks further relief in the form of an order directing the President to act in terms of s12 (6) (a) of the NPA Act, to suspend Jiba and Mrewbi and to institute an enquiry for each of them. FUL also requests a Court order against the Respondents, jointly and severally, including costs of two counsel.

4. The respondents oppose the application.

5. The application consisted of two parts. In Part A, FUL sought relief on an urgent basis, that pending the final determination of relief sought in Part B, Jiba and Mrwebi be interdicted from discharging any function or duties as officials of the NPA. A cost order was sought against the President along with any other Respondent opposing the relief sought in Part A, *alternatively* ordering that the costs of the application for the relief sought in Part A be reserved for determination in the application for relief sought in Part B.

6. Part A of the application came before Court on 19 November 2015 where it was struck from the roll for want of urgency. The matter was then set down in the ordinary motion Court roll and came before the Honourable Mr Justice Wright on 6 June 2017, which was further postponed to a date to be determined by the Deputy Judge President. The issues resulting in that postponement as well as the cost implications thereof, which were argued during the hearing of Part B of this application, will be dealt with later in this judgment under costs. The Deputy Judge President placed Part B of the application on the special motion roll, presided by a Full Bench of three Judges on 30 and 31 October 2017.

BACKGROUND

Review of the President's decision

7. FUL's review application against the President arises essentially out of adverse findings and comments made in court judgments against Jiba and Mrwebi. Before referring to these cases, it is apposite to state succinctly, a background to the said court cases.

8. In December 2010 Jiba was appointed as Deputy National Director of Public Prosecutions *("ONDPP')* and, Mrwebi about a year later in November 2011 as Special Director of Public Prosecutions *("SOPP').* A year after her appointment as DNDPP Jiba was also appointed Acting NDPP during December 2011. It is common cause therefore that both Jiba and Mrwebi are advocates and officials in the NPA.

9. At the time of the elevation of Jiba and Mrwebi to senior positions in the NPA, there were two high profile cases pending in the High Court, Gauteng Division, Pretoria. The one case was a criminal_ trial where charges had been preferred against General Richard Mdluli, *("Mdluli')* Head of the Intelligence Unit of the South African Police Services, who was charged with murder and other offences . The other was a review application launched by the Democratic Alliance against a decision by the former Acting NDPP, Advocate Mokotedi Mpye SC, to withdraw charges against Mr Zuma, currently the President of the Republic of South Africa. Jiba's appointment coincided with an interlocutory application in that review wherein certain recorded material *("so-called spy tapes")* and documents were sought from the NPA.

10. It was during her tenure as Acting NDPP that Jiba made decisions in high profile cases which eventually attracted review applications, where adverse findings and comments were made against her by the courts.

11. These high profile court cases are: *Booysen v Acting National Director of Public Prosecutions and Others*[1] *("the Gorven J Judgment");* the judgment of Murphy J in the matter of *Freedom Under Law v National Director of Public Prosecutions and Others*[2] *(" the Murphy J judgment")* and the appeal of this latter judgment in the Supreme Court of Appeal *("SCA")* cited as *National Director of Public Prosecutions and Others v Freedom Under Law*[3] *("the Mdluli SCA Appeal")* and the Supreme Court of Appeal judgment in the matter of *Zuma v Democratic Alliance*[4] *("the ZUMA/DA SCA Judgment').*

12. The Murphy J Judgment was delivered on 23 September 2013. It was followed by the Gorven J Judgment delivered on 26 February 2014, then the Mdluli SCA Appeal whose judgment was delivered on 17 April 2014 and, the ZUMA/DA SCA Judgment was delivered on 28 August 2014. In the Murphy J Judgment as well as the appeal thereof in the SCA, and the Govern J Judgment, scathing comments on the conduct of Jiba and Mwrebi were made and, in the ZUMA/DA SCA judgment these comments were directed at Jiba.

13. FUL also relies on two reports in support of their application against the President. The one report was compiled by former NDPP, Mr Mxolisi Nxasana *("Nxasana")* and the other by Constitutional Court Justice Z M Yacoob *("the Yacoob report')* into allegations of serious impropriety within the NPA, particularly on the part of Jiba and Mrwebi.

14. FUL contends that the adverse findings and statements made by the respective Judges in the cases referred to above, as well as in the Nxasana and Yacoob reports in the judgment, raise serious questions of impropriety and their fitness to hold their offices as officials in the NPA. It is

[1] Booysen v Acting National Director of Public Prosecutions and Others [2014] 2 ALL SA 319 KZD).
[2] Freedom Under Law v National Director of Public Prosecutions and Others [2014 (1) SA 254 (GNP).
[3] National Director of Public Prosecutions AND Others v Freedom Under Law [2014) (4) SA 298 (SCA).

further contended that the President, being aware of these adverse comments, failed to suspend the two officials and institute inquiries into their fitness to hold office, as provided for in section 12 (6) (a) of the NPA Act.

15. FUL sought relief to have the alleged failure to suspend and institute inquiries against Jiba and Mrwebi, reviewed and set aside, and further, that the President be directed to suspend them, and institute inquiries against them.

Review of the NDPP's decision to withdraw charges

16. The review case against Abrahams/Mokgatlhe[5] has its origin from events during or about August 2012, still on Jiba's watch as Acting NDPP. An authorisation was requested by the Director of Public Prosecutions in Kwa-Zulu Natal, to institute criminal prosecution against Johan Booysen *("Booysen"),* a Major General in the South African Police Services and others on charges of racketeering in terms of section 2 of the Prevention of Organised Crime Act *("POCA").* Jiba granted the authorisations and Booysen was served with an indictment of seven counts of various offences.

17. Booysen applied to the KwaZulu-Nata l Division of the High Court, seeking to review and set aside the decision of Jiba to issue the authorisations on the basis that they were arbitrary, irrational and offended the principle of legality and the rule of law. Booysen further contended that there was no material implicating him before the authorisation was made. The application came before the Honourable Mr Justice Gorven on 7 February 2014.

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[4] Zuma v Democratic Alliance [2014) 4 ALL SA 35 (SCA). Supra

[5] FUL contends that it is Abrahams who took the decision to withdraw charges, but Abrahams and Mokgatlhe insist that it was Mokgatlhe who took the decision.

18. Gorven J found that Jiba's conduct in exercising her powers to issue authorisat ions in terms of POCA against Booysen and, the manner in which she conducted her defence of the review application unsatisfactory and not befitting of her office

19. According to the records, the following are the events leading to the withdrawal of the charges against Jiba. On 22 July 2015, Abrahams held a briefing session with NPA officials regarding the Jiba charges. He relieved Willie Hofmeyr *("Hofmeyr")* of oversight regarding the prosecution of Jiba and instructed the prosecution team to report to Mokgatlhe. On 5 August 2015, the prosecution team of Ferreira and Van Eden provided an opinion, recommending that Jiba be prosecuted. On 11 August 2015, the South African Broadcasting Corporation news reported that the newly appointed NDPP was set to withdraw charges against Jiba. It transpired that Abrahams, upon assuming office, provided a written delegation to Mokgatlhe to prepare an opinion and make the decision on whether to proceed with Jiba's prosecution. Mokgatlhe provided an opinion to Abrahams recommending the withdrawal of charges against Jiba. Abrahams convened an *in pronto* press conference on 18 August 2015 , in which he announced that there were no prospects of a successful prosecution and a decision had been taken to withdraw charges against Jiba.

20. FUL exchanged correspondence with the office of the NDPP inquiring as to the reasons for the withdrawal of charges. In the course of that correspondence, it transpired that there was uncertainty as to whether the decision was taken by Abrahams and/or Mokgatlhe.

21. FUL contends that the withdrawal of prosecution against Jiba was irrational and should be reviewed and set aside.

Other court decisions

22. Prior to and after FUL launched this application, there were various other similar matters, in addition to those referred to above, which were heard by other courts and had a bearing on the issues raised in this application. These matters are (a) On 1 April 2015 , the General Council of the Bar of South Africa ("the GCB") instituted an application in the Gauteng High Court before Legodi J and Hughes J, for the striking off of Jiba and Mrwebi from the roll of advocates , *("the GCB application").* The Court struck the names of Jiba and Mrwebi off the roll of advocates.[6] At the time of wr iting this judgment, that matter is pending on appeal before the Supreme Court of Appeal. (b) On 14 September 2015, the Democratic Alliance *(" DA")* approached the Western Cape High Court for review of the President's failure to take a decision to institute enquiries in respect of Jiba and Mrwebi and to have them both suspended. That application was dismissed by Dolamo J *("the Dolamo J Judgment").*[7] Two months after the DA applicat ion, on 17 November 2015, FUL then launched this application in the Gauteng High Court, seeking in part, the exact same relief; (c) A Full Court of the Gauteng High Court on 17 March 2017 delivered a judgment in the Ntlemeza matter,[8] *("the Ntlemeza judgment")* concerning the removal of General Berning Ntlemeza ("Ntlemeza") as head of the Directorate for Priority Crime lnvestigation, ("the *Hawks*"). In both the Full Court Judgment and the SCA Judgments on appeal, scathing remarks were again made about the impropriety of Ntlemeza and his non-suitability to remain in office even for 1 day further and (d) The President made reference to a matter pending in the Gauteng Division, Pretoria, *("the CASAC application')*[9] wherein the constitutional validity of section 12 of the NPA Act is under attack. The President contends that the preferable course would be to await the outcome of that application. These decisions also became a focus of the proceedings before this Court.

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[6] General Council of the Bar of South Africa v Jiba and Others 2017 (2) SA 122 (GP).
[7] Democratic Alliance v President of the Republic of South Africa and Others (2016] All SA 537 (WCC).
[8] Helen Suzman Foundation v Minister of Police
[9] Council for the Advancement of the South African Constitution v President of the Republic of South Africa, Case No. 93043/2015.

Points in limine

23. Jiba and Mrwebi raised points *in limine* in their opposing papers. All but one of the points *in limine* were heard together with the rest of the arguments. At the commencement of the hearing, the Court had to deal with a point *in limine* raised by Mrwebi in his answering affidavit and adumbrated in his counsel's heads of argument. This contention applies equally to Jiba and was supported by Jiba's counsel. Mrwebi contends that the High Court in the matter of *The General Council of the Bar "GCB"* application against Jiba and him, heard in the Gauteng Division, Pretoria, struck them both off the Roll of Advocates . An appeal has been launched with the SCA and the hearing thereof is imminent in the first half of 2018. Therefore pending the outcome of the appeal, the application before Court should not be heard.

24. In essence, the point *in limine* is predicated on the reasoning that having been struck off the roll of advocates, they will no longer qualify by law, to continue as officials of the NPA. Thus, continues the reasoning, the suspension and enquiry sought by FUL in terms of section 12 (6) (a) of the NPA Act will no longer be necessary. The Court was of the view that this point in limine if upheld would have had the effect of the hearing being stayed or postponed. The Court then invited the parties to present argument in limine on this point.

25. During the debate on this issue, FUL persisted with the argument that the matter should proceed, relying on the Ntlemeza judgment in which it was held that his continued stay in office even for one day longer pending appeal, would erode public confidence in the police. Therefore the delay in removing Jiba and Mrwebi from office would continue to harm the NPA. Counsel for respondents supported the contention that it will be untenable for this Court to order the relief sought on the basis, essentially of the same issue that is before the appeal court. The Court adjourned to consider the submissions and ruled that the proceedings will continue. In

doing so, the Court reserved the reasons for its decision to be outlined in the final judgment.

26. The following were the reasons:

(a) Firstly, the appeal launched against the GCB judgment suspends the execution of that judgment. [10] Consequently, both Jiba and Mrwebi are still advocates pending the outcome of the appeal process.

(b) Secondly, the GCB decision did not pronounce on Mrwebi's fitness to hold office in the NPA. There is a distinction between his fitness to be on the Roll of Advocates on the one hand and his fitness to be an official of the NPA on the other. If he is struck from the roll of Advocates, he is disqualified from both positions. However should he remain on the roll of advocates, that would not preclude a possible inquiry where he may still be found not fit and proper to be an official of the NPA.

(c) As already stated, FUL's application is two pronged. The case against Mrwebi appears in only one leg of the application namely the impugned failure by the President to suspend Mrwebi and institute an inquiry to investigate his fitness to continue holding office in the NPA. Mrwebi is not implicated in the case against Abrahams and Mokgatlhe's withdrawal of charges against Jiba. The Court would have in any event had to continue with the hearing of the withdrawal of the prosecution leg of the application.

27. It is on the basis of these reasons that the Court proceeded with the hearing of the application. I now proceed to deal with the two applications which were argued together.

THE LAW

[10] See section 17 of the Superior Courts Act 10 of 2013.

28. FUL's application is grounded on the principle of legality and rationality. In terms of the legality principle, the exercise of public power must be rational and lawful. The public power in this instance derives from section 179 of the Constitution[11], read with sections 12(6) and 22(2)(c) of the NPA Act. Navsa JA, writing for the SCA in the matter of ***DA v Acting NDPP and Another***[12] dealt with the review of a decision to discontinue a prosecution. After considering the question, Navsa JA concluded that a review of a decision to discontinue prosecution can be reviewable on the grounds of legality and irrationality.[13] This view was further endorsed in the matter of ***The NDPP v Freedom under Law***[14] where the Court stated in paragraph 29 as follows:

> *"[29] As demonstrated by the numerous cases since decided on the basis of the legality principle, the principle acts as a safety net to give the Court some degree of control over action that does not qualify* as *administrative under PAJA, but nonetheless involves the exercise of public power. Currently it provides* a *more limited basis of review than PAJA. Why I say "currently" is because it* is *accepted that 'legality is an evolving concept in our jurisprudence, whose full creative potential will be developed in the context-driven and incremental manner.'... But for the present purposes it can be accepted with confidence that it includes review on grounds of irrationality and on the basis that the decision- maker did not act in accordance with the empowering statute (see: Democratic Alliance and Other v Acting National Director of Public Prosecutions and Others 2012 (3)* SA *486 (SCA para 's 28 to 30)."*

29. In paragraph 32 of its judgment, the Constitutional Court in ***Albutt v***

[11] Constitution of the Republic of South Africa Act, 1996.
[12] 2012 (3) SA 486 (SCA) at p 494 from para 23.
[13] The SCA dealt with the history of the review as developed in Pharmaceutical Manufacturers Association of South Africa and Another In Re: Ex Parte the President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) and Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC).
[14] 2014 (4) SA 298 (SCA).

Centre for the Study of Violence and Reconciliation and Others,[15] explains rationality in review proceedings as being really concerned with the evaluation of a relationship between means and ends - the relationship, connection or link between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. In paragraph 51, the Constitutional Court held thus:

"...*But, where the decision is challenged on the grounds of rationality, Courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other* means *that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution."*

30. Rationality raises substantive and procedural issues.[16] It follows therefore that both the process by which the decision is made (the means) and the decision itself must be rationally related. This principle was confirmed by the Constitutional Court in ***DA v President of the Republic of South Africa***[17]

31. In the matter of ***Freedom Under Law v National Director of Public Prosecutions and Others***[18] Murphy J dealt with the question of the review grounds under PAJA, of a decision to prosecute. This matter went on appeal to the SCA[19] where the Court re-emphasised the principle that the decision to discontinue a prosecution or not to prosecute can be reviewable not under PAJA but on the basis of the principle of legality and irrationality. Importantly, further that in deference to the doctrine of separation of powers, it is not appropriate for a court seized with a review

[15] 2010 (3) SA 293 (CC).
[16] Albutt supra at
[17] 2013 (1) SA 248 (CC)
[18] 2014 (1) SA 254 (GNP)
[19] 2014(4) SA 298 (SCA)

application, and upon setting aside the decision, to step into the shoes of the prosecution and grant orders and directives as to how the prosecution should be carried out from that point onwards.

32. In this application, FUL contends that both in the case of the President and that of Abrahams and/or Mokgatlhe, their exercise of public powers in terms of sections 12(6) and 22(2)(c) respectively, was irrational and therefore stands to be reviewed and set aside.

WITHDRAWAL OF CHARGES AGAINST JIBA

33. The power to review charges preferred against an individual are stated in Section 22(2)(c) of the NPA Act. As already stated above, Nxasana, faced with the adverse comments made by the Courts in regard to Jiba, in particular in the Booysen matter, requested the President to institute an enquiry into the conduct of Jiba. The President did not respond to this request. Nxasana then instituted charges of fraud against Jiba. Shortly thereafter, Nxasana was replaced by Abrahams who, upon assumption of office, wrote to Mokgatlhe requesting his opinion and decision in relation to the charges. Mokgatlhe in return wrote an opinion which he forwarded to Abrahams who on receipt of the opinion, announced the following day the withdrawal of charges against Jiba.

34. The charges against Jiba arise from the adverse comments made by the Court in the Booysen review application. In passing judgment on 26 February 2014 , Gorven J had this to say about the Jiba:
"As regard the inaccuracies, the NDPP is, after all, an officer of the court. She must be taken to know how important it is to ensure that her affidavit is entirely accurate. If it is shown to be inaccurate and thus misleading to the Court, she must also know that it is important to explain and, if appropriate, correct any inaccuracies. Despite this, the invitation of Booysen was not taken up by the NDPP by way of a request, or application, to deliver a further affidavit. In response to Booysen assertion

of mendacity on her part, there was a deafening silence. In such circumstances, the Court is entitled to draw an inference adverse to the NDPP. The inference in this case need go no further than that. On her version, the NDPP did not have before her Annexure "NJ4" at that time. In addition, it is clear that Annexure "NJ3" is not a sworn statement. Most significantly , the inference must be drawn that none of the information on which she says she relied linked Booysen to the offences in question. This means that the documents on which she says she relied did not provide the rational basis for the decision to issue the authorisations to Judge Booysen for contravention of Section 2(1)(e)and (f) respectively. ..... I can conceive of no test for rationality, however, relaxed, which could be satisfied by her explanation. The impugned decisions were arbitrary, offend the principle of legality and, therefore, the Rule of Law and were unconstitutional."

35. Consequent to the remarks by Gorven J, Nxasana, who by then had been appointed NDPP from 1 October 2013, ordered his legal team to withdraw the appeal lodged against the Gorven J judgment in March 2014. The following year in March 2015, Nxasana, after failing to persuade the President to suspend and institute an inquiry into the conduct of Jiba, preffered charges of fraud and perjury against her. Jiba appeared in court in relation to the fraud and perjury charges on 21 April 2015. The case was postponed to 10 June 2015. By this date, all the parties had indicated their preparedness to continue with the trial and the date thereof was set for 21 and 22 August 2015. During this period, there was a change of personnel in the NDPP with Nxasana leaving on 1 June 2015 and replaced by Abrahams. On 18 August, two days before the commencement of the trial, Abrahams announced the withdrawal of the charges against Jiba.

36. The grounds of review of the decision to withdraw charges against Jiba, as presented by FUL in this case are in essence that Booysen, who had a direct interest in the matter, was not consulted prior to the withdrawal of charges. Secondly, FUL contends that if Mokgatlhe took the decision to

withdraw the charges (as both he and Abrahams contend) *" then he did so irrationally and unlawfully - perpetrating a number of material errors of law along the way."*

37. The withdrawal of the charges against Jiba was announced by Abrahams in a press conference wherein he told the media that the withdrawal of the charges arises from the provisions of Section 78 of POCA, which in their view *"clearly absolves Ms Jiba from any liability, including criminal prosecution, for having exercised the power in terms of the empowering provisions of POCA. There are no prospects of* a *successful prosecution and I accordingly declined to prosecute ....." (court emphasis)*

38. The quotation in the preceding paragraph is attributed to the statement which Abrahams read to the media. It is not clear whether in presenting this statement, Abrahams was quoting Mokgatlhe or was communicating his own words. If it is the latter, then it is clear that he is the one who took the decision to withdraw the charges. However, FUL contends that Abrahams did not file any record of decision on the grounds that he did not take the decision to withdraw the charges.

39. Mokgatlhe filed a record which revealed that he relied on his opinion for his decision. On the record submitted by Mokgatlhe, his opinion stands alone as the reason for the withdrawal of the decision to prosecute.

40. This opinion came under attack by FUL. It is contended that by relying on Section 78 of POCA, Mokgatlhe committed a material error of law in that the charges preferred against Jiba arise mainly from her conduct in her opposition to Booysen's review application. Jiba in instituting proceedings against Booysen was not performing functions under POCA, which would exempt her from liability. Section 78 of POCA Provides:

> *"Any person generally or specifically authorised to perform any function in terms of this Act, shall not, in his or her personal*

capacity, be liable for anything done in good faith under this Act."

41. Gorven J found that Jiba, in the exercise of her powers to charge Booysen, relied on statements that were untrue and taken on oath in the form of an affidavit submitted in the review application. The charges against Jiba are fraud and perjury. Fraud arises from the averment by Jiba in her affidavit opposing Booysen's review application that she had *"information under oath which* was *before her which indicate that Johan Booysen knew or ought to have known that his subordinates were killing* suspects *instead of arresting them."* Gorven J found that there was nothing before Jiba linking Booysen to the alleged activities. In particular, the learned Judge further found that one of the statements in Jiba's possession on which she purportedly relied to take the decision to prosecute Booysen, was dated ***after*** *the decision to prosecute had been taken. It could thus not have informed the decision.* This conduct is the basis of the misrepresentation constituting the fraud charge. In deposing to an affidavit that she had in her possession information implicating Booysen, which it turned out she did not have, as Gorven J found, Jiba was not truthful and thus made her liable for prosecution on a perjury charge.

42. Therefore when Jiba deposed to and filed an affidavit containing information misleading to the court, she was not performing any functions under POCA. Section 78 would thus not find any application in this instance.

43. Abrahams in his answering affidavit further alleges that the charges preferred against Jiba were a consequence of a personal vendetta on the part of Nxasana. There is no merit in this allegation. As already indicated, Jiba's charges arise out of conduct which is attributed to her and which she engaged in during her tenure as Acting NDPP. That was before the appointment of Nxasana. Whatever the relationship between Nxasana nd Jiba, it cannot be said that Nxasana trumped-up the charges.

44. Abrahams and Mokgatlhe thus committed an error of law by their reliance on Section 78 of POCA. As demonstrated in the preceding .paragraph, the finding by Gorven J, which was the basis of the fraud and perjury charges , arose from Jiba's conduct in Booysen's review application. Mokgatlhe's opinion did not adequately address the findings by Gorven J. In this regard, the opinion is a display of a supine approach to the findings and remarks by Gorven J.

45. The further stance adopted by Abrahams and Mokgatlhe in opposing the relief sought by FUL, does not deal directly with the allegations by the latter. Instead, they raised two arguments. The first being that they present a lengthy explanation of the merits and demerits of the case against Jiba in order to demonstrate that there was no *prima facie* case. Secondly, it is argued that the GCB decision of Legodi and Hughes, which is now on appeal, confirms that there is no *prima facie* case against Jiba in that the court found that she acted in good faith.

46. As FUL correctly contends, these defences have no merit. In the first instance, in a review application the decision maker is bound by the reasons it advanced for its decision and is barred from relying on additional reasons. In the matter of ***National Lotteries Board v South African Education and Environment Project***[20]***,*** Cachalia JA writing for the SCA upheld the English Law principle that a decision that is invalid for want of adequate reasons cannot be validated by different reasons given later. The Learned Appeal Court Judge wrote :

> *"The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly and the failure to give reasons, which includes proper or adequate reasons, should ordinary render the disputed decision reviewable. In England, the*

[20] 2012 (4) SA 504 (SCA) at paragraph 27.

Courts have said that such a *decision would ordinarily be void and cannot be validated by different reasons given afterwards - even if they show the original decision may have been justified.*

For in truth the latter reasons are not the true reasons for the decision, but rather an ex post facto realisation of a *bad decision.*"[21]

47. The after-the-fact efforts to provide a lengthy explanation in the affidavit in an attempt to justify the decision, results in new reasons being advanced, which were not stated in the record. Abrahams and Mokgatlhe are confined to the reasons stated in the record and nothing further. The opinion has been attacked on several grounds that it was irrational in that it sought to ignore an opinion of the senior counsel without dealing therewith; the views of the prosecuting team led by Ferreira as well as the Gorven J Judgment. The test of rationality has to apply to the reasons for the decision proffered in terms of Rule 53 of the Uniform Rules of Court.

48. The second leg of the defence raised by Abrahams and Mokgatlhe, relies on the judgment of Legodi J in the GCB matter, where with reference to that matter, it is argued that Jiba, in instituting charges against Booysen, acted in good faith. It is contended by the respondents that *"the GCB matter now demonstrates beyond doubt that there is no prima facie case against Jiba."*

49. There are three reasons why in this Court's view the finding by the Court - in the GCB decision cannot find application in this case. Firstly, the decision to withdraw the prosecution was taken in August 2015 while the GCB decision was delivered in September 2016. The GCB decision was thus not before Abrahams and Mokgatlhe when they took the decision to withdraw charges. The principle of reliance on the ex post facto reasons

[21] This principle find support in The Minister of Defence and Others v Motau and Others 2014 (5) SA 69 (CC). See also Mobile Telephone Networks (Pty) Ltd v Chairperson of the Independent Communications Authority of South Africa and Others [2014) (3) ALL SA 171 (GJ) at paragraphs 94 and 97

stated above, equally applies.

50. Secondly, it does not appear in the GCB judgment that it was dealing with Jiba's affidavit before Gorven J, which gave rise to that Court's adverse findings , in turn resulting in fraud and perjury charges. The GCB decision also did not in arriving at their finding, deal with the opinions and views such as that of Ferreira and Adv. Pat Ellis SC *("Advocate Ellis")* whose opinions supported of the need to prosecute. Thirdly and most importantly, the GCB application does not constitute an appeal against the finding by Gorven J concerning Jiba's conduct.

51. The Respondents raise a further defence that FUL has not complied .with its duty to exhaust internal remedies and consequently this Court should not entertain their application. This defence is based on the contention that the decision to withdraw charges against Jiba was taken by Mokgatlhe and not Abrahams and as such FUL should have followed the provisions of Section 22 (2)(c) of the NPA Act by approaching the NDPP to review the decision to prosecute or not to prosecute.

52. As a matter of record, neither FUL nor Booysen has approached Abrahams to review the decision to withdraw the charges. Further, Jiba had not approached Abrahams with a representation that charges be withdrawn.

53. This Court is of the view that the ground of opposition premised on the alleged failure to exhaust internal remedies is misplaced. Firstly, the facts indicate that it was not Mokgatlhe but rather Abrahams who took the decision to withdraw charges preferred against Jiba.

54. The record reflects further that the process leading to the withdrawal of the charges was initiated by Abrahams, who, upon assuming office as the **NDPP,** and acting without any representation from Jiba, inquired from Mokgatlhe as to his decision regarding the charges. This inquiry comes on

the back of the decision having already been taken and parties, including the state, having informed the court of their readiness to proceed. In response, Mokgatlhe, with a full knowledge of the matter being ready to proceed, delivered an opinion to Abrahams on 17 August 2015 in which he ***recommended*** that the charges against Jiba be withdrawn.

55. It is the Court's view that the version of Abrahams and Mokgatlhe raises serious questions of credibility. Apart from the fact that it was Abrahams who initiated the inquiry concerning the decision to prosecute, being aware that such had already been made and that Jiba had appeared in Court, the request directed to Mokgatlhe appears in fact to be an initiative to review a decision already taken by his predecessor.

56. Secondly, if Mokgatlhe was tasked with taking a decision, it is not clear why he in turn had to provide a recommendation.

57. Thirdly, the explanation given by Abrahams and supported by Mokgatlhe to the effect that the decision to withdraw charges purportedly taken by Mokgatlhe was disguised as a form of recommendation so as to avoid it being leaked, is bizarre in the extreme. Both are public officials and should be aware that what they place on paper is part of the record to which the public is entitled to have access.

58. To opine and make recommendation which later turns out to have been a disguise as a decision, is disingenuous and lacks integrity. This kind of conduct on the part of officials was frowned upon by the SCA in the matter of ***Jalal NO v Managing Metropolitan Municipality 2014 (5) SA 123 (SCA)*** where in paragraph 30 the Court had this to say:

> "…. *where, as here, the legality of the actions of 'the relevant officials' is at stake it is crucial for the public servants to neither be coy nor to play fast and lose with the truth. On the contrary, it is their duty to take the Court into their confidence and fully explain*

the facts so that an informed decision can be taken in the interests of public and good governance."

59. Having regard to what is stated above, it is the finding of this Court that firstly, the decision to withdraw charges against Jiba was taken by Abrahams on recommendation by Mokgatlhe. Secondly, the reasons advanced for the withdrawal of charges against Jiba are based on the material error of law which falls short of the legality expected in a rational decision. Thirdly, the defence that FUL has not exhausted the internal remedies by seeking a review of a decision to prosecute has no merit.

60. The NPA derives its power from section 179 of the Constitution and the NPA Act. Its mandate is to institute criminal proceedings on behalf of the state. Once a decision has been made to prosecute, the NPA may review that decision in a manner prescribed by section 179 (5) (d) of the Constitution. The exercise of that power must not be manifestly at odds with the purpose for which the power was conferred.[22]

61. Thus, this Court concludes that the means selected to withdraw the charges against Jiba are not rationally related to the NPA's objectives which it sought to achieve. Consequently, it is the finding of this Court that the decision to withdraw charges against Jiba was irrational and is set aside.

62. Having reviewed and set aside the decision to withdraw charges, the question which arises is what will be the appropriate remedy. In this regard, this Court can do no more than refer to the matter of ***NDPP v Freedom under Law***[23] where with reference to the doctrine of separation of powers, the Court made it clear that the doctrine precludes the Court from impermissibly assuming the functions that fall within the domain of the executive. However, towards the end of that paragraph the SCA had

[22] The NDPP v Freedom Under Law supra.
[23] The NDPP v Freedom Under Law, supra at pragraph 51.

this to say:

> "... *The setting aside of the withdrawal of the criminal charges and the disciplinary proceedings has the effect that the charges and the proceedings are automatically re-instated, and it is for the executive authorities to deal with them."*

THE PRESIDENT'S ALLEGED FAILURE TO SUSPEND AND INSTITUTE INQUIRIES AGAINST JIBA AND MRWEBI

63. The relief sought by FUL in the second stage of this application is three-fold:
    a. FUL contends that this Court must find that President failed to institute Inquiries under Section 12(6)(a) of the NPA Act, into Jiba's and Mrwebi's fitness to hold the offices of Deputy National Director of Public Prosecutions and Head of Specialised Commercial Crime Unit respectively;
    b. The President is also alleged to have failed to provisionally suspend the two officials from office pending the said enquiries;
    c. FUL further contends that this Court must direct the President to institute the enquiries and provisionally suspend Jiba and Mrwebi from office pending the enquiries.

64. The relief sought in the first two prayers is the same, except that it relates each to Jiba and Mrwebi separately. The same legal principles will apply in each instance.

65. In both judgments of the High Court and the SCA, adverse remarks were made against Jiba and Mrwebi which raised serious questions of impropriety on their part as officials of the NPA.

66. There was a further matter of *Zuma v the DA,* in which the production of certain recordings that were made in having charges against Mr Zuma

withdrawn, were sought. These recordings were generally known as *"the spy tapes".* Again in this case, the Court had adverse statements to make about Jiba which also further reflected on her suitability and fitness to hold office.

67. Prior to leaving office as NDPP, Nxasana on 26 June 2014 had sought and received advice from Advocate Ellis in regard to criticism of Jiba and Mrwebi in the various court judgments. On 7 July 2014, Ellis provided an opinion in which he recommended that the President must suspend Jiba and authorise an inquiry into her fitness to hold office. He further recommended that she be charged with perjury. On 18 July 2014, Hofmeyr, on authority of Nxasana, wrote to the Minister of Justice and Correctional Services, wherein he sought the suspension of both Jiba and Mrwebi. There was exchange of correspondence. The end result is that the President did not act.

68. The allegation on the failure by the President to suspend the two officials and institute enquiries into their fitness to hold office in the NPA, stems from three judgments one of which went on appeal to the SCA. These are the Gorven judgment[24]; the Murphy judgment;[25] the SCA Mdluli judgment and the the Zuma/DA SCA judgment[26].

69. In all these judgments, the courts made scathing and adverse findings against Jiba and in some instances Jiba and Mrwebi. In addition thereto, the conduct of the two officials also appears in the NDPP's Annual Report for the year 2014/2015 prepared in terms of Section 35 (2) of the NPA Act as well as the report by former Constitutional Court Justice Mohammed Yacoob *(" the Yacoob report")* into allegations of serious impropriety within the NPA, particularly on the part of Jiba and Mrwebi. FUL contends that the Yacoob report in particular reveals startling findings that show that

[24] Booysen v Acting National Director of Public Prosecutions and Others Supra
[25] Freedom Under Law v National Director of Public Prosecutions and Others Supra
[26] Zuma v Democratic Alliance Supra

there is a firm basis for Jiba's and Mrwebi's immediate suspension and institution of disciplinary and other proceedings against them.

70. I now turn to deal briefly with the findings in these judgments and the two reports.

The Murphy J's judgment

71. The Murphy J's judgment, dated 23 September 2013, follows a review application brought by FUL, challenging the decisions of Jiba and Mrwebi in withdrawing criminal charges that were pending against General Richard Mdluli *("Mdtull')* the then Head of Crime Intelligence within the South African Police Service. Mdluli faced two sets of charges. The first set of charges were made up of 18 counts including murder, attempted murder, intimidation, kidnapping, assault with the intent to do grievous bodily harm and defeating the ends of justice *("the murder charges").* The second set of charges relate to fraud and corruption, theft and money laundering, all arising out of an alleged unauthorised use of funds of the Secret Service's account.

72. Prior to taking the decisions to withdraw charges against Mdluli, Jiba engaged the services of various senior counsel to provide opinions on the matter. These included Adv . Mutau SC, Mr J E Ngoetjana , Adv. Motimele SC, Adv. Notshe SC, Adv. S Phaswane and Adv. L P Halgryn SC. All these eminent counsel opined that it would be incorrect for Jiba and Mrwebi to oppose the review application challenging the withdrawal of the charges against Mdluli. She nevertheless went ahead and opposed the relief sought. This then resulted in the matter of *FUL v The NDPP in 2014 before Murphy J.*

73. In several paragraphs of the Murphy judgment, the Court had adverse comments to make about Mrwebi and Jiba. In paragraph 24 of the judgment, the Court had this to say about their conduct:

"*.... unbecoming of persons of such ·high rank in the public service, and especially worrying in the case of the NDPP, a senior officer of this Court with weighty responsibilities in the proper administration of justice. "*

Further,

"The attitude of (Jiba and Mrwebi) signals a troubling lack of appreciation of the Constitutional ethos and principles underpinning the offices they hold."

74. Further in paragraph 68, Murphy J opined:

" The averments accordingly can carry little weight on the grounds of unreliability. The conduct of Mrwebi falls troublingly below the standard expected of a *senior officer of this Court."*

75. In regard to the conduct of Jiba, the Court further stated:

"Besides not availing herself of the opportunity to review the decision, she waited more than a *year after the application was launched before raising the point and then did so in terms that can fairly be described as abstruse".*

76. Murphy J at paragraph 237 of the judgment had this to say:

"The NDPP and the OPP's have not demonstrated exemplary devotion to the independence of their offices, or the expected capacity to pursue this matter without fear or favour. Remittal back to the NDPP, I expect, on the basis of which has gone before, will be a *foregone conclusion, and further delay will cause unjustifiable prejudice to the complainants and will not be in the public interest. The sooner the job is done, the better for all concerned. Further prevarication will lead only to public disquiet and suspicion that those entrusted with the constitutional duty to prosecute are*

not equal to the task."

The Gorven J's Judgment

77. The Gorven judgment dated 26 February 2014 followed Murphy J's Judgment. The issues there arise from an application for review by Major General Booysen in which is sought to set aside a decision by Jiba to issue authorisations for his prosecution. The grounds of the review were that the authorisations were arbitrary, irrational and offend the principle of legality and the rule of law. This because Booysen contended that there was no material implicating him in the crimes he is alleged to have committed. FUL contends that the key findings in the Gorven judgment cast serious doubt on Jiba's fitness and propriety to hold office. Gorven J's judgment as dealt with earlier in this judgment, found Jiba's conduct not befitting an officer of the court.

The Mdluli SCA Judgment

78. The Murphy judgment went on appeal to the SCA where the conduct of Jiba and Mrwebi was once again criticised. The learned Brandt JA writing for the SCA in a judgment handed down on 17 April 2014, stated thus at paragraph 37:

This case we know that Adv. Breytenbach made a request early on to the NDPP, which was supported by a 200 page memorandum, that the latter should intervene in Mrwebi's decision to withdraw the fraud and corruption charges. In addition, the dispute had been ongoing for many months before it eventually came to Court and, during that period, it was widely covered by the media. But despite this wide publicity, the high profile nature of the case and the public outcry that followed, the NDPP never availed herself of the opportunity to intervene. Against this background FUL could hardly be blamed for regarding an approach to the NDPP's meaningless and elusory in a matter of some urgency."

79. Further at paragraph 41, the learned JA continued:

"With the Court a *quo's conclusion (para 55) that Mrwebi's averment in his answering affidavit .... is untenable and incredible, to the extent that it falls to be rejected out of hand."* And that *"the only inference is thus that the [&h Respondent's) decision was not in accordance with the dictates of the empowering statute on which it was based."*

80. FUL submits, in support of the impugned failure by the President to suspend Jiba and Mrwebi and further institute enquiries against each of them, that the adverse findings in the judgments of Murphy J and the SCA raise serious questions of impropriety against both officials. FUL further contends that the two officials are found in these judgments to have sought to deliberately mislead the Court by not placing before it a proper record of all the documents and facts relevant to the proceedings in the matter before Murphy J. It is contended further that Jiba in particular, persisted in her baseless opposition to the review application despite advice to the contrary from three sets of senior counsel. Most importantly, they presented palpably false and incredible versions of the facts to the court.

The Zuma/DA SCA Judgment

81. The judgment of the SCA, dated 28 August 2014, in the *Zuma/DA* appeal concerning the release of the so-called *"spy tapes"* also commented on the conduct of Jiba who was then the acting NDPP. Navsa JA, writing for the SCA, stated as follows At paragraph 41 of that judgment:

"In the present case, the then ANOPP, Ms Jiba, provided an "opposing" affidavit in generalised, hearsay and almost meaningless terms. Affidavits from people who had first-hand knowledge of the relevant facts were conspicuously absent. Further, it is to be decried that an important

constitutional institution such as the office of the NDPP is loath to take an independent view about confidentiality, or otherwise, of documents and other materials within its possession, particularly in the face of an order of this Court. Its lack of interest in being of assistance to either the High Court or this Court is baffling. It is equally lamentable that the office of the NDPP took no steps before the commencement of litigation in the present case to place the legal representatives of Mr Zuma on terms in a *manner that would have ensured either* a *definitive response by the latter or* a *decision by the NPA on the release of the documents and material sought by the DA. This conduct is not worthy of the office of the NDPP. Such conduct undermines the esteem in which the office of the NDPP ought to be held by the citizenry of this country."*

82. FUL contends that in addition to the other judgments, the comments made by the SCA in the preceding paragraph attacks the propriety of Jiba and raises serious questions whether she is a fit and proper person to occupy a position of authority within the NPA.

The Yacoob Report

83. In October 2014, commenting about the evidence presented by Mrwebi at the Breytenbach disciplinary enquiry, the Yacoob report opined as follows about Mrwebi:

"… left a *great deal to be desired. It displayed much arrogance, contradicted himself repeatedly and in material respects, and demonstrated considerable lack of understanding of the law and legal process. In our view, his evidence was certainly not becoming of* a *person holding the position of special director. He certainly did not come across as* a *man of credibility or integrity....* "

84. In regard to Jiba, the report in paragraph 37 states as follows :

"[The Third Respondent] said in the High Court that she knew nothing about the withdrawal of these cases and the Court found it difficult to believe her. We agree ... we find it quite incredible that she did not know about these cases.... The Supreme Court of Appeal rightly criticise her in the Mdluli case for doing nothing about Ms Breytenbach's representations to her. She must have known about them. Finally, in the Democratic Alliance case in the Supreme Court of Appeal, she was again criticised, with justification, in our view, for adopting a *supine approach to Court order to deliver certain materials to the FULs."*

The NPA Report

85. Consequent to the Murphy J and SCA judgments, the NPA, via the office of the State Attorney, briefed senior counsel to opine as to whether disciplinary steps ought to be taken against, amongst others, Jiba and Mrwebi. The senior counsel's opinion was not provided to this Court however, an extract from the report quoting the SC's opinion reads thus:

"The findings of Murphy J in the High Court, as confirmed by Brandt JA in the SCA, *constitute compelling justification for the disciplinary proceedings against [the First and Sixth Respondents]. The fact that they misled the Court and were prepared to lie under oath not only indicates* a *strong prima facie case of serious misconduct, but also casts grave doubt on their fitness to hold office. He consequently recommends that the President should, in terms of Section 12(6)(a), of the NPA Act, consider provisionally suspending the {Third and Sixth Respondents] pending an enquiry into their fitness to hold office.... He further recommends that a criminal investigation for perjury be opened against [the Third and Sixth Respondents]. "*

86. It is on record that Nxasana forwarded the recommendations from the SC's opinion as contained in this report, to the President to suspend these officials and institute enquiries. Instead, an enquiry was instituted into

Nxasana's fitness to hold office. Nxasana was replaced by Abrahams.

87. FUL contends that against the background of the scathing comments on the impropriety of Jiba and Mrwebi as stated in the four judgments and two reports, the President ought to have exercised his powers in terms of Section 12(6)(a) of the NPA Act, to suspend the two officials and institute enquiries into their fitness to hold office. Thus by failing to do so, the President failed in discharging his constitutional obligation and this failure stands to be reviewed and set aside.

88. A similar review application was launched in the Western Cape by DA[27] on 14 September 2015, prior to this review application by FUL. In that review application , the President contended that since the General Council of the Bar *("GCB")* had launched an application to have Jiba and Mrwebi struck from the roll of advocates , in the Gauteng Division, Pretoria, it would be premature for him to suspend the two officials and institute a parallel inquiry into their fitness to hold office. Dolamo J, who presided in the matter, dismissed DA's application on 23 May 2016 .

89. The GCB application, launched on 1 April 2015 , seeking relief to strike Jiba and Mrwebi from the roll of advocates was heard in the Gauteng Division, Pretoria, where Legodi J, with Hughes J concurring , concluded on 14 September 2016 that the two officials (Jiba and Mrwebi) should be struck from the roll of advocates. However, the two officials sought and received leave to appeal their striking from the roll of advocates to the SCA. Currently as this judgment is written, the matter is pending before the SCA. As a consequence, the President in opposing the current application by FUL, repeats the stance he adopted with success in the DA application before Dolamo J.

90. FUL persists with the argument that the decision reached in the GCB

[27] [2016] 3 All SA 537 (WCC).

judgment does not preclude the suspension and institution of enquiries against Jiba and Mrwebi on the question of their fitness to hold office. FUL contends that even if the Supreme Court of Appeal may set aside the judgment of the High Court, and find that they are in fact fit and proper persons to remain on the roll of advocates, the enquiry, which has to be instituted in terms of section 12(6)(a) of the NPA Act, is still relevant and thus the President is not precluded from instituting such enquiry.

91. The chronological sequence of events points out that long before the GCB filed its case on 1 April 2015, the conduct of Jiba and Mrwebi was a matter of public knowledge and disquiet. The adverse comments concerning Jiba first surfaced in the Murphy J's Judgment on 23 September 2013. The trend continued with the Gorven J's Judgment on 26 February 2014. On 17 April 2014 when the SCA delivered its judgment on appeal of the Murphy J's Judgment.

92. In August 2014, the SCA in Zuma v the DA continued with the scathing attack on Jiba. This then prompted Nxasana in September 2014, to write to the President requesting that he institute inquiry into Jiba's and Mrwebi's fitness to hold office.. The period from September 2013 to September 2014 has relevance and, there was no response from the President. The President did not act.

93. As at this time, the GCB application which the President raised as a reason not to act in terms of section 12 (6) (a) of th NPA, had not been launched. That application was launched on 1 April 2015 and relied on in the subsequent review application of 14 September 2015 by the DA in the Western Cape. There is no explanation provided in the papers as to why the President failed, for a period exceeding 1 year, to act even after having been requested to do so by the then NDPP, Nxasana.

94. This Court is of the view that the adverse findings and comments made by the courts against Jiba and Mrwebi have a direct effect on and erodes the

public confidence in the NPA as a law enforcement agency. It is therefore essential for the President as authorised, to act decisively and swiftly when the situation calls for such as in this case. We accept the view of the SCA that the continued presence of such high profile public officers in their positions under the circumstances, even for one day longer, should not be countenanced.

95. The President was questioned in Parliament about his views on the adverse comments made by the Courts concerning the two officials. It is not stated in the President's affidavit as to what prevented him at that time, before the launch of the GCB case to suspend the two officials and institute enquiries into the fitness to continue holding office as NPA officials. Contrary to the findings and conclusions reached by Dolamo J in the *DA v The President,* we are of the view that the President's failure to act under the circumstances constitutes a dereliction of his constitutional and statutory duties in terms of section 179 of the Constitution read with section 12 (6) (a) of the NPA Act. His failure to act as authorised is thus reviewed and set aside.

96. In regard to the remedy sought by FUL that the President should be directed to forthwith act in terms of section 12 (6) (a) of the NPA Act is concerned, the Court has to examine this in light of the GCB matter. As already stated, the two officials have appealed the decision of Legodi and Hughes JJ, striking them from the roll of advocates. The matter is pending before the Supreme Court of Appeal. The question is how, as Dolamo J found, the pending GCB case would affect the relief sought herein? In response to this inquiry, It is apposite to refer to Legodi J's remarks expressed thus in paragraphs 19 to 23 of their Judgment:

> *"19. To put the gist of Jiba 's criticism in perspective, it is necessary to refer to Sections 12 and 7 of the NPA Act and Admission of Advocate 's Act respectively.* ....

20. Section 12 of the NPA Act deals with the term of office of the National Director and Deputy National Director of Public Prosecutions, and sub-sections (5), (6) and (7) of Section 12 deal with the removal or suspension of same. ...

21. There is a *distinct difference between removal or suspension under Section 12 of the NPA Act and removal or suspension under the Admission of Advocates Act. ...*

22. The process under Section 12 of the NPA Act and Section 7 *of the Admission of Advocates Act, whilst overlapping, has* a *sharp distinction. In terms of the NPA Act, the National Director or Deputy National Director may be removed or suspended as such. That would not necessarily mean that such* a *person is automatically removed from the Roll of Advocates. For any such removal from the Roll of Advocates one has to follow the process envisaged in Section* 7 *of the Admission of Advocates Act. However, the National Director or Deputy National Director who is removed from the Roll of Advocates cannot continue to be* a *National Director or Deputy National Director of Public Prosecutions because of the provisions of Section 9 of the NPA Act which provides:*

> *"1. Any person to be appointed* as *National Director, Deputy National Director must –*
>
> (a) *Possess legal qualifications that would* ***entitle him or her to practice in all courts in the Republic; and***
>
> (b) *Be* a *fit and proper person, with due regard to his or her experience, conscientiousness and integrity. To be entrusted with the responsibilities of the office concerned. ...*"
>
> *(emphasis added)*

23. So, if you seize to be a *fit and proper person. under Section* 7 *of*

the Admission of Advocates Act, and you are removed from the Roll of Advocates, you cannot be entitled to practice in all courts in the Republic as contemplated in paragraph (a) of Section 9(1) of the Act. These processes can sometimes run parallel to each other, but any choice of the two would not render the process unfair."

97. In essence, the GCB judgment draws a distinction between fitness required to be an advocate and the fitness required to be an official in the NPA by examining the admission of Advocates' Act on the one hand and the NPA Act on the other. While the one may have the impact on the other, the two are capable of being delinked. The removal from the roll as an advocate will certainly impact on the fitness to hold office as an employee of the NPA. However, an advocate in good standing may not necessarily be fit and proper to hold office in the NPA.

98. We are of the view that upon completion of the prosecution of the appeal processes to finality, it transpires that Jiba and Mrwebi remain struck from the roll of advocates, both officials will, by operation of the law, cease to be officials in their respective capacities in the NPA. Counsel for Jiba and Mrwebi conceded as much. However, should the appeal be successful, they may be declared advocates in good standing. In such instance, the question of their standing and fitness to continue as officials of the NPA would then have to be addressed.

99. Having regard to the above, there is no doubt that the appeal process may have an impact on the remedy sought in this application. To direct the President to suspend and hold inquiries against Jiba and Mrwebi forthwith might result in an exercise running parallel with the appeal process, with the risk of resulting in a waste of resources in the event the appeal process fails.

100. We are of the view that FUL has thus made out a case that the President be directed to suspend and institute inquiries against Jiba and

Mrwebi. However, in light of the pending appeal process, this order must be stayed. This would accord with the stance now taken by the President as in the Western Cape matter before Dolamo J and in this Court.

101. The Court also had to examine the question of Jiba's and Mwrebi's suspension, pending the prosecution to finality, of the appeal process. The argument was raised that their continued presence in the NPA, pending the appeal process, would have the same effect as would be if the inquiries were contemplated. After the GCB Judgment striking them off the roll, the President wrote to the two officials, inviting them to show cause why they should not be suspended.

102. Abrahams took a decision at the request of both Jiba and Mrwebi, to put them on "special leave" pending the prosecution to finality, of the appeals against the judgment in the GCB matter. The Court, on inquiry to the advocates representing the parties to this application, could not establish in terms of what authority Abrahams acted to place the two officials on special leave. Further, it was stated in Court that in placing them on leave, Abrahams allowed them to take their official computers and granted them access to their offices. We are of the view that this arrangement is unsatisfactory. In effect, Jiba and Mrwebi are having access to computers and documents in the NPA as well as visiting the offices of the NPA. This was as good as they continuing with their functions in the normal way.

103. We are thus of the view that under further and/or alternative relief in the notice of motion, this Court will not be unsuited in ensuring that the two officials do not perform any functions pending the prosecution to finality of their appeals . An appropriate order should follow.

104. Jiba contends in her affidavit that these review proceedings are unsuited as the matter is *re judicata* in the Western Cape Division. This was with reference to the Western Cape application before Dolamo J. Also

joining Jiba on this point in limine, the President argues that this Court must develop the common law to provide for instances where a matter traversing the same issues is heard in one division, should be a bar to other parties to raise it in another division. I am of the view that this particular point *in limine* should fail because that application in the Western Cape Division was brought by the Democratic Alliance and not Freedom Under Law. The point of *res judicata* would apply where the same parties were before Court on the same issue.[28] The principle of Res Judicata has been developed over the years and is clear. There is thus no need to develop the common law further.

105. In regard to the question of costs, counsel for Jiba and Mrwebi contended that given the constitutional issues raised in this particular case, should they not be successful, they should not be mulcted with costs on the strength of the Biowatch[29] case. We agree. However the same cannot be stated in regard to the President as well as the National Director of Public Prosecutions.

106. There was a further issue of the reserved costs when the application was postponed before Wright J. The postponement is attributed to presentation of a document entitled *"FUL's Main Responding Note For Oral Argument"* by FUL which dealt with the latter's submissions concerning recent court decisions having a bearing on this application. Counsel for FUL submitted that the 58 page document was nothing more than notes for oral argument. The Respondents were of the view that the document was a re-draft of the heads of argument which by then all parties had submitted. The Respondents then requested leave to study the note and respond to it. Consequently, this resulted in another round of exchange of "notes" which were basically supplementary heads of argument, without leave of the court.

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[28]

[29] Biowatch Trust v Registrar, Genetic Resource, and Others 2009 (6) SA 232 (CC)

107. The directives of this court permit the filing of only one set of heads of argument. Any further heads or notes have to be with leave of the court. The exchange of these notes unnecessarily led to the increase in the volume of documents filed in this application. FUL sought relief in terms of section 12 (6)(a) of the NPA Act and asked the court to exercise its remedial powers under section 172(1)(b) of the Constitution by directing the President to institute disciplinary enquiries and to suspend Jiba and Mrwebi pending the outcome of their enquiries. The application was launched in the public interest and FUL has successfully shown how the President felled to comply with his constitutional obligations. FUL has achieved substantial success and should thus not be mulched with wasted costs occasioned by the postponement; Biowatch *supra.* FUL added to the prolixity of these "notes" by filing a further note, in reply to the respondent's notes.

108. In the premises I make the following order:

1. The decision taken by the National Director of Public Prosecution on the recommendation contained in an opinion provided by the Regional Head: Special Commercial Crime Unit, to withdraw charge against the Deputy National Director of Public Prosecutions, Ms N Jiba, is reviewed and set aside.
2. The failure by the President to suspend and institute inquiries into the fitness of the Deputy National Director of Public Prosecutions, Ms N Jiba and the Director: Sgecial Director of Public Prosecutions Mr L Mrwebi, to hold office in the National Prosecuting Authority, is reviewed and set aside.
3. The President is directed to institute disciplinary inquiries against Jiba and Mrwebi into their fitness to hold office in the National Prosecuting Authority and to suspend them pending the outcome of those inquiries. It is further ordered that the implementation of this specific order be suspended pending the outcome of their ultimate appeal of the GCB judgment.
4. Pending the prosecution to finality of the appeals lodged by Jiba and

Mrwebi against the GCB judgment and order Ms N Jiba and Mr L Mrwebi are prohibited from performing any functions relating to their offices in the National Prosecution Authority and further prohibited to present themselves to the National Prosecuting Authority offices and/or engage in any discussion concerning any pending cases under consideration by the NPA.

5. The National Director of Public Prosecutions as well as the President of the Republic of South Africa are ordered to pay the costs of this application, jointly and severally, one paying the other to be absolved.

_____

S P MOTHLE
Judge of the High Court,
Gauteng Division.

_____

V V TLHAPI
Judge of the High Court,
Gauteng Division.

WRIGHT J – I respectfully dissent for the following reasons.

THE PARTIES

1. The applicant, Freedom under Law is a non-profit company. It promotes democracy under law and advances the understand ing of and respect for the rule of law and the principle of legality. It moves the present application in its own interest and in the interest which the public has in the objects of FUL.

2. The first respondent, Mr Abrahams is the National Director of Public Prosecutions. He heads the National Prosecuting Authority and is joined in that capacity. The second respondent is the Regional Head of the Specialised Commercial Crime Unit within the NPA. Mr Mokgatlhe holds this position. The third respondent, Ms Jiba is cited in her personal capacity and in that of Deputy National Director of Public Prosecutions. The fourth respondent is the Minister of Justice and Correctional Services joined by virtue of his being the member of the cabinet responsible, pursuant to the provisions of section 179(6) of the Constitution for the administration of justice and the person who exercises final responsibility over the NPA. The fifth respondent is the President of the Republic of South Africa. He is joined as FUL alleges that he has failed to exercise powers granted to him under section 12 of the National Prosecuting Authority Act 32 of 1998 and because if FUL is successful in part of the relief sought the President will be required to take certain actions consequently. The sixth respondent, Mr Mrwebi is cited in his personal capacity and in that as Head of the Specialised Commercial Crime Unit and as Special Director of Public Prosecutions within the NPA.

THE PROCEEDINGS

3. This case started in November 2015. FUL launched an application containing, in the notice of motion a part A and a part B. Part A, said by FUL to be urgent was struck from the roll by Prinsloo J. Whether he did so on the ground of lack of urgency or because FUL had not complied with procedure relating to urgency is not relevant to the application at present. Prinsloo J, after considering the question of costs concluded that there should be no order as to costs. In part A FUL had sought temporary relief aimed at protecting FUL in the interim in the event of the final relief sought by FUL in part B being granted.

4. In the founding affidavit, sworn to on 5 November 2015 the deponent. Ms Fritz the executive officer of FUL stated in paragraph 160 that *"It is evident that substantial redress cannot be obtained in due course and as such the matter is patently urgent."* At no time between November 2015 and the eventual hearing in October 2017 did FUL attempt to reconcile this statement with the substantial redress it seeks in part B.

5. What FUL sought in part B of the application when launched. apart from a prayer 1 relating to urgency were orders that:

   Prayer 2 - *" The decision taken on or about 18 August 2015 by the first respondent, alternatively, the first and second respondents to decline to prosecute and withdraw the charges of perjury and fraud which have been brought against the third respondent is reviewed and set aside."*

   Prayer 3 - *"the failures by the fifth respondent:*

   3.1 *to institute an enquiry, under section 12(6)(a) of the National Prosecuting Authority Act, 1998 ("NPA Act") , into the third respondent 's fitness to hold the office of Deputy National Director of Public Prosecutions ("the Jiba enquiry');*

   3.2 *provisionally to suspend the third respondent from her office, under section 12(6){a) of the NPA Act pending the finalisation of the Jiba enquiry,*

   3.3 *to institute an enquiry, under section 12(6){a) of the NPA Act, into the sixth respondent's fitness to hold the office of Head: Specialised Commercial Crime Unit and Special Director of Public Prosecutions ("the Mrwebi enquiry');*

   3.4 *provisionally to suspend the sixth respondent from his office under section 12(6)(a) of the NPA Act pending the finalisation of the Mrwebi enquiry, are reviewed and set aside:*

   Prayer 4. the fifth respondent is directed to institute the Jiba enquiry and provisionally to suspend the third respondent from her office pending the finalisation of such enquiry;

Prayer 5. *the fifth respondent is directed to institute the Mrwebi enquiry and provisionally to suspend the sixth respondent from his office pending the finalisation of such enquiry "*

6. It is to be noted that there is no suggestion in prayer 2 that Mr Mokgatlhe, acting on his own on or about 18 August 2015 decided not to prosecute Ms Jiba and decided to withdraw perjury and fraud charges against Ms Jiba. The prayer is limited to the relevant decisions having been taken by Mr Abrahams or by Mr Abrahams and Mr Mokgatlhe together.

7. After service of the application in November 2015 Mr Abrahams, Mr Mokgatlhe and Mr Majavu an attorney acting for Ms Jiba filed answering affidavits on the question of urgency. Mr Mrwebi filed an answering affidavit dealing partly with the question of urgency. Ms Fritz, on 13 November 2015 filed a *"provisional replying affidavit'.*

8. The application, being in the nature of a review called upon Mr Abrahams, Mr Mokgatlhe and President Zuma to produce the relevant records relating to their decisions sought to be reviewed. President Zuma's attorney, Mr Baloyi filed a short record consisting of two letters on 26 November 2015. On 3 December 2015 Mr Baloyi, as attorney for Mr Abrahams, Mr Mokgatlhe, the Minister and the President filed the *"2'1d RESPONDENT'S RECORD".*

9. On 15 April 2016 FUL, as it was entitled to do under Rule 53(4) delivered a notice of motion signed on that date. It contains a part A and a part B. Part A appears to be identical to part A in the notice of motion as originally served. Part B in the new notice of motion is different to Part B as originally framed in that reference is made in the new part B. prayer 2 to Mr Mokgatlhe having taken the relevant decision on his own. The new prayer 2 thus contains a second alternative rather than just one as in the original prayer 2. Prayer 3 in the new part B was not in the original Part B. This new prayer seeks the review and setting aside of Mr Abrahams'

decision to delegate his power to Mr Mokgatlhe to make the decision to decline to prosecute and to withdraw charges against Ms Jiba.

10. On 28 April 2016 the attorneys for Mr Abrahams. Mr Mokgatlhe, the Minister and the President filed a notice under Uniform Rule 30(2)(b) objecting to the lateness of the supplementary founding affidavit. No objection was raised then to the new form of Part B. By the time the case was eventually heard in October 2017 all the parties had agreed that further and late affidavits were properly before the court.

11. What is presently before the court is Part B of the new notice of motion dated 15 April 2016.

12. Part B of the application was set down for hearing on 6 and 7 June 2017 before me sitting alone. The hearing was postponed to 30 and 31 October 2017 for reasons set out later in this judgment. In between the June and October hearings Judge President Mlambo assigned the present full court to the case.

13. Mr Abrahams deposed to an answering affidavit on 26 June 2016. Ms Jiba deposed to an answering affidavit on 24 March 2016. The President deposed to his answering affidavit on 13 May 2016. Mr Mrwebi deposed to his supplementary answering affidavit on the same date. On 1 July 2016 Mr Mokgatlhe deposed to his answering affidavit. On 29 August 2016 Ms Fritz deposed to her replying affidavit. On 31 January 2017 she deposed to her supplementary founding affidavit. On 28 February 2017 Mr Abrahams deposed to his supplementary answering affidavit. On the same day Ms Jiba deposed to her supplementary answering affidavit.

BACKGROUND FACTS

14. In the case of **Freedom Under Law v National Director of Public Prosecutions and others** 2014(1) SA 254 GNP Ms Jiba and Mr Mrwebi

were respondents. Murphy J found, among other things that Ms Jiba had failed to mention certain relevant facts, remained supine when she should not have in the face of a public outcry and that her conduct was inconsistent with her public duty under the Constitution to be responsive, accountable and transparent. Murphy J held that Mr Mrwebi had failed to disclose relevant documents and had made statements which were untenable and incredible to a degree that they fell to be rejected. Murphy J described Mr Mrwebi's evidence, or at least part of it as wholly improbable. In relation to both Ms Jiba and Mr Mrwebi Murphy J found that their conduct was unbecoming of persons of their high rank.

15. The judgment of Murphy J was considered on appeal in **National Director of Public Prosecutions and others v Freedom Under Law** 2014 (4) SA 298 SCA. Brand JA spoke for the court. He agreed with Murphy J that an averment by Mr Mrwebi in an affidavit was untenable and incredible to the extent that it that fell to be rejected out of hand.

16. Some years ago widely publicised allegations were made that Major General Booysen of the SAPS and a number of officers under his control were murdering suspects. Ms Jiba decided to prosecute Maj Gen Booysen and the officers on counts of murder and other offences including racketeering. In particular and in relation to racketeering and on 17 August 2012 Ms Jiba authorised prosecutions against Maj Gen Booysen and others under section 2(4) of the Prevention of Organised Crime Act 121 of 1998. Maj Gen Booysen brought an application to the High Court in KZN in which he sought the setting aside of Ms Jiba's decision to prosecute him. Gorven J set aside the decision of Ms Jiba and made findings against her. He held, among other things that Ms Jiba had not acted rationally in law in deciding to prosecute and that her decision was arbitrary, offended the principle of legality and was unconstitutional. Gorven J held that Ms Jiba had made inaccurate statements in her affidavit. Ms Jiba did not appeal the judgment of Gorven J.

17. Following the Gorven J judgment charges of fraud and perjury were preferred against Ms Jiba arising out of her decision to prosecute Maj Gen Booysen and the findings made by Gorven J in relation to Ms Jiba.

18. On 13 August 2015 Mr Abrahams asked Mr Mokgatlhe to provide him with *"your opinion and decision"* before 17 August 2015 relating to the fraud and perjury trial of Ms Jiba which was due to commence on 19 August 2015 . Mr Mokgatlhe replied on 17 August 2017. He did so in an eleven page memorandum to Mr Abrahams. The memorandum states that Mr Mokgatlhe had before him and had considered the evidence in the police docket in the criminal case against Ms Jiba, the charge sheet, NPA policy directives, the provisions of the Prevention of Organised Crime Act, the judgment of Gorven J, affidavits by Maj Gen Booysen and Ms Jiba and legal opinions by two prosecutors. Accord ing to the memorandum, Mr Mokgatlhe consulted with prosecutors in the case against Maj Gen Booysen.

19. In paragraph 47 of his recommendation dated 17 August 2015 to Mr Abrahams , Mr Mokgatlhe wrote that *"Section 78 of POCA clearly insulates Ms Jiba from any personal liability for carrying out her functions under the Act."*

20. Mr Mokgatlhe concludes his memorandum by stating that the decision to prosecute Ms Jiba is not supported by objective facts, there are no reasonable prospects of a successful prosecution and "/ *accordingly recommend'* that the case against Ms Jiba be withdrawn. On 18 August 2015 Mr Abrahams announced at a press conference that charges against Ms Jiba had been withdrawn. On 21 August 2015 Mr Abrahams wrote to FUL's attorney Mr Movshovich stating that the decision had been taken by Mr Mokgatlhe and was premised on the latter's assessment of no reasonable prospects of a successful prosecution.

21. In **Zuma v Democratic Alliance** (2014) 4 ALL SA 35 SCA the court, per

Navsa ADP held that Ms Jiba had provided an affidavit in generalised, hearsay and almost meaningless terms. The judgment decried the fact that the office of the NDPP had been loathe to take an independent view about the confidentiality of documents in its possession. It was held that the lack of assistance by the office of the NDPP was baffling.

22. FUL points to a report by a committee appointed by a former NDPP and chaired by retired Justice Yacoob. The report found it quite incredible that Ms Jiba had not known certain things she claimed she did not know. The report found, among other things that Mr Mrwebi did not come across as a man of credibility or integrity, that he had made unacceptable and dubious statements about judges and that he had improperly and without justification accused these judges of having made false and unjustifiable assumptions and of having been blinded by those assumptions.

23. FUL relies on a report by the NPA and on an opinion by a senior counsel. In my view, these documents do not advance the case for FUL beyond the judgments referred to above and the Justice Yacoob report.

24. In about mid 2015 the General Council of the Bar launched an application to strike the names of Ms Jiba and Mr Mwrebi from the roll of advocates. The application was based on the judicial findings against Ms Jiba and Mr Mrwebi.

25. President Zuma says in his affidavit that on 10 April 2015 he was asked questions in Parliament about senior NPA officials. He asked Minister Masutha about whether or not he should exercise his presidential powers under section 12(6)(a) of the NPA Act. The President also received a letter on 22 July 2015 from Accountability Now, a public interest organisation calling for action by him under section 12(6) of the NPA Act. The President, having discussed the matter with the Minister decided to await the outcome of the GCB matter. On 3 August 2015 Mr R Cassius Lubisi, acting on behalf of the President wrote to Mr Paul Hoffman SC the director

of Accountability. Now stating that *"In the President's judgment , the GCB is the appropriate body charged with the conduct of advocates in general and accordingly better placed to ventilate its concerns and to have these matters determined.*"

26. On 26 August 2015 attorneys representing the Democratic Alliance wrote to the President demanding that he suspend Ms Jiba pending an enquiry into her fitness to hold office. On 1 September Mr Lubisi replied, to the effect that the President chose to await the outcome of the GCB application. The President says that he has acted on the advice of his Minister.

27. The President says in his affidavit that "/ was *informed also by the Minister that Adv Jiba and Adv Mrwebi were performing their functions well, according to Adv Abrahams. "* The President does not suggest that the Minister agreed with Adv Abrahams. The President does no more than say that the Minister conveyed Mr Abrahams' opinion to the President.

28. On 15 September 2016 Legodi J, as he then was and Hughes J gave judgment in the application brought by the GCB against Ms Jiba and Mr Mrwebi. The court ordered that the names of Ms Jiba and Mr Mrwebi be struck from the roll of advocates. The judges made serious adverse findings against both Ms Jiba and Mr Mrwebi. These included findings of bad faith and dishonesty. Both Ms Jiba and Mr Mrwebi have been granted leave to appeal. Their appeal is pending before the SCA.

29. The President has decided not to institute enquiries against Ms Jiba and Mr Mrwebi until after the finalisation of the appeal process in the GCB striking off case.

30. Ms Jiba and Mr Mwrebi are on what the parties refer to as *"special leave"* as a result of the relevant facts set out above.

SOME LEGAL CONSIDERAT IONS

31. The parties agree that the decisions sought to be impugned do not fall under the provisions of the Promotion of Administrative Justice Act 3 of 2000. It is common cause that so long as the decisions are rational they stand. Rational means based on or in accordance with reason or logic.

32. In **Albutt v Centre for the Study of Violence and Reconciliation** 2010(3) SA 293 (CC) the court, in dealing with the nature of the President's power to grant pardons for crimes where a pardon is sought on the ground of a special dispensation based on political motivation held, per Ngcobo CJ at paragraph 49 *"that the exercise of all public power must comply with the Constitution, which is the supreme raw, and the doctrine of legality, which is part of the rule of law ··* and that *"the exercise of the power to grant pardon must be rationally related to the purpose sought to be achieved by the exercise of it."*

33. In **Minister of Safety and Security N.O. and another v Schubach.** a decision of the SCA on 1 December 2014 , (2014] ZASCA Navsa ADP, at paragraph 11 listed, as one of the requirements in an action for damages for malicious prosecution , that the defendant acted without reasonable and probable cause in deciding to prosecute.

34. Under section 21(1) of the NPA Act the NDPP shall, in accordance with section 179(5)(a) and (b) of the Constitution and any other relevant section of the Constitution, with the concurrence of the Minister and after consulting the Directors, determine prosecution policy and issue policy directives which must be observed in the prosecution process.

35. Under section 22(2)(c) of the NPA Act, and based on section 179(5)(d) of the Constitution, the NDPP may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the NDPP

from the following persons:

35.1. the accused

35.2. the complainant

35.3. any other person or party whom the National Director considers to be relevant.

36. Under Part 5.1 of the Prosecution Policy Directives dated 1 June 2015 *"Once enrolled, cases may only be withdrawn on compelling grounds, e.g if it appears after thorough police investigation that there is no longer any reasonable prospect of* a *successful prosecution ...*".

37. Under Part 6 A.3 of these directives *"Where an accused person tenders* a *version of events which contradicts those of State witnesses, the witnesses should be given an opportunity to respond to these allegations. Where confronted with inherently opposing versions without other objective evidence to support either version, prosecutors should refrain from making a "credibility finding" based on written statements and should rather refer the matter for trial if there is* a *reasonable prospect of a successful conviction."* I read this directive to leave it to the prosecutor, after refraining from making a credibility finding but after having taken into account the accused person's version, to proceed to trial if there is a reasonable prospect of a conviction.

38. Under section 22(6)(a) of the NPA Act the NDPP shall, in consultation with the Minister and after consultation with the Deputy National Directors and the Directors, frame a code of conduct which shall be complied with by members of the prosecuting authority. Under section 22(6)(b) the code of conduct may from time to time be amended and must be published in the government gazette for general information.

39. In the Government Gazette 33907 published on 29 December 2010, Government Notice R1257 included a code of conduct for prosecutors to operate *"with effect from 18 October 2010".* Under D.1(d) prosecutors

"should' "proceed when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and not continue a prosecution in the absence of such evidence".

40. Under D.2(c) prosecutors *"should' ' ;'consider the views. legitimate interests and possible concerns of victims and witnesses when their personal interests are. or might be, affected, and endeavour to ensure that victims and witnesses are informed of their rights, especially with reference to the possibility. if any. of victim compensation and witness protection".*

41. Under section 40 of the NPA Act the Minister may make regulations prescribing matters required or permitted by the Act to be prescribed , steps to be taken to ensure compliance with the code of conduct and matters necessary or convenient to be prescribed for carrying out or giving effect to the Act. There are no regulations relevant to the present dispute.

42. In a criminal case the prosecution has the onus to prove the guilt of the accused beyond reasonable doubt. So long as the accused person's defence is reasonably possibly true the accused is entitled to an acquittal.

THE DECISION TO WITHDRAW AGAINST MS JIBA

43. Both Mr Abrahams and Mr Mokgathle say in their affidavits that it was Mr Mokgatlhe and not Mr Abrahams who took the decision. Mr Abrahams, with the wording of section 22(2)(c) of the NPA Act in mind, says that he did not take the decision for the very reason that after Mr Mokgatlhe had taken the decision he, Mr Abrahams would be able to review the decision of Mr Mokgatlhe. Mr Abrahams does not say what he would have done had Mr Mokgatlhe been in favour of continuing the prosecution of Ms Jiba. Mr Abrahams was not bound by the view of Mr Mokgatlhe. Mr Abrahams could, had he so determined, continued with the prosecution. What Mr Mokgatlhe had sent to Mr Abrahams was merely a recommendation, rather than a decision. Section 22(2)(c) does not provide for the review of

a recommendation. In my view, the decision was taken by Mr Abrahams. I make no adverse credibility finding against either Mr Abrahams or Mr Mokgatlhe. I simply prefer my interpretation of the facts and the law to theirs. This finding makes it unnecessary for me to consider the lack of authority to delegate point.

44. Given this finding, the question to be decided is not the rationality or otherwise of the recommendation by Mr Mokgatlhe but rather that of the decision by Mr Abrahams. The basis for and the content of the recommendation is however evidence to be considered in deciding the rationality of the decision taken by Mr Abrahams.

45. With reference specifically to the case heard by Gorven J, the papers in which case formed part of the material before Mr Mokgatlhe, it seems to me that there are three tiers of information relevant to the question to be decided, namely:

    45.1 the judgment of Gorven J

    45.2 the evidence and argument on which the judgment was based and

    45.3 evidence referred to in that case but which evidence was not itself before the court when the case was argued and decided.

46. All of these tiers of information may be relevant in a criminal case against Ms Jiba but it is not clear to me that the judgment of Gorven J would be admissible against Ms Jiba in a criminal trial. In any event, she would have been able to lead evidence in support of some of the facts referred to and she would have been allowed to lead evidence to rebut others. All accused persons start criminal trials under a constitutional presumption of innocence with the right to challenge and adduce evidence.

47. It would appear that the findings of the Judges in the cases referred to above would be admissible in civil proceedings against Ms Jiba and Mr Mrwebi such as the present application and in the GCB application for

their striking off. See **Society of Advocates of South Africa (Witwatersrand Division) v Rottanburg** 1984 (4) SA 35 TPD at 40 C-E.

48. The charge sheet against Ms Jiba describes itself as provisional. It is not clear when this status would have changed. The trial was due to start within days. The defence team was entitled to a final version of the charge sheet a reasonable time prior to trial.

49. This observation aside, the charge sheet does not make for easy reading. It refers, for example, to the judgment of Gorven J without making it clear what role the judgment is to play in the prosecution. It is not clear if the prosecutor intended to rely on the contents of the judgment as itself forming an uncontradictable basis for the guilt of Ms Jiba. Had the trial proceeded, evidence by Ms Jiba to contradict findings made by Gorven J would have been admissible. The papers before me include an affidavit by the senior counsel who represented Ms Jiba before Gorven J stating that counsel did not make at least some of the concessions which Gorven J stated were made.

50. In her answering affidavit Ms Jiba points to a finding by Gorven J, adverse to Ms Jiba and relating to certain annexes to Ms Jiba's answering affidavit in that case. In Ms Jiba's answering affidavit in the present case she offers an explanation, saying that there had been a drafting error. Evidence of this defence would be admissible in a criminal trial to rebut unlawful intention. It is not for me to weigh this defence other than to say that Icannot hold, at least on paper that it should be dismissed out of hand. Of course, Ms Jiba's answering affidavit in the present case was not yet in existence on 18 August 2015 when the decision to withdraw charges against Ms Jiba was taken but it highlights the desirability for prosecutors needing to prove unlawful intention beyond a reasonable doubt carefully to consider defences that might be raised in rebutting the element of unlawful intention. It was mainly on the ground of fear of not being able to prove unlawful intention that the decision to withdraw charges was taken.

51. The papers reveal numerous and far reaching disputes of fact. I have set out two examples.

52. In his judgment in **National Director** referred to above Brand JA, at paragraphs 33 and 34 highlighted the difference between withdrawing a prosecution before the accused has pleaded, as provided for in section 6(a) of the Criminal Procedure Act 51 of 1977 and stopping a prosecution after the accused has pleaded, under section 6(b). Under section 6(a) a withdrawal may be followed later on by a decision, different and original, to re-institute proceedings. Stopping a prosecution under section 6(b) entitles the accused person to an acquittal. Had the trial against Ms Jiba commenced and thereafter Mr Abrahams had wished to desist he would have had no choice but to stop the prosecution under section 6(b) with the consequence of an acquittal. Mr Abrahams was perhaps rationally keeping his powder dry. I make no finding on this latter point.

53. Given my finding below on the status of Mr Abraham's decision, it is not necessary for me to find whether or not, objective ly considered there was sufficient basis for him to form the at least rational view that the prosecution of Ms Jiba should not continue

54. The above considerations aside, the decision to discontinue the prosecution against Ms Jiba, to withstand review scrutiny, needs to have been taken for reasons rationally connected to the decision. If the decision was taken for a reason or reasons which were bad and which had an appreciable or substantive influence on the taking of the decision then the decision cannot stand even if, objectively speaking there existed one or more good reasons for the decision. See **Rustenburg Platinum Mines v Commiss ion for Conciliation, Mediation and Arbitration** 2007 (1) SA 576 SCA at paragraph 8.

55. The opinion of Mr Mokgatlhe, regarding section 78 of POCA clearly played

at least an appreciable or significant part in Mr Mokgatlhe's recommendation to Mr Abrahams. It was referred to by Mr Abrahams at a press conference on 18 August 2015 when he announced that the prosecution against Ms Jiba would not continue. The inference is inescapable that it formed an at least appreciable or significant part of the reasoning of Mr Abraham in taking his decision.

56. The reason is wrong in law. Section 78 of the Prevention of Organised Crime Act 121 of 1998 reads ***"Liability.-*** *Any person generally or specifically authorised to perform any function in terms of this Act, shall not, in his or her personal capacity, be liable for anything done in good faith under this Act ."* This section is clearly intended to protect the person referred to from liability for things done in good faith. The charges against Ms Jiba are criminal rather than civil in nature and allege intentional wrongdoing. It cannot have been the intention of the legislature that section 78 would provide immunity against the criminal charges preferred against Ms Jiba.

57. For this reason alone the decision of Mr Abrahams cannot stand and it is not necessary to make findings on other grounds of attack on it.

58. The prosecution of Ms Jiba was on track untilthe decision was taken to stop it. That decision has been found to be reviewable and it suffices to set it aside. It is neither necessary nor desirable to make any further order. Compare the decision of the full court of the Gauteng Division as upheld by the SCA on 13 October 2017 in the case of **Zuma v DA** (771/2016); **ANDPP v DA** (1170/2016) (2017].

THE PRESIDENT'S DECISIONS

59. Section 12(5) of the NPA Act reads

··The National Director or a Deputy National Director shall not be

suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8)"

60. Section 12(6)(a) reads

" The President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office-

(i) *for misconduct;*

(ii) *on account of continued ill-health;*

(iii) *on account of incapacity to carry out his or her duties of office efficiently; or*

(iv) *on account thereof that he or she is no longer a fit and proper person to hold the office concerned. "*

61. In my view, the institution by the President of an enquiry is a pre-requisite for a decision to suspend provisionally a NDPP or a DNDPP. Given my findings below, I need not decide whether FUL may use the power to suspend as a peg on which to hang the call for an enquiry.

62. In **Veriava and others v President, SA Medical and Dental Council, and others** 1985 (2) SA 293 TPD the court considered a complaint by the applicant doctor to the Council about the conduct of some doctors relating to the death in detention of Mr Biko. The Council had declined to institute disciplinary proceedings against the doctors. The court set aside decisions by the Council not to take disciplinary action against the doctors and directed that it be resolved by a committee of the Council that the available evidence disclosed prima facie evidence of improper or disgraceful conduct by the doctors concerned. At page 310 H the court quoted from the speech of Earl Cairns in **Julius v The Lord Bishop of Oxford** (1879 - 80) 5 AC 214 (HL).

"There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so."

63. In a case such as the present case the President would have a duty to suspend in appropriate circumstances once he had decided to institute an enquiry in the first place. He would have a duty to institute an enquiry in the first place in appropriate circumstances.

64. It is so that the SCA has pronounced with finality in the judgments as referred to above and that the judgment of Gorven J was not appealed. It may be that ultimately the findings and criticisms against Ms Jiba and Mr Mrwebi funnel into the GCB case.

65. On 9 June 2017 the SCA gave judgment in the case of **Ntlemeza v Helen Suzman Foundation and Freedom Under Law.** My brother, Matojane had, in an earlier case concerning a high ranking police officer, Mr Sibiya, made adverse credibility findings against Lt Gen Ntlemeza. Thereafter, the latter had been appointed as the head of the DPCI. commonly known as the Hawks by the then Minister of Police, Mr Nhleko. Minister Nhleko, at the time he appointed Lt Gen Ntlemeza to head the Hawks, had been aware of the findings by Matojane J but had taken the view that he need not consider them. The Minister's appointment of Lt Gen Ntlemeza as head of the Hawks was set aside ·on review by a full court of the Gauteng Division. Lt Gen Ntlemeza brought an application for leave to appeal. HSF and FUL brought a counter application under section 18(3) of the Superior Courts Act 10 of 2013 that Lt Gen Ntlemeza not continue as head of the Hawks pending the finalisation of his appeal. Lt Gen Ntlemeza's application for leave to appeal was dismissed and the counter application was granted. Lt Gen Ntlemeza appealed the s18(3) order as of right to the

SCA which handed down judgment on 9 June 2017 .

66. A full court of the Gauteng Division had heard the application for leave to appeal and the section 18(3) counter-appl ication. In so doing, it had considered the prospects on appeal of Lt Gen Ntlemeza. It was bound to do so as prospects on appeal are relevant in deciding an application for leave to appeal. They are also relevant to the section 18(3) enquiry, pending appeal. See the **Ntlemeza** judgment of the SCA of 9 June 2017 at paragraph 44. The full bench had correctly held, according to the **Ntlemeza** judgment that Lt Gen Ntlemeza's prospects of success had been *"severely limited"* by the adverse credibility findings made by Matojane J.

67. By the time the **Ntlemeza** case was heard by the SCA the further application for leave to appeal, namely his petition to the SCA had failed.

68. The SCA also held that the HSF and FUL had shown exceptional circumstances as required by section 18(3). In short, the high public position of head of the Hawks coupled with the adverse credibility findings by Matojane J amounted to exceptional circumstances, requiring that in the public interest Lt Gen Ntlemeza not remain as head of the Hawks pending the finalisation of his appeal.

69. In the present case, this full court is not dealing with an application for leave to appeal nor with an application under section 18(3). The question of prospects on appeal and s 18(3) type considerations do not arise.

70. It would accordingly be unwise of me to attempt in any way to predict or anticipate which way the SCA will hold in the pending GCB appeal. It would also be unnecessary, given my finding below on the reasons given by the President for his decisions.

71. The person or persons holding the enquiries sought by FUL to be

instituted by the President under section 12(6)(a) of the NPA Act may be obliged to take into account all relevant findings yet to be made by the SCA. It may follow that such enquiry could not properly be completed until the SCA's judgment has been given. If the matter goes to the Constitutional Court the same considerations may apply. If such enquiries could not properly be completed until after the appeal process has been exhausted it perhaps could not be said that the President's decision not to institute enquiries until after the appeal process has run its course is irrational.

72. Accepting that it is of the utmost importance in a constitutional democracy that persons holding high public office are suitable for the position. the President, in deferring to the SCA in the GCB appeal may rationally be allowing the law to run its course. The legitimate concern of FUL that it is undesirable for high public office bearers to remain in office pending the unfolding of the legal process is considerably ameliorated in the present case by the fact that Ms Jiba and Mr Mwrebi are on *"special leave"* and are not carrying out any official duties.

73. The above considerations notwithstanding, it is clear that the opinion of Mr Abrahams, that Ms Jiba and Mr Mrwebi were doing their jobs well played an appreciable or significant role in the taking of the decision by the President not to institute enquiries against Ms Jiba and Mr Mrwebi. The opinion of Mr Abrahams is clearly wrong. Nowhere in the respondents' papers is any reason offered how any person 1n Mr Abraham's position could reasonably, let alone rationally think that Ms Jiba and Mr Mrwebi were doing their jobs well in the light of the serious and adverse judicial findings against them.

74. At least for the reason that at least one irrational reason played an appreciable or significant part in the taking of the decisions not to institute inquiries against Ms Jiba and Mr Mrwebi these decisions are reviewable.

75. I would not go further and order the President to institute enquiries or to suspend Ms Jiba and Mr Mrwebi. The question of a possible suspension arises only if and when an enquiry is instituted by the President. It would be inappropriate for this court to go into the question of suspension pending an enquiry because it should be left to the President to decide whether or not enquiries should be held and if so, whether or not suspensions should be in place pending the enquiries. More than two years have passed since the impugned decisions were taken. Water may have flowed under the bridge since the last affidavits were filed and there may be facts or circumstances relevant to the rationality or otherwise of a decision unknown to this court as at the date of hearing. The judgment of the SCA in the forthcoming GCB striking off appeal may well be relevant to the question of whether the President should institute enquiries and possibly suspensions.

RULE 16A

76. Initially, the respondents took issue with the fact that Ful did not give notice to the registrar under uniform rule 16A(1)(a) which is a requirement for any person raising a constitutional issue. Counsel for the respondents did not press the matter in argument. Ful does not challenge the constitutionality of any law. It seeks compliance with laws which it is common cause are valid. In **Phillips v SA Reserve Bank** 2013(6) SA 450 SCA the court was concerned with a constitutional challenge to different laws. It would appear, from paragraphs 30 - 36 of the minority judgment of Farlam JA and paragraphs 63 - 75 of the majority judgment of Majiedt JA that where there is a challenge to the constitutionality of a law the rule is applicable. I do not read either judgment as authority for the proposition that, in a case where there is no challenge to the constitutionality of a law, the rule is, for that reason alone, not applicable.

77. In **Sato Star Fishing (Pty) Ltd v Minister of Environmental Affairs** 2004(4) SA 490 CC at paragraph 22 it was held that the control of public

power is always a constitutional matter.

78. The purpose of the rule is to bring to the attention of persons who may be affected by or have a legitimate interest in the case the particularity of the constitutional challenge, in order that they may take steps to protect their interests. See **Shaik v Minister of Justice and Constitutiona l Development** 2004(3) SA 599 CC at paragraph 24.

79. The court has the power under rule 16A(9) to dispense with the requirements of rule 16A if it is in the interests of justice to do so. The application was widely covered in the media and two different organizations indicated that they might want to apply to be admitted as amicae. One did, namely the Education for Social Justice Foundation. I dismissed its application on 6 June 2017.

80. The wide media coverage and the importance of the case are considerations that weigh in favour of dispensing with the requirements of the rule. See **Rates Action Group v City of Cape Town** 2004(5) SA 545 CPD at paragraph 22.

81. The failure by an applicant to comply with rule 16A is not, on its own, a ground sufficient to deny the applicant a hearing. See **De Lange v Presiding Bishop of the Methodist Church of Southern Africa** 2016(2) SA 1 CC at paragraph 30(d).

82. I would dispense with the requirements of the rule in this case.

AMICA APPLICATION

83. On 18 April 2017 the Education for Social Justice Foundation served an application seeking to be admitted as amica curiae in the main application. The notice of motion is not dated. In the founding affidavit the deponent, Mr Makaneta, a director and deputy chairperson of ESJF states that ESJF

seeks to assist the court in the evaluation of important constitutional issues raised in the main application. One of the objectives of ESJF is to ensure the *"transformation of South African constitutional institutions so* as *to enhance the realisation of the fundamental constitutional mission of accountability, effectiveness and good governance".*

84. Only as late as 23 February 2017 did ESJF begin to make enquiries about the status of the main application. ESJF, aware of the application in November 2015 took no steps for over fourteen months to launch its application. It provides no explanation for this inaction. In my view, for this reason alone the amica application fails. The failure by FUL to produce a notice under Rule 16A is irrelevant. Nothing prevented ESJF from making enquiries about the main application from November 2015 when ESJF was aware of the main application.

85. In any event, the application is supported by a lengthy, argumentative and repetitive affidavit which takes adjudication in the main application no further. The founding affidavit contains some unfortunate allegations which attack FUL and persons associated with FUL rather than FUL's application. One example is *"this application is no more than just a desperate attempt to save General Johan Booysen from criminal prosecution.*

86. These unfounded attacks attracted a punitive costs order.

87. Only FUL opposed the amica application.

COSTS

88. FUL brought an application in good faith pursuant to its interest in promoting adherence to the Constitution. It has been successful to a significant extent in prayers relating to matters of constitutional importance.

89. The case was set down for hearing before me sitting alone on 6 and 7 June 2017, being dates chosen by DJP Ledwaba. The heads of argument of all parties had been delivered well before the hearing. At the commencement of the hearing, lead counsel for FUL handed up a fresh 56 page comprehensive set of heads of argument. It was not possible for either me or any of the respondents' counsel to give proper consideration to the new document in the limited time available for hearing. The matter was necessarily postponed to give the respondents' legal teams a reasonable time to consider the new document and to do answering heads of their own. DJP Ledwaba then ordered that the matter be heard on 30 and 31 October 2017. FUL's lead counsel, in belatedly handing up the new heads was acting in good faith in his client's best interests. Accordingly, FUL should be ordered to pay the wasted costs of 6 and 7 June 2017.

90. I would have proposed the following order.

ORDER:

1. Prayer 2 of Part B of the Notice of Motion dated 15 April 2016 is granted. The decision taken by Mr Abrahams to discontinue the prosecution against Ms Jiba is reviewed and set aside.

2. Prayers 4.1 and 4.3 of Part B of the Notice of Motion dated 15 April 2016 are granted. The decisions by the President not to institute enquiries under section 12(6)(a) of the NPA Act are reviewed and set aside.

3. The balance of the application as contained in Part B of the Notice of Motion dated 15 April 2016 is dismissed.

4. FUL is to pay the wasted costs of the respondents of the hearing of 6 and 7 June 2017. These costs are to include those of one senior counsel where so employed and those of one junior counsel where so employed.

5. Apart from the order in paragraph 4 above, the respondents, in their official capacities are jointly and severally to pay FUL's costs including those of two junior counsel.

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GC WRIGHT

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For the First, Second, Fourth and Fifth Respondents: Adv. H Epstein SC
Assisted by: Adv M Osborne, Adv . T Mabuda
Instructed by: The State Attorney
Pretoria

For the Third Respondent: Adv . N M Arendse SC
Assisted by: Adv. S Fergus
Instructed by: Majavu Inc
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For the Sixth Respondent:
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Instructed by: AM Vilakazi Tau Attorneys
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