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## **EXHIBIT EE**

**MXOLISI SANDILE OLIVER  
NXASANA**



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

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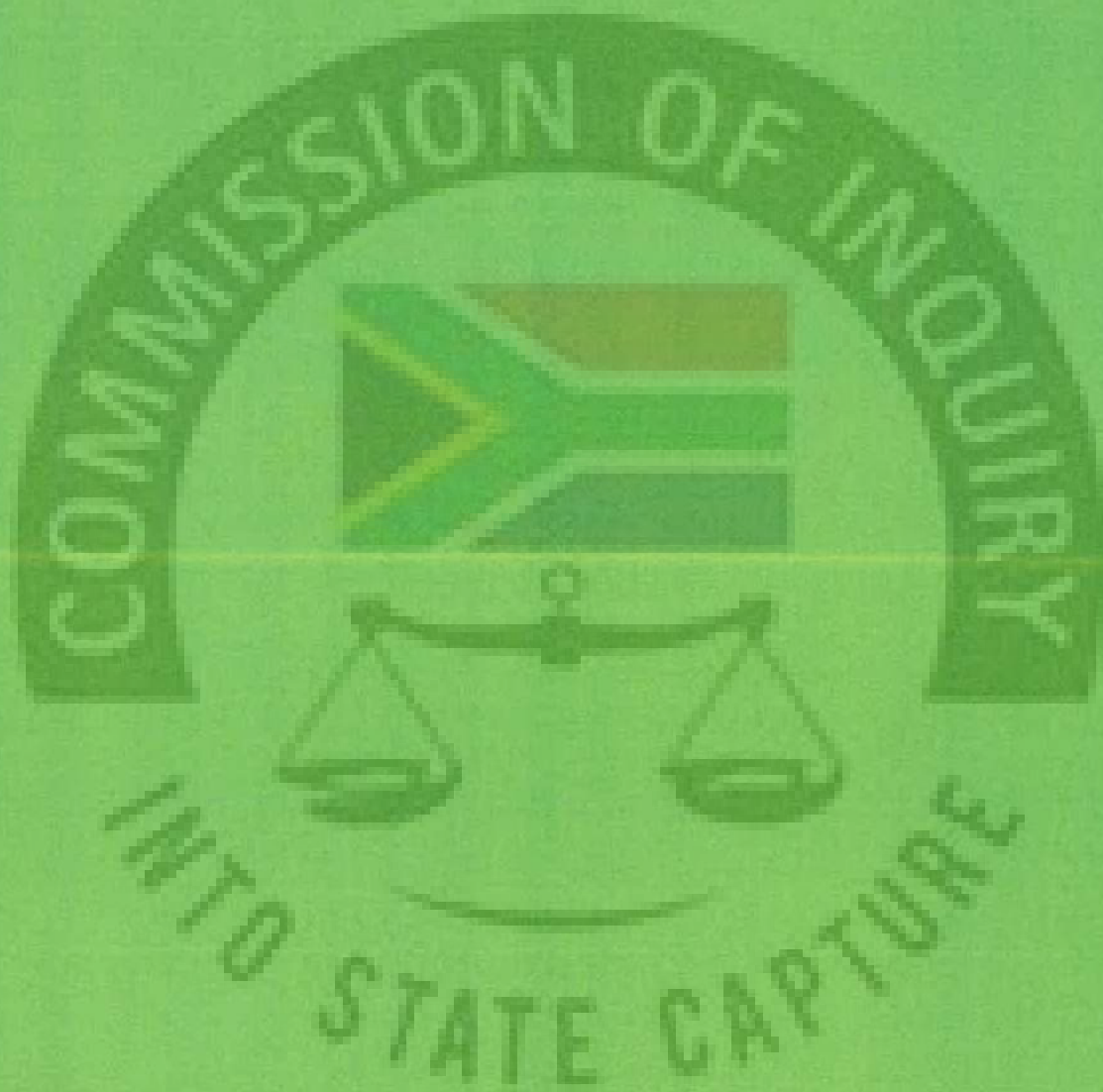
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EE 1





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# **EXHIBIT EE 1**

**AFFIDAVIT & ANNEXURE**

**OF**

**MXOLISI SANDILE OLIVER  
NXASANA**





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**AFFIDAVIT**

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I, the undersigned,


**MXOLISI SANDILE OLIVER NXASANA**

do hereby state under oath:

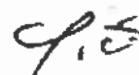
1. I am the former National Director of Public Prosecutions (**NDPP**) and was previously based at the head office of the National Prosecuting Authority (**NPA**), in Pretoria.
2. The facts deposed to below are within my personal knowledge, unless otherwise stated or indicated by the context, and they are, to the best of my belief, true and correct.
- A. **The NPA before my appointment (A pattern of political interference and instability?)**
3. Below is a brief timeline reflecting the various individuals who have held the position of NDPP:
  - 3.1 April 2001 – 31 August 2004: Bulelani Ngcuka
  - 3.2 August 2004 – January 2005: Dr Silas Ramaite (acting)
  - 3.3 1 February 2005 – 17 February 2009: Vusi Pikoli (suspended and then removed / retired)
  - 3.4 1 May 2009 – 31 October 2009: Mokotedi Mpshe (acting)
  - 3.5 1 December 2009 – 8 May 2012: Menzi Simelane (December 2011 Simelane was suspended after the SCA judgement; 8 May 2012 Simelane dismissed pursuant to the Constitutional Court judgment).



- 3.6. 20 December 2011 – 30 September 2013: Advocate Nomgcobo Jiba in an acting capacity, including her maternity leave, which she took between early January and 17 May 2013.
- 3.7. 1 October 2013 – 31 May 2015: Mxolisi Nxasana
- 3.8. 18 June 2015 – 13 August 2018: Shaun Abrahams
- 3.9. 1 August 2018 – 31 January 2019: Dr Silas Ramaite (acting)
- 3.10. 1 February 2019 – present: Shamila Batoyi
4. Bulelani Ngcuka was the first NDPP. His term of office ended in 2004 following an enquiry into his fitness to hold office. He was alleged to have been an apartheid spy. He was cleared by Judge Hefer. He subsequently resigned in August 2004.
5. Vusi Pikoli succeeded him. He too was subjected to an enquiry into his fitness to hold office: The Ginwala enquiry. It was alleged that the relationship between him and the then Minister of Justice had broken down. He was cleared. The matter was referred to Parliament. He was 'voted' out of office. He had instituted charges against former President Zuma and Jackie Selebi, the Commissioner of Police. His term of office came to an end in February 2009.
6. During Pikoli's suspension Advocate Mpshe acted as NDPP. He was not permanently appointed. He withdrew charges against Zuma – after the Nicholson J judgement.
7. President Zuma then appointed Menzi Simelane as NDPP. His appointment was declared invalid by the Constitutional Court.
8. He was replaced by Advocate Jiba – in an acting position.
9. I was appointed in August 2013 with effect from 1 October 2013.



10. I am able to comment on this brief history of the NPA as follows:
- 10.1. Stability: None of the NDPP's before me lasted their full term of office (10 years).
- 10.2. Independence: There was political interference or outside interference in the decision-making in the NPA.
- 10.3. Parliamentary oversight: I will comment on the Vusi Pikoli case.
- B. The appointment of a NDPP**
11. The appointment of the NDPP is governed by section 179 of the Constitution. It requires there to be a single NPA structured in terms of an Act of Parliament, consisting, *inter alia*, of a NDPP who is the NPA's head. The President appoints the NDPP in his capacity as head of the National Executive.
12. Section 179(2) of the Constitution provides that the NPA has the power to institute criminal proceedings on behalf of the State. Section 179(4) of the Constitution requires there to be national legislation to ensure that the NPA exercises its functions '*without fear, favour or prejudice*'.
13. In terms of Section 179(5) the NDPP must determine prosecution policy with the Minister of Justice's concurrence. Section 179(6) states that the Minister exercises final responsibility over the NPA.
14. Section 9 of the National Prosecuting Authority Act 32 of 1998 (NPA Act) sets out the requirements of a person appointed as NDPP. Such person must be:
- a South African citizen;
  - possess legal qualifications that entitle him or her to practise in all courts in the Republic; and



- 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 of the NDPP.

15. The suspension and removal from office of the NDPP are governed by Section 12 of the NPA Act.

**C. My appointment as NDPP**

16. I was appointed by the former President of the Republic of South Africa, the honourable Mr Zuma (the former President), as the National Director of Public Prosecutions (NDPP) with effect from 1 October 2013, in terms of section 84(e) of the Constitution.

17. In terms of section 179 of the Constitution read, with section 10 of the NPA Act, my appointment was for a period of 10 years.

18. During 2013 I was approached by Mr Hulley at my office in Durban where he requested to meet with me. The meeting took place at my office and lasted approximately 30 minutes. He had with him a list of 3 names whom I assumed were candidates for the post. I was not one of them.

19. Mr Hulley told me that my colleagues had recommended me to take up the position of NDPP. He asked if I was willing to serve as NDPP and I said "yes I would". Following my appointment, I met Mr Hulley again as part of my transition to the office of NDPP.

20. I was surprised when told I was being considered for the post as I had not applied for the post, had not sought it out, indicated to anyone that I was interested in it and I had no expectation of being appointed to the post.

21. In approximately August 2013 I met with the President, Mr Hulley, and the President's legal advisor, at the President's official residence in Pretoria. That too was a short meeting lasting no more than half an hour. The main concern





of the President was whether I had the necessary courage required of the post. I took that to mean that the President wanted to know whether I understood that a main requirement of the post was prosecutorial independence. He asked how I would cope under the pressure and demands of 'the job'. I said that if appointed, I would approach the job with the necessary courage, but also with the composure characteristic of the President's own performance.

- 21.1. As I was leaving the meeting with the President, Mr Hulley asked me if there was anything he should know. I told him that my father had been a trade unionist whom I understand had interacted politically with the President on occasion, a long time ago. I disclosed this information because it is not well known or public knowledge, and because I thought that I should disclose information about any connection between the President and my late father.
22. On 30 August 2013, Mr Hulley telephoned me and asked me to send him a copy of my CV, which I did. He told me that the President was going to announce his decision to appoint me as NDPP.
23. On 31 August 2013 the President announced his decision to appoint me as NDPP.
24. To the best of my knowledge the position was not advertised. I was not aware of any selection process other than what I have stated above.
  - 24.1. I was not interviewed (in a way ordinarily characteristic of a job interview) by the President or anyone on his behalf for the purpose of considering whether to appoint me;
  - 24.2. I was not required to complete any application form or similar document (except for my security clearance application which I completed on 4 December 2013 after I had already been appointed);

*f.e* *mg*

- 24.3. The only document I completed and signed (apart from my security clearance application) was my employment contract.

**D. What I found in the NPA**

25. When I arrived at the NPA personnel were warm and receptive to me.
26. My view on arrival was that the NPA was a well-equipped and functional organization. This was so notwithstanding the challenges it faced at a leadership level.
27. There was no handing-over to me. There was clearly a reluctance and insubordination on the part of Jiba to do so. I instructed her to "hand-over". She refused.
28. I recall that I had not been informed of the Cato Manor investigations into General Booysen. I read about this in the newspaper, which published the judgement of Gorven J. This judgement was critical of Advocate Jiba's handling of the case.
29. I was also not briefed on the status of the President Zuma investigation.

**E. Events leading to my suspension**

30. During my first year in office, it became clear that my leadership of the NPA was resisted by National Deputy Director Advocate Norngcobo Jiba (Advocate Jiba) and the Special Director Specialised Commercial Crime Unit Advocate Lawrence Mrwebi (Advocate Mrwebi). They appeared determined to undermine my standing with the President. I later established that they had run a campaign to discredit me as a person fit and proper to hold the office of NDPP.
31. Even before I assumed my position as NDPP, I was made aware of attempts from within the NPA to discredit me.





32. I grew up in Umlazi, in Durban. Although I no longer live there, I have family and friends who still do. Soon after my appointment was announced, they reported to me that unknown people had been asking questions about me, trying to dig up information about my past. In particular, they were asking questions about my background and my arrest and acquittal on charges of murder in 1985.
33. Almost Immediately after I was appointed, two NPA officials approached me (independently of each other) with information that Advocates Jiba and Mrwebi were plotting to oust me. They volunteered this information of their own accord.
34. One of the employees, **Mr Terence Joubert (Mr Joubert)**, a Risk Specialist for the NPA, deposed to an affidavit in which he explained how he had been approached by **Colonel Welcome Mhlongo (Colonel Mhlongo)**, a member of the Directorate of Priority Crimes Investigation (**DPCI**, commonly referred to as the "**Hawks**") for information about me. Colonel Mhlongo claimed to be acting on the authority of Ms Jiba.
35. I do not know Mr Joubert and the information that he sent me was unsolicited. Furthermore, I do not know why he decided to send me the information.
36. A copy of his affidavit is attached, marked **Annexure "MN 1."**. In his affidavit, Mr Joubert states the following under oath;
- 36.1. On 18 September 2013 he was meant to fetch Advocate Jiba from King Shaka International Airport.
- 36.2. Her secretary phoned him and told him that he did not need to fetch her. She said that arrangements had been made for Colonel Mhlongo to fetch Advocate Jiba instead.



- 36.3. Colonel Mhlongo disclosed to him that Advocate Jiba had told him that she did not think that I was the correct person for the job of NDPP. According to him, she told Colonel Mhlongo that "they" (presumably Colonel Mhlongo, Advocate Jiba and Advocate Mrwebi) should try to find some dirt on me as they had against Mr Stanley Gumede.
- 36.4. Mr Stanley Gumede is the Regional Court magistrate who had been tipped to become NDPP. His appointment was withdrawn following media reports that the Magistrates Commission was investigating numerous complaints against him.
- 36.5. Colonel Mhlongo disclosed to him that he was following up information that I had embezzled money from the Road Accident Fund.
37. Mr Joubert recorded his conversation with Colonel Mhlongo. He also sent me a copy of a voice recording of the conversation that he had with Colonel Mhlongo. I listened to and it confirmed what he stated in his affidavit.
38. In addition, I believe that Advocates Jiba and Mwebi advised the President that I intended to reinstate the criminal charges against him that my predecessor had withdrawn. I had in fact made no such decision.
39. The President informed me in one of our meetings that he had been told that I was apparently meeting former NDPP Bulelani Ngcuka at a flat in Durban. He said; *"Hey Mfanakiti, umuntu uma eke washo igama lalowomuntu angifuni nokuzwa lutho ngaye indlela angangifuni ngakhona ngivesane ngihlanye"*. This can be roughly translated as *"once they mention the name of this person I don't want to hear anything about that man - I simply go crazy."* I told the President that I have never met Mr Ngcuka and that he was being misled.
40. I believe that Advocate Jiba was resentful when she was not appointed as NDDP as she had been acting in that position prior to my appointment. I do not have any reason to believe that Advocate Jiba and I were unable to



work together professionally, but do believe that the campaign to have the President remove me was aimed at ensuring her continuing to act as, or even her permanent appointment as, the NDPP. I later discovered that Advocate Jiba had been recommended in a memorandum by former Minister of Justice and Constitutional Development, Mr Jeffrey "Jeff" Thamsanqa Radebe (**Minister Radebe**), for permanent appointment as NDPP. This campaign was similar to that which disqualified Mr Stanley Gumede who had been widely tipped to be made NDPP before my appointment.

41. I believe that this campaign against me culminated in the President's establishment of the inquiry into my continued service as NDPP.
42. Finally, I was concerned that this campaign was also used to influence some staff members against me. Some staff members were used in pursuit of the campaign, which disrupted the operation of the organisation.
43. I had taken various steps to address the instability suffered by the NPA at this time. These Included:
  - 43.1. Obtaining a legal opinion from Senior Counsel Patrick Ellis, regarding the findings of the High Courts and the Supreme Court of Appeal against Advocates Jiba, Mrwebi and Advocate Sibongile Mzinyathi (**Mzinyathi**) the Director of Public Prosecutions North Gauteng Division
  - 43.2. The appointment of a Commission of Inquiry headed by retired Constitutional Court Justice Yacoob to inquire into the instability within the NPA leadership. Advocates Jiba and Mrwebi refused to assist the commission despite my instructions to do so.
  - 43.3. The preparation of a Memorandum by Advocate Gerhard Nel the Legal Advisor in my office. This was signed by Mr Willie Hofmeyr (**Mr Hofmeyr**). It was addressed to the Minister for onward transmission to the President. It dealt with the situation at the NPA. A copy of an affidavit attested to by




Mr Hofmeyr is attached as Annexure "MN 2." This affidavit deals with circumstances relevant to this memorandum.

- 43.4. Correspondence addressed to the General Council of the Bar regarding Advocates Jiba, Mrwebi and Mzinyathi.
- 43.5. Informal attempts to improve my relationship with Advocates Jiba, Mrwebi and Mzinyathi; and
- 43.6. Repeatedly requesting a meeting with the President, so as to request him to intervene and address the situation at the NPA by instituting disciplinary action against Advocates Jiba, Mrwebi and Mzinyathi.
- 43.7. My initiation of disciplinary action against Advocates Jiba, Mrwebi and Mzinyathi appeared not to be supported by the President and the then Minister of Justice, Minister Masutha. I had requested that the President intervene by taking disciplinary steps against Advocates Jiba, Mrwebi and Mzinyathi, and I had provided him with a file of relevant documentation. This included the legal opinion, reports and memoranda.
- 43.8. At the NPA meeting at Emperors Palace in March 2015 Minister Masutha informed me that the President had agreed to intervene as I had requested. He failed to do so.
44. In July 2014, I was informed by the President that he had taken a decision to institute a commission of inquiry to determine whether I was fit and proper to hold office, in terms of section 12(6)(a)(iv) of the NPA Act.
45. At the end of that month, the President also informed me that he intended to suspend me with full pay pending the outcome of the inquiry and he gave me an opportunity to make submissions in that regard.





**F. My suspension**

46. By letter dated 4 July 2014, the President informed me that, after careful consideration, he had taken a decision to institute an inquiry in terms of section 12(6)(a)(iv) of the NPA Act. Section 12(6)(a)(iv) provides that the President may provisionally suspend the NDPP from his office, pending an Inquiry into his fitness to hold office. A copy of this letter is attached marked Annexure "MN 3."

47. The President advised me that the details regarding the establishment of the inquiry would be communicated to me shortly. The notice did not contain the terms of reference of such an inquiry. Nor did it list the allegations that the inquiry would investigate against me.

48. On 30 July 2014 I received a notice from the President informing me that he was considering suspending me on full pay pending the finalisation of the inquiry into whether I was fit and proper to hold the office of the NDPP. A copy of this notice is attached marked Annexure "MN 4." The notice reads:

*"The enquiry will examine your fitness to hold the office as National Director of Public Prosecutions having regard to whether:*

- 1. The criminal convictions which you possess for violent conduct;*
- 2. Reported comments in the media are unbecoming of a National Director of Public Prosecutions, divisive and have the effect of bringing the National Prosecuting Authority into disrepute;*
- 3. The lack of disclosure of the facts and circumstances of prosecutions which you faced.*

*Are consonant with the conscientiousness and integrity of an incumbent to the office of the National Director of Public Prosecutions as required by the Act"*

49. The notice invited me to provide the President with written representations as to why I should not be suspended.

**My rights to a fair hearing**

50. Section 12(6)(a) of the NPA Act empowers the President to suspend me pending an enquiry into my fitness to hold office. Implicit in the statutory power to suspend is the right to a fair hearing before suspension.
51. The requirement of fairness required that I be given a fair hearing or a fair opportunity to be heard on why I should not be suspended. That meant that I should have been given sufficient or adequate time and sufficient or adequate particularity of the allegations against me to make proper representations. It is apparent from the President's letter of 30 July 2014 that I was not given sufficient or adequate essential particulars of the allegations against me.
52. The first bullet point of the President's notice of 30 July referred to the "criminal convictions I possess for violent conduct". The President did not give particulars of the criminal convictions to which this allegation referred.
53. In the second bullet point of the President's notice of 30 July I was told that the inquiry would investigate "reported comments in the media" which the President contended were unbecoming of an NDPP, were divisive, and had the effect of bringing the NPA into disrepute. The President did not give particulars of the comments reported in the media, the dates on which those comments were reported and the media in which they were reported.
54. The third bullet point informed me that the enquiry would consider whether I was fit to hold the office of NDPP in light of my lack of disclosure of facts and circumstances of prosecutions which I had faced. The President did not give particularity of the prosecutions, nor to whom and when I had failed to disclose the relevant prosecutions.

55. I could speculate, as I did in my representations of 1 August 2014. But to have required me to speculate about the essential particulars of the allegations against me was unfair.
56. Because I did not have the essential particulars of the allegations against me, I could not say whether they were true, or whether they were sufficiently serious to warrant suspension or whether they were such that it is not possible for me to interfere with an investigation into them or with witnesses who made them. These are all considerations relevant to suspension.
57. In his 8 August 2014 letter the President justified his refusal to provide me with particulars of the allegations by saying that:
- "It is my view that the details you require in paragraph 5 of your letter dated 30 July 2014 and repeated under paragraph 2 of your recent letter are matters that will be the subject of the enquiry that I advised I shall be instituting. The information which I have provided is sufficient for the purpose of the representations which you are invited to make. In any event, it appears apparent from your initial response that you were aware of the matters to which I refer.*
- As a result, I do not deem it appropriate to engage on matters that will form the subject matter of the enquiry. My letter invites you to make representations as to why you believe I should not suspend you pending the finalisation of this enquiry and I await your supplementary representations by no later than the extended deadline of 16:00 on Wednesday 13 August 2014".*
58. I submit that it was unfair and unlawful to require me to respond to allegations as lacking in particularity as the allegations in the President's notice of 30 July 2014 were.





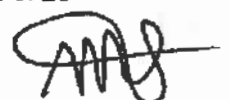
**G. The Cassim Enquiry regarding the fitness of the NDPP to hold office:**

**Terms of Reference**

59. By letter dated 5 February 2015 the President informed me that he had appointed Nazeer Cassim SC (Cassim) (assisted by LG Nkosi-Thomas and SKD Mdladla) to chair an inquiry.
60. The inquiry's Terms of Reference were published in Government Gazette No. 38453 on 9 February 2015.
61. The TOR directed the Chairperson to inquire into whether it was fit or proper for me to hold the office of the NDPP in light of the following:
- 61.1.1. My two previous separate convictions on charges of assault;
  - 61.1.2. The complaints of professional misconduct laid against me with the KwaZulu - Natal Law Society;
  - 61.1.3. My having faced criminal charges for acts of violence;
  - 61.1.4. My arrest and detention on criminal charges;
  - 61.1.5. Media statements either issued by me or on my instruction that undermined or brought the office of the NDPP or the NPA into disrepute;
  - 61.1.6. Any other matter as might be relevant to the abovementioned issues and my fitness and propriety to hold the office of the NDPP as contemplated in section 9 (1)(b) of the NPA Act.

**The President's complaints**

62. Submissions on behalf of the President and the Minister were filed on Monday 4 May 2015 at 18h30.
63. His complaints in the submissions were different to the complaints in the Terms of Reference.

**The complaints in the submissions were the following:**

63.1.1. Before my appointment I had failed to disclose to the President or his advisors that I had two previous convictions for assault.

63.1.2. I had failed to take steps to expedite the finalisation of a complaint to the Law Society by Mr Jabulani Mtshali against me in 2008.

63.1.3. In my security clearance application questionnaire, in answer to the question:

*"Have you ever been convicted or are there any pending cases for a criminal/departmental offence...?"*

I failed to disclose the following:

- During 1985 I had been acquitted on a charge of murder;
- During October 2012 I had been arrested, but not charged, for inconsiderate driving.

63.1.4. I had failed to disclose whether had taken took any steps to resolve my complaint against the two police officers who arrested me unlawfully (during October 2012) for inconsiderate driving.

63.1.5. I had made made statements to the media that:

- were not in the public interest;
- fuelled media speculation;
- negatively affected the public's confidence in the NPA;
- breached the Code of Conduct.

**Complaints that did not fall within the TOR**

64. The following complaints did not fall within the TOR:

64.1.1. The complaint identified in paragraph 63.1.1 above. The complaint in the first TOR was that my two previous convictions of assault meant that I was not fit and proper to hold the office of NDPP.

64.1.2. The complaint identified in paragraph 63.1.2. above. The complaint in the second TOR is that I am not fit and proper because of complaints of professional misconduct made against me with the KwaZulu-Natal Law Society,

64.1.3. The complaint identified in paragraph 63.1.3. The complaint in the third TOR is that I am not fit and proper because I faced criminal charges for acts of violence.

64.1.4. The complaint identified in paragraph 63.1.3 (bullet 2). The complaint in the fourth TOR was that I was not fit and proper because of my arrest and detention on criminal charges.

64.1.5. The complaint identified in paragraph 63.1.4. None of the TOR referred to a failure to disclose what steps I took to finalise my complaint against the South African Police Services (SAPS).

65. I further submitted that the only complaint contained in the submissions that should be adjudicated at the inquiry was the complaint identified in paragraph 63.1.5. Despite this, I responded to all of the allegations contained in the President's submissions.

**My submission to the Cassim Enquiry**

66. I prepared (but did not present) a detailed submission to the Cassim Enquiry wherein I dealt at length with the TOR of the Enquiry and the complaints against me.



67. My submission is attached hereto as **Annexure "MN 5."**
68. In my submission I raised my opinion that the complaints against me concerned the three requirements of Section 9(1)(b) as set out in 12.3 of my submission (paragraph 14 of this affidavit, above). Salient points raised in this regard are indicated in the excerpt below:
15. *Those three requirements mean the following:*
- 15.1 *Integrity includes the high standards of honesty and candour the law expects from all legal practitioners who may not compromise on standards of honesty and integrity.*
- 15.2 *Experience implies relevant knowledge and skill acquired over time from observing and from practical acquaintance.*
- 15.3 *Conscientiousness means hardworking, diligent, and reliable with a genuine concern for the quality of one's work.*
16. *The fit and proper test for appointment as NDPP is substantially similar to the fit and proper test for admission as an attorney or advocate; i.e. the same requirements and considerations apply. Consequently, the submission by the President that a higher test applies to the appointment of an NDPP is wrong in law (and in logic. There is no reason why the requirements of Integrity, experience and conscientiousness applicable to legal practitioners should be any different for the NDPP.)*
17. *The requirements of s9(1)(b) apply to the NDPP to ensure that he discharges his statutory and prosecutorial duties honestly, independently, diligently, without fear, favour or prejudice, in keeping with the professional status and standards associated with the post, while maintaining prosecutorial independence.*



18. *The question whether the NDPP is a fit and proper person is an objective inquiry. Whether the NDPP is fit and proper is not a question left to the discretion or indeed opinion or view of the President.*

**H. Unlawful conduct of Advocates Jiba and Mrwebi and Public Perceptions of the NPA**

69. I also dealt with this aspect in my submission to the Cassim Enquiry when dealing with the public's perception of the NPA, emanating from numerous media reports. The President later complained that my statements to the media damaged the public's perception of the NPA. While I agreed that public confidence in the NPA had been shaken, I disputed that it was because of anything that I had done.
70. Rather, it was because of the unlawful conduct of Advocates Jiba and Mrwebi. Both of them had abused their positions in the NPA and had acted unlawfully. Examples of this conduct include:
- 70.1. The involvement of Advocates Mrwebi and Jiba in withdrawing charges of fraud and corruption against the former head of crime intelligence, Major-General Richard Naggie Mdluli (**Major-General Mdluli**).
- 70.2. Both the High Court<sup>1</sup> and the Supreme Court of Appeal<sup>2</sup> found that there were grounds to review their decision to withdraw charges against Major-General Mdluli. The NPA was ordered to reinstate the charges against Major-General Mdluli.
- 70.3. In the High Court, Murphy J criticised the manner in which they had conducted the proceedings. He held<sup>3</sup>:

<sup>1</sup> *Freedom Under Law v The national Director of Public Prosecutions* (26912/12) [2013] ZAGPHHC 271; [2013] all SA657 (GNP); 2014 (1) SA 254 (GNP); 2014 (1) SA SACR 111 (GNP) (23 September 2013)

<sup>2</sup> *National Director of Public Prosecutions v Freedom Under Law* (67/2014; ZASCA 58; 2014 (4) SA 298 (SCA); 2014 (2) SACR 107 (SCA) (17 April 2014)

<sup>3</sup> *FUL v NDPP*, op cit at [24]



*"Suffice it to say that the conduct of the respondents is 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 responsibility in the proper administration of justice. The attitude of the respondents signals a troubling lack of appreciation of the constitutional ethos and principles underpinning the offices they hold"*

70.4. Murphy J found that Advocate Jiba had failed to disclose Glynnis Breytenbach's representations in the NPA's record of the decision. Advocate Jiba also made no mention of the representations made by Ms Glynnis Breytenbach urging her to review the decision not to pursue charges against Major-General Mdiuli<sup>4</sup>

70.5. In the SCA, Brand JA confirmed Murphy J's decision. He criticised Advocate Jiba's conduct.<sup>5</sup>

70.6. In the case of Major-General Johan Booysen v Acting National Director of Public Prosecutions,<sup>6</sup> Gorven J found that Advocate Jiba had misled the court<sup>7</sup>.

71. In relation to Advocate Mrwebi, the following is relevant:

71.1. Murphy J found that Advocate Mrwebi's evidence lacked credibility, particularly in relation to his contention that he consulted with Mr Sibongile Mzinyathi before he decided to discontinue the prosecution against Major-General Mdluli.<sup>8</sup>

<sup>4</sup> FUL v NDPP, op cit para 88

<sup>5</sup> NDPP v FUL 2014 (4) SA 298 (SCA) at para [37]

<sup>6</sup> (2014) 2 All SA 391 (KZD)

<sup>7</sup> (2011) 32 ILJ 112 (LAC)

<sup>8</sup> FUL v NDPP, op cit [56]

- 71.2. Advocate Mrwebi had failed to disclose relevant documents that formed part of the record of his decision to withdraw charges against Major-General Mdluli<sup>9</sup>.
- 71.3. Murphy J also rejected Advocate Mrwebi's contention that the decision to withdraw charges against Major-General Mdluli had been made in consultation with Mr Sibongile Mzinyathi. He also rejected Advocate Mrwebi's contention that investigations into the charges against Major-General Mdluli were defective, and his evidence that Ms Breytenbach had believed that the charges were defective, as improbable. He found his evidence unreliable<sup>10</sup>.
- 71.4. Murphy J's findings against Advocate Mrwebi were confirmed by the SCA<sup>11</sup>.
72. As early as 18 July 2014 I had recommended to the Minister of Justice that the President pursue disciplinary action against, amongst others, both Advocate Mrwebi and Advocate Jiba.
73. In the memorandum to the Minister of Justice referred to above, it was pointed out that:
- 73.1. Section 195 (1) of the Constitution requires public administration to be governed by democratic values and principles enshrined in the Constitution. These values require public servants to conduct themselves with a high standard of professional ethics, to provide services impartially, fairly and equitably without bias, and to be accountable,
- 73.2. The Code of Conduct of the NPA was informed by the values and principles that are enshrined in the Constitution, the NPA Act and the United Nations Guidelines on the Role of Prosecutors. It emphasises the crucial role that

<sup>9</sup> *Booyesen v Action National Director of Public Prosecutions*, op cit at para [32] and [34]

<sup>10</sup> *FUL v NDPP*, op cit at paras [58]; [61]; [68]

<sup>11</sup> *NDPP v FUL* op cit at Fn6, paras [40] - [42]





prosecutors play in the administration of justice. It also stresses the need for prosecutors to be fair, effective and to act without fear, favour or prejudice.

- 73.3. I requested the President to suspend Advocates Jiba and Mrwebi pending an inquiry into their fitness to hold the offices of Deputy NDPP and Directors of Public Prosecutions. I suggested that the inquiry be chaired by a retired Judge of the High Court.
- 73.4. I pointed out that there were outstanding criminal proceedings against Advocate Mrwebi for defeating the ends of justice and for intimidation.
74. At the time I wrote that memorandum I was considering appointing a fact-finding inquiry to investigate allegations of unethical conduct by senior members of the NPA, including Advocates Jiba and Mrwebi.
75. On 31 July 2014 Justice Yacoob was appointed to investigate, establish and determine:
  - 75.1. The alleged involvement of the NPA's employees, including senior officials, in the leaking of Information to the media and other interested parties;
  - 75.2. The alleged unethical and unprofessional conduct on the part of the NPA's employees.
  - 75.3. Whether any member of the NPA committed an unlawful act.
76. Advocates Jiba and Mrwebi refused to cooperate with Justice Yacoob, despite my express instructions to them to do so.
77. Justice Yacoob completed his report.
78. Justice Yacoob made three recommendations, two of which were relevant to the Cassim inquiry. They were:
  - 78.1. Criminal charges should be instituted or continued against certain members of the NPA;




78.2. The NPA should appoint a Judicial Commission of Inquiry with powers of compulsion to investigate allegations of impropriety in the NPA.

78.3. I handed a copy of Justice Yacoob's recommendations to the Minister of Justice and the President. They did not act on the recommendations.

79. The Mokgoro Commission was later appointed by President Ramaphosa.

**I. The settlement agreement**

80. I had on 8 August 2014 submitted a founding affidavit to the High Court citing the President of the Republic of South Africa as the first Respondent and the Minister of Justice and Correctional Services as the Second Respondent, in an application to compel the President to furnish me with further particulars pursuant to his intention to hold an Inquiry into my fitness to remain in office. I did not proceed with my urgent application since negotiations then commenced between myself and the President with a view to settling the dispute that had arisen regarding my continued service as head of the NPA.

81. There were a number of reasons why I negotiated a settlement agreement with the President.

82. First, I entered into the settlement agreement to settle what I considered to be an intractable, undesirable and ongoing dispute between myself, the President and Minister Radebe.

82.1. The source of the dispute was the fact that the President wanted me to vacate the office of the NDPP and I did not want to leave office. A number of spurious and baseless grounds were raised for me to depart office, and I vehemently disagreed with those grounds. To this day I maintain that I am fit and proper to hold the office of NDPP and would serve again. My fitness and propriety was agreed to and recorded by the President and Minister in the settlement agreement, and they did not contend otherwise before Court.

- 82.2. In my position as the NDPP I understood my relationship with the President as the appointing authority of the NDPP to be relevant to my employment status. This is based on his appointment powers in terms of section 179 of the Constitution. I further understood my tenure as NDPP to be contractual in nature and not exclusively regulated by the NPA Act.
- 82.3. While the dispute between the President and I remained unresolved, attempts were made to resolve it through negotiations between myself, the President's legal representatives, Michael Hulley and Ms Busisiwe Makhene, (Ms Makhene) the Minister and the Minister of State Security, David Mahlobo (Minister Mahlobo).
- 82.4. In light of these negotiations, I ultimately accepted the terms of the settlement agreement so as to resolve the dispute that had arisen with the President and the pending litigation I had been forced to bring to the Court. I did so on the basis that the President and I were entitled to resolve disputes by reaching a settlement that was acceptable to all parties.
- 82.5. I was therefore of the view that the settlement agreement was concluded, not in terms of the NPA Act, but rather to settle a dispute. I later was advised, and accept, that the NPA Act regulated the terms of any early termination of my tenure as NDPP.
- 82.6. However, all of this did not change the simple fact that the settlement agreement was not, and was never intended to be, concluded to constitute a request on my part to vacate office in terms of section 12(8) of the NPA Act.
83. Second, I was also of the view that my entering into the settlement agreement was an attempt to protect the integrity of the office of the NDPP.
- 83.1. The dispute between the President and I, and my difficulties with Advocates Jiba and Mrwebl of the NPA had been ongoing and the President did not seem willing to intervene to resolve them.



83.2. There was also considerable media attention paid to the dispute and speculation on the issues at stake regarding the integrity and functionality of the NPA.

83.3. During May 2015, the President, the Minister and I concluded a settlement agreement in terms of which I agreed to relinquish my position as NDPP. I received a settlement amount equivalent to what I would have received as a salary had I served my full term as NDPP. In that agreement, the President acknowledged that I was a fit and proper person to hold office as the NDPP.

84. I then vacated my office as the National Director of Public Prosecutions, but not in terms of Section 12(6) of the NPA Act.

**J. My refusal to vacate my Office in terms of section 12(6)**

85. At all material times, the President, the Minister and the President's legal representative Mr Hulley, were aware that I did not intend to, and in fact did not, request the President to allow me to vacate office in terms of section 12(6), me having informed them accordingly.

86. In this regard, I met with Mr Hulley after the conclusion of the settlement agreement and shortly after I was served with the papers in the application issued out of the Court under case number 62470/15 (the **Corruption Watch/ Freedom Under Law** application).

86.1. On 22 October 2015, I met with the Minister of State Security, David Mahlobo at the Beverley Hills Hotel in Durban, at his request. I drove him to Ebandla Hotel in Ballito where he was scheduled to speak at the opening of the "Integrity Leadership Summit", hosted by the Office of the then Premier of KwaZulu Natal, Mr Senzo Mchunu.

86.2. I was acquainted with Minister Mahlobo from when we had both attended university at the same time.





- 86.3. Minister Mahlobo instructed his Chief of Staff, Mr Maduma, to arrange a meeting between myself and Mr Hulley. That meeting took place on the next day, 23 October 2015, between myself, Mr Hulley and Mr Maduma, over breakfast at the Beverly Hills Hotel in Durban,
- 86.4. During that meeting, Mr Hulley enquired how I intended to approach this application by Corruption Watch and Freedom Under Law. I advised him that I had not filed a Notion of Intention to Oppose.
- 86.5. Mr Hulley proposed that I should work with the President on the matter and he offered to pay my legal costs, including the costs attendant on appointing a senior counsel.
- 86.6. I advised him that I could not accede to that request until I had seen the response which the President intended to file.
- 86.7. It was evident to me that Mr Hulley wanted me to say on oath that I had made a request to the President to vacate my office in terms of section 12(8) of the NPA Act. I advised Mr Hulley that I was not prepared to make that statement since that was not what had occurred factually. I reminded him that I was an officer of this Court and that I would not mislead the Court. I emphasised to him that there was correspondence between my legal representatives and the President that made it clear that I had never made such a request. I had drafted some of that correspondence personally.
87. I pause to note that, when I requested copies of this correspondence from my attorney following the meeting, I was informed that the files containing it had disappeared from my attorney's office. Fortunately, I had taken the precaution of keeping copies of the documents.
88. I concluded by stating to Mr Hulley that I did not intend to oppose the application, but I would be required to file a response in the event that the President's answering affidavit contained any false representation of events. Mr Hulley advised me that the Presidents answering affidavit had already



been prepared and that no false averments as to the sequence of events were made in this regard.

89. Mr Hulley undertook to provide me with a copy of the draft affidavit. However, he never did so.
90. I only became aware of the content of the President's answering affidavit after it had been filed in February 2016.
91. Thereafter, I contacted Minister Mahlobo and complained about the version contained in the President's affidavit and Mr Hulley's conduct. Minister Mahlobo invited me to his official residence in Waterkloof. Mr Maduma was also present at that meeting. I advised Minister Mahlobo about my meeting with Mr Hulley, and in particular about Mr Hulley's undertaking to me to provide the President's affidavit to me before it was filed, which was not fulfilled.
- 91.1. I advised Minister Mahlobo that I was not happy about what had happened and the version in the affidavit. I made it clear to him that even though I had not filed a notice of intention to oppose the application, I would consult with my legal representatives and advise them of what had happened. I explained to Minister Mahlobo and Mr Maduma that this application had now affected my reputation and I had to do something about it.
- 91.2. Minister Mahlobo then immediately telephoned the Minister, in my presence, although I did not speak to the minister.
- 91.3. Minister Mahlobo explained to the Minister that the President had deposed to an affidavit in which he had stated that I had requested to vacate office, even though there was correspondence which clearly indicated that this was not correct.



91.4. Minister Mahlobo advised me that, according to the Minister, Mr Hulley had advised the Minister that I had agreed that I had made a request to vacate office. I disputed this with Minister Mahlobo,

92. Accordingly, to the knowledge of the President's legal representatives and the Minister, I have always denied that I made a request to the President to vacate the office of the NDPP in terms of section 12(8) or at all. This is supported by the irrefutable documentary evidence that has been placed before Court.

#### K. Conclusions

93. Political and external interference in decision making in the NPA undermined its integrity and effectiveness and served to erode public confidence in the organisation.

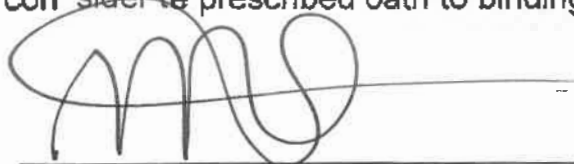
94. The failure to act decisively against Advocates Jiba and Mrwebi harmed the organisation.

95. In my view the Parliamentary Committee on Justice did little or nothing to exercise appropriate oversight or intervene in the issues concerning Advocates Jiba and Mrwebi, at least while I was in office.

I know and understand the contents of this declaration.

I have no objection to taking the prescribed oath.

I consider the prescribed oath to binding on my conscience.



**MXOLISI SANDILE OLIVER NXASANA**





The Deponent has acknowledged that he knows and understands the contents of this affidavit, which was sworn to before me and the deponent's signature was placed thereon in my presence at Pretoria on this the 11<sup>th</sup> day of June 2019, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

 89006-8  
CS7  
COMMISSIONER OF OATHS

FULL NAMES:

Thabi' Eddie GANYA

DESIGNATION:

CS7



ADDRESS:

71 Dundalk Avenue  
Parkview SAPS

## ANNEXURE MN.1



1.5

*[Signature]*

WH6

## AFFIDAVIT

**I, the undersigned,**

**TERENCE JOHN JOUBERT,**

States under oath in English:

1.

I am an adult male 45years old with I.D no. 680728 5526 085, and residing at 32 Roosevelt Road, Padfield Park, Pinetown, 3610 with telephone number (031) 3345095, with cell number 0765966332 and I am employed as a Risk Specialist for the National Prosecuting Authority of SA, 88 Field Street, 3<sup>RD</sup> Floor, Southern Life Building, Durban, 4001.

2.

I hereby make oath and say that the facts deposed to herein are within my own personal knowledge and belief unless otherwise stated and are true and correct.

3.

On the 2013-09-18, I was on duty and I was supposed to fetch Adv. Jiba from the Ushaka International Airport. After making the arrangements I got a call from Adv. Jiba's secretary to say that she would be fetched by Col. Mhlongo on instructions from the DPP-KZN. Col. Mhlongo is currently seconded to NPA's Missing Person's Unit, that is headed by Debra Quinn in the province and by Shawn Abrahams at VGM. Their job is to assist members of the NPA to obtain information by interviewing witnesses to conclude their investigations. Shortly after the meeting between Adv. Jiba and Col Mhlongo, he (Col. Mhlongo) came to me in my office and told me that the new guy (referring to the new NDPP Mr. Nxasana), does not like Adv. Jiba and Adv. Mrwebi. He is aware that I do have a great relationship with Adv. Mrwebi and he was playing on my emotions. I asked why he thought so, and he said that he was sent by Jiba, as she is convinced that this guy is not the right person for the job and that we should try and find something on him as they did against Mr. Gumede.

J. E

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IT'S MAN  
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## AFFIDAVIT

4.

Mr. Gumede was the first person that we had heard about who would have been appointed the NDPP. The DPP had then insisted that Adv. Makhosi (prosecutor) make a statement against Mr. Gumede concerning the manner in which he (Mr. Gumede) had ill-treated her. This incident gave us indications as to the kind of people we were dealing with and to what lengths these people would go to get their way. Col. Mhlongo was instrumental in mobilizing people to gang up against Mr. Gumede.

5.

I then told him that this would be playing with fire as we are only small fries and when elephants fight the grass suffers was my comment to his suggestion. Col. Mhlongo assured me that their efforts would not be in vain as Jiba had said if this man (Mr. Nxasana) is removed, then she would be appointed again. The plan was not whether Mr. Nxasana is guilty but the mere fact that they wanted to embarrass him and insist that he be removed.

6.

On the 18<sup>th</sup> November 2013 we (Col. Mhlongo and I) had another meeting, but this time to discuss the fact that there are two unknown police officials occupying an office next to the DPP. When I raised this with the DPP, my executive manager, Mr. Ramahana flew down to Durban to inform me that the DPP complained about the manner in which I handled the issue of the police officials. I should leave those members as they are, and I should not ask too many questions. The police officials are said to be here to protect the DPP, but this is done without any TRA (Threat Risk Assessment) as per the security policy. We have requested secondment letters from SAPS but to date we have not received any correspondence from SAPS.

7.

Col Mhlongo then informed me that I should not worry about these two members as they were brought to work on the project against the NDPP. They went to Umlazi SAPS where they found people that could implicate Mr. Nxasana in a murder case. This case apparently happened in 1985/6 and his mother (who is a teacher) paid for the docket to disappear. The police

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P. C. M. M. E. R.

## AFFIDAVIT

officials interviewed people in the Umlazi area to see whether they could not get tangible evidence out of them. These two police members were given a vehicle from the Provincial Commissioner to do their investigations against the NDPP.

8.

Col. Mhlongo also asked that I must assist them with somebody that works at RAF (Road Accident Fund) because the information was that he, Mr. Nxasana had embezzled money from RAF. He also mentioned that Mr. Nxasana wife worked there. I told him that I would talk to people that I knew to see whether they could assist us. He then informed me that even if he is moved from the NPA to another place, he would continue his investigation from wherever he is.

9.

I know and understand the contents of this statement.  
I have no objection to taking the prescribed oath.  
I consider the prescribed oath to be binding to my conscience.

DATED AT DURBAN THIS      DAY OF NOVEMBER 2013

TERENCE JOHN JOUBERT

The abovementioned statement was taken down by me and the deponent has acknowledged that he knows and understands the content of this statement. This statement was sworn to before me and the deponent's signature was placed thereon in my presence at Durban on 2013-11-25.

*P. E.* *AD* *W. M.* *S.* *R.*



**ANNEXURE MN.2**



Y. E



**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

**CASE NO: 17782/15**

In the matter between:

**DEMOCRATIC ALLIANCE**

Applicant

and

**PRESIDENT OF THE REPUBLIC  
OF SOUTH AFRICA**

First Respondent

**THE MINISTER OF JUSTICE AND  
CORRECTIONAL SERVICES**

Second Respondent

**THE NATIONAL DIRECTOR OF  
PUBLIC PROSECUTIONS**

Third Respondent

**NOMGCOBO JIBA**

Fourth Respondent

**GENERAL COUNCIL OF THE BAR**

Fifth Respondent

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**AFFIDAVIT BY WILLIAM ANDREW HOFMEYR**

---

I, the undersigned,

**WILLIAM ANDREW HOFMEYR**

Do hereby make oath and state:

1. I am an adult male. I was appointed to the National Prosecuting Authority (NPA) in 1999 in order to head the Asset Forfeiture Unit (AFU). I have held that position ever since, first as a Special Director of Public Prosecutions, and from 2001 as a Deputy National Director of Public Prosecutions to head the AFU. On 17 August 2015 I was moved from my position as head of the AFU and became the head of the Legal Affairs Division.
2. The facts herein contained are, except where the context otherwise indicates, within my personal knowledge and are, to the best of my knowledge and belief both true and correct.

*[Signature]*

*[Signature]*

3. I have read the answering affidavit on behalf of the First, Second and Third Respondents in this case (that is case number 17782/15 in the High Court of South Africa (Western Cape Division, Cape Town)) of which the deponent was Mr Shaun Abrahams (Mr Abrahams), the National Director of Public Prosecutions (NDPP). In that affidavit Mr Abrahams expresses opinions about my conduct which are unfounded and misleading. I have sought the advice of Attorneys Webber Wentzel and of Senior Counsel. I have in these circumstances been advised that as an officer of the court it would be my duty to set the record straight on affidavit and to make my affidavit available to the parties in this matter.
4. In addition, I have been advised that it is my duty to disclose the information I know having regard to the provisions of s34, s165 and s179 of the Constitution, and the provisions of the NPA Act. I have become aware that Mr Abrahams's affidavit is misleading to my personal knowledge. I am well equipped and better placed than any other person to set the record straight. Further I have been maligned and wish to act in defence of my reputation.
5. I do not want to take sides in this matter, and therefore wish to make my affidavit available to both sides.
6. Mr Mxolisi Nxasana (Mr Nxasana) was appointed as NDPP by the President of the Republic of South Africa with effect from 1 October 2013. He succeeded Ms Nomgcobo Jiba (Ms Jiba) who had been acting as NDPP for the period of the preceding 18 months. During this period I was head of the AFU.
7. The end of Ms Jiba's tenure as Acting NDPP and the beginning of Mr Nxasana's term as NDPP saw a storm of judicial criticism of Ms Jiba in the judgments in the following cases:
  - 7.1 *Freedom Under Law v The National Director of Public Prosecutions & Others* (North Gauteng High Court, Pretoria case no. 26912/2012 and SCA case no. 67/2014 in which judgments were handed down on 23 September 2013 and 17 April 2014 respectively). (Judgments in these decisions have been reported as *Freedom Under Law v National Director of Public Prosecutions & Others* 2014 (1) SA 254 (GNP); [2013] 4 All SA 657 (GNP), and *National Director of Public Prosecutions & Others v Freedom Under Law* 2014 (4) SA 298 (SCA); [2014] 4 All SA 147 (SCA), respectively);
  - 7.2 *Booyesen v Acting National Director of Public Prosecutions and Others* (KwaZulu-Natal High Court, Durban case number 4665/2010 in which judgment was handed down on 26 February 2014) (The judgment in this decision has been reported as



Handwritten signatures of the deponent and legal representatives.

*Booyesen v Acting National Director of Public Prosecutions & Others* [2014] 2 All SA 391 (KZN));

7.3 *Democratic Alliance v Acting National Director of Public Prosecutions & Others* (North Gauteng High Court, Pretoria case no. 19577/2009 and SCA case no. 836/2013 in which judgments was handed down on 16 August 2013 and 28 August 2014 respectively). The judgments in these decisions have been reported as *Democratic Alliance v Acting National Director of Public Prosecutions & Others* [2013] 4 All SA 610 (GNP); and *Zuma v Democratic Alliance and Others* [2014] 4 All SA 35 (SCA)).

8. Over the months following his appointment, Mr Nxasana made a sincere effort to find truth and understand what had happened. He requested reports from all those affected. They all provided him with reports, except for Ms Jiba who refused to respond despite a number of follow-up requests that she do so. She was given every opportunity to explain her conduct and refute the court findings, but she failed to do so.
9. I wish to emphasise that this was not an effort build a case against Ms Jiba or any of the others.
10. It was in the context of this refusal by Ms Jiba to provide Mr Nxasana with information or explanations of what had happened in these cases that asked me and others to assist him to gather information concerning these cases and what had transpired in them, including copies of judgments and the records of the cases.
11. I wish to stress that this was purely an internal investigation as happens every day in organisations where there is a need to to determine whether these has been irregular conduct or not. It did not involve the use of law enforcement powers. It was also similar to what I had been requested to do by the then NDPP in the Zuma matter where serious allegations were made against senior NPA staff. It involved looking at documents and interviewing members of the NPA and others to gather information about what had transpired. It was not in the nature of a criminal investigation. The purpose was to ensure that Mr Nxasana was fully informed of the circumstances of the criticism of Ms Jiba so as to enable him to carry out his functions and responsibilities as NDPP. Mr Nxasana was briefed about this situation not only by me, but also by other officials of the NPA.
12. In some cases information was gathered by the Chief Executive Officer (CEO) of the NPA, Ms Karen van Rensburg, where it was necessary to use the powers vested in her to access information in possession of the NPA.

*[Signature]*

*[Signature]*  
R

13. In addition, on 26 June 2014, the NPA briefed Mr Ellis SC to furnish a legal opinion on the following questions:

- 13.1 the disciplinary procedures available in respect of senior personnel in the NPA; and
- 13.2 whether disciplinary steps ought to be taken against Ms Jiba amongst others whose conduct had also been subjected to judicial criticism.

14. Mr Ellis SC furnished his opinion to the NPA on 7 July 2014.

15. Concerning Ms Jiba, Mr Ellis made the following recommendations:

*"I consequently recommend that the President should, in terms of section 12(6)(a) of the NPA Act, consider to provisionally suspend Ms Jiba pending an inquiry into her fitness to hold the office of Deputy National Public Prosecutions to be presided over by a retired judge of the High Court.*

*I also recommend that a criminal investigation for perjury be opened against Ms Jiba.*

*Finally, I recommend that the findings against Ms Jiba made in the judgments referred to above be submitted to the General Council of the Bar as a matter of urgency to consider whether an application should be brought against her in terms of section 7 of the Admission of Advocates Act."*

16. It was on the basis of this opinion that the NDPP instructed his legal advisor, Mr Gerhard Nel (Mr Nel), to draft the confidential ministerial memorandum dated 18 July 2014 addressed to the Minister of Justice and Correctional Services (the Minister). The memorandum was approved by the NDPP shortly before he departed on leave for 2 days subject to few minor changes that he required. Since he regarded the matter as urgent, he requested me to sign the memorandum once the changes had been made as I would be acting as NDPP during his absence.

17. The memorandum made a number of conclusions and recommendations, namely that the NPA and the NDPP should:

- 17.1 report the adverse findings to the Minister and the President;
- 17.2 recommend that the President should in terms of section 12(6)(a) of the NPA Act, consider to provisionally suspend Ms Jiba, and Messrs Mrwebi and Mzinyathi pending an inquiry into their fitness to hold the offices of Deputy NDPP and DPPs, respectively, to be presided over by a retired judge of the High Court;

*[Handwritten signatures and initials]*



- 17.3 refer the matter and findings of the Courts to the South African Police Service (SAPS) with a view to open criminal investigations for perjury against the above-mentioned members of the NPA;
- 17.4 submit the findings of the Courts against the three members of the NPA to the General Council of the Bar so as to consider whether an application should be brought against them in terms of section 7 of the Admission of Advocates Act.
18. Mr Nxasana and I were briefed by Mr Nel regarding the opinion of Advocate Ellis SC. We also applied our minds to the opinion and the records of the cases available to us. It is not for me to judge whether Ms Jiba is culpable. No more do I wish to take sides in this case. We adopted a view in good faith, firstly, that there were *prima facie* grounds in terms of section 12(6)(a) of the NPA Act on the basis of which the President should suspend Ms Jiba pending an inquiry into her fitness, secondly, there existed a reasonable suspicion that Ms Jiba had lied under oath and that the matter should be referred to the SAPS for further investigation and, thirdly, that there was a *prima facie* case of unprofessional conduct on the part of Ms Jiba of sufficient gravity that the matter should be reported to the General Council of the Bar to consider whether an application should be brought against her in terms of section 7 of the Admission Advocates Act.
19. We are of the view and I submit that the contents of paragraph 85, 87, 97.5, 122.5 of Mr Abrahams' affidavit are defamatory of us and are untrue. Nxasana and I reserve our rights in this regard. There was no conspiracy to bring down Ms Jiba. NDPP Nxasana could not just fold his hands and be supine in his response to the judicial criticism of Ms Jiba. He took steps after careful consideration of the merits of the criticisms to ensure these were fully investigated by the appropriate authorities - the SAPS, the GCB and the President - so as to give them opportunity to take appropriate action if necessary.
20. I submit that Mr Nxasana conducted himself in accordance with the standards set in section 195 of the Constitution. As is my legal duty, I assisted him when he required my assistance.
21. I refer to the statement by Mr Abrahams at paragraph 91 of his affidavit in which he states his conviction that the Yacoob Committee was initiated by Mr Nxasana and Ms Van Rensburg with a mind, in particular, to discredit Ms Jiba. This is not true. Mr Abrahams interposes in parenthesis as follows "[importantly, I pause to mention that Mr Hofmeyr confirmed to me that he had recommended the notion of the Yacoob Commission to Mr Nxasana]." I did indeed support the fact finding committee by Judge Yacoob in order to obtain a further independent view (in addition to that of Adv Ellis) from a respected, retired, senior judge on the accuracy and gravity of the judicial criticisms of Advocate Jiba




and others. He was to interview relevant persons, look at the judgments, the records of the cases and any other relevant documents which had been found. His work was not to be equated to that of a public commission of inquiry. It was intended to be an internal investigation in support of possible disciplinary processes as envisaged in the NPA Act.

22. Regarding the argument/implication that this was unlawful, the NPA looked carefully at this issue, took advice from counsel and was satisfied that it was lawful. In particular, it also considered the precedent at SARS where a similar process was initiated to consider serious allegations against its head, Mr Magashula.
23. Ms Jiba and Mrwebi were requested to co-operate with the Yacoob committee, but refused to do so. Thus Yacoob recommended a formal commission of enquiry that would have powers to compel them to cooperate.
24. I refer to Advocate Abrahams' statement at paragraphs 92 and 97.4 of his affidavit which imply that it was improper for members of the AFU to have been involved in the internal investigations regarding Ms Jiba. There was no impropriety. I was requested by the Ms van Rensburg, the CEO of the NPA, to make some of my staff in the AFU available to assist in the process of assembling documents for the Yacoob committee, and to assist her. Mr Nxasana supported this request. In regard to these activities they reported to her, not to me. She was acting within her powers. I complied. Had I not complied, she was in any event entitled to proceed to utilise members of the AFU without my consent.
25. As CEO, Ms van Rensburg was the Chief Information Officer of the NPA and entitled to all information and documentation in possession of the NPA and its officials.
26. I do not wish in this affidavit to debate the merits of the criticisms of Ms Jiba. These will no doubt be at the heart of the debate on the merits of this case. However, for the sake of clarity I refer to the following:
  - 26.1 there is a conflict between what Mr Abrahams states at paragraphs 112.6 and 170 of his affidavit. On the one hand he states that Advocate Jiba's instructions were in fact that a further affidavit be interposed to deal with allegations in Booyesen's answering affidavit. On the other he states that he is advised and verily believes that Ms Jiba was relying on the advice of counsel in not seeking to interpose a further affidavit;
  - 26.2 I refer to the extract from Gorven J's judgment contained in paragraph 24 of my memorandum to the Minister of Justice and Correctional Services being annexure "SA2" to Mr Abraham's affidavit. Gorven J stated:

*"The inference in this case need go no further than that, on her version, the NDPP did not have before her annexure NJ4 at the 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 Mr Booysen to the offences in question."*

- 26.3 Whilst casting serious aspersions on the character and conduct of Booysen annexures NJ2, NJ3 and NJ4 do not at all implicate Booysen in the conduct in respect of which he was charged; annexure NJ5 on which Adv Jiba said she relied (a copy of which I attach marked **WH1**) does link Booysen to the offences in question, but the statement is hearsay in its entirety in so far as Booysen is concerned.
- 26.4 I am in possession of documents received by me in the normal course my work at the NPA relevant to the case which Mr Abrahams has not attached to his affidavit. As an officer of this court I am advised by my legal advisers that I am duty bound to disclose this information. I attach one of these documents marked **WH2**. It is a memorandum from Mr Jan Ferreira the prosecutor in the criminal case against Ms Jiba arising from her conduct in the Booyens matter, dated 5 August 2015. He reaches the conclusion that the decision to prosecute Ms Jiba was sound in law. Mr Ferreira is widely regarded as one of the best and most experienced prosecutors in the NPA.
- 26.5 I attach marked **WH3** an email from Mr Ferreira to Mr Mokgathle dated 17 August 2015. The subject is Ms Jiba. Mr Ferreira<sup>4</sup> asked whether the docket (and opinion) had been forwarded to the NDPP. He stated he needed a 'decision' as soon as possible. It is clear from the email that Mr Mokgathle believed that it was the NDPP who would make the decision, even though Mr Abrahams later announced that Mr Mokgathle had made the decision.
- 26.6 Mr. Nxasana had called for all files that she had dealt with as acting NDPP.
- 26.7 The possible appeal against the Gorven judgement was not brought to Nxasana's attention after his appointment. It was only when he read about it in the media that he first knew of it. He was concerned that such a high profile matter was being conducted without informing and briefing him, and called for a briefing and was not told that there was an appeal.

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- 26.8 The tema informed him that counsel had let them down by making certain concessions in court. However, the notice of appeal filed later disputes that the concessions were made.
- 26.9 He asked Ms Jiba whether judge was incorrect in his finding, and she replied that she had relied on the advice from the racketeering experts. He convinced the team that even if the concessions had been wrongly made, that there would be little prospects of success given the findings on the Ms Jiba's evidence. He understood them to agree that the appeal should be withdrawn.
- 26.10 I refer to paragraph 199 of Mr Abrahams affidavit. As described above, I signed the confidential ministerial memorandum dated 18 July 2014 addressed to the Minister of Justice and Correctional Services. I did so on behalf of the NPA. Any significant action by an acting NDPP would only be undertaken with the full knowledge of the NDPP, either by consulting on the phone or on email. In this case, I received a request by the NDPP, Mr Nxasana, to sign the memo that he had already approved subject to a few changes. I submit that annexe SA6 to Mr Abrahams' affidavit clearly demonstrates that I was authorised to sign the memorandum and that it was duly submitted on behalf of the NPA.
- 26.11 If it is correct that the Minister did not forward the memorandum. I would regard this as unusual since I believe he was duty bound to forward the memorandum to the President who was the decision maker in such matters. However, it is not correct that the President did not receive the memorandum as Mr Nxasana informed me that he had personally handed the memo to the President when he met with him in about July 2014.
- 26.12 Section 24(3) of the National Prosecuting Authority Act No 32 of 1998 provides as follows:
- A Special Director shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her by the President, subject to the directions of the National Director: Provided that if such powers, duties and functions include any of the powers, duties and functions referred to in section 20 (1), the shall be exercised, carried out and performed in consultation with the Director of the area of jurisdiction concerned.*
- 26.13 I attach marked WH4 redacted draft minutes of a meeting of the EXCO of the NPA dated 24 and 25 January 2012. The meeting was chaired by Ms Jiba. I refer to page 7 of the minute where both Dr Ramaite and I explained the existence and



effect of the provisions of section 24(3). Ms Jiba must have known at that point that the decision of Mr Mrwebi to withdraw charges against Mdluli without having done so in consultation with Mr Mzinyathi was unlawful. Yet she continued to defend Mr Mrwebi's decision over the course of the following year in the litigation in the FUL case.

- 26.14 I would like to point out that almost all the NPA senior management accepts that the meaning of "in consultation" means that there must concurrence between the relevant decision makers. Indeed there is no room for debate as it is defined as such in s233(3) of the Interim Constitution.
- 26.15 Finally, I wish to refer to paragraph 86 of Mr Abrahams' affidavit. I sat in the meeting when Adv Ellis SC was briefed. He was informed that some acrimony existed in the NPA to ensure that he would bear that in mind when he considered the matter. However, this was given merely as background information. It was not relevant to the conduct of Ms Jiba in respect of which his opinion was sought.
27. Mr Abrahams has launched an unwarranted and unfounded attack on my integrity in his affidavit. Shortly after his assumption of office he had removed me from my position as head of the AFU, which I had occupied with success for many years. He made me head of the Legal Affairs Division.
28. He has removed from my supervision as head of LAD the significant number of cases dealing with allegations of unethical conduct by Ms Jiba and other senior NPA officials, and has indicated that he or his personal advisor would deal with such cases.
29. He presumably appointed me to the head of LAD as he viewed me as someone with sufficient capabilities to hold that post. The question is why he would then remove those cases from my supervision.
30. I believe that this is so because I have made it clear that I would not countenance false or misleading information being placed before court to protect NPA officials against allegations of wrongdoing.
31. Thus it has become the situation that almost half the LAD staff no longer report to me on certain matters, although they are still formally on the establishment of the LAD.
32. The same has happened in this application. After it was delivered to the LAD, it was taken away and I never saw the answer that was drafted until I was contacted by a journalist about it.

The block contains three handwritten marks at the bottom of the page. On the left is a signature that appears to be 'Lester'. In the center is a stylized signature or set of initials, possibly 'MO'. On the right is the word 'NAH' with a large 'R' written below it.



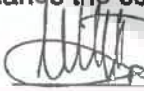
33. This raises the issue whether he wants to afford undue protection to Ms Jiba even if this means that he must make baseless and defamatory attacks on me.
34. A request for Mutual Legal Assistance in the Booysens matter was removed from me shortly after I informed him that it had been handed to me. It related, *inter alia*, to a request to Greece for Mr Danikas to sign the unsigned statement that was referred to in the judgement by Gorven J.
35. The various attempts to undermine Mr Nxasana by Ms Jiba and others are dealt with comprehensively in his response to the Cassim enquiry which is attached as WH5.
36. I refer to WH6, a signed statement made by Mr Terence Joubert, a senior employee in the Security and Risk Department of the NPA. In the affidavit Mr Joubert tells a story of how he and others had done investigations at the instance of Ms Jiba with a view to bring about Mr Nxasana's removal from office. He indicates that they had done the same previously in respect of Mr Gumede who had earlier been mooted as a candidate for the office of NDPP following the FUL application to compel the President to appoint a permanent NDPP in the place Ms Jiba who had been acting for a considerable period. A recording of the conversation to which he refers is available.
37. It suggests to me that there is a systematic pattern of protecting Ms Jiba and others improperly, not just in this case, but in others as well. It suggests that he has chosen to align himself with their agenda.
38. While she was acting NDPP, Ms Jiba openly boasted about her close relationship with the then Minister of Justice, and how she could persuade him to do whatever was needed for the NPA.
39. The attempts by Ms Jiba to engage in activities that are in support of political groupings is not new. In my affidavit in the DA application to review the decision to drop the charges against Mr Zuma, I dealt extensively with the unethical role played by Ms Jiba in the Selebi prosecution to try to assist those close to then President Mbeki, as well as the subsequent disciplinary action taken against her.
40. Mr Abrahams has referred to me as a politician. I have not participated in politics since I joined the NPA. For the past 17 years I have been a loyal and dedicated member of the NPA. I have come across efforts by politicians to manipulate the NPA for their factional purposes, which I have strongly opposed and have exposed whenever I became aware of it.

41. In regards to the statement by Mr Abraham that implies that there was something improper in the NPA having a CEO, I wish to point out that it was Ms Jiba who personally motivated for and persuaded the Minister and the DG of Justice to appoint Ms van Rensburg as the CEO of the NPA on a 5 year contract.
42. I attach the confirmatory affidavit of Mr Mxolisi Sandile Oliver Nxasana.

  
**WILLIAM ANDREW HOFMEYR**

Signed and sworn to before me at Pretoria on **30 January 2016**, the deponent having acknowledged that the deponent knows and understands the contents of this affidavit.

 716 5762-2  
 Nematikonde R CST

Commissioner of oaths

Full names: Nematikonde Rendini  
 Business address: 119 Dukpers road  
 Designation: CST  
 Capacity: Visipol





   
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**ANNEXURE MN.3**



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*[Handwritten signature]*



MN 1

4 July 2014

Dear Mr Nxasana

**NOTICE OF INSTITUTION OF ENQUIRY**

I hereby advise you that, after careful consideration of all the matters before me, I have taken a decision to institute an enquiry in terms of Section 12(6)(a)(iv) of the National Prosecuting Authority Act 32 of 1998.

The detail regarding the establishment of the Enquiry will be communicated to you shortly.

Yours faithfully

Mr Jacob G. Zuma

President, Republic of South Africa

Mr Nxasana  
National Director of Public Prosecutions  
Private Bag X 752  
Pretoria  
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**ANNEXURE MN.4**



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*[Signature]*



MH 2



30 July 2014

Dear Mr Nassara

**NOTICE OF INTENTION TO SUSPEND IN TERMS OF SECTION 12(6)(a)  
OF THE NATIONAL PROSECUTING AUTHORITY ACT 32 OF 1998**

I had earlier advised you of my decision to institute an enquiry in terms of Section 12(6)(a)(iv) of the National Prosecuting Authority Act 32 of 1998. The enquiry is in the throes of being established and I am advised that the details of such will be communicated to you in the next few days with a view to it proceeding expeditiously.

You are no doubt aware that the National Prosecuting Authority is an important constitutional institution in the administration of justice and that maintaining public confidence in the institution is of necessity. In consideration of maintaining the integrity of the National Prosecuting Authority and in particular its good administration, I am giving consideration to suspending you on full pay pending the finalization of the enquiry to which I've referred.

The enquiry will examine your fitness to hold the office as National Director of Public Prosecutions having regard to whether:

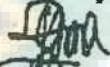
1. the criminal convictions which you possess for violent conduct;
2. reported comments in the media are unbecoming of a National Director of Public Prosecutions, divisive and have the effect of bringing the National Prosecuting Authority into disrepute;

3. the lack of disclosure of the facts and circumstances of prosecutions which you faced

are consonant with the conscientiousness and integrity of an incumbent to the office of National Director of Public Prosecutions as required by the Act.

You are required to furnish me with written representations in this regard by no later than 16h00 on Friday 1 August 2014.

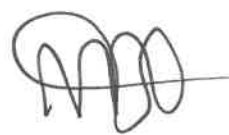
Yours faithfully



Mr Jacob G. Zuma

President of the Republic of South Africa

Mr Nxasana  
National Director of Public Prosecutions  
Private Bag X 752  
Pretoria  
0001

**ANNEXURE MN.5**



*J.S.* *[Signature]*

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WH5

## CASSIM INQUIRY

## THE FITNESS OF THE NDPP TO HOLD OFFICE

## SUBMISSIONS BY THE NDPP

(DRAFT)

## The Inquiry

- 1 By letter dated 5 February 2015 the President informed me that he had appointed Mr N Cassim SC (assisted by Ms LG Nkosi-Thomas and Mr SKD Madlala) to chair an inquiry. A copy of the letter is attached, marked MN1.
- 2 The Inquiry's Terms of Reference (TOR) were published in Government Gazette No. 38463 on 9 February 2015.<sup>1</sup>
- 3 The TOR direct the Chairperson (Chair) to inquire into whether it is fit or proper for me to hold the office of the NDPP in light of the following:
  - 3.1 My two previous separate convictions on charges of assault;
  - 3.2 The complaints of professional misconduct laid against me with the KwaZulu – Natal Law Society;
  - 3.3 My having faced criminal charges for acts of violence;
  - 3.4 My arrest and detention on criminal charges;

<sup>1</sup> A copy of the TOR is at pp 54 – 59 of the President's bundle

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- 3.5 Media statements either issued by me or on my instruction that undermine or bring the office of the NDPP or the NPA into disrepute;
- 3.6 Any other matter as may be relevant to the abovementioned issues and my fitness and propriety to hold the office of the NDPP as contemplated in section 9(1)(b) of the NPA Act.

#### The President's complaints

- 4 Submissions on behalf of the President and the Minister were filed on Monday 4 May 2015 at 18h30.
- 5 His complaints in the submissions are different to the complaints in the TOR. The complaints in the submissions are the following:
- 5.1 Before my appointment I failed to disclose to the President or his advisors that I had two previous convictions for assault.<sup>2</sup>
- 5.2 I failed to take steps to expedite the finalisation of a complaint to the Law Society by Mr Jabulani Mtshali against me in 2008.<sup>3</sup>
- 5.3 In my security clearance application questionnaire, in answer to the question -

*"Have you ever been convicted or are there any pending cases for a criminal/departmental offence...?"* -

I failed to disclose the following:

<sup>3</sup> President's submissions, p22/29  
<sup>2</sup> President's submissions p24/33- 34

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5.3.1 During 1985 I was acquitted on a charge of murder;<sup>4</sup>

5.3.2 During October 2012 I was arrested, but not charged, for Inconsiderate driving.<sup>5</sup>

5.4 I failed to disclose whether I took any steps to resolve my complaint against the two police officers who arrested me unlawfully (during October 2012) for Inconsiderate driving.<sup>6</sup>

5.5 I made statements to the media that<sup>7</sup>:

5.5.1 are not in the public interest;

5.5.2 fuel media speculation;

5.5.3 negatively affect the public's confidence in the NPA;

5.5.4 breach the Code of Conduct.

#### Complaints that do not fall within the TOR

6 The following complaints do not fall within the TOR:

6.1 The complaint identified in paragraph 5.1 above. The complaint in the first TOR is that my two previous convictions of assault mean that I am not fit and proper to hold the office of NDPP.

6.2 The complaint identified in paragraph 5.2. The complaint in the second

<sup>4</sup> President's submissions p 28/37  
<sup>5</sup> President's submissions p 31/42.2  
<sup>6</sup> President's submissions p35/47  
<sup>7</sup>

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TOR is that I am not fit and proper because of complaints of professional misconduct made against me with the KwaZulu-Natal Law Society.

6.3 The complaint identified in paragraph 5.3.1. The complaint in the third TOR is that I am not fit and proper because I faced criminal charges for acts of violence.

6.4 The complaint identified in paragraph 5.3.2. The complaint in the fourth TOR is that I am not fit and proper because of my arrest and detention on criminal charges.

6.5 The complaint identified in paragraph 5.4. None of the TOR refers to a failure to disclose what steps I took to finalise my complaint against the South African Police Services (SAPS).

7 The only complaint in the submissions that falls in the TOR is the complaint identified in paragraph 5.5. It is a complaint covered by the fifth TOR.

8 I submit that the only complaint contained in the submissions that should be adjudicated at the inquiry is the complaint identified in paragraph 5.5. Despite this, I shall respond to all of the allegations contained in the President's submissions.

#### The applicable legal rules

##### Appointment of the NDPP

9 The appointment of the NDPP is governed by section 179 of the Constitution. It requires there to be a single NPA structured in terms of an Act of Parliament, consisting, *inter alia*, of an NDPP who is the NPA's head. The President appoints the NDPP in his capacity as head of the national executive.

10 Section 179(2) provides that the NPA has the power to institute criminal

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proceedings on behalf of the state. Section 179(4) requires there to be national legislation to ensure that the NPA exercises its functions *'without fear, favour or prejudice'*.

11 In terms of s 179(5) the NDPP must determine prosecution policy with the Minister of Justice's (Minister) concurrence. Section 179(6) states that the Minister exercises final responsibility over the NPA.

12 Section 9 of the National Prosecuting Authority Act 32 of 1998 (NPA Act) sets out the requirements of a person appointed as NDPP. Such person must be:

12.1 a South African citizen;<sup>8</sup>

12.2 possess legal qualifications that entitle him or her to practise in all courts in the Republic;<sup>9</sup> and

12.3 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 of the NDPP.<sup>10</sup>

13 As the NDPP, I may be removed from office if I am not fit and proper.<sup>11</sup> I may not be removed before there has been an inquiry into whether I am fit and proper to continue to hold office. The TOR prescribe the limits and ambit of the inquiry into whether I am fit and proper to continue to hold office as NDPP.

14 The TOR and complaints against me concern the three requirements of s9(1)(b) set out in 12.3 above.

15 Those three requirements mean the following:

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- <sup>8</sup> Section 9(2)
  - <sup>9</sup> Section 9(1)(a)
  - <sup>10</sup> Section 9(1)(b)
  - <sup>11</sup> Section 12(6)(a)(iv)

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- 15.1 Integrity includes the high standards of honesty and candour the law expects from all legal practitioners<sup>12</sup> who may not compromise on standards of honesty and integrity.<sup>13</sup>
- 15.2 Experience implies relevant knowledge and skill acquired over time from observing and from practical acquaintance.<sup>14</sup>
- 15.3 Conscientiousness means hardworking, diligent, and reliable with a genuine concern for the quality of one's work.<sup>15</sup>
- 16 The fit and proper test for appointment as NDPP is substantially similar to the fit and proper test for admission as an attorney or advocate; i.e. the same requirements and considerations apply.<sup>16</sup> Consequently, the submission by the President<sup>17</sup> that a higher test applies to the appointment of an NDPP is wrong in law (and in logic. There is no reason why the requirements of integrity, experience and conscientiousness applicable to legal practitioners should be any different for the NDPP.)
- 17 The requirements of s9(1)(b) apply to the NDPP to ensure that he discharges his statutory and prosecutorial duties honestly, independently, diligently, without fear, favour or prejudice, in keeping with the professional status and standards associated with the post, while maintaining prosecutorial independence.<sup>18</sup>
- 18 The question whether the NDPP is a fit and proper person is an objective inquiry.<sup>19</sup> Whether the NDPP is fit and proper is not a question left to the discretion or indeed opinion or view of the President.

<sup>12</sup> Botha v Law Society Northern Provinces 2009 (1) SA 216 (SCA) para 18

<sup>13</sup> Malan v Law Society Northern Provinces 2009 (1) SA 216 (SCA) para 10

<sup>14</sup> Fine v Society of Advocates of SA 1983 (4) SA 488 (A) at 495 A - H

<sup>15</sup> ORB

<sup>16</sup> ORB

<sup>17</sup> Pikoli v President of the Republic of South Africa 2010 (10 SA 400 (GNP) at 406F

<sup>18</sup> President's submission p 14/19

<sup>19</sup> Pikoli v the President 2010 (1) SA 400 (GNP) at 406F

Democratic Alliance v President of the Republic of South Africa 2013 (1) SA 248 (CC) at para [20]-[22]

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19 I submit that the way that the inquiry should be carried out is as follows:<sup>20</sup>

19.1 Determine whether the conduct of which I am accused has been established on a balance of probabilities;

19.2 Determine whether my conduct breaches any or all of the requirements in s9(1)(b) by –

19.2.1 comparing my conduct to the requirements in s9(1)(b);

19.2.2 comparing my conduct with the way in which the requirements have been applied by judicial authority;

19.2.3 considering whether my conduct falls foul of the ordinary meaning of the wording of those requirements considered against their purpose by exercising a value judgment in line with constitutional and statutory imperatives and previous judicial pronouncements.<sup>21</sup>

Two convictions for assault

Convictions do not mean I am not fit or proper

20 Although this is no longer the complaint, it is implicit in the first TOR that the fact I have two criminal convictions for assault means that I am not fit and proper to be the NDPP.

21 In his submissions, the President does not explain why the mere fact of the two previous convictions means that I am not fit and proper to be the NDPP. Consequently, I am compelled to assume that the complaint in the first TOR is that the mere fact that I have two convictions for common assault, dating back to

<sup>20</sup> Jassat v Natal Law Society 2000 (3) SA 44 (SCA) at para 10

<sup>21</sup> General Council of the Bar of South Africa v Oeach 2013 (2) SA 52 (SCA) at [60]

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1986, means that I am not fit and proper,

- 22 It is a matter of public record that I have two criminal convictions, both for common assault. The first conviction was in 1985. I recall very little of the details of that conviction except that it was for common assault and that I was cautioned and discharged. I was reminded of it when I applied for a security clearance during December 2013 when I was given a copy of a SAPS 69 form showing two previous convictions for common assault. The second conviction was for common assault in 1986. I was convicted of assaulting my girlfriend at the time. I was sentenced to 30 days imprisonment or a R50 fine. I paid the fine.
- 23 The only fit and proper requirement that the two convictions might be relevant to is the requirement of integrity. But in the context of a fit and proper legal practitioner (I submit a fit and proper NDPP), integrity relates to whether I can be trusted to discharge my statutory and prosecutorial and professional duties, honestly, independently, without fear, or prejudice and in keeping with the professional status and standards of the post.
- 24 I submit that the two convictions are not evidence that I am unable to discharge my duties with integrity for the following reasons:
- 24.1 I was 17 and 18 years old when I was convicted for the two assaults;
- 24.2 The convictions occurred almost 30 years before my appointment;
- 24.3 I have not been convicted of the same or similar offences since then;
- 24.4 They were not committed in the course of my employment or during the course of my discharging any office;
- 24.5 I have not since, either during the course of my employment or the discharge of any office, been guilty of or been found guilty of assault or

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any other crime;

24.6 The assault on my girlfriend at the time, was not serious. And I was very young at the time. But ever since, I have deeply regretted assaulting her. I am aware that our society is bedevilled by gender violence. It is a matter that causes pain to our society and to me. I do not stand for it. I do not tolerate it. I have lived my life by a moral code that rejects gender violence (and indeed all forms of violence). One incident when I was 17 years' old does not make me a perpetrator of gender violence. Nor does it mean that I live my personal or professional life by perpetrating or supporting violence, particularly against the vulnerable in our society.

24.7 There is and has been no complaint against me that in my role as NDPP, I have not directed the NPA to take domestic or gender violence seriously and to prosecute persons who are guilty of such violence.

25 I have never hidden the fact that I have a criminal record. I am an admitted attorney. I was admitted as an attorney on 12 May 1997. In my application for admission I disclosed the fact that I had a criminal record. A copy of my admission application is attached to my submissions, marked MN2. In paragraphs 23 to 26 of my affidavit I disclose the background to my 1986 conviction. I did not disclose my 1985 conviction for assault because I could not remember it.

26 A representative of the professional committee of the KwaZulu Natal Law Society (Law Society) filed an affidavit supporting my application for admission as an attorney, with knowledge of my 1986 conviction for assault. The Law Society did not consider that I was unfit or improper to practice as an attorney because of my 1986 assault conviction. I do not believe that the attitude of the Law Society would have been any different had I disclosed both convictions.

27 I was admitted to practice as an attorney and enrolled on the roll of practising attorneys by the court with full knowledge of my 1986 assault conviction. I do not believe that the court would not have admitted or permitted my enrolment had the

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court been aware of the 1985 assault conviction.

No failure to disclose

28 The complaint in the submission is that my failure to disclose my two previous convictions to the President means that I am not fit or proper.<sup>22</sup>

29 I admit that before my appointment, I did not inform the Presidency of my two previous convictions for common assault.

30 In law, an omission to speak is not unlawful. The failure to disclose becomes unlawful where, in the circumstances, there is a duty to speak. A duty only arises if the omitted information is within the exclusive knowledge of the party guilty of omission, such that the party relying on him for information has him as his only source.<sup>23</sup>

31 My appointment as NDPP was preceded by the following interactions:

31.1 A meeting with Mr Hulley at which he told me that the President was considering appointing me as NDPP. The meeting took place at my office in Durban during June 2013. The meeting lasted approximately 30 minutes.

31.2 I was surprised when told I was being considered for the post. I had not applied for the post. I had not sought it out. I had not indicated to anyone that I was interested in it. I had no expectation of being appointed to the post;

31.3 In approximately August 2013 I met with the President, Mr Hulley, and the President's legal advisor, at his official residence in Pretoria. That too was a short meeting lasting no more than half an hour. The main

<sup>22</sup> See p 22/29 of the President's submission

<sup>23</sup> Eskom Holdings Limited (Pty) v Pipaza (2013) 34 ILJ 349 (LAC) at [50]

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concern of the President was whether I had the necessary courage required of the post. I took that to mean that the President wanted to know whether I understood that a main requirement of the post was prosecutorial independence. He asked how I would cope under the pressure of the demands of the job. I said that if appointed, I would approach the job with the necessary courage, but also with the composure characteristic of the President's own performance.

31.4 On 30 August 2013, Mr Hulley telephoned me and asked me to send him a copy of my CV, which I did. He told me that the President was going to announce his decision to appoint me as NDPP.

31.5 On 31 August 2013 the President announced his decision to appoint me as NDPP.

32 Before my appointment --

32.1 I was not interviewed (in a way ordinarily characteristic of a job interview) by the President or any one on his behalf for the purpose of considering whether to appoint me;

32.2 I was not required to complete any application form or similar document (except for my security clearance application which I completed on 4 December 2013, after I had already been appointed);

32.3 The only document I completed and signed (apart from my security clearance application) was my employment contract;


32.4 As I was leaving the meeting with the President, Mr Hulley asked me if there was anything he should know. I told him about that my father had been a trade unionist whom I understand had interacted politically with the President on occasion a long time ago. I disclosed this information

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because it is not well known or public knowledge and because I thought that I should disclose information about any connection between the President and my late father.

33 I did not deliberately conceal my previous convictions from Mr Hulley or the President. That (or other sanction) was not asked or raised in the two meetings before my appointment. The purpose or tenor of those meetings was not to get information about me from myself. In any event, I assumed that the President would never have considered me for the post, without doing a check on my background and public records and records held by the Law Society as is required by the Constitutional Court.<sup>24</sup>

34 It is apparent from the above that my failure to inform the Presidency was not in breach of a legal duty to speak. I was not the only source of the fact of my previous convictions. I did not know and was not informed that the President was relying on me as the exclusive source for information such as my previous convictions.

Section 271A(b) of the Criminal Procedure Act 51 of 1997

35 The assaults for which I was convicted do not reflect negatively on my integrity. They are unrelated to the NPA or to my responsibilities as NDPP. As I pointed out in my submissions to the President on why I should not be suspended, under section 271A(b) of the Criminal Procedure Act 51 of 1977 (CPA), I am entitled to apply to expunge the criminal record of those convictions.

36 I understand and agree that even if I were to apply to have my criminal record expunged, it would not change the fact that I had been convicted for assault. It would mean that I did not have a criminal record. But even in terms of the law, these convictions are not regarded as serious. There is no automatic right to apply under section 271A(b) of the CPA to have a criminal record expunged. It applies only in cases that are not regarded as serious.

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- 37 The President criticises me for not having applied to have my record expunged. I am aware that in my suspension submissions I stated that I intended to apply to the Director-General (Justice and Constitutional Development) to expunge my criminal record. It is true that I have not done so. On reflection I decided that it was not necessary for me to do so. I did not want to be accused of being opportunistic in anticipation of this inquiry. My decision cannot impact upon my integrity. It is in any event irrelevant for purposes of deciding whether I am fit and proper to hold the position of NDPP.

The complaints of professional misconduct laid against me with the KwaZulu - Natal Law Society

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- 38 The complaint in the second TOR is that I am not fit and proper because three complaints had been made against me to the Law Society.
- 39 These are complaints about my conscientiousness. Implicit in this complaint is that I am not fit and proper to be the NDPP because I am not hardworking or diligent or reliable with a genuine concern for my work.
- 40 Two of the complaints are that I allowed matters to prescribe. In one of them, the Law Society found me guilty. It imposed a R2 000,00 fine which I paid. The Law Society dismissed the other complaint; i.e. that complaint was found to be unfounded.
- 41 The third complaint was that I took too long to wind up the estate of a former client, a Mr Mthali. The complaint was made against me by Mr Mthali's stepson, Mr Jabulani Mthali.
- 42 It is true that there were delays in winding up Mr Mthali's estate. The reasons for the delay are set out in my letter of 21 June 2014.<sup>25</sup> There is no need to repeat those reasons here. I ask that the letter be treated as incorporated at this point in my statement. It is obvious from my explanation in the letter that the delay in

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<sup>25</sup> In my letter to the President on 21 June 2014 at President's Bundle Item 2 p5-7

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finalising the deceased's estate was not of my making and that the delay was beyond my control.

- 43 Only one of the complaints turned out to be valid. The one instance in my career as an attorney where I allowed a matter to prescribe, was isolated and was not characteristic of my career as an attorney. It is not evidence of any professional character flaw. That explains why the Law Society (or anyone else) never applied for my removal from the roll of attorneys. In any event, allowing one matter to prescribe that would not constitute conduct rendering a person unfit or improper to be an attorney.
- 44 There is no complaint that I have not been conscientious in discharging my duties as NDPP. I am unaware of any allegation by the Presidency that I have not been conscientious since my appointment as NDPP. 10
- 45 The President's complaint has changed. It is no longer the complaint that is contained in the TOR. The complaint now is that I have not done everything reasonably expected of me to finalise the complaint by Mtshali. The President maintains that I lack the willingness to bring the complaint to a conclusion. He claims that it suits me to leave it hanging. He says so because he assumes that I have done nothing to expedite the finalisation of the complaint.
- 46 I have told the President what I did to try and resolve the matter.<sup>36</sup> I told him that:
- 46.1 Prior to my appointment I contacted the Law Society; 20
- 46.2 I asked about the status of this complaint against me;
- 46.3 The Law Society could not locate their file. This means that there is no record of this complaint against me;

<sup>36</sup> In my letter to the President on 21 June 2014 at President's Bundle Item 2 p5-7

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45.4 I asked my former colleague (who took over my practice in Durban) to search for Mr Mtshali's case file in my old office. He could not locate it.

46.5 I went to my former office myself to try to locate the file. I could not locate it.

47 Although the President criticises me for not having done enough to finalise this complaint, he does not say what else I should have done. I do not know what else I could have done. As far as I am concerned I did everything reasonably expected of me. Any delays in finalising this complaint are not of my own making. I cannot now be criticised for the fact that the Law Society has not finalised a complaint against me. A delay by the Law Society cannot mean that I am not fit and proper.

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Charge/acquittal on a charge of murder – does not mean I am unfit or improper

48 In the third TOR the complaint is that the mere fact that I was charged with and acquitted of murder in 1985 means that I am not fit and proper.

49 Briefly, the facts that gave rise to the charge and acquittal are the following:

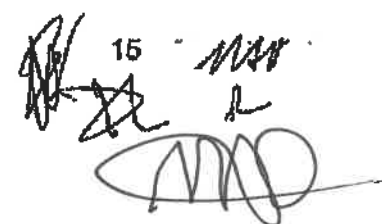
49.1 In December 1985 (as is now known, when I was 17 years' old) I was with friends visiting my girlfriend at her house in Umlazi, C Section. Unknown men attacked her house and its occupants. In the ensuing scuffle I stabbed one of our attackers in self-defence.

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49.2 I reported the matter to my father who took me to the police where I was detained and subsequently released on bail. I was charged with murder and tried in the Regional Court in Durban where I was found not guilty



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and acquitted.

- 50 The fact of my acquittal means that I am innocent of any charge of criminal conduct. It is true that in the incident involved violence on my part. But the violence was legally and lawfully justified. It was employed in self-defence against violent intruders. I should not be held to be unfit or improper.

Change of TOR complaint in President's submission

- 51 The complaint in the TOR was changed in the President's submission. The complaint now is that my failure to disclose this fact in my security clearance application means that I am not fit or proper.<sup>27</sup>
- 52 It is true that I did not disclose this fact in my written application for a security clearance on 4 December 2012.
- 53 The security application form required me to fill in a questionnaire. One of the questions I was asked to answer (item 11 on page 6 of the security application form)<sup>28</sup> was whether I had ever been convicted of a criminal offence and/or whether there were any pending criminal actions against me. I disclosed that I had two criminal convictions for assault although I could not remember the details about one of them.
- 54 I was never required in the security application form to provide information about acquittals. I could not reasonably have been expected to provide this information in circumstances where the security application form was explicit about the type of information I was required to provide. That information was information about previous convictions or pending criminal and/or departmental charges, not acquittals.
- 55 The President relies on an affidavit from the former Acting DG of SSA, Mr Simon

<sup>27</sup> President's submission at p26/36.4

<sup>28</sup> President's bundle of documents, p 88 and 93 - 94

Ntombela for submitting that I refused to place on record the background circumstances relating to my arrest and acquittal on charges of murder, requested in the security clearance process.<sup>29</sup>

56 The allegation by Ntombela is wrong on two grounds. The first is that I was never asked to provide information about acquittals. The second is that I never refused to discuss that information in discussion with Mr Ntombela.

57 I discussed the details of my arrest and acquittal with Mr Ntombela on two occasions. The first time was on 15 May 2014. The second time was on 19 May 2014.

58 I met with Mr Ntombela to discuss progress about my security clearance. I had applied in December 2013. I could not understand why my clearance had not been processed by May 2014 or why it took so long to process.

59 After making the security clearance application, it was brought to my attention by certain members of the SAPS in KwaZulu Natal, that two members of SSA (Mr Bloese and Mr Sihole) had been investigating my background. I was told that they were trying to find out information about my arrest for murder. I did not understand why they were doing this. I told Mr Ntombela what I had heard. I asked him if he knew about it. He said that he did not.

60 I explained to Mr Ntombela the background to my arrest and subsequent acquittal. I explained to him why I had not disclosed this in my security application form. I told him that I did not believe that the security application questionnaire required me to disclose this information.

61 My meeting with Mr Ntombela was cordial. He even thanked me for clarifying the matter with him. I got the impression that the matter had been resolved.

<sup>29</sup> President's bundle of documents, p97/15

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- 62 I recorded the details of my discussion with Mr Ntombela in writing by way of a letter dated 26 May 2014. A copy of the letter is attached, marked MN3. The letter sets out the background circumstances related to my arrest for murder. It also explains why I did not disclose this in my security application form.
- 63 Mr Ntombela has never disputed the contents of the letter. I took that to mean that he agrees with the contents. The only inference to be drawn from his silence in the face of my letter that he must have received in May 2014 already, is that he admitted that we had met and that I had explained the circumstances surrounding the charge and acquittal. It is surprising that in his affidavit he now claims under oath that I refused to place the facts of my arrest and murder on record. This is not true. I never refused to do so.
- Arrest and detention on criminal charges – does not mean I am not fit or proper
- 64 The complaint in the fourth TOR is that because I was arrested and detained for Inconsiderate driving, I am not fit and proper to be NDPP.
- 65 This complaint relates to my arrest during October 2012 for Inconsiderate driving and resisting arrest. I was arrested one evening during October 2012 while driving my wife's BMW 526 along Sydney Road, in Durban.
- 66 I was released on R1 000 bail. The following morning I appeared in the Durban Regional Magistrates Court. The senior public prosecutor, Mr Ntuli, withdrew the matter from the roll. I laid criminal against the police officers who arrested me. To my knowledge, that investigation has not yet been finalised. That of course is not an investigation (departmental, or otherwise) into my conduct.
- 67 The President does not take issue with my version of what happened. He does not dispute the fact that I was unlawfully arrested. The fact that I was unlawfully arrested does not make me unfit or my appointment improper. It means that police officers unlawfully arrested me.

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68 The President's complaint in his submission is different to the complaint as set out in the fourth TOR. His complaint now is that I did not disclose the fact of my arrest in my security clearance application questionnaire.

69 I did not disclose this fact in my application for a security clearance for the same reasons that I did not disclose the fact that I was arrested and acquitted for murder in 1988. I was not required to do so.

70 The fact that I was arrested for inconsiderate driving and resisting arrest has no bearing on my suitability to hold the office of NDPP. I was not charged with or convicted of inconsiderate driving or resisting arrest. The incident has no bearing on whether I am honest or fit to do my job. 10

71 The President's second complaint is that I have not done enough to finalise my complaint against the two police officers. The President does not say what he thinks I should have done. I do not know what I more I should have done. It is the responsibility of the police to investigate a criminal charge against one of its members. As a citizen, I must rely on the police to investigate properly complaints against the police.

72 When I was appointed NDPP, my complaint against the two police officers had not been resolved. Once I was appointed I did not want to be seen to be putting pressure on the police to finalise an investigation. I did not want to be seen to be abusing my position of NDPP. 20

73 I submit that my complaint about police misconduct and how I followed it up in these circumstances has no bearing on whether I am fit and proper. I complained to the Independent Complaints Directorate (now Independent Police Investigative Directorate). The responsibility to follow up my complaint lies with them, and not with me. Even if there have been delays in finalising my complaint, that fact does not mean that I am not fit and proper to be NDPP. It is an entirely irrelevant consideration.

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**Media statements either issued by me or on my instruction that undermine or bring the office of the NDPP or the NPA into disrepute**

74 This ground of complaint relates to statements by me recorded in the Sunday Independent and the Weekend Argus on 1 June 2014 and to the Sunday Times on 8 July 2014 and to Times Live on 8 June 2014 .

75 In the Sunday Times of 8 July 2014 I was reported as saying:

75.1 I learned about the President's decision to institute an inquiry into my fitness to hold office from the media;

75.2 I would decide in due course whether to challenge the President's decision to hold an inquiry;

75.3 I did not comment on whether I intended cooperating with any inquiry as I would "wait and cross that bridge" when I got to it;

75.4 I did not want to comment on whether I was fit and proper as I did not want to be seen to be defying the President.

76 The comments recorded in the Sunday Times are accurate. But I do not understand the complaint of the President to relate to these comments. I shall ignore them in my submission.

77 In the Sunday Independent and Weekend Argus on 1 June 2014 I was reported as saying:

77.1 My deputy, Ms Nomngobo Jiba had engineered a plot to oust me;

77.2 The former Minister had asked me to resign because SSA refused to

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grant me a top-secret security clearance;

77.3 I had proof that two senior managers in the NPA, Mr Lawrence Mrwebi and Ms Jiba, had been attempting to dig up dirt on me and discredit me.

78 Times Live on 8 June 2014 reported me to have said that the journalist should report what Mokotedi said and I would sue him.

79 The summary of my statements as set out in 77-8 above is accurate. The complaint about my comments to the media is presumably that I lack integrity. I am accused of putting my own interests above those of the NPA and of damaging the public perception of the NPA as a result of my comments to the media, particularly my comments about senior managers in the NPA such as Ms Jiba and Mr Mrwebi<sup>30</sup> and of breaching the Code of Conduct.<sup>31</sup>

80 The President maintains I should have allowed the Minister and the President time to deal with the problems in the NPA and not chosen to "vent my anger" to the media.<sup>32</sup>

81 The context in which I made the statements in 77 above to the media is the following:

81.1 These statements were made some time after journalists first started approaching me about damaging allegations about me and after damaging press reports about me appeared in the media. Until these statements were made, I declined to speak to the media. These statements were made after journalists approached me shortly after my meeting with the Minister on 21 May and my meeting with EXCO on 22 May 2014.

<sup>30</sup> President's submissions, p 35/47.2

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<sup>32</sup> President's submissions, p36/47.4

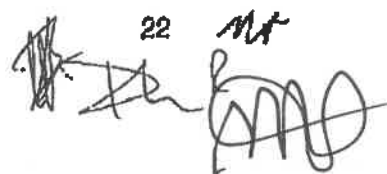
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- 81.2 My statement that the Minister asked me to resign is true. He did so during a meeting I had with him on 21 May 2014 during which he informed me that SSA had declined to grant me a top-secret security clearance. When I declined to resign, the Minister said that the President would be left with no alternative but to establish an inquiry into whether I am fit and proper to hold the post of NDPP.
- 81.3 Following my meeting with the Minister, I met with the NPA's EXCO. I informed them what had happened. I told them about my meeting with the Minister the day before. I also told them that the Minister had asked me to resign because SSA had declined to grant me a security clearance.
- 81.4 Soon after my meeting with EXCO, I was approached by journalists asking me to comment on allegations that I had been asked to resign, that the President intended holding an inquiry into my fitness to hold office and that senior managers in the NPA were conspiring to get rid of me.
- 81.5 At the same time various media houses published articles about me claiming that I had been asked to resign and that I had been refused a security clearance for not disclosing that I had killed a man. The media articles questioned my integrity and my fitness to hold office. They also distorted the truth.
- 81.6 I attach a copy of an article (MN4) that appeared in the Mail and Guardian on 30 May 2014 as just one example of the types of articles



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that were circulating about me at the time. These articles distorted the truth about me. They damaged my reputation. By implication, they damaged the credibility of the NPA in the eyes of the public.

82 My comments to the media about attempts to discredit me and oust me from my position were informed by information that had come to my knowledge from sources that I honestly believed to be reliable. Given the information at my disposal, my belief that Ms Jiba and Mr Mrwebi were intent on discrediting me is reasonable.

83 The President announced his intention to appoint me as NDPP on 31 August 2013 with effect from 1 October 2013. 10

84 Even before I assumed my position as NDPP, I was made aware of attempts from within the NPA to discredit me.

85 I grew up in Umlazi, in Durban. Although I no longer live there, I still have friends who do. Soon after my appointment was announced, they reported to me (unknown) people had been asking questions about me, trying to dig up information about my past. In particular they were asking questions about my background and my arrest and acquittal on charges of murder in 1985.

86 Almost immediately after I was appointed, two NPA officials approached me (independently of each other) with information that Ms Jiba and Mr Mrwebi were plotting to oust me. They volunteered this information of their own accord. 20

87 One of the employees, Mr Terrence Joubert, a Risk Specialist for the NPA, deposed to an affidavit in which he explained how he had been approached by Colonel Welcome Mhlongo, a member of the Hawks for information about me. Colonel Mhlongo claimed to be acting on the authority of Ms Jiba.

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88 I do not know Mr Joubert. The information that he sent me was unsolicited. I do not know why he decided to send me the information.

89 A copy of his affidavit is attached, marked MN5. Mr Joubert states the following under oath:

89.1 On 18 September 2013 he was meant to fetch Ms Jiba from Ushaka International Airport.

89.2 Her secretary phoned him and told him that he did not need to fetch her. She said that arrangements had been made for Colonel Mhlongo to fetch Ms Jiba instead.

89.3 Colonel Mhlongo disclosed to him that Ms Jiba had told him that she did not think that I was the correct person for the job of NDPP. According to him, she told Colonel Mhlongo that "they" (presumably Colonel Mhlongo, Ms Jiba and Mr Mrwebi) should try to find some dirt on me as they had against Mr Gumede.

89.4 Mr Stanley Gumede is the former magistrate who was tipped to become NDPP. His appointment was withdrawn following media reports that the Magistrates Commission was investigating numerous complaints against him.

89.5 Colonel Mhlongo disclosed to him that he was following up information that I had embezzled money from the Road Accident Fund.

89.6 Mr Joubert recorded his conversation with Colonel Mhlongo. He also sent me a copy of a voice recording of the conversation that he had with Colonel Mhlongo. I listened to it. It confirms what he stated in his affidavit. I am in possession of the voice recording. I have not had it

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transcribed although I intend to do so and make it available to the inquiry.

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90 The statements reported in the media were made by me:

90.1 in my capacity as NDPP

90.2 in the discharge of my duty as NDPP;

90.3 in response to queries from the media about allegations of impropriety on my part and attempts to discredit me;

90.4 in the discharge of my duty to keep the media and the public informed about matters of public interest relating to the NDPP;

90.5 in the public interest and in the interests of the media to keep the public informed about matters relating to the NPA and the office of the NDPP.

91 In addition:

91.1 The statement in paragraph 77.2 is true;

91.2 The statement in paragraph 77.1 and 77.3 were made in honest belief in their truth and they were made based on information supplied to me by

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sources that I believed to be reliable.

91.3 My statements were made in the discharge of my duty as NDPP.

91.4 My statement in paragraph 77.4 was made in the honest belief that the information about Mr Prince Mokotedi, supplied by the journalist, was true.

92 The President's complaint that I breached the by talking to the media is misplaced. The Code of Conduct prohibits prosecutors from making public statements about on going cases. It is clear from my comments that my comments had nothing to do with on going cases in the NPA.

93 My statements reported in the Sunday Independent and Weekend Argus on 1 June 2014 and Times Live on 8 June 2014 appear to be the statements relied on in the complaint.

94 The media in question approached me. They approached me in my capacity as NDPP. They had a right to do so. They had a right to ask the questions that solicited my statements. The public also had a right to know what my answers were to questions posed by the media. I cannot recall every single question asked by the journalists who solicited these answers from me.

95 Given this context, my comments to the media were necessary to set the record straight. I did not respond out of anger. I responded because I believed that I have a duty as NDPP to respond truthfully to queries by the media. The journalists who asked for my comment told me that they intended publishing stories that reflected badly on me as NDPP whether I responded or not. Had I not responded, the public's perception of the NPA would have been distorted.

96 There is no requirement for me not to communicate with the media. There is also

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no requirement that I need to channel my statements through the Minister or the President. The NPA has its own spokesperson. I am entitled to address the media as and when I see fit. In this case, I believe that it was correct for me to respond the way I did.

Minister's request for me to resign

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Attempts to discredit me

Prince Mokotedi

98 Prince Mokotedi is the former head of the NPA's Integrity Management Unit (IMU).

99 During my meeting with the former Minister on 21 May 2014, he told me that Mr Mokotedi had lodged a complaint against me with the Public Service Commission.<sup>33</sup>

100 In his complaint, Mr Mokotedi stated that he had been investigating allegations of murder against me and that I had interfered with the investigation.

101 At the time I was unaware that he had lodged such a complaint. I was also unaware of the details of the complaint.

102 I am aware that Mr Mokotedi was investigating allegations of murder against me. Mr Mokotedi informed me of this himself during a meeting that we had. I cannot recall the day I met him.

<sup>33</sup> President's bundle of documents, p10

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103 Mr Mokotedi told me that he was investigating a second charge of murder against me.

104 I told him that I did not want to discuss the matter with him since the background facts were a matter of public record. I told him that I did not want to be seen to be interfering with his investigation.

105 My comments to the media about Mr Mokotedi should be understood in the following context:<sup>24</sup>

105.1 I was approached by a journalist asking me to comment Mr Mokotedi's claims that I had blocked his investigation of me.

105.2 Mr Mokotedi had told the journalist that he was investigating a second charge of murder against me.

105.3 The journalist also claimed to know about my meeting with the Minister and the fact that the Minister had asked me to resign. He asked for my comment.

105.4 The journalist told me that he intended publishing the story whether I commented or not.

105.5 I confirmed that the Minister had asked me to resign.

105.6 I also confirmed that I was aware that Mr Mokotedi was investigating me. I denied that I had attempted to block his investigation.

105.7 I denied that I had ever been charged or convicted for a second murder.

105.8 I told the journalist that if Mr Mokotedi persisted with his allegations that I

<sup>24</sup> Press report, Times Live 8 June 2014, p120

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had been charged with a second murder I would consider suing him for defamation.

106 Mr Mokotedi's statements to the media are defamatory. I believe that he made them with the intention of damaging my reputation. I had a right to comment in circumstances where a journalist intended publishing a story that was factually incorrect and damaging to me. It was important to clear my name. It was also important for the integrity of the NPA that I deny the allegations against me.

Public perceptions of the NPA

107 The President complains that my statements to the media have damaged the public's perception of the NPA. While I agree that public confidence in the NPA has been shaken, I dispute that it is because of anything that I have done.

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108 Rather, it is because of the unlawful conduct of Ms Jiba and Mr Mrwebi. Both of them have abused their positions in the NPA and acted unlawfully. Examples of this conduct include:

108.1 The involvement of Mr Mrwebi and Ms Jiba in withdrawing charges of fraud and corruption against the former head of crime intelligence, Major-General Mdluli.

108.2 Both the High Court<sup>35</sup> and the Supreme Court of Appeal<sup>36</sup> found that there were ground to review their decision to withdraw charges against Major-General Mdluli. The NPA was ordered to reinstate the charges against Major-General Mdluli.

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108.3 In the High Court Murphy J criticised the manner in which they had

<sup>35</sup> Freedom Under Law v The National Director of Public Prosecutions (26912/12) (2013) ZAGPPHC 271; [2013] 4 All SA 657 (GNP); 2014 (1) SA 254 (GNP); 2014 (1) SACR 111 (GNP) (23 September 2013).

<sup>36</sup> National Director of Public Prosecutions v Freedom Under Law (67/2014) [2014] ZASCA 58; 2014(4) SA 298 (SCA); 2014 (2) SACR 107 (SCA) (17 April 2014).



conducted the proceedings. He held:<sup>37</sup>

*" Suffice it to say that the conduct of the respondents is 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 responsibility in the proper administration of justice. The attitude of the respondents signals a troubling lack of appreciation of the constitutional ethos and principles underpinning the offices they hold."*

108.4 Murphy J found that Ms Jiba failed to disclose Glynnis Breytenbach's representations in the NPA's record of the decision. She also made no mention the representations made by Ms Glynnis Breytenbach urging her to review the decision not to pursue charges against Major-General Mdluli.<sup>38</sup>

108.5 In the SCA, Brand J confirmed Murphy J's decision. He criticised Ms Jiba's conduct.<sup>39</sup>

108.6 In the case of *Booyesen v Acting National Director of Public Prosecutions*<sup>40</sup> Gerven J found that Ms Jiba had misled the court.<sup>41</sup>

109 In relation to Mr Mrwebi, the following evidence exists:

109.1 Murphy J found that Mr Mrwebi's evidence lacked credibility, particularly in relation to his contention that he consulted with Mr Sibongile Mzinyathi before he decided to discontinue the prosecution.<sup>42</sup>

109.2 Mr Mrwebi had failed to disclose relevant documents that formed part of the record of his decision to withdraw charges against Major-General

<sup>37</sup> FUL v NDPP, op cit at [24]

<sup>38</sup> FUL v NDPP, op cit, para 88

<sup>39</sup> NDPP v FUL 2014 (4) SA 298 (SCA) at para [37]

<sup>40</sup> [2014] 2 All SA 391 (KZD)

<sup>41</sup> (2011) 32 ILJ 112 (LAC)

<sup>42</sup> FUL v NDPP, op cit [56]

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109.3 Murphy J also rejected Mr Mrwebi's contention that the decision to withdraw charges against Major-General Mdluli was made in consultation with Mr Sibongile Mzinyathi. He also rejected Mr Mrwebi's contention that investigations into the charges against Major – General Mdluli, and his evidence that Ms Breytenbach had believed that the charges were defective as improbable. He found his evidence unreliable.<sup>44</sup>

109.4 Murphy J's findings against Mr Mrwebi were confirmed by the SCA.<sup>45</sup>

110 As early as 18 July 2014 I recommended to the Minister of Justice that the President pursue disciplinary action against, amongst others, both Mr Mrwebi and Ms Jiba.

111 In my memorandum to the Minister of Justice, attached marked MN6, I pointed out:

111.1 Section 195 (1) of the Constitution requires public administration to be governed by democratic values and principles enshrined in the Constitution. These values require public servants to conduct themselves with a high standard of professional ethics, to provide services impartially, fairly and equitably without bias, and to be accountable.

111.2 The NPA's Code of Conduct was published in Government Gazette 29 of December 2010 (attached marked MN7). The Code of Conduct was informed by the values and principles that are enshrined in the Constitution, the NPA Act and the United Nations Guidelines on the Role

<sup>43</sup> *Booyens v Acting National Director of Public Prosecutions*, op cit at para [32] and [34]

<sup>44</sup> *FUL v NDPP*, op cit at paras [58]; [61]; [68]

<sup>45</sup> *NDPP v FUL* op cit at Pn6, paras [40] – [42]

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of Prosecutors. It emphasises the crucial role that prosecutors play in the administration of justice. It also stresses the need for prosecutors to be fair, effective and to act without fear, favour or prejudice.

111.3 I requested the President to suspend Ms Jiba and Mr Mrwebi pending an inquiry into their fitness to hold the offices of Deputy NDPP and Directors of Public Prosecutions. I suggested that the inquiry be chaired by a retired judge of the High Court.

111.4 I pointed out that there were outstanding criminal proceedings against Mr Mrwebi for defeating the ends of justice and for intimidation.

112 At the time I wrote that memorandum I was considering appointing a fact finding inquiry to investigate allegations of unethical conduct by senior members of the NPA, including Ms Jiba and Mr Mrwebi.

113 On 31 July 2014 retired Constitutional court justice Yakoob was appointed to investigate, establish and determine:

113.1 The alleged involvement of the NPA's employees, including senior officials, in the leaking of information to the media and other interested parties;

113.2 The alleged unethical and unprofessional conduct on the part of the NPA's employees.

113.3 Whether any member of the NPA committed an unlawful act.

114 Ms Jiba and Mr Mrwebi refused to cooperate with Justice Yakoob.

115 Justice Yakoob completed his report on [insert the date]. A copy of his findings and recommendations is attached, marked MNx. Justice Yakoob made three recommendations, two of which are relevant to this inquiry. They are:

32 MNx R

*[Handwritten signatures and initials]*

115.1 Criminal charges should be instituted against certain members of the NPA (Mr Mrwebi) should continue;

115.2 The NPA should appoint a judicial commission of inquiry with powers of compulsion to investigate allegations of impropriety in the NPA.

116 I have given a copy of Justice Yakoob's recommendations to the Minister and the President. To date they have not acted on the recommendations.

**Any other relevant issues**

117 In addition to the issues listed in the TOR, the President has raised an additional two issues which he believes impacts on whether I am fit and proper to hold the office of NDPP. 10

118 The first relates to my submission in paragraph 4 of my letter to the President on 21 June 2014. I submitted to the President that the current attitude of the courts to offences similar to the offences I was convicted of in 1985 and 1986 would be to refer them to Alternative Dispute Resolution.

119 The President has interpreted this to mean that I do not accept the seriousness of domestic violence and that my comments are intended to minimise its seriousness.

120 The implication is that my comment places doubt about my ability to ensure that the NPA protects the interests of everyone in our society, including the interests of vulnerable people, especially victims of domestic violence. 20

121 My statement has been taken out of context. That is not what I meant. I was merely explaining how cases like this would be dealt by our courts today.

*LC*

33 *NAH*  
*R*  
*MS*

- 122 The second issue relates to my statement, contained in my representations on 1 August 2014 in which I communicated my intention to apply to have my criminal record expunged in terms of section 271A(b) of the Criminal Procedure Act. I have already dealt with the reasons why I did not apply to have my criminal record expunged.

#### Conclusion

- 123 The test for whether I am fit and proper to hold the position of NDPP is an objective test. To be fit and proper I must be honest, have integrity and be conscientious. Similarly, to remove me from office, there must be objective evidence that I lack integrity or that I am dishonest or have been dishonest in the past. The fact that the Minister and the President believe that I am not fit and proper is not sufficient.

- 124 Objectively, none of the issues raised in the TOR or the President's complaint (as it is now framed), impact on my ability to perform my job as NDPP. They do not impact negatively on my integrity or my honesty.

- 125 For that reason, there is no basis for this inquiry to conclude that I am not fit and proper to remain in my position as NDPP.

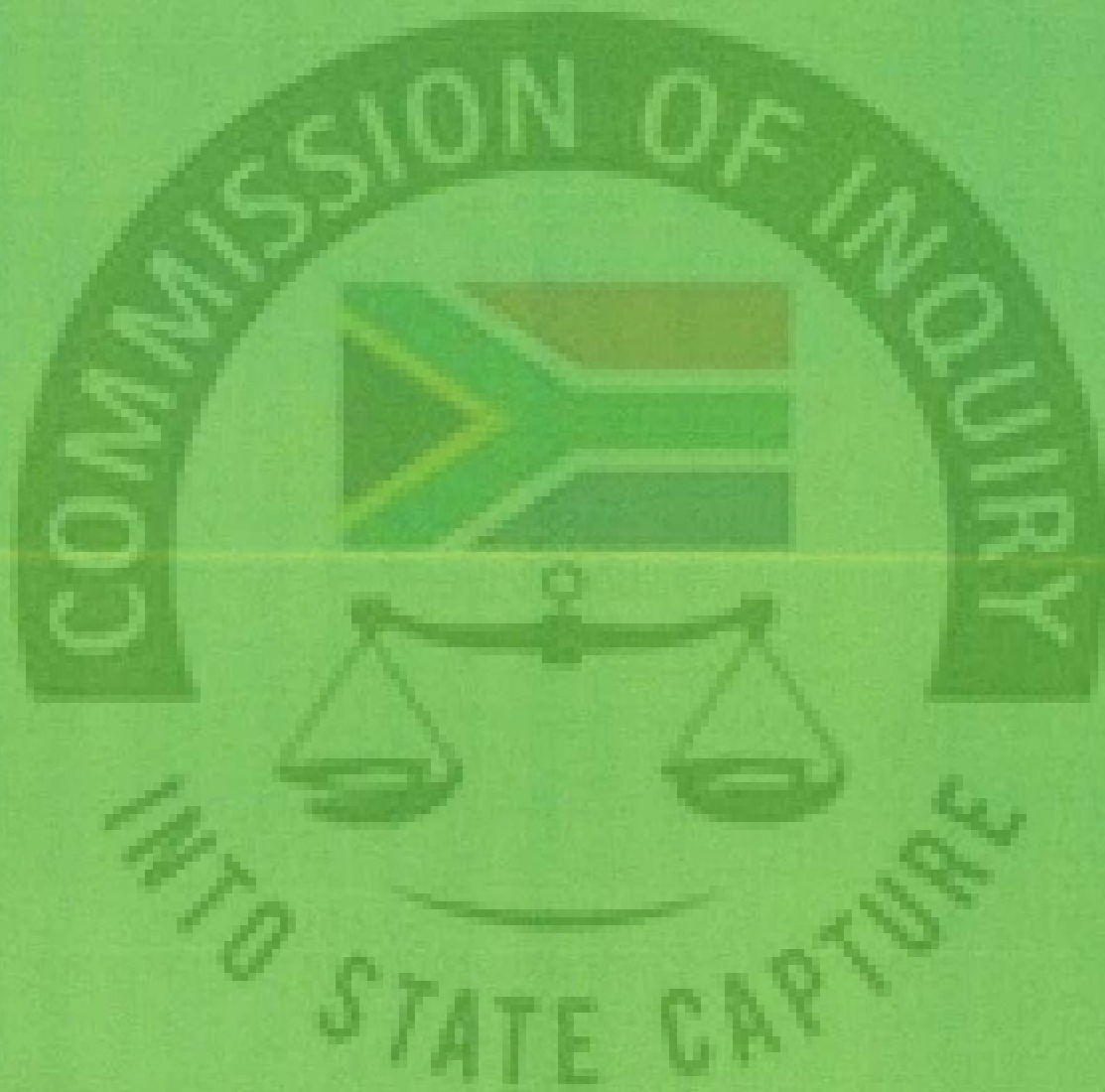
MXOLISINXASANA

*S. E.*

34 *mm*  
*RE*  
*AND*



EE 2







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## **EXHIBIT EE 2**

**CONSTITUTIONAL COURT  
OF SOUTH AFRICA**

**CASE NO:**

**CCT 333/17 & CCT 13/18**

**ORDER & JUDGEMENT**



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

2<sup>nd</sup> floor, Hillside House  
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**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 333/17 and CCT 13/18

Case CCT 333/17

In the matter between:

**CORRUPTION WATCH NPC**

First Applicant

**FREEDOM UNDER LAW NPC**

Second Applicant

**COUNCIL FOR THE ADVANCEMENT OF  
THE SOUTH AFRICAN CONSTITUTION**

Third Applicant

and

**PRESIDENT OF THE REPUBLIC  
OF SOUTH AFRICA**

First Respondent

**MINISTER OF JUSTICE AND  
CORRECTIONAL SERVICES**

Second Respondent

**MXOLISI SANDILE OLIVER NXASANA**

Third Respondent

**SHAUN KEVIN ABRAHAMS**

Fourth Respondent

**DIRECTOR GENERAL: DEPARTMENT OF  
JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

Fifth Respondent

**CHIEF EXECUTIVE OFFICER OF THE NATIONAL  
PROSECUTING AUTHORITY**

Sixth Respondent

**NATIONAL PROSECUTING AUTHORITY**

Seventh Respondent

**DEPUTY PRESIDENT OF THE REPUBLIC  
OF SOUTH AFRICA**

Eighth Respondent

and

**HELEN SUZMAN FOUNDATION**

Amicus Curiae

Case CCT 13/18

In the matter between:

**MXOLISI SANDILE OLIVER NXASANA**

Applicant

and

**CORRUPTION WATCH NPC**

First Respondent

**FREEDOM UNDER LAW NPC**

Second Respondent

**COUNCIL FOR THE ADVANCEMENT OF  
THE SOUTH AFRICAN CONSTITUTION**

Third Respondent

**PRESIDENT OF THE REPUBLIC  
OF SOUTH AFRICA**

Fourth Respondent

**MINISTER OF JUSTICE AND  
CORRECTIONAL SERVICES**

Fifth Respondent

**SHAUN KEVIN ABRAHAMS**

Sixth Respondent

**DIRECTOR GENERAL: DEPARTMENT OF  
JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

Seventh Respondent

**CHIEF EXECUTIVE OFFICER OF THE NATIONAL  
PROSECUTING AUTHORITY**

Eighth Respondent

**NATIONAL PROSECUTING AUTHORITY**

Ninth Respondent

**DEPUTY PRESIDENT OF THE REPUBLIC  
OF SOUTH AFRICA**

Tenth Respondent

and

**HELEN SUZMAN FOUNDATION**

Amicus Curiae

**Neutral citation:** *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23

**Coram:** Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J.

**Judgments:** Madlanga J (majority): [1] to [94]  
Jafta J (minority): [95] to [129]

**Heard on:** 28 February 2018

**Decided on:** 13 August 2018

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## ORDER

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Application for confirmation of the order of the Gauteng Division of the High Court, Pretoria and related appeals against the order of the same court:

1. The appeal of Mr Mxolisi Sandile Oliver Nxasana is upheld with no order as to costs and Mr Nxasana's explanatory affidavit is admitted.
2. The costs order by the High Court of South Africa, Gauteng Division, Pretoria (High Court) against Mr Nxasana is set aside.
3. The appeal of Advocate Shaun Kevin Abrahams and the National Prosecuting Authority is dismissed with costs, including the costs of two counsel.
4. The declaration by the High Court that the settlement agreement dated 14 May 2015 concluded by former President Jacob Gedleyihlekisa Zuma, the Minister of Justice and Correctional Services and Mr Nxasana in terms of which Mr Nxasana's incumbency as the National Director of Public Prosecutions (NDPP) was terminated is constitutionally invalid is confirmed.
5. The declaration by the High Court that the termination of the appointment of Mr Nxasana as NDPP is constitutionally invalid is confirmed.

6. The declaration by the High Court that the decision to authorise payment to Mr Nxasana of an amount of R17 357 233 in terms of the settlement agreement is invalid is confirmed.
7. The declaration by the High Court that the appointment of Advocate Abrahams as NDPP is invalid is confirmed.
8. The declaration by the High Court that section 12(4) of the National Prosecuting Authority Act 32 of 1998 is constitutionally invalid is confirmed.
9. The declaration by the High Court that section 12(6) of the National Prosecuting Authority Act is constitutionally invalid is confirmed only to the extent that the section permits the suspension by the President of an NDPP and Deputy NDPP for an indefinite period and without pay.
10. The declaration of constitutional invalidity contained in paragraph 9 is suspended for 18 months to afford Parliament an opportunity to correct the constitutional defect.
11. During the period of suspension—
  - (a) a section 12(6)(aA) will be inserted after section 12(6)(a) and it will read:

“The period from the time the President suspends the National Director or a Deputy National Director to the time she or he decides whether or not to remove the National Director or Deputy National Director shall not exceed six months.”
  - (b) section 12(6)(e) will read (with insertions and deletions reflected within square brackets):

“The National Director or Deputy National Director provisionally suspended from office shall receive, for the duration of such suspension, [~~no salary or such salary as may be determined by the President~~] [her or his full salary].”



12. Should Parliament fail to correct the defect referred to in paragraph 9 within the period of suspension, the interim relief contained in paragraph 11 will become final.
13. Decisions taken, and acts performed, by Advocate Abrahams in his official capacity will not be invalid by reason only of the declaration of invalidity contained in paragraph 7.
14. Mr Nxasana is ordered to repay forthwith to the state the sum of R10 240 767.47.
15. The President is directed to appoint an NDPP within 90 days of the date of this order.
16. The President, the Minister of Justice and Correctional Services and the National Prosecuting Authority are ordered to pay all costs in this Court that are additional to the costs referred to in paragraph 3, such costs to include the costs of two counsel.

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## JUDGMENT

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MADLANGA J (Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, and Theron J concurring):

### *Introduction*

[1] The applicants, Corruption Watch NPC (Corruption Watch), Freedom Under Law NPC (FUL) and Council for the Advancement of the South African Constitution (CASAC), seek confirmation of orders of constitutional invalidity made by the High Court of South Africa, Gauteng Division, Pretoria (High Court). What the High Court declared constitutionally invalid are—

- (a) a settlement agreement concluded by former President Jacob Gedleyihlekisa Zuma, the Minister of Justice and Correctional Services

(Minister) and the former National Director of Public Prosecutions (NDPP), Mr Mxolisi Sandile Oliver Nxasana who is the third respondent in the confirmation application in terms of which Mr Nxasana's incumbency as the NDPP was terminated;

- (b) the actual termination of Mr Nxasana's incumbency as the NDPP;
- (c) a decision to authorise payment to Mr Nxasana of an amount of R17 357 233 (R17.3 million) in terms of the settlement agreement;
- (d) the appointment of Advocate Shaun Kevin Abrahams as the NDPP in the position vacated by Mr Nxasana;
- (e) section 12(4) of the National Prosecuting Authority Act<sup>1</sup> (NPA Act); and
- (f) section 12(6) of the NPA Act to the extent that it permits the President to suspend the NDPP unilaterally, indefinitely and without pay.

[2] The High Court's order is two-legged and quite extensive. To do justice to its content, I think it best to render it in full in a footnote.<sup>2</sup>

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<sup>1</sup> 32 of 1998.

<sup>2</sup> *Corruption Watch (RF) NPC v President of the Republic of South Africa* [2017] ZAGPPHC 743; [2018] 1 All SA 471 (GP); 2018 (1) SACR 317 (GP) (High Court judgment) at paras 128-9. The first leg of the order granted in respect of an application brought by Corruption Watch and FUL jointly reads:

"In the result we make the following order on the application of Corruption Watch and Freedom Under Law:

1. The settlement agreement between the President, the Minister of Justice and Mr Nxasana dated 14 May 2015, is reviewed, declared invalid and set aside.
2. The termination of the appointment of Mr Nxasana as National Director of Public Prosecutions is declared unconstitutional and invalid.
3. The decision to authorise payment to Mr Nxasana of an amount of R17 357 233, in terms of the settlement is reviewed, declared invalid and set aside.
4. The appointment of Adv Abrahams as National Director of Public Prosecutions is reviewed, declared invalid and set aside.
5. Decisions taken and acts performed by Adv Abrahams in his capacity as the National Director of Public Prosecutions are not invalid merely because of the invalidity of his appointment.
6. Mr Nxasana is ordered forthwith to repay to the State all the money he received in terms of the settlement.
7. It is declared that, in terms of section 96(2)(b) of the Constitution, the incumbent President may not appoint, suspend or remove the National Director of Public Prosecutions or someone in an Acting capacity as such.

[3] The confirmation application was consolidated with an appeal by Mr Nxasana against the High Court's refusal to grant him condonation for the late filing of what he called "an explanatory affidavit". As appears from the declarations of constitutional invalidity just referred to and the quoted order, Advocate Abrahams and the National

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8. It is declared that, as long as the incumbent President is in office, the Deputy President is responsible for decisions relating to the appointment, suspension or removal of the National Director of Public Prosecutions or, in terms of section 11(2)(b) of the National Prosecuting Authority Act, someone in an Acting capacity as such.

9. The orders of invalidity in paragraphs 2 and 4 above are suspended for a period of 60 days or until such time as the Deputy President has appointed a National Director of Public Prosecutions in terms of paragraph 8 above, whichever is the shorter period.

10. The costs of this application must be paid jointly and severally by the President, the Minister of Justice, Adv Abrahams and the National Prosecuting Authority."

Here is the second leg which was granted in respect of an application launched by CASAC:

"In the result we make the following order on the application of Council for the Advancement of the South African Constitution:

1. It is declared that section 12(4) of the National Prosecuting Authority Act 32 of 1998 is unconstitutional and invalid.

2. It is declared that section 12(6) of the National Prosecuting Authority Act is unconstitutional and invalid to the extent that it permits the President to suspend the National Director of Public Prosecutions unilaterally, indefinitely and without pay.

3. The order of invalidity in paragraph 2 is suspended for 18 months.

4. During the period of suspension:

4.1 An additional subsection shall be inserted after section 12(6)(a) that reads:

'(aA) The period from the time the President suspends the National Director or a Deputy National Director to the time he or she decides whether or not to remove the National Director or Deputy National Director shall not exceed six months.'; and

4.2 Section 12(6)(e) shall read:

'The National Director or a Deputy National Director provisionally suspended from office shall receive, for the duration of such suspension, his or her full salary [~~no salary or such salary as may be determined by the President~~].'

5. Should Parliament fail to enact legislation remedying the defect identified in paragraph 2, the interim order in paragraph 4 shall become final.

6. The President, the Minister of Justice and the National Prosecuting Authority shall pay the applicant's costs, including the costs of two counsel.

7. The orders of invalidity made above relating to the National Prosecuting Authority Act are referred to the Constitutional Court in terms of section 165(5) of the Constitution for confirmation."

The High Court heard and determined the two applications simultaneously.

Prosecuting Authority (NPA) were unsuccessful before the High Court. Of particular note in this regard, the appointment of Advocate Abrahams as the NDPP was declared constitutionally invalid and Advocate Abrahams and the NPA were ordered to pay the applicants' costs, including the costs of two counsel. Advocate Abrahams and the NPA too brought an appeal before this Court against the adverse orders. They also oppose the confirmation proceedings insofar as they relate to Advocate Abrahams. Their appeal was heard simultaneously with the confirmation application and Mr Nxasana's appeal.

[4] Plainly the matter is properly before us and nothing more need be said in that regard.<sup>3</sup> The questions are whether the orders of constitutional invalidity must be confirmed and the appeals upheld.

[5] The applicants have cited a number of respondents.<sup>4</sup> Some have entered the fray, others not.<sup>5</sup> The Helen Suzman Foundation applied to be admitted as a friend of the court (*amicus curiae*). It is admitted as there is no reason not to grant that application.

### *Background*

[6] The events that are at the centre of these proceedings are in the public domain. The judgment of the High Court notes that it was common cause before that Court that

<sup>3</sup> Section 172(2)(a) of the Constitution provides:

“The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.”

<sup>4</sup> Respectively, the first to ninth respondents are the President of the Republic of South Africa, the Minister of Justice, Mr Nxasana, Advocate Shaun Abrahams, the Director General: Department of Justice and Constitutional Development, the Chief Executive Officer: National Prosecuting Authority, the National Prosecuting Authority and the Deputy President of the Republic of South Africa.

<sup>5</sup> The respondents listed above in n 4 participated before the High Court. Before this Court the respondents that have participated throughout are Mr Nxasana, Advocate Abrahams, the Director General: Department of Justice and Constitutional Development, the Chief Executive Officer: National Prosecuting Authority and the National Prosecuting Authority. When the proceedings were launched before this Court, former President Zuma was the incumbent President. Before the oral hearing, he resigned and President Cyril Ramaphosa became President. Thirteen days before the hearing and after President Ramaphosa had taken over, the President's participation in the proceedings was terminated.

since September 2007 the recent history at the NPA “has been one of paralysing instability”.<sup>6</sup> That judgment gives details of that history.<sup>7</sup> I do not propose doing the same. I will commence with the narrative from when Mr Nxasana, one of the people affected by the High Court’s orders, was appointed to the position of NDPP.<sup>8</sup> His appointment – which followed the short lived incumbency of Mr Menzi Simelane – took effect from 1 October 2013. Mr Simelane’s appointment had come after that of Mr Vusi Pikoli who – following a suspension, a commission of inquiry into his fitness to hold office, some litigation and the conclusion of a settlement agreement – had also vacated office in terms of that agreement without finishing his term of office.

[7] In July 2014 – within about only nine months of his appointment – a process calculated to remove Mr Nxasana from office commenced. The then President, Mr Jacob Zuma, informed Mr Nxasana of his intention to institute an inquiry into his fitness to hold office.<sup>9</sup> This was followed by a notice that the former President was considering suspending Mr Nxasana pending finalisation of the inquiry. The former President said that suspension was necessary in order to maintain the integrity and good administration of the NPA. The notice also specified that the inquiry sought to establish whether certain issues were “consonant with the conscientiousness and integrity of an incumbent in the office of National Director of Public Prosecutions as required by the [NPA] Act”. These issues were: Mr Nxasana’s previous criminal conviction for “violent conduct”; allegedly unbecoming and divisive comments which had the effect of bringing the NPA into disrepute made by Mr Nxasana and reported in the media; and alleged non-disclosure of facts and circumstances of prosecutions which Mr Nxasana had faced previously. The former President called upon

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<sup>6</sup> High Court judgment above n 2 at para 19.

<sup>7</sup> Id at paras 18-46.

<sup>8</sup> In this narrative I borrow copiously from, and am indebted to, the High Court’s summary of the facts.

<sup>9</sup> In terms of section 12(6)(a)(iv) of the NPA Act the President may remove an NDPP from office if the NDPP is no longer a fit and proper person to hold office.

Mr Nxasana to give reasons “in this regard”. Apparently this was an invitation for representations on why Mr Nxasana should not be suspended.<sup>10</sup>

[8] In a letter requesting an extension of the deadline for the submission of representations, Mr Nxasana also requested particularity on the three issues itemised above to which the intended inquiry related. By the morning of the deadline, former President Zuma had not responded to either request. Mr Nxasana was forced to make preliminary representations so as to meet the deadline. His intention was to supplement them upon receipt of the requested particulars. When he followed-up on the particularity, the former President said it was not proper to discuss these issues as they were the subject of the inquiry. Mr Nxasana approached the High Court seeking an order: compelling former President Zuma to provide the required particularity; and interdicting the former President from suspending him until he had furnished him with this particularity. That application was not pursued to finality. The former President changed tack. In late 2014 he proposed that the dispute between him and Mr Nxasana be mediated. Mr Nxasana acceded to this proposal.

[9] It appears from a letter written on 10 December 2014 by attorneys acting for Mr Nxasana that former President Zuma had engaged Mr Nxasana to get him to agree to vacate office. In the letter Mr Nxasana made it plain that he did not want to vacate office as there was no basis for him to. He stated that he would, however, consider stepping down only if he was fully compensated for the remainder of the contract period.

[10] In early 2015 the former President set up the long-threatened commission that was to enquire into Mr Nxasana’s fitness to hold office. After some preliminary work, the commission set 11 May 2015 as the commencement date for the hearing. Parallel with this inquiry process, Mr Hulley – the former President’s legal adviser – made a

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<sup>10</sup> Indeed, this is how Mr Nxasana understood what was required of him. This appears from a letter in which Mr Nxasana requested an extension of the deadline for giving the reasons and a letter that contained the reasons or representations themselves. This was put beyond question by the content of later correspondence from the former President.



promise that Mr Nxasana would be paid a settlement amount from public coffers. Over time that amount increased progressively. An earlier offer contained in a draft settlement agreement was R10 million. Mr Nxasana did not accept it. Former President Zuma was undeterred. Thereafter Mr Hulley sent Mr Nxasana another draft settlement agreement with the amount left blank for Mr Nxasana to fill it in himself. Nothing of moment came of this.

[11] In the end the commission hearing never commenced as settlement was eventually reached. Mr Nxasana signed the settlement agreement on 9 May 2015. The Minister and former President did so on 14 May 2015. In terms of this agreement Mr Nxasana would relinquish his position as NDPP and receive a sum of R17.3 million as a settlement payment. In the event, Mr Nxasana was paid an amount of R10 240 767.47 as the rest was retained by the state for income tax.

[12] It must be noted that, right from the onset and throughout the entire negotiation process that culminated in the settlement agreement, Mr Nxasana unequivocally stated that he did not wish to resign and that he considered himself to be fit for office. Instead his preference was for former President Zuma's allegations that he was no longer fit for office to be tested in a formal inquiry as proposed by the former President. Throughout, he protested the existence of a factual or legal basis for him to vacate office. Also, he disavowed any invocation by him of section 12(8) of the NPA Act to voluntarily vacate office.<sup>11</sup> It is so, of course, that he did indicate that he would resign only if he was paid the full salary for the remainder of his term of office.

[13] On 18 June 2015 former President Zuma appointed Advocate Shaun Abrahams who – to this day – is the incumbent NDPP.

[14] Corruption Watch and FUL approached the High Court seeking the review and setting aside of the settlement agreement, an order that Mr Nxasana repay the R17.3 million settlement payout and the review and setting aside of the appointment

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<sup>11</sup> This section – which I deal with more fully later – provides for the voluntary vacation of office by the NDPP.

of Advocate Abrahams. In a separate application which was later consolidated with the application by Corruption Watch and FUL, CASAC sought an order declaring section 12(4) and (6)<sup>12</sup> of the NPA Act unconstitutional.<sup>13</sup>

[15] The High Court granted both applications, hence the present confirmation proceedings.

### *Issues*

[16] The issues are whether—

- (a) the settlement agreement and, therefore, Mr Nxasana's vacation of the office of NDPP are constitutionally valid;
- (b) Mr Nxasana should be required to repay the R17.3 million settlement payout;
- (c) the appointment of Advocate Abrahams as NDPP is constitutionally invalid;
- (d) section 12(4) and (6) of the NPA Act is constitutionally invalid; and
- (e) the High Court erred in refusing to grant Mr Nxasana condonation for the late filing of his affidavit.

[17] I proceed to deal with these issues, but not necessarily in this order.

### *The validity of the settlement agreement and Mr Nxasana's vacation of office*

[18] The importance of the office of NDPP in the administration of justice is underscored and amplified by no less an instrument than the Constitution itself. Section 179(4) of the Constitution requires that there be national legislation which guarantees the independence of the prosecuting authority. In terms of section 179(1) the prosecuting authority consists of the NDPP who is its head, Directors of Public

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<sup>12</sup> The section is quoted at n 44 below.

<sup>13</sup> The relief sought by the applicants in both applications was more extensive than what I have captured here. That is apparent from the two-legged High Court order quoted above n 2.

Prosecutions and prosecutors.<sup>14</sup> Section 179(4) provides that national legislation must ensure that the NPA exercises its functions without fear, favour or prejudice. That legislation is the NPA Act. Predictably, section 32(1)(a) of the NPA Act requires members of the prosecuting authority to carry out their duties without fear, favour or prejudice, and subject only to the Constitution and the law.

[19] This Court has said of the NPA's independence "[t]here is . . . a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts".<sup>15</sup> The reason why this guarantee of independence exists is not far to seek. The NPA plays a pivotal role in the administration of criminal justice. With a malleable, corrupt or dysfunctional prosecuting authority, many criminals – especially those holding positions of influence – will rarely, if ever, answer for their criminal deeds. Equally, functionaries within that prosecuting authority may – as CASAC submitted – “be pressured . . . into pursuing prosecutions to advance a political agenda”. All this is antithetical to the rule of law, a founding value of the Republic.<sup>16</sup> Also, malleability, corruption and

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<sup>14</sup> Section 179 of the Constitution provides:

- “(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of—
  - (a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and
  - (b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.
- ...
- (4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.”

<sup>15</sup> *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 146.

<sup>16</sup> Section 1 of the Constitution provides:

- “The Republic of South Africa is one, sovereign, democratic state founded on the following values:
  - (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
  - (b) Non-racialism and non-sexism.
  - (c) Supremacy of the Constitution and the rule of law.
  - (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.”

dysfunctionality are at odds with the constitutional injunction of prosecuting without fear, favour or prejudice. They are thus at variance with the constitutional requirement of the independence of the NPA.

[20] At the centre of any functioning constitutional democracy is a well-functioning criminal justice system. In *Democratic Alliance* Yacoob ADCJ observed that the office of the NDPP “is located at the core of delivering criminal justice”.<sup>17</sup> If you subvert the criminal justice system, you subvert the rule of law and constitutional democracy itself. Unsurprisingly, the NPA Act proscribes improper interference with the performance of prosecutorial duties. Section 32(1)(b) provides:

“Subject to the Constitution and this Act, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.”

[21] Improper interference may take any number of forms. Without purporting to be exhaustive, it may come as downright intimidation. It may consist in improper promises or inducements. It may take the form of corruptly influencing the decision-making or functioning of the NPA. All these forms and others are proscribed by an Act that gets its authority to guarantee prosecutorial independence directly from the Constitution.

[22] Another guarantee of the NDPP’s independence is provision for security of tenure. In section 12(1) the NPA Act provides that the NDPP shall hold office for a 10-year non-renewable term of office.<sup>18</sup> It is now well established in terms of this Court’s jurisprudence that security of tenure is an integral feature of the constitutional requirement of independence. In *Justice Alliance* this Court held that “international

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<sup>17</sup> *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) at para 26.

<sup>18</sup> Section 12(1) provides:

“The National Director shall hold office for a non-renewable term of 10 years, but must vacate his or her office on attaining the age of 65 years.”

standards acknowledge that guaranteed tenure and conditions of service, adequately secured by law, are amongst the conditions necessary to secure and promote the independence of judges”.<sup>19</sup> These necessary conditions must, of course, be true of the independence of the NPA as well. In a unanimous judgment in *McBride* Bosielo AJ said that amongst the factors that are relevant to the independence of offices or institutions which – in terms of constitutional prescripts – must be independent are “the method of appointment, the method of reporting, disciplinary proceedings and the method of removal . . . from office, and security of tenure”.<sup>20</sup>

[23] The NPA Act has two other salient features that help shield the NPA from improper interference, namely: the non-renewability of the 10-year term of office of the NDPP;<sup>21</sup> and certain safeguards on the removal of the NDPP from office.<sup>22</sup> Section 12(8) provides for the voluntary vacation of office by an NDPP.<sup>23</sup> This section is of some significance. It must be read in the context of the constitutional

<sup>19</sup> *Justice Alliance of South Africa v President of the Republic of South Africa* [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) (*Justice Alliance*) at para 38.

<sup>20</sup> *McBride v Minister of Police* [2016] ZACC 30; 2016 (2) SACR 585 (CC); 2016 (11) BCLR 1398 (CC) at para 31.

<sup>21</sup> Section 12(1).

<sup>22</sup> Section 12(5).

<sup>23</sup> Section 12(8) provides:

- “(a) The President may allow the National Director or a Deputy National Director at his or her request, to vacate his or her office—
  - (i) on account of continued ill-health; or
  - (ii) for any other reason which the President deems sufficient.
- (b) The request in terms of paragraph (a)(ii) shall be addressed to the President at least six calendar months prior to the date on which he or she wishes to vacate his or her office, unless the President grants a shorter period in a specific case.
- (c) If the National Director or a Deputy National Director—
  - (i) vacates his or her office in terms of paragraph (a)(i), he or she shall be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her if his or her services had been terminated on the ground of continued ill-health occasioned without him or her being instrumental thereto; or
  - (ii) vacates his or her office in terms of paragraph (a)(ii), he or she shall be deemed to have been retired in terms of section 16(4) of the Public Service Act, and he or she shall be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her if he or she had been so retired.”

guarantee that the office of NDPP be independent and, indeed, in the context of all the provisions of the NPA Act that seek to give content to the provisions of section 179(4) of the Constitution.<sup>24</sup> Any act or conduct that purports to be a voluntary vacation of office but which compromises or has the potential to compromise the independence of the NDPP is constitutionally invalid. A question that follows is whether the manner in which Mr Nxasana vacated office is constitutionally compliant.

[24] Crucially, at the hearing before us it was no longer in dispute that Mr Nxasana had not vacated office in terms of section 12(8). The contest concerned the question whether the manner in which he vacated office was lawful. The applicants argued that Mr Nxasana vacated office in a manner that was at odds with the Constitution and the law. Advocate Abrahams and the NPA argued that an NDPP is not precluded from vacating office voluntarily otherwise than under section 12(8). Mr Nxasana, on the other hand, accepted that his vacation of office was not constitutionally compliant.

[25] The facts set out above point to one thing and one thing only: former President Zuma was bent on getting rid of Mr Nxasana by whatever means he could muster. His was an approach that kept on mutating: it was first a stick; then a carrot; a stick once more; and eventually a carrot. There was first the notification that Mr Nxasana would be subjected to an inquiry with a view to establishing whether he was still a fit and proper person to hold office. Concomitantly, there was a threat of suspension pending finalisation of the inquiry, albeit with full pay. This was followed by former President Zuma's proposal that there be mediation. When there was no progress on this, the inquiry was instituted. Whilst the inquiry was in its preliminary stages, the former President pursued a parallel process in which Mr Nxasana was first offered – in a draft settlement agreement – R10 million. As indicated earlier, he did not accept it. What plainly evinces how desperate former President Zuma was to get rid of Mr Nxasana is that this was followed by a draft settlement in which the amount was left blank. Mr Nxasana was being told to pick whatever figure. Indeed,

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<sup>24</sup> To recapitulate, this is the section that provides that “[n]ational legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice”.



Mr Hulley said that he would “await the *final amount*” from Mr Nxasana. (Emphasis added.)

[26] I am not suggesting that the former President would have accepted any amount Mr Nxasana inserted. All I am saying is that the very idea that former President Zuma was willing, at least, to consider whatever amount Mr Nxasana inserted speaks volumes. To be more direct, it lends credence to the view that he wanted to get rid of Mr Nxasana at all costs. If that were not the case, why else would he have given Mr Nxasana an opportunity to insert an amount of his liking? After all, this all started because former President Zuma overtly made all and sundry believe that he had a basis for holding a view that Mr Nxasana was no longer fit for office. It must have been a matter of relative ease, therefore, to pursue the inquiry instead of offering Mr Nxasana what – by all accounts – was an extremely huge sum of money. In its judgment the High Court notes that before it the parties were agreed that the amount of R17.3 million “far exceeded what Mr Nxasana’s financial entitlement would have been had his office been lawfully vacated in terms of section 12(8)(a)(ii) of the NPA Act”.<sup>25</sup>

[27] Instead of settling for so huge an amount, why did the former President not simply pursue the inquiry? Did he not believe that the evidence that had motivated him to come up with the idea of an inquiry was sufficiently cogent? If so, why did he not just abandon the inquiry and leave Mr Nxasana in office? After all, he was exercising powers as President and not involved in a personal dispute which he could settle as he pleased. It is difficult to comprehend why he would have settled on so huge an amount, and from public coffers to boot.

[28] The inference is inescapable that he was effectively buying Mr Nxasana out of office. In my book, conduct of that nature compromises the independence of the office of NDPP. It conduces to the removal of “troublesome” or otherwise unwanted NDPPs through buying them out of office by offering them obscenely huge amounts

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<sup>25</sup> High Court judgment above n 2 at para 3.

of money. Although I deliberately eschew deciding the question whether an NDPP may vacate office outside of the provisions of section 12(8) of the NPA Act, this much I do want to say: it can never be that vacating office outside of these provisions would ever entitle an NDPP to more benefits than those set out in section 12(8). Section 12(8) is specific on the benefits. It provides that when an NDPP vacates office on the basis of “continued ill-health”,<sup>26</sup> “he or she shall be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her if his or her services had been terminated on the ground of continued ill-health occasioned without him or her being instrumental thereto”.<sup>27</sup> When an NDPP vacates office for “any other reason which the President deems sufficient”,<sup>28</sup> “he or she shall be deemed to have been retired in terms of section 16(4) of the Public Service Act, and he or she shall be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her if he or she had been so retired”.<sup>29</sup> All these are the usual public service benefits. The problem with benefits that are not capped by the section 12(8) limit is that they give rise to the real possibility of NDPPs being bought out of office. That, as I say, compromises the independence of the office of NDPP. Whatever we are to make of the full import of section 12(8), the manner of voluntary vacation of office should never undermine the constitutional imperative of the independence of the NDPP.

[29] The settlement agreement, Mr Nxasana’s vacation of office and the obligation to pay the sum of R17.3 million are one composite whole. In fact, the vacation of office and obligation to pay and subsequent payment were in terms of the settlement agreement. I am led to the conclusion that all are constitutionally invalid for having come about in a manner inconsonant with the constitutionally required independence of the office of NDPP.

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<sup>26</sup> Section 12(8)(a)(i).

<sup>27</sup> Section 12(8)(c)(i).

<sup>28</sup> Section 12(8)(a)(ii).

<sup>29</sup> Section 12(8)(c)(ii).

[30] Although I have alluded to this, let me say it explicitly. On the approach I have taken, it is not necessary to deal with the argument by Advocate Abrahams and the NPA that an NDPP may vacate office voluntarily outside the provisions of section 12(8).

*Was the appointment of Advocate Abrahams constitutionally invalid?*

[31] The appointment of Advocate Abrahams as NDPP was an act consequential upon the constitutionally invalid vacation of office by Mr Nxasana. Consequential acts which follow on constitutionally invalid conduct are commonplace. An interesting question raised by the oft-cited statement of law in *Oudekraal*<sup>30</sup> is the effect of the constitutional invalidity of Mr Nxasana's vacation of office on the consequential act of the appointment of Advocate Abrahams.<sup>31</sup> In that statement Howie P and Nugent JA said that until administrative action is set aside by a court in review proceedings, it continues to exist in fact and has legal consequences that cannot simply be overlooked.<sup>32</sup> This pronouncement has been relied upon by this Court on a number of occasions.<sup>33</sup> Does this mean that – because Mr Nxasana's vacation of office had not yet been set aside when Advocate Abrahams was appointed NDPP – Advocate Abrahams was validly appointed?

[32] What may lead some readers of what I have paraphrased from *Oudekraal* astray is reading it in isolation. Later *Oudekraal* makes it clear that where a

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<sup>30</sup> *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) (*Oudekraal*).

<sup>31</sup> The fact that *Oudekraal* concerned administrative action should not lead to the conclusion that I am suggesting that former President Zuma's conduct relative to Mr Nxasana's vacation of office was administrative action. As appears above from how I resolved the question of the lawfulness of Mr Nxasana's vacation of office, it is not necessary for me to decide the issue whether the former President's conduct was administrative action. That said, there is no reason in principle why *Oudekraal* should not apply to the conduct of the Executive.

<sup>32</sup> *Oudekraal* above n 30 at para 26.

<sup>33</sup> See *Department of Transport v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) at para 88; *Merafong City v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) at para 36; *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (*Kirland*) at para 103; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) (*Bengwenyama*) at para 82; and *Camps Bay Ratepayers' and Residents Association v Harrison* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) at para 62.

consequential act could be valid only as a result of the factual existence – not legal validity – of the earlier act, the consequential act would be valid only for so long as the earlier act had not been set aside.<sup>34</sup> In *Seale Cloete JA* for a unanimous Court put this beyond question. He held:

“Counsel for both Seale and the TYC sought to rely in argument on passages in the decision of this court in *Oudekraal Estates (Pty) Ltd v City of Cape Town* which adopted the analysis by Christopher Forsyth of why an act which is invalid may nevertheless have valid consequences and concluded:

‘Thus the proper enquiry in each case – at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect *for so long as the initial act is not set aside by a competent court.*’

...

[T]he reliance by counsel on the decision in *Oudekraal*, [is] misplaced. As appears from the italicised part of the judgment just quoted, the analysis was accepted by this court as being limited to a consideration of the validity of a second act performed consequent upon a first invalid act, pending a decision whether the first act is to be set aside or permitted to stand. This court did not in *Oudekraal* suggest that the analysis was relevant to that latter decision.”<sup>35</sup> (Footnotes omitted.)

[33] The Supreme Court of Appeal then concluded that “it is clear from *Oudekraal* . . . that if the first act is set aside, a second act that depends for its validity on the first act must be invalid as the legal foundation for its performance was non-existent”.<sup>36</sup>

<sup>34</sup> *Oudekraal* above n 30 at para 31.

<sup>35</sup> *Seale v Van Rooyen N.O.; Provincial Government, North West Province v Van Rooyen N.O.* [2008] ZASCA 28; 2008 (4) SA 43 (SCA) at para 13.

<sup>36</sup> *Id.*

[34] In *Kirland* this Court accepted what was decided in *Seale*. Writing for the majority, Cameron J had this to say:

“In *Seale* . . . the Court, applying *Oudekraal*, held that acts performed on the basis of the validity of a prior act are themselves invalid if and when the first decision is set aside. . . . [T]he Court rightly rejected an argument, in misconceived reliance on *Oudekraal*, that the later (second) act could remain valid despite the setting aside of the first.”<sup>37</sup>

[35] Now that the manner in which Mr Nxasana vacated office has been declared constitutionally invalid, it follows that the appointment of Advocate Abrahams is constitutionally invalid. The appeal by Advocate Abrahams and the NPA directly countered the application for confirmation of the order declaring the appointment of Advocate Abrahams invalid. As a consequence, that appeal falls to be dismissed.

*The validity of section 12(4) and (6) of the NPA Act*

[36] The challenge to the constitutional validity of this section is not founded on any factual matrix. Section 12(4) is about the extension of the term of office of an NDPP who is otherwise liable to retire on grounds of age. In these proceedings nobody was affected by the provisions of this section. Section 12(6) provides for the indefinite suspension of an NDPP by the President without pay or with such pay as the President may determine. Mr Nxasana was suspended with full pay. Nobody else was suspended. A preliminary issue that arises is whether we must entertain this abstract challenge.

[37] This Court has entertained abstract challenges in appropriate circumstances. In *Ferreira* in the context of an abstract challenge arising from public interest litigation, O'Regan J held that the relevant factors are—

“whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and

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<sup>37</sup> *Kirland* above n 33 at fn 74.

prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court.”<sup>38</sup>

[38] In *Lawyers for Human Rights* Yacoob J, writing for the majority, quoted this passage with approval<sup>39</sup> and held that even though O’Regan J was in the minority, the passage was not inconsistent with anything said in the majority judgment on standing.<sup>40</sup> Crucially, he then held that the factors set out by O’Regan J in respect of public interest standing where there is a live controversy are of relevance even where there is none. In other words, the factors apply even in the case of abstract public interest challenges. This is how he articulated this:

“It is ordinarily not in the public interest for proceedings to be brought in the abstract. But this is not an invariable principle. There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case. The factors set out by O’Regan J help to determine this question. The list of relevant factors is not closed. I would add that the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important considerations in the analysis.”<sup>41</sup>

[39] I am of the view that – in the present circumstances – it is imperative that the abstract challenge be entertained. What stands out is the nature of the unconstitutionality complained of and its susceptibility to occurring without detection. CASAC argued that when the alleged unconstitutionality relates to independence as is the case with the present challenges, abstract challenges are vital. It explained that “the problem is not only the actual exercise of unconstitutional powers, but the subtle ways in which the mere existence of those powers undermines independence”. An NDPP may refrain from acting independently because she or he fears indefinite

<sup>38</sup> *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 234.

<sup>39</sup> *Lawyers for Human Rights v Minister of Home Affairs* [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) at para 16.

<sup>40</sup> *Id* at para 17.

<sup>41</sup> *Id* at para 18.



unpaid suspension and the factual matrix for the challenge not to be abstract may never arise. As CASAC further argued, rather than give the factual matrix an opportunity to eventuate, it is better to pre-emptively challenge the relevant statutory provision.

[40] It is, therefore, not surprising that the *Glenister II*<sup>42</sup> and *Helen Suzman Foundation*<sup>43</sup> challenges were determined in the absence of any factual predicate. In sum, this is a fitting case to entertain an abstract challenge.

[41] I next proceed to deal with the challenges to the two subsections one after the other.<sup>44</sup>

<sup>42</sup> *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (*Glenister II*).

<sup>43</sup> *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* [2014] ZACC 32; 2015 (2) SA 1 (CC); 2015 (1) BCLR 1 (CC) (*Helen Suzman Foundation*).

<sup>44</sup> Section 12(4) and (6) provides:

- “(4) If the President is of the opinion that it is in the public interest to retain a National Director or a Deputy National Director in his or her office beyond the age of 65 years, and—
- (a) the National Director or Deputy National Director wishes to continue to serve in such office; and
  - (b) the mental and physical health of the person concerned enable him or her so to continue,
- the President may from time to time direct that he or she be so retained, but not for a period which exceeds, or periods which in the aggregate exceed, two years: Provided that a National Director’s term of office shall not exceed 10 years.
- ...
- (6) (a) 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.
- (b) The removal of the National Director or a Deputy National Director, the reason therefor and the representations of the National Director or Deputy National Director (if any) shall be communicated by message to Parliament within 14 days after such removal if Parliament is then in session or, if

[42] Section 12(4) empowers the President to extend the term of office of an NDPP or a Deputy NDPP which must ordinarily come to an end at age 65 beyond that age, but not for a period which exceeds, or periods which in the aggregate exceed, two years provided that an NDPP's term of office shall not exceed 10 years. The President's power to extend an NDPP's term of office undermines the independence of the office. Here is how this was explained in *Justice Alliance*:

"In approaching this question it must be borne in mind that the extension of a term of office, particularly one conferred by the Executive or by Parliament, may be seen as a benefit. The judge or judges upon whom the benefit is conferred may be seen as favoured by it. While it is true, as counsel for the President emphasised, that the possibility of far-fetched perceptions should not dominate the interpretive process, it is not unreasonable for the public to assume that extension may operate as a favour that may influence those judges seeking it. The power of extension in section 176(1) must therefore, on general principle, be construed so far as possible to minimise the risk that its conferral could be seen as impairing the precious-won institutional attribute of impartiality and the public confidence that goes with it."<sup>45</sup> (Footnotes omitted.)

[43] In similar vein, Mogoeng CJ held in *Helen Suzman Foundation*:

"Renewal invites a favour-seeking disposition from the incumbent whose age and situation might point to the likelihood of renewal. It beckons to the official to adjust her approach to the enormous and sensitive responsibilities of her office with regard

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Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

- (c) Parliament shall, within 30 days after the message referred to in paragraph (b) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of the National Director or Deputy National Director so removed, is recommended.
- (d) The President shall restore the National Director or Deputy National Director to his or her office if Parliament so resolves.
- (e) The National Director or a Deputy National Director provisionally suspended from office shall receive, for the duration of such suspension, no salary or such salary as may be determined by the President."

<sup>45</sup> *Justice Alliance* above n 19 at para 75.

to the preferences of the one who wields the discretionary power to renew or not to renew the term of office. No holder of this position of high responsibility should be exposed to the temptation to ‘behave’ herself in anticipation of renewal.”<sup>46</sup>

[44] There is no basis for this reasoning not to apply to section 12(4). The High Court’s declaration of constitutional invalidity must be confirmed.

[45] Coming to section 12(6), two aspects that make the President’s power to suspend particularly egregious are the facts that she or he may suspend with or without pay and for an indefinite period. Of importance, suspending without pay is the default position: the section says that for the duration of the suspension, an NDPP or Deputy NDPP “shall receive no salary or such salary as may be determined by the President”. There is no guidance whatsoever on how and on what bases the President may exercise the discretion to (a) allow receipt of a salary and (b) determine its quantum. This tool is susceptible to abuse. It may be invoked to cow and render compliant an NDPP or Deputy NDPP. The prospect of not earning an income may fill many with dread and apprehension. The possibility of this enduring indefinitely exacerbates the situation. This is not a tool that should be availed to the Executive. It has the potential to undermine the independence and integrity of the offices of NDPP and Deputy NDPP and, indeed, of the NPA itself.

[46] In *Helen Suzman Foundation* this Court held:

“Suspension without pay defies the exceedingly important presumption of innocence until proven guilty or the *audi alteram partem* rule and unfairly undermines the National Head’s ability to challenge the validity of the suspension by the withholding of salary and benefits. It irrefutably presumes wrongdoing. An inquiry may then become a dishonest process of going through the motions. Presumably the Minister’s mind would already have been made up that the National Head is guilty of what she is accused of. Personal and familial suffering that could be caused by the exercise of

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<sup>46</sup> *Helen Suzman Foundation* above n 43 at para 81.

that draconian power also cries out against its retention. It is also the employer's duty to expedite the inquiry to avoid lengthy suspensions on pay."<sup>47</sup>

[47] There is the question of "unilateral suspension"<sup>48</sup> on which the challenge is also pegged. I read Mogoeng CJ for the majority in *Helen Suzman Foundation* to say there is nothing inherently wrong with a unilateral suspension. What he has a problem with are the possibility of suspension without pay and benefits and the use of the words "as the Minister deems fit" in section 17DA(2)(a) of the South African Police Service Act.<sup>49</sup> In *McBride*, on the other hand, Bosielo AJ, writing for a unanimous Court, says:

"To my mind, the cumulative effect of the impugned sections has the potential to diminish the confidence the public should have in IPID [the Independent Police Investigative Directorate]. As the amicus curiae emphasised in its submissions, both the independence and the appearance of an independent IPID are central to this matter. The manner in which the Minister dealt with Mr McBride demonstrates, without doubt, how invasive the Minister's powers are. *What exacerbates the situation is that he acted unilaterally.* This destroys the very confidence which the public should have that IPID will be able, without undue political interference, to investigate complaints against the police fearlessly and without favour or bias. IPID must therefore not only be independent, but must be seen to be so. Without enjoying the confidence of the public, IPID will not be able to function efficiently, as the public might be disinclined or reluctant to report their cases to it."<sup>50</sup> (Emphasis added.)

[48] I do not think this is a proper case in which I need grapple with the import of the content of the two judgments on "unilateral suspension". There is enough to invalidate section 12(6) based on the above reasoning. In that regard, I conclude that

<sup>47</sup> *Helen Suzman Foundation* above n 43 at para 85.

<sup>48</sup> Ordinarily, suspensions are unilateral acts. In the context of a functionary who is constitutionally required to be independent the question may arise whether the power to suspend may be exercised by the member of the Executive on whom that power vests without the involvement of Parliament; with the involvement of Parliament the exercise of the power would be bilateral.

<sup>49</sup> 68 of 1995.

<sup>50</sup> *McBride* above n 20 at para 43.

section 12(6) is constitutionally invalid for empowering the President to suspend an NDPP and Deputy NDPP without pay and for an indefinite duration.

*Mr Nxasana's appeal*

[49] This appeal concerns the High Court's refusal of condonation of the late filing of an affidavit Mr Nxasana labelled as an "explanatory affidavit". He was the third respondent in the application brought by Corruption Watch and FUL and the fourth in CASAC's. He filed the explanatory affidavit out of turn; that is, he did not file it when answering affidavits by respondents were due. In fact, it was so out of time that he filed it after all affidavits had been filed even in the CASAC application which had been launched later. Mr Nxasana accepts that – even though he styles the affidavit as an explanatory affidavit – it is in fact an answering affidavit in both applications. The affidavit was filed under cover of a notice that was headed "notice to abide". In addition to saying Mr Nxasana would abide the decision of the Court, the notice said that the affidavit would be used to explain "the position of the third respondent". Reference to the third respondent was to Mr Nxasana.

[50] The former President opposed the application for condonation.

[51] The fundament of Mr Nxasana's grievance in the appeal is that the High Court made certain adverse findings against him without considering his version and thus contrary to the *audi alteram partem* (loosely, hear both sides) rule. He argues that in the circumstances, the High Court's order is not just and equitable within the meaning of section 172(1)(b) of the Constitution.<sup>51</sup>

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<sup>51</sup> Section 172(1) provides:

"When deciding a constitutional matter within its power, a court—

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make any order that is just and equitable, including—
  - (i) an order limiting the retrospective effect of the declaration of invalidity; and
  - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[52] He “notes” that he was never served with any of the papers in the CASAC application until April 2017 and that in the application by Corruption Watch and FUL he received only the founding papers. By April 2017 all affidavits in both applications had been filed. He filed the explanatory affidavit on 11 April 2017. He explains filing out of time in these terms:

“I accept that my waiting until the conclusion of the rule 30/30A proceedings was not in strict compliance with the Rules. However, I submit that it was a pragmatic approach given the delay inevitably caused by the President’s failure to comply with rule 53 and my desire to only provide a single affidavit to Court.”

[53] The High Court refused condonation for two reasons. The first was that the explanation for the delay was not persuasive. I agree. The second was that “it is generally accepted that when evidence is presented so late in proceedings, there is the danger of it having been tailored to fit a particular position”.<sup>52</sup> On this, the question that arises is: how real was this danger in the instant matter?

[54] Before dealing with this second reason, let me touch on Mr Nxasana’s apparent complaint that he did not always receive proper service of the papers. Mr Nxasana says that service of the application papers on him was haphazard at best. I do not want to make much of this. He seems to have been aware of what was going on. This is especially so with regard to the application by Corruption Watch and FUL. He assisted these applicants closely with the compilation of the rule 53 record. That being the case, if he was ever intent on acting expeditiously, he could have taken the initiative and insisted on being served with the papers. After all, he is an experienced attorney.

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<sup>52</sup> High Court judgment above n 2 at para 8.



[55] The explanatory affidavit first deals with the “background”. Here Mr Nxasana begins with discussing facts around his appointment as NDPP. Nothing contentious arises from that.

[56] It next deals with acrimony between Mr Nxasana, on the one hand, and Advocate Jiba, the former Acting NDPP, and Advocate Mrwebi, the Special Director: Specialised Commercial Crime Unit, on the other. The acrimony allegedly erupted soon after Mr Nxasana’s appointment. These are allegations that were not coming to the fore for the first time. In the explanatory affidavit Mr Nxasana was repeating allegations he had made previously in his founding affidavit in the application to interdict former President Zuma from suspending him. That affidavit was before the High Court in the present proceedings. It had been filed by CASAC before the explanatory affidavit was filed. Mr Nxasana had also made these same allegations as far back as 1 August 2014 in the letter in which he made representations as to why the former President should not suspend him. That letter too had already been filed of record in the present proceedings by the time Mr Nxasana filed the explanatory affidavit.

[57] The explanatory affidavit then deals with various steps that Mr Nxasana says he took to address the instability that existed at the NPA. In a context that had nothing to do with Mr Nxasana’s condonation application, the High Court’s judgment itself noted that it was common cause before it that since September 2007 the recent history at the NPA “ha[d] been one of paralysing instability”.<sup>53</sup> The steps that Mr Nxasana says he took are also nothing we were seeing for the first time in the explanatory affidavit. For example, in the papers filed of record there is earlier mention of: the fact that Mr Nxasana obtained an opinion from senior counsel regarding adverse findings that had been made by the High Court and Supreme Court of Appeal against Advocate Jiba, Advocate Mrwebi and Advocate Mzinyathi;<sup>54</sup> the appointment of retired Justice Yacoob to enquire into the instability at the NPA; a memorandum

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<sup>53</sup> High Court judgment above n 2 at para 19.

<sup>54</sup> Those findings were not made in the present proceedings.

prepared by Mr Willie Hofmeyr addressed to the Minister for onward transmission to former President Zuma in which the former President was being requested to provisionally suspend Advocates Jiba, Mrwebi and Mzinyathi; and Mr Nxasana's requests for a meeting with former President Zuma for the former President to intervene and address the instability at the NPA.

[58] The rest of what is dealt with under background is so uncontentious as not to require any discussion.

[59] After the background the explanatory affidavit deals with the circumstances that led to Mr Nxasana's resignation. On this, correspondence that is contemporaneous with those circumstances lends support to what Mr Nxasana is now saying in the explanatory affidavit. To an extent the settlement agreement itself also records why it was concluded; and that too is supportive of Mr Nxasana's version in the explanatory affidavit.

[60] The explanatory affidavit next asserts – and substantiates extensively – that the settlement agreement was not concluded pursuant to a request by him to vacate office. I need not say much on this because the High Court – relying on objective material filed as part of the rule 53 record before the explanatory affidavit was deposed to – found likewise.

[61] I now revert to the High Court's view that "it is generally accepted that when evidence is presented so late in proceedings, there is the danger of it having been tailored to fit a particular position". Based on my analysis of the content of the explanatory affidavit, it seems that the High Court applied the view without a close look at the specific facts of this case. That is, it did not consider how real the danger of the evidence having been tailored in a particular way was in this specific instance. Looking at the content of the explanatory affidavit, I think very little in it was surfacing for the first time when it was filed. And nothing in that is crucial to the determination of the issues. That to me substantially minimises, if not eliminates, the

danger identified by the High Court. Does that entitle us to interfere with the High Court's exercise of discretion in refusing condonation?

[62] The High Court's decision entailed the exercise of a discretion "in the strict sense"<sup>55</sup> or "true sense".<sup>56</sup> As such, there are limited bases for us to interfere. In *National Coalition* this Court held:

"A court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles."<sup>57</sup> (Footnotes omitted.)

[63] To my mind, the view that the High Court took on the danger of improperly tailoring evidence amounts to a misdirection on the facts. That view was a central pillar in the High Court's exercise of discretion. The other pillar was the lack of a satisfactory explanation for the delay. Because of the misdirection on the facts, one of the central pillars collapses. I do not see how the edifice can remain standing on only one of the central pillars. We are thus entitled to interfere with the exercise of discretion. Must we then grant condonation and accept Mr Nxasana's explanatory affidavit?

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<sup>55</sup> *South African Broadcasting Corporation Limited v National Director of Public Prosecutions* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at para 39.

<sup>56</sup> *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at paras 84-5.

<sup>57</sup> *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (*National Coalition*) at para 11. See also *Mathale v Linda* [2015] ZACC 28; 2016 (2) SA 461 (CC); 2016 (2) BCLR 226 (CC) at para 40.

[64] In *Brummer* this Court held that it is the interests of justice that are paramount in considering whether to grant condonation. On how interests of justice are determined it held:

“The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect.”<sup>58</sup>

[65] Although the explanation for the delay is weak, Mr Nxasana is strong on the merits of what the explanatory affidavit was – in the main – meant to achieve; that is to counter former President Zuma’s version. For me, another factor that should count in Mr Nxasana’s favour is that, although he delayed in filing his own affidavit, he expended time and effort towards the compilation of a proper rule 53 record and was thus of great assistance not only to Corruption Watch and FUL but to the Court as well. Also, based on the possible relief that may be granted and the likely bases for it, a lot is at stake in this matter; that tends to tilt the scales towards giving a hearing to all disputants. Lastly, I am not aware of prejudice that was suffered by any party as a result of the late filing of the explanatory affidavit; and none was suggested.

[66] On balance, I am of the view that condonation must be granted and the explanatory affidavit accepted.

[67] Reverting to the declarations of invalidity, what must follow them?

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<sup>58</sup> *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3. See also *Aurecon South Africa (Pty) Ltd v City of Cape Town* [2015] ZASCA 209; 2016 (2) SA 199 (SCA) at para 17.

*Remedy**General*

[68] There is no preordained consequence that must flow from our declarations of constitutional invalidity. In terms of section 172(1)(b) of the Constitution we may make *any* order that is just and equitable. The operative word “any” is as wide as it sounds. Wide though this jurisdiction may be, it is not unbridled. It is bounded by the very two factors stipulated in the section – justice and equity. This Court has laid down certain principles in charting the path on the exercise of discretion to determine a just and equitable remedy.

[69] What must be paramount in the relief that a court grants is the vindication of the rule of law.<sup>59</sup> The effect of that is the reversal of the consequences of the constitutionally invalid conduct. Ordinarily, therefore, Mr Nxasana would have to resume office as he did not vacate it validly. This is analogous to the situation of an employee whose dismissal was invalid. About that this is what Zondo J, writing for the majority, said in *Steenkamp*:

“An invalid dismissal is a nullity. In the eyes of the law an employee whose dismissal is invalid has never been dismissed. If, in the eyes of the law, that employee has never been dismissed, that means the employee remains in his or her position in the employ of the employer. In this Court’s unanimous judgment in *Equity Aviation*, Nkabinde J articulated the meaning of the word ‘reinstate’ in the context of an employee who has been dismissed. She said, quite correctly, it means to restore the employee to the position in which he or she was before he or she was dismissed. With that meaning in mind, the question that arises in the context of an employee whose dismissal has been found to be invalid and of no force and effect is: how do you restore an employee to the position from which he or she has never been moved? That a dismissal is invalid and of no force and effect means that it is not recognised as having happened. It is different from a dismissal that is found to be unfair because that dismissal is recognised in law as having occurred.

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<sup>59</sup> See *Electoral Commission v Mhlope* [2016] ZACC 15; 2016 (5) SA 1 (CC); 2016 (8) BCLR 987 (CC) (*Mhlope*) at para 130.

When a dismissal is held to be unfair, one can speak of a reinstatement but not in the case of an invalid dismissal. This, therefore, means that an order of reinstatement is not competent for an invalid dismissal.”<sup>60</sup> (Footnotes omitted.)

[70] So, effectively this means Mr Nxasana remains in office as his vacation was invalid. All that would have to happen is for him to physically resume office. A natural consequence of that would be that Advocate Abrahams would have to be removed from office. But must all that – that is the resumption and vacation of office by Mr Nxasana and Advocate Abrahams, respectively – follow inexorably?

[71] The specific circumstances of a given matter may displace what should ordinarily be the position. In *Mhlope* we granted just and equitable relief *that was at odds with extant statutory provisions*. Mogoeng CJ held that the failure of the Electoral Commission to compile a voters’ roll in accordance with section 16(3) of the Electoral Act<sup>61</sup> was at “odds with the strictures not just of the law but also of the rule of law”.<sup>62</sup> When it came to a choice between scuppering the local government elections which – in terms of the Constitution – had to take place by a certain date<sup>63</sup> and upholding the strictures of the law, the Court opted for allowing the elections to go ahead.

[72] What starkly helps illuminate why section 172(1)(b) of the Constitution empowers us – where justice and equity dictate – to go so far as to make orders that are at odds with extant law is the Canadian Supreme Court’s decision in the

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<sup>60</sup> *Steenkamp v Edcon Limited* [2016] ZACC 1; 2016 (3) SA 251 (CC); 2016 (3) BCLR 311 (CC) at paras 189-90.

<sup>61</sup> 73 of 1998.

<sup>62</sup> *Mhlope* above n 60 at para 122.

<sup>63</sup> Section 159 of the Constitution provides:

- “(1) The term of a Municipal Council may be no more than five years, as determined by national legislation.
- (2) If a Municipal Council is dissolved in terms of national legislation, or when its term expires, an election must be held within 90 days of the date that Council was dissolved or its term expired.”



*Manitoba Language Rights* case.<sup>64</sup> Without suggesting that – for a fact – this case informed the inclusion of section 172(1)(b) in our Constitution, it typifies difficult situations that explain why the framers of our Constitution may have decided to avert those situations by expressly including this expansive remedial power. Very briefly on this case, since 1890 the Manitoba Parliament had enacted statutes in English only. This was contrary to constitutional prescripts that required that statutes be enacted in English and French.

[73] These statutes were held to be invalid, and this holding was made in 1985, some 95 years from the time the Manitoba Parliament started enacting statutes in this manner. Realising that a declaration of invalidity without more would take Manitoba back 95 years in that the declaration would: undo post-1890 amendments to statutes that continued to exist; revive pre-1890 statutes that had since been repealed; and leave without statutory governance situations that were not provided for statutorily before 1890 but which, as at the date of the judgment, plainly required statutory governance, the Canadian Supreme Court decided to deem the invalid statutes temporarily valid for the period necessary for translation to French, re-enactment, printing and publication. The Court held that not to do so would result in the Province of Manitoba “being without a valid and effectual legal system for the present and future”,<sup>65</sup> something that would be at odds with the rule of law. Crucially, without the equivalent of section 172(1)(b), the Court was able to keep in force laws that were unconstitutional.

[74] The relevance of this is that – despite the fact that ordinarily the Canadian Supreme Court had to invalidate all the affected laws without more – it did not do so because justice, equity and indeed the rule of law dictated otherwise.

[75] The fact that in terms of our declaration of invalidity Mr Nxasana is ordinarily entitled to resume office is the default legal position. As such, it is a legal position

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<sup>64</sup> *Re Manitoba Language Rights* [1985] 1 SCR 721; 1985 CanLII 33 (SCC).

<sup>65</sup> *Id* at 758.

like any other. It enjoys no place in law that is more special than – say – the provisions of section 16(3) of the Electoral Act that were in issue in *Mhlope*. Despite the continued validity of those provisions we were able – in the exercise of the section 172(1)(b) power – to make an order at variance with them.

[76] I have had the pleasure of reading the judgment by Jafta J (second judgment). I disagree with much that it says. After some preliminary issues, it begins the debate by making an observation that “*Mhlope* is not authority for the proposition that an employee whose dismissal has been declared unlawful cannot resume his or her duties”.<sup>66</sup> Of course, that is so. But that is not the end of the matter. The principle laid down by *Mhlope* is that – if justice and equity so require – an existing law may not be adhered to. *Steenkamp* does not purport to say anything at odds with that. It merely declared what the legal position was. Statutory provisions do something similar, if not more; they create law. We were able to depart from one of them in *Mhlope*.

[77] Another basis of distinction by the second judgment is that “[i]t is true that the order that was issued in *Mhlope* suspended the operation of a valid statute. But this was linked to the suspension of the declaration of invalidity.”<sup>67</sup> For present purposes, what difference there may be between *Mhlope* and the present matter is not in substance, but in context only. In the present matter as well there is a declaration of invalidity. That is the invalidity of Mr Nxasana’s vacation of office. So, there is nothing magical about the fact that we made a declaration of invalidity in *Mhlope*. The ordinary effect of declaring Mr Nxasana’s vacation of office invalid is that – in accordance with the *Steenkamp* principle – Mr Nxasana should return to office. As was the case with section 16(3) of the Electoral Act in *Mhlope*, this principle is the extant legal position that must ordinarily carry the day. The question is: why – as seems to be the suggestion of the second judgment – this principle must be immune from the courts’ just and equitable remedial jurisdiction under section 172(1)(b) of the

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<sup>66</sup> See [103].

<sup>67</sup> See [106].

Constitution? Why must it inexorably take precedence? If in *Mhlope* we were able to hold that “the duty imposed by section 16(3) is . . . suspended for purposes of the August 2016 elections”, here as well we should – by parity of reasoning – be able to suspend the applicability of the *Steenkamp* principle.

[78] In paragraphs 106 to 112 the second judgment deals at length with considerations that moved this Court to order suspensions of declarations of invalidity in other matters and concludes that nothing similarly calls for that in the instant matter. I will not deal with all those considerations. Suffice it to say that in those other matters this Court never purported to lay down a closed list of scenarios where suspensions of declarations of invalidity may be ordered. The question is whether – in a given case – justice and equity demand that a suspension be made. Here they do. After all, although Mr Nxasana may have been under pressure from former President Zuma, he did not cover himself in glory; more on this later.

[79] My reasoning in this regard applies equally to the second judgment’s discussion of section 12 of the NPA Act.<sup>68</sup> The second judgment underscores the detail that has to be followed for an NDPP to be removed from office. I do not see why – in comparison to section 16(3) of the Electoral Act – section 12 of the NPA Act must have some superior force. The second judgment emphasises the fact that section 12 is “umbilically linked to the Constitution”. So is section 16(3) of the Electoral Act which – as we held in *Mhlope* – helps enhance so important a fundamental right as the right to vote; a right that is at the centre of constitutional democracy. Indeed, in our constitutional dispensation universal adult suffrage is one of the founding values.<sup>69</sup> Thus the detail of the procedure that would normally have to be followed in order to remove Mr Nxasana from office makes no difference. The point of substance is that – like section 16(3) of the Electoral Act – section 12 of the NPA Act may be departed from if justice and equity so dictate.

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<sup>68</sup> See [113] to [119].

<sup>69</sup> The founding values are quoted in n 16 above.

[80] I do not see the inconsistency adverted to in the second judgment with regard to reliance on section 12 in declaring the vacation of office invalid but then not holding that it is obligatory, in terms of section 12, that Mr Nxasana be allowed to return to office.<sup>70</sup> The very quotation by the second judgment from *Mhlope*<sup>71</sup> also says that the Electoral Commission had not complied with section 16(3). Therefore, section 16(3) was central to the ultimate declaration of constitutional invalidity. And yet the Court then proceeded to suspend the duty imposed by section 16(3). Where then is the distinction that the second judgment seeks to draw in this regard? I do not see it.

[81] In sum, I see no legal impediment to us being able to depart from what is nothing other than another legal position; that is the default legal position that Mr Nxasana should ordinarily resume office. Likewise, I do not understand why we should treat section 12 of the NPA Act differently from how we treated section 16(3) of the Electoral Act. The question is: must we depart from the default position dictated by the *Steenkamp* principle and the process imposed by section 12? What is just and equitable for us to order? That is what I next deal with both with regard to Mr Nxasana and Advocate Abrahams.

*The resumption of office by Mr Nxasana or retention of Advocate Abrahams*

[82] In the context of the just and equitable remedial jurisdiction provided for in section 8 of the Promotion of Administrative Justice Act,<sup>72</sup> Moseneke DCJ said that “at a broader level [the purpose of a public law remedy is] to entrench the rule of law”.<sup>73</sup> In the same context in *Bengwenyama* Froneman J said:

“I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative

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<sup>70</sup> See [116].

<sup>71</sup> See [105].

<sup>72</sup> 3 of 2000. I think the pronouncements in that context are of relevance to the just and equitable jurisdiction provided for in section 172(1)(b) of the Constitution.

<sup>73</sup> *Steenkamp N.O. v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) at para 29.

action. The rule of law must never be relinquished, but the circumstances of each case must be examined”<sup>74</sup>

[83] Where necessary, the aim is to ameliorate the effect of vindicating the rule of law.<sup>75</sup> I say where necessary because in a given case it may be fitting to undo – without any qualification – everything that came about as a result of the constitutionally invalid conduct. But the injustice and inequity arising from this may be of such a nature that the reversal – if there must be any at all – may have to be tempered. That is a judgment call to be made based on the circumstances of each case.

[84] In the present context, relief that upholds the rule of law is one that helps vindicate the integrity of the office of NDPP.

[85] Starting with Mr Nxasana, I have a lot of sympathy for him for the undue, persistent pressure to which he was subjected. That said, based on the objectively available material, quite early on he indicated his preparedness to vacate office if he was paid in full for the remainder of his contract period. He made this demand when he had been in office for just over a year. And yet he wanted a payout for close to nine years, the unexpired period of his term of office. Some of the objectively available material was obtained by Corruption Watch and FUL from Mr Nxasana himself when he was assisting them with collating the rule 53 record. Effectively, although Mr Nxasana strongly protested his fitness for office, he was saying he was willing to be bought out of office if the price was right. As much as I sympathise with him, I do not think that is the reaction expected of the holder of so high and important an office; an office the holder of which – if she or he is truly independent – is required to display utmost fortitude and resilience. Even allowing for human frailties – because Mr Nxasana is human after all – I do not think the holder of the office of

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<sup>74</sup> *Bengwenyama* above n 33 at para 85.

<sup>75</sup> Compare *id* at para 85.

NDPP could not reasonably have been expected to do better. His conduct leads me to the conclusion that a just and equitable remedy is not to allow him to return to office.

[86] I do agree with the second judgment that exercising our just and equitable remedial jurisdiction in a manner that perpetuates non-compliance with an extant legal position must be done only in exceptional circumstances.<sup>76</sup> In *Mhlope* what was exceptional was the fact that, but for not adhering to the strictures of section 16(3) of the Electoral Act, there would have been a constitutional crisis. In *Black Sash* if we had not allowed the constitutionally invalid contract to continue, the vulnerable social grant beneficiaries would have been subjected to untold hardship and suffering. What we held in these two judgments does not create a closed list of what constitutes exceptional circumstances. What is exceptional depends on the circumstances of each case. The question is whether there are exceptional circumstances in the present case. There are, and here is why.

[87] The narrative at the beginning of this judgment shows that for a few years there has been instability in the office of NDPP and, therefore, in the leadership of the NPA. With the court challenge to Mr Nxasana's vacation of office and to the appointment of Advocate Abrahams, that instability persists to this day. The second judgment accepts – correctly – that it would be open to the President to initiate an inquiry into whether the manner in which Mr Nxasana vacated office renders him unfit to hold office. The order proposed by the second judgment thus has the effect of prolonging the instability. Surely, this unending instability is deleterious not only to the office of NDPP, but also to the NPA as an institution. The sooner it is brought to an end the better. In the circumstances, an order that has the potential of prolonging the instability cannot be just and equitable. To all this, we must add the fact that Mr Nxasana is not free of blame in the manner in which he vacated office.

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<sup>76</sup> Compare *Black Sash Trust v Minister of Social Development* [2017] ZACC 8; 2017 (3) SA 335 (CC); 2017 (5) BCLR 543 (CC) at para 51.



[88] I next deal with Advocate Abrahams. As a point of departure, I must state that not a single party has suggested that he is not a fit and proper person to hold office. As was to be expected, Advocate Abrahams seeks to get a lot of mileage out of this. Must he succeed? I think not. Former President Zuma appointed Advocate Abrahams following his unlawful removal of Mr Nxasana. That removal was an abuse of power. Advocate Abrahams benefitted from this abuse of power. It matters not that he may have been unaware of the abuse of power; the rule of law dictates that the office of NDPP be cleansed of all the ills that have plagued it for the past few years. It would therefore not be just and equitable to retain him as this would not vindicate the rule of law.

*Suspension of declarations of invalidity*

[89] With the exception of the declaration in respect of section 12(6), I see no need to suspend any of the declarations of invalidity. The extent to which we are confirming the High Court's declaration of the invalidity of section 12(6) means the power to suspend an NDPP or Deputy NDPP will continue in existence. Like the High Court, I think it proper to afford Parliament an opportunity to address the shortcomings we have identified with the section. I consider a period of 18 months' suspension to be sufficient for this purpose.

[90] It would be downright inconsonant with the requirement of the independence of the NDPP, the Deputy NDPP and the NPA itself for the power to suspend to continue in its present form. For that reason, there is a need for relief that is to apply in the interim. I will not reinvent the wheel. I am happy with the interim relief crafted by the High Court. I set it out in the order below.

*Repayment of the sum of R10 240 767.47*

[91] Mr Nxasana did not resist paying back the money. And nobody has suggested that he should not. Paying back the money is a natural consequence of the declaration

of constitutional invalidity of the manner in which Mr Nxasana vacated office. I can conceive of no reason why repayment should not follow as a matter of course.

*Appointment of a new NDPP*

[92] A new NDPP must be appointed expeditiously. But the President must be afforded a sufficient opportunity to make a suitable choice. I think 90 days is enough for that purpose.

*Decisions taken and acts performed by Advocate Abrahams*

[93] The setting aside of decisions taken, and acts performed, by Advocate Abrahams in his official capacity before his appointment was declared invalid would result in untold dislocation in the work of the NPA and in the administration of justice itself. It is thus necessary to appropriately preserve these acts and decisions.

*Order*

[94] The following order is made:

1. The appeal of Mr Mxolisi Sandile Oliver Nxasana is upheld with no order as to costs and Mr Nxasana's explanatory affidavit is admitted.
2. The costs order by the High Court of South Africa, Gauteng Division, Pretoria (High Court) against Mr Nxasana is set aside.
3. The appeal of Advocate Shaun Kevin Abrahams and the National Prosecuting Authority is dismissed with costs, including the costs of two counsel.
4. The declaration by the High Court that the settlement agreement dated 14 May 2015 concluded by former President Jacob Gedleyihlekisa Zuma, the Minister of Justice and Correctional Services and Mr Nxasana in terms of which Mr Nxasana's incumbency as the National Director of Public Prosecutions (NDPP) was terminated is constitutionally invalid is confirmed.

5. The declaration by the High Court that the termination of the appointment of Mr Nxasana as NDPP is constitutionally invalid is confirmed.
6. The declaration by the High Court that the decision to authorise payment to Mr Nxasana of an amount of R17 357 233 in terms of the settlement agreement is invalid is confirmed.
7. The declaration by the High Court that the appointment of Advocate Abrahams as NDPP is invalid is confirmed.
8. The declaration by the High Court that section 12(4) of the National Prosecuting Authority Act 32 of 1998 is constitutionally invalid is confirmed.
9. The declaration by the High Court that section 12(6) of the National Prosecuting Authority Act is constitutionally invalid is confirmed only to the extent that the section permits the suspension by the President of an NDPP and Deputy NDPP for an indefinite period and without pay.
10. The declaration of constitutional invalidity contained in paragraph 9 is suspended for 18 months to afford Parliament an opportunity to correct the constitutional defect.
11. During the period of suspension—
  - (a) a section 12(6)(aA) will be inserted after section 12(6)(a) and it will read:

“The period from the time the President suspends the National Director or a Deputy National Director to the time she or he decides whether or not to remove the National Director or Deputy National Director shall not exceed six months.”
  - (b) section 12(6)(e) will read (with insertions and deletions reflected within square brackets):

“The National Director or Deputy National Director provisionally suspended from office shall receive, for the

duration of such suspension, [~~no salary or such salary as may be determined by the President~~] [her or his full salary].”

12. Should Parliament fail to correct the defect referred to in paragraph 9 within the period of suspension, the interim relief contained in paragraph 11 will become final.
13. Decisions taken, and acts performed, by Advocate Abrahams in his official capacity will not be invalid by reason only of the declaration of invalidity contained in paragraph 7.
14. Mr Nxasana is ordered to repay forthwith to the state the sum of R10 240 767.47.
15. The President is directed to appoint an NDPP within 90 days of the date of this order.
16. The President, the Minister of Justice and Correctional Services and the National Prosecuting Authority are ordered to pay all costs in this Court that are additional to the costs referred to in paragraph 3, such costs to include the costs of two counsel.

JAFTA J (Petse AJ concurring):

[95] I have had the benefit of reading the judgment prepared by my colleague Madlanga J (first judgment). I agree with it except in relation to one issue. This is whether Mr Nxasana is entitled to resume office in light of the declaration that his purported removal was invalid. The first judgment concludes that he may not. I think he may.

[96] With reference to the decision of this Court in *Steenkamp*, the first judgment accepts that the termination of Mr Nxasana’s appointment as the NDPP amounted to a

nullity in the eyes of the law.<sup>77</sup> This principle was laid down by this Court in *Steenkamp* where the Court emphasised that a dismissal which is invalid has no force and effect, hence it constitutes a nullity.

[97] While accepting this to be the position in law, the first judgment holds that it does not follow that Mr Nxasana may resume office.<sup>78</sup> I disagree.

[98] *Steenkamp* tells us that an invalid termination of employment or a dismissal has no legal consequences. In that matter Zondo J declared:

“An invalid dismissal is a nullity. In the eyes of the law an employee whose dismissal is invalid has never been dismissed. If, in the eyes of the law, that employee has never been dismissed, that means the employee remains in his or her position in the employ of the employer.”<sup>79</sup>

[99] Therefore on the authority of *Steenkamp*, Mr Nxasana must be taken as if he has not been dismissed. Since his dismissal constituted a nullity, there is nothing further that may be done in the law to vindicate his rights arising from the dismissal. *Steenkamp* informs us that, in his case, reinstatement is incompetent because he cannot be reinstated to the post he had not vacated in terms of the law.<sup>80</sup> This means that he may report for duty and resume his work.

[100] To make the position clearer, Zondo J held that it is open to an employee whose dismissal has been declared invalid on the ground of unlawfulness to report for work. And if the employer prevents him or her from entering the workplace, the employee may seek a court interdict against the employer. In this regard, our colleague said:

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<sup>77</sup> *Steenkamp* above n 60.

<sup>78</sup> See [85].

<sup>79</sup> *Steenkamp* above n 60 at para 189.

<sup>80</sup> *Id.*

“An employee whose dismissal is invalid does not need an order of reinstatement. If an employee whose dismissal has been declared invalid is prevented by the employer from entering the workplace to perform his or her duties, in an appropriate case a court may interdict the employer from preventing the employee from reporting for duty or from performing his or her duties. The court may also make an order that the employer must allow the employee into the workplace for purposes of performing his or her duties.”<sup>81</sup>

[101] It is apparent from the judgment of the High Court that that Court proceeded from a mistaken premise with regard to whether Mr Nxasana could resume office. The High Court assumed that his reinstatement was necessary; hence it withheld such an order on the ground that it was not just and equitable to reinstate him. The High Court stated:

“Mr Nxasana too must have known that the bargain he was driving was unlawful. First, he was after all the NDPP and the NPA Act was ultimately his charge to administer; he must have been aware of its provisions. Second, his attorney’s letter of 10 December 2014 shows that he was fully aware of the specific statutory provisions relative to his financial entitlement; but that he thought that since he was not offering voluntarily to resign, they did not apply to him – the President was at large to agree to his demands. Third, he abided the decision of the Court as to the lawfulness of the settlement agreement, but was not prepared to say when the realisation of potential unlawfulness came to him.

As in the case of the President, the inference that Mr Nxasana knew that he was acting without lawful foundation is strong; but, as in the case of the President, for the reason there articulated, we prefer to conclude that he was reckless as to whether his demand was lawful.

In our view, given then the conduct of these two main protagonists and the considerations to which we have alluded, it is not just and equitable, in the context of vindicating the Constitution and the independence of the prosecutorial authority, to reinstate Mr Nxasana.”<sup>82</sup>

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<sup>81</sup> Id at para 192.

<sup>82</sup> High Court judgment above n 2 at paras 92-4.



[102] It does not appear from the record that the decision of this Court in *Steenkamp* was brought to the attention of the High Court. Being bound by *Steenkamp*, it is doubtful that the High Court could have reached the same conclusion if it was aware of this decision. But more importantly, the order issued by the High Court did not prevent Mr Nxasana from resuming office. Strictly speaking and on the authority of *Steenkamp*, he could have reported for duty after the High Court had delivered its judgment because the order did not preclude him from going back to work. All that was said by the High Court was that it was not just and equitable to reinstate him. But now we know that reinstatement was not competent in his case. Therefore, what was stated by the High Court was irrelevant.

#### *Mhlope*

[103] The question that arises is whether the decision of this Court in *Mhlope*<sup>83</sup> alters the legal position in *Steenkamp*. I think not. *Mhlope* is not authority for the proposition that an employee whose dismissal has been declared unlawful cannot resume his or her duties. That case dealt with a wholly different situation.

[104] In *Mhlope* the Electoral Commission had failed to comply with a statutory injunction, emanating from a provision that was held to be valid. The issue that arose for determination was the consequential effect of the order that declared unlawful the Electoral Commission's non-compliance with a valid statute. Declaring the Commission's failure to comply with a statute to be invalid there could put at risk the entire municipal elections which were scheduled to take place in August 2016.

[105] To avoid this Mogoeng CJ opted for suspending the declaration of invalidity. The Chief Justice said:

“[t]he invalidation of the unlawful conduct, which is essentially the production of the national common voters' roll that does not comply with section 16(3) of the

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<sup>83</sup> *Mhlope* above n 59.

Electoral Act, has to be suspended. That suspension will allow the IEC to proceed with the August 2016 elections and correct the defective voters' roll. The suspension of the declaration of invalidity of the IEC's unlawful conduct has the effect of suspending the duty imposed by section 16(3) on the IEC which, if carried out, there would have been no invalidity. The non-compliance with section 16(3) is in terms of our just and equitable remedial powers condoned and the duty imposed by section 16(3) is itself suspended for purposes of the August 2016 elections.”<sup>84</sup>

[106] It is true that the order that was issued in *Mhlope* suspended the operation of a valid statute. But this was linked to the suspension of the declaration of invalidity. This much is clear from the statement cited above. It is usual for this Court to declare an Act of Parliament to be invalid and suspend the declaration for a fixed period so as to avoid serious disruptions in the administration of government. The effect of the suspension is that an invalid Act continues to operate as if it is valid.<sup>85</sup>

[107] However, the need to suspend the operation of the declaration of invalidity arises where its immediate coming into effect would result in serious dislocation or disruption in the administration of government. It is the interests of justice and good government which may justify an order that allows an invalid law or conduct to continue to operate for a fixed period of time.<sup>86</sup>

[108] That this Court has the power to direct that an unconstitutional law will continue to have force and effect is beyond question. But that power may be exercised where there are compelling reasons to allow an invalid law or conduct to continue to operate.<sup>87</sup> In *Ferreira* this Court held:

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<sup>84</sup> Id at para 133.

<sup>85</sup> See *Ramuhovhi v President of the Republic of South Africa* [2017] ZACC 41; 2018 (2) SA 1 (CC); 2018 (2) BCLR 217 (CC); *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd* [2014] ZACC 3; 2014 (3) SA 106 (CC); 2014 (4) BCLR 373 (CC).

<sup>86</sup> *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 30.

<sup>87</sup> *Mvumvu v Minister of Transport* [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC) at paras 45-6.

“The provisions of section 98(5) and (6), which permit the Court to control the result of a declaration of invalidity, may give temporary validity to the law and require it to be obeyed and persons who ignore statutes that are inconsistent with the Constitution may not always be able to do so with impunity.”<sup>88</sup>

[109] In the present matter, unlike in *Mhlope*, the declaration of invalidity pertaining to the termination of Mr Nxasana’s appointment is not suspended. Its operation is immediate. Nor are the requirements of section 12 of the NPA Act suspended. The reasons that compelled this Court in *Mhlope* to suspend section 16(3) of the Electoral Act do not exist here. In fact, no interests of good government have been put forward which warrant the suspension of section 12 of the NPA Act. It is doubtful that such suspension may be granted without suspending the declaration of invalidity on the termination of the appointment and also condoning the unlawful termination as was done in *Mhlope*.

[110] But more importantly, the suspended operation of the relevant statutory provision in *Mhlope* did not adversely affect the rights of anybody. On the contrary, that suspension enabled millions of voters to exercise their right to vote. The suspension of section 12 of the NPA Act here will hugely prejudice Mr Nxasana by depriving him of the protections that the section affords, in circumstances where there are no reasons compelling suspension of the operation of a valid legislation. Instead, compliance with section 12 will enhance the promotion of the independence of the NPA and the rule of law.

[111] In *Mhlope* the suspension of the relevant statutory provision was justified by the exceptional circumstances of that case which were regarded as crying out “for an exceptional solution or remedy to avoid a constitutional crisis”.<sup>89</sup> Similarly, in *Black Sash* the emphasis was placed on the extraordinary circumstances of the case and the catastrophic consequences which could likely have ensued if the

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<sup>88</sup> *Ferreira* above n 38 at para 28.

<sup>89</sup> *Mhlope* above n 59 at para 137.

unconstitutional contract was not allowed to continue to operate. Cautioning that the just and equitable remedial power has limits, Froneman J said:

“It is necessary to be frank about this exercise of our just and equitable remedial power. That power is not limitless and the order we make today pushes at its limits. It is a remedy that must be used with caution and only in exceptional circumstances. But these are exceptional circumstances. Everyone stressed that what has happened has precipitated a national crisis. The order we make imposes constitutional obligations on the parties that they did not in advance agree to. But we are not ordering something that they could not themselves have agreed to under our supervision had an application been brought earlier, either by seeking an extension to the contract that would have expired on 31 March 2017 or by entering into a new one.”<sup>90</sup>

[112] In the present matter there is nothing exceptional or extraordinary that warrants the exercise of remedial power to prevent Mr Nxasana from returning to office. His return will certainly not cause a constitutional crisis or a national crisis. On the contrary, his return would enable the President to follow the law if he wishes to remove him from office and Parliament would play a vital part in that process. And more importantly, preventing Mr Nxasana from returning to office without pronouncing on the validity of his employment contract would not only be unfair to him but would also create considerable uncertainty on the parties’ rights and interests. This would be antithetical to the rule of law which promotes certainty.

### *Section 12*

[113] As the first judgment rightly points out, the purpose of the NPA Act is to protect both the institutional independence of the NPA and the individual independence of its head.<sup>91</sup> The section seeks to achieve this by securing the tenure of office, conditions of service and other benefits.<sup>92</sup> But more importantly, section 12(5)

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<sup>90</sup> *Black Sash* above n 76 at para 51.

<sup>91</sup> See [21] to [23].

<sup>92</sup> Section 12 must be read with section 18 of the NPA Act.

provides that the National Director “shall not be suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8)”. This is a potent guarantee, deliberately chosen by Parliament to protect the NPA’s independence as required by section 179(4) of the Constitution.<sup>93</sup>

[114] Therefore, section 12 of the NPA Act is umbilically linked to the Constitution.<sup>94</sup> Suspending its operation will not only subvert its purpose but will also be antithetical to the Constitution. Such suspension would be in conflict with the principle of separation of powers and a number of provisions in the Constitution. These include: section 1(c) which lists the supremacy of the Constitution and the rule of law; section 2 which underscores the supremacy of the Constitution by declaring that conduct inconsistent with it is invalid; section 165(2) that guarantees the independence of courts “subject to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice”; and section 179(4).

[115] Ironically the first judgment impliedly suspends the operation of section 12(5) of the NPA Act in order to uphold the rule of law and secure “the integrity of the office of the NDPP”.<sup>95</sup> I disagree. Suspending the operation of section 12(5) would attain quite the opposite. It would mean that Mr Nxasana’s removal from office is achieved by means other than the procedure prescribed in section 12. In that procedure Parliament plays a crucial part. Barring a voluntary resignation, there can be no removal of a National Director from office without the involvement and approval of Parliament. A suspension of the operation of section 12 will be subversive of this and will deny Parliament the role it had constitutionally given to itself.

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<sup>93</sup> Section 179(4) reads:

“National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice”.

<sup>94</sup> *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 53.

<sup>95</sup> See [75].

[116] What is more, this denial will occur in circumstances where the Court would have taken inconsistent positions in relation to the enforcement of section 12. It will be recalled that non-compliance with section 12 was the basis on which the decision that the termination of Mr Nxasana's appointment and the settlement agreement were invalid, rested. The section could not be enforced and at the same time its operation be suspended. This is another factor that distinguishes the present matter from *Mhlope*.

[117] In terms of section 12(6) and (7), a National Director may be removed from office only if one of the grounds listed in subsection (6)(a) has been established, following an inquiry into the matter. In this case no enquiry was held and no pronouncement on the existence of one or more of the listed grounds has been made. This underlines the inappropriateness of holding that Mr Nxasana should not return to office. Allowing him to return to office, does not mean that he is fit to continue in the office. If his involvement in the conclusion of the settlement agreement renders him unfit, it would be open to the President to invoke section 12(6) and establish an enquiry to determine his fitness to hold office. If found unsuitable, Parliament will be involved in his removal.

[118] This approach does not do violence to the will of Parliament and the continuing operation of section 12 of the NPA Act. It is also consonant with the various provisions of the Constitution mentioned earlier. Adhering to the requirements of section 12 will, in addition, be consistent with the jurisprudence of this Court. In *Steenkamp Zondo J* remarked:

“When a dismissal is held to be unfair, one can speak of a reinstatement but not in the case of an invalid dismissal. This, therefore, means that an order of reinstatement is not competent for an invalid dismissal. An employer against which an order has been made declaring the dismissal of its employees invalid and who does not want to continue or cannot continue the employment relationship with those employees will have to dismiss them again. Otherwise, they remain in its employ and, if they tender



their services or are prevented by the employer from performing their duties, will be entitled to payment of their remuneration.”<sup>96</sup>

[119] The instability in the NPA relied in the first judgment for not following section 12 does not constitute a constitutional or national crises referred to in *Mhlope* and *Black Sash*. Nor was that instability created by compliance with that section. In fact the section may be employed in manner that would not result in the immediate return to office by Mr Nxasana. The President may suspend him before such return if the requirements of the section are met. And if he is to blame for instability, the enquiry envisaged in the section is the best forum to determine this issue. But significantly, the instability is not the reason advanced for preventing his return to office.

[120] Section 16(3) which was considered in *Mhlope* did not provide a remedy for non-compliance. Yet section 12 prescribes in mandatory terms what should be done in order to remove a National Director from office. Therefore there is no need to search for a remedy in section 172(1) of the Constitution.

[121] Of course section 12 need not be followed in the case of Advocate Abrahams. This is because the section guarantees the independence of and secures the tenure of a National Director whose appointment was valid. Since Advocate Abrahams’ appointment was invalid, the protections of section 12 are not available to him.

### *Just and equitable order*

[122] I need briefly to address this issue because the conclusion reached in the first judgment is based on it.<sup>97</sup> The concept of a just and equitable order is sourced from section 172(1)(b) of the Constitution.<sup>98</sup> It is an equivalent of section 98 of the interim

<sup>96</sup> *Steenkamp* above n 60 at para 190.

<sup>97</sup> See [71] to [72].

<sup>98</sup> Section 172(1)(b) provides:

“(1) When deciding a constitutional matter within its power, a court—

...

(b) may make any order that is just and equitable, including—

Constitution mentioned in the statement from *Ferreira* quoted in paragraph 108. The power to make a just and equitable order does not mean that a court may do whatever it thinks would be just and fair in a given case, even if the order it intends issuing is unlawful or inconsistent with the Constitution. On the contrary, the just and equitable order must be lawful and consistent with the Constitution. This is because when a court makes such order, it exercises judicial power.

[123] In terms of section 165(2) of the Constitution courts are entrusted to exercise judicial power subject to the Constitution and the law. Moreover, courts are duty bound to apply the law “impartially and without fear, favour or prejudice”. A court may not evade the obligation to apply a valid statute by simply suspending its operation and do so only for purposes of a particular order in circumstances where that statute was enforced.

[124] The just and equitable remedial powers enable a court to regulate consequences flowing from the declaration of invalidity. Section 172(1)(b) of the Constitution mandates courts to preserve temporarily the validity of a law or conduct that is inconsistent with the Constitution. This is usually achieved by suspending the declaration of invalidity. A suspension becomes necessary only if the information placed before the court shows that the interests of justice or good government warrant that the invalid law or conduct should continue to operate, pending the correction of the defect by the competent authority.<sup>99</sup>

[125] A just and equitable order must invariably be fair to all persons affected by it. A court that contemplates issuing such order must weigh up the interests of all parties

- 
- (i) an order limiting the retrospective effect of the declaration of invalidity; and
  - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

<sup>99</sup> *Mvumvu* above n 87 at paras 44-6.

to a litigation and where appropriate, the balancing must also take into account the interests of the public.<sup>100</sup>

[126] In the context of employment this Court has outlined the requirements of a just and equitable order in these terms:

“In the context of our Constitution, ‘appropriate relief’ must be construed purposively, and in the light of section 172(1)(b), which empowers the Court, in constitutional matters, to make ‘any order that is just and equitable’. Thus construed, appropriate relief must be fair and just in the circumstances of the particular case. Indeed, it can hardly be said that relief that is unfair or unjust is appropriate. As Ackermann J remarked, in the context of a comparable provision in the interim Constitution, ‘[i]t can hardly be argued, in my view, that relief which was unjust to others could, where other available relief meeting the complainant’s needs did not suffer from this defect, be classified as appropriate’. Appropriateness, therefore, in the context of our Constitution, imports the elements of justice and fairness.

Fairness requires a consideration of the interests of all those who might be affected by the order. In the context of employment, this will require a consideration not only of the interests of the prospective employee but also the interests of the employer. In other cases, the interests of the community may have to be taken into consideration. In the context of unfair discrimination, the interests of the community lie in the recognition of the inherent dignity of every human being and the elimination of all forms of discrimination.”<sup>101</sup>

[127] What emerges from this statement is that the interests of all those who may be affected by the just and equitable order must be considered in the process leading up to issuing the order. Furthermore, an order that is unjust to some must be avoided where the interests of the party seeking relief may be met by an alternative order. In this matter, to require Mr Nxasana to pay back the money in circumstances where he

<sup>100</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) and *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province* [2007] ZASCA 165; 2008 (2) SA 481 SCA at paras 22-9.

<sup>101</sup> *Hoffmann v South African Airways* [2000] ZACC 17; 2001 (1) SA 1; [2000] 12 BLLR 1365 (CC) at paras 42-3.

is not allowed to go back to office, cannot be fair to him. This is especially so in light of the fact that the former President was hell-bent to remove him from office at any price and had put Mr Nxasana under intolerable pressure to leave. As the first judgment points out, the former President used stick and on other occasions carrot in an attempt to get rid of him.

[128] As mentioned, allowing Mr Nxasana to go back to his job would also meet the objects of the Constitution and the rule of law. If his involvement in the impugned settlement agreement brought his fitness to hold office into question, he may be removed in terms of section 12 of the NPA Act.

[129] For all these reasons, I do not support the conclusion that Mr Nxasana ought not to resume office, following the setting aside of the invalid and unlawful termination of his appointment.

For the First Applicant in CCT 333/17 and the First Respondent in CCT 13/18:

M Chaskalson SC and P Ramano instructed by Webber Wentzel.

For the Second Applicant in CCT 333/17 and the Second Respondent in CCT 13/18:

W Trengove SC instructed by Webber Wentzel.

For the Third Applicant in CCT 333/17 and the Third Respondent in CCT 13/18:

G Budlender SC, M Bishop and E Webber instructed by Legal Resources Centre.

For the Fourth and Seventh Respondents in CCT 333/17 and the Sixth and Eighth Respondents in CCT 13/18:

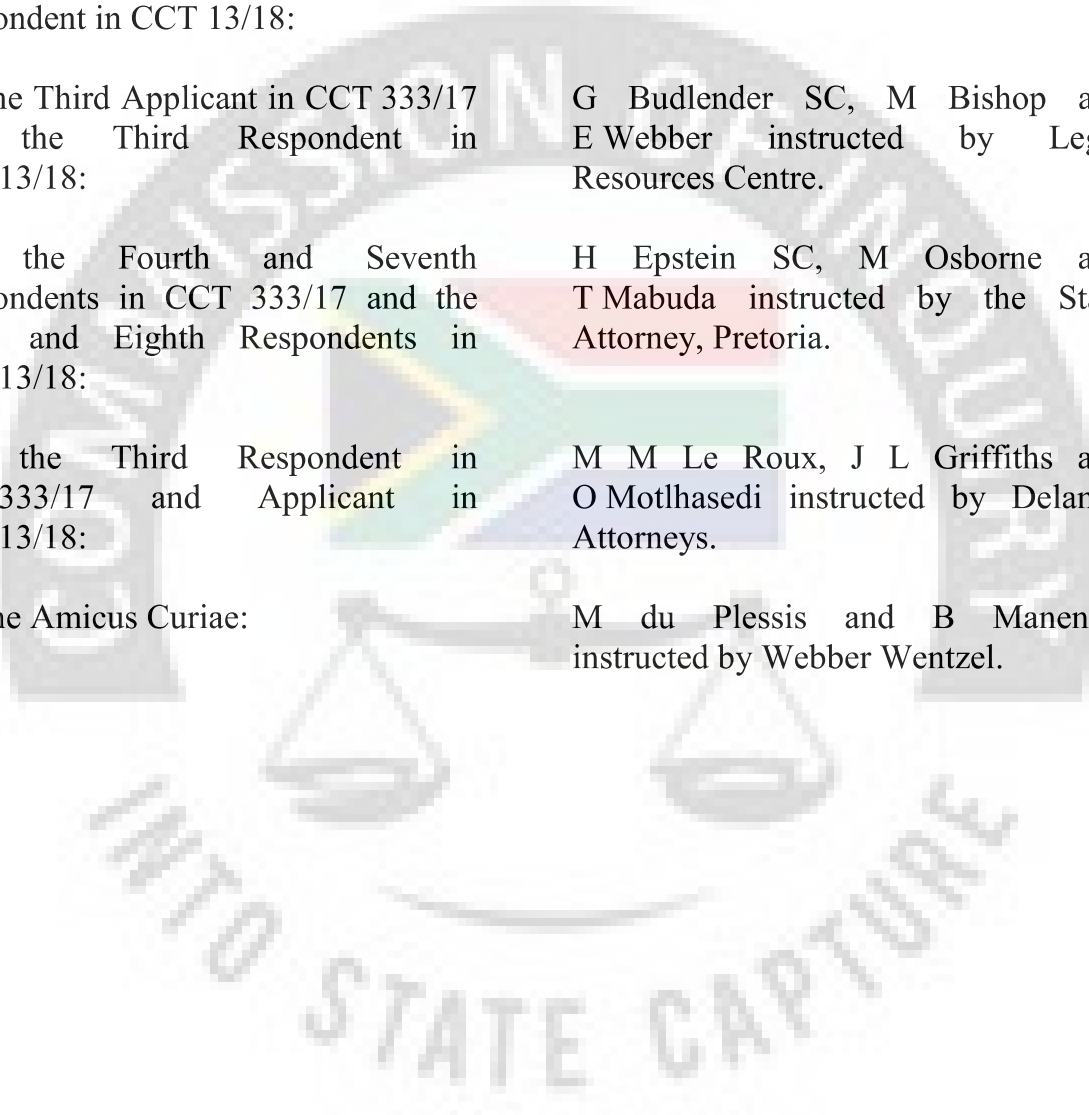
H Epstein SC, M Osborne and T Mabuda instructed by the State Attorney, Pretoria.

For the Third Respondent in CCT 333/17 and Applicant in CCT 13/18:

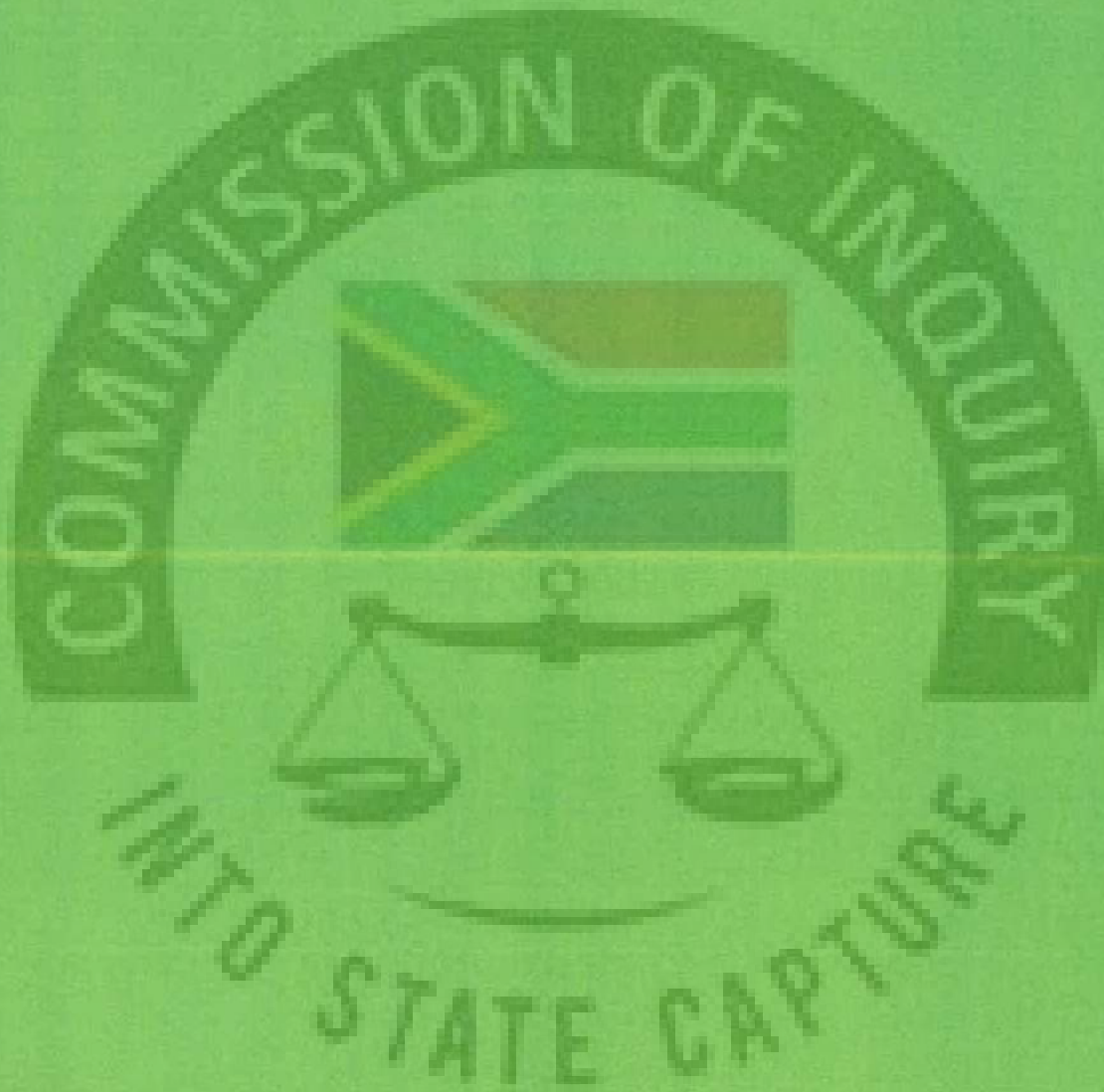
M M Le Roux, J L Griffiths and O Motlhasedi instructed by Delaney Attorneys.

For the Amicus Curiae:

M du Plessis and B Manentsa instructed by Webber Wentzel.



EE 3







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## **EXHIBIT EE 3**

**FIRST RESPONDENT'S  
ANSWERING AFFIDAVIT  
(JG ZUMA)**

**HIGH COURT GAUTENG  
LOCAL DIVISION  
CASE NO: 62410/15**



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

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**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG LOCAL DIVISION, PRETORIA)**

CASE NO: 62410/15

In the matter between:

**CORRUPTION WATCH**

First Applicant

**FREEDOM UNDER LAW (RF) NPC**

Second Applicant

and

**THE PRESIDENT OF THE  
REPUBLIC OF SOUTH AFRICA  
MINISTER OF JUSTICE AND  
CORRECTIONAL SERVICES  
MXOLISI SANDILE NXASANA  
SHAUN ABRAHAMS**

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

**DIRECTOR GENERAL: DEPARTMENT OF  
JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

Fifth Respondent

**CHIEF EXECUTIVE OFFICER OF  
THE NATIONAL PROSECUTING AUTHORITY**

Sixth Respondent

**NATIONAL PROSECUTING AUTHORITY**

Seventh Respondent

**THE DEPUTY PRESIDENT OF THE  
REPUBLIC OF SOUTH AFRICA**

Eighth Respondent

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**FIRST RESPONDENT'S ANSWERING AFFIDAVIT**

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/s/

J. G. Z.

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I, the undersigned

**JACOB GEDLEYHLEKISA ZUMA**

Do hereby make oath and state that:

1. I am the President of the Republic of South Africa ("the President"), duly elected in terms of section 87 of the Constitution of the Republic of South Africa, 108 of 1996 ("the Constitution"); first respondent, and with my address of service as care of the State Attorney, SALU building, 316 Thabo Sehume Street Pretoria.

- 1.1 The facts contained herein are, unless the context otherwise indicates within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

- 1.2 Any legal submissions that are made by me are made on the advice of my legal representatives, which advice I believe to be correct.

2. I have read the affidavits of **DAVID LEWIS** and **NICOLE FRITZ** in support of the application and wish to respond thereto in a manner outlined hereunder.

3. The broad structure of this affidavit will deal with:

- 3.1 the nature of the application and the relief sought;

- 3.2 summary of the answer;

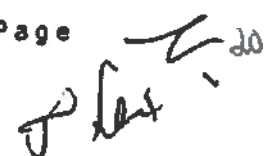
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J. G. Zuma

- 3.3 an outline of the legislative framework;
- 3.4 the developments leading to the inquiry and settlement agreement of Mr Nxasana ("Nxasana"), the third respondent;
- 3.5 the appointment of Mr Abrahams ("Abrahams"), the fourth respondent;
- 3.6 the answer to each and every averment in the first applicant's founding affidavit insofar as it relates to me;
- 3.7 the answer to each and every averment in the second applicant's founding affidavit also as they relate to me; and
- 3.8 the answer to each and every averment in the supplementary affidavit that calls for my answer.

#### THE NATURE OF THE APPLICATION AND THE RELIEF SOUGHT

- 4. This is an application in which the applicants are seeking *inter alia*,
  - 4.1 to review and set aside:
    - 4.1.1 the settlement agreement entered between the first, second and third respondents dated 14 May 2015 and the monetary consequences arising therefrom;
    - 4.1.2 the appointment of the fourth respondent as the National Director of Public Prosecutions ("the NDPP");
  - 4.2 to declare that the:

4.2.1 third respondent is obliged to refund the State, money received in terms of the settlement agreement;

4.2.2 first respondent may not appoint, suspend or remove the NDPP in terms of section 96(2)(b) of the Constitution; and

4.2.3 second respondent is responsible for decisions relating to the appointment, suspension or removal of the NDPP for as long as the first respondent holds office.

## SUMMARY OF THE ANSWER

### Settlement Agreement: prayer 1.1

5. In so far as the applicants seek to challenge the settlement agreement, entered into between Nxasana and the second respondent in which inter alia, Nxasana vacated his office as the National Director of Public Prosecution. The challenge is bad in law in that:

5.1 I exercised my constitutional power in terms of sections 179(1)(a) of the Constitution and 12(8) of the National Prosecuting Authority Act, 32 of 1998 ("the NPA Act") in the appointment and the vacating of office of Nxasana.

5.2 I appointed Nxasana as the NDPP on 30 August 2013 under Presidential Minute No. 295, a copy of the minute is attached and marked "JS1".



- 5.3 I informed Nxasana, on 4 July 2014, that after consideration of all the evidence before me, I took the decision to institute an inquiry in terms of Section 12(6)(a) of the NPA Act.
- 5.4 I established an inquiry into the fitness of Nxasana to hold office of the NDPP, on 5 February 2015, by notice in the Government Gazette, No. 38463, Notice 102 of 2015. The Rules for the inquiry were published in the Government Gazette No. 38491, Notice 155 of 2015. The inquiry was to sit on 11 May 2015, when I took the decision to terminate it.
- 5.5 During the period, August 2013 to 9 May 2015, Nxasana and I had various one on one verbal discussions regarding the discord that existed in the National Prosecuting Authority, especially as between Nxasana and the senior management. (b)
- 5.6 The discord was so pronounced, that the senior management was divided and the National Prosecuting Authority was destabilised and haemorrhaging. The looming inquiry into the fitness to hold office of Nxasana also contributed to this discord. The inquiry offered some of the senior management an additional platform to question the authority of Nxasana.
- 5.7 Section 12(8) of the NPA Act provides that the NDPP may request to vacate his or her office for any reason which the President deems sufficient. Nxasana made the request to me to vacate his office. Nxasana made it plain that the discord in the NPA largely rested on the senior management not sharing his strategic views and the disciplinary 26

M.S

J. G. 1

steps or criminal charges which he intended taking against certain of the senior managers. This posited intractable disputes paralysing the proper functioning of the NPA.

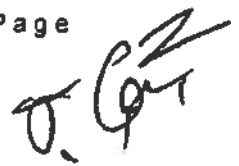
5.8 I, therefore, deemed the reasons provided by Nxasana, together with the possibility of a protracted litigation and the holding of the inquiry not to be in the best interest of the National Prosecuting Authority, Nxasana and the Republic of South Africa, to be sufficient to allow Nxasana to vacate office.

5.9 It was plain to me that Nxasana was no longer willing to continue as the NDPP and the only outstanding issue remained the financial aspects relating to his vacating his office. 10

5.10 There were extensive negotiations relating to the financial terms with which he would be agreeable to leave office having made the request to do so. I was informed that there were offers made to Nxasana and counter offers made by him around the amount he contended he was entitled to.

5.11 Subsequently, I was informed that the parties had reached an agreement around the money to be paid to Nxasana which rendered the holding of the inquiry unnecessary. The settlement agreement was therefore the culmination of these events. 20

5.12 With Nxasana having made it crystal clear to me that he no longer wishes to continue as the NDPP, I am advised that it was within my power to allow Nxasana to vacate office having been satisfied that it



was in the interests of the NPA, Nxasana and the Republic for him to do so.

- 5.13 It is particularly surprising that the applicants find no fault with the appointment of Nxasana by me and want to contend that he is still to be regarded as the NDPP. I appointed Nxasana as the NDPP. It was still during the period that I am perceived to be in "jeopardy of prosecution". If that appointment remains untainted there is no reason that any other appointment of an NDPP by me would suffer a challenge on that ground.

**Decision to authorise: prayer 1.2**

- 5.14 The applicants also seek to impugn the decision to authorise the payment to Nxasana of an amount of R17 357 233.00. This process was undertaken by the fifth and seventh respondents. I am advised that the respondents who are competent to speak on the matter will do so when they file their answering affidavits.

- 5.15 In so far as the Court may find that the payment to Nxasana of the aforesaid amount was unlawful, I intend to abide by the decision of the Court. I need to emphasise however, that the challenge relating to the settlement payment is severable from Nxasana's vacating office as an NDPP.

- 5.16 I am advised that the Court having been satisfied that Nxasana made the request to vacate his office; for reasons which I found sound and sufficient; and his intimation that he has no desire to continue as an

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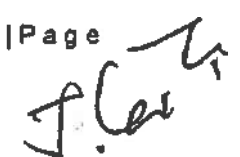
NDPP satisfies the first leg of section 12(8) of the NPA Act. To the extent that the payment to Nxasana is found unlawful, all that needs to happen is that he must be paid in terms of the provisions of section 12(8)(c)(ii) of the NPA Act (meaning that he would be deemed to have retired in terms of section 16(4) of the Public Service Act, and that he shall be entitled to such pension as he would have been entitled to under the pension law applicable to him had he been so retired).

**Appointment of the fourth respondent: prayer 1.3**

5.17 The applicants want the appointment of the fourth respondent as NDPP to be reviewed, declared invalid and set aside. The argument offered for this relief, is that there was no vacancy. This argument is bad. As a matter of fact and law, I am advised, that Nxasana had vacated his office as from 1 June 2015 having made the request to vacate his office; for reasons which I deemed sufficient and in interests of the Republic. That he may have received payment inconsistent with the provisions of the NPA Act, does not render his vacating office as invalid.

5.18 I am advised that the applicants do not question the fitness or propriety of the fourth respondent to hold office as the NDPP. For this reason I need not address the considerations I took account of in the appointment of the fourth respondent as the NDPP.

**Nxasana still as the NDPP: prayer 1.4**



5.19 The applicants argue that the Court must declare that Nxasana to still be holding the office of the NDPP. The argument draws its strength from an inference that a challenge on the decision to allow Nxasana to vacate office is unlawful, holds in logic, that Nxasana would be reinstated as the NDPP. This is incorrect. Apart from maintaining that Nxasana relinquished office in accordance with law, he has made it very plain that he does not intend to serve as an NDPP. To have him declared as still holding the office of an NDPP would be bad both in law and fact. I am also informed that a Court cannot order somebody to do that which he plainly does not want to do.

5.20 I am advised further that such a declarator would offend against the rule of law in so far as it would conflate the separation of powers. The constitutional power to appoint an NDPP remains that of Executive. Further legal argument would be made at the hearing of this application.

**Third respondent to refund the money he received: prayer 1.5 .**

5.21 I abide the decision of this Honourable Court in relation to whether Nxasana is to refund the money he received in terms of the settlement agreement.

**Section 96(2)(b) of the Constitution argument: prayer 1.6**

5.22 The applicants seek a declarator that I may not appoint, suspend or remove an NDPP. The argument stems from a contention that I am in jeopardy of prosecution and therefore would be conflicted in making

such an appointment. There is no substance to this argument. As a matter of fact, there are no pending criminal charges against me.

5.23 I am advised that the only litigation pending in the courts relates to a decision by a former acting NDPP Mr Mpshe, to discontinue the prosecution against me. I am advised that there is no basis for the applicants to contend that that application will be successful and if successful would mean that the NDPP would not make his or her decision without fear favour or prejudice as the law requires.

5.24 The applicants' contention in this regard has embedded in it a wanton and veiled accusation that I would act improperly or whoever the NDPP is would equally act improperly. There is no evidence to support what is merely an unfounded suspicion by the applicants.

5.25 There is no reason to believe that I will, in the event that actual conflict of interest is shown to exist, act despite the existence of such a conflict, in the exercise of my constitutional power. The applicants are inviting the Court to make a determination on a matter entirely academic and in anticipation that any conflict of interest might in the future be shown to exist.

5.26 In any event, the nature of the relief which is sought in relation to this aspect straddles the separation of powers doctrine – which is part of the rule of law. The applicants are inviting the Court to make pronouncements in areas which the Constitution has left exclusively for





the exercise by the Executive. I am told further legal argument will be made at the hearing of this application.

**Deputy President to appoint an NDPP: prayer 1.7**

5.27 In so far as the applicants seek a declarator that for as long as I am the President the power for the appointment the NDPP should be exercised by the Deputy President. I am advised that the Constitution is very clear as to what must happen if I or the President, is absent from the Republic or otherwise unable to fulfil the duties of President that various members of the Cabinet would perform those duties.

5.28 Without conceding that there is any basis for this declarator, the applicants do not make a case why a Minister designated by me cannot act as President; a Minister designated by the other members of Cabinet; the Speaker, until the National Assembly designates one of its other members to perform the duties of President – all of which the Constitution authorises should be options available and are constitutionally authorised.

5.29 I am advised that the Court has no power to suspend the operation of a constitutional provision which is what the applicants seek by way of a declarator under this relief.

**Assignment of Presidential powers: prayer 1.8**

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5.30 The applicants want the Court to direct me to assign my constitutional power to the Deputy President. They say this must happen in terms of section 98 of the Constitution. This is a power the President has to assign to a Cabinet Member any power or function of another member who is absent from office or is unable to exercise their power or perform that function.

5.31 I repeat what I have said in relation to prayer 1.7 above.

6. I now turn to deal with the Legislative framework.


#### THE LEGISLATIVE FRAMEWORK

7. The applicants contend that I am conflicted regard being had to section 96(2)(b) of the Constitution which provides for conduct of cabinet members and deputy minister and states that:

"(2) Members of the Cabinet and Deputy Ministers may not –

- (a) undertake any other paid work;
- (b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
- (c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person." (own emphasis)

8. The reading of section 96(2)(b) of the Constitution addresses an entirely different subject. It concerns itself with members of cabinet pursuing private interests which are in conflict with their constitutional obligations. The appointment of the NDPP is a performance of a constitutional duty which is not pursued of any private interest. The Constitution further reposes independence of the office of the NDPP who is to exercise the power to prosecute or not to prosecute without fear, favour or prejudice.
9. There is no suggestion that an NDPP would take a decision tainted purely by who would have appointed him or her. Should there be evidence to support that contention the proper relief would be to set aside the decision by that NDPP on those grounds. To ask the Court in an anticipatory fashion to do so would offend against the doctrine of the separation of powers. Further legal argument would be advanced at the hearing of this application. 10
10. Regarding the institutional autonomy of the NPA which the Constitution provides in section 179(1)(a) for a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament and consisting of a NDPP, who is the head of the prosecuting authority and who is appointed by the President, as head of the national executive.



11. The NPA Act regulates matters incidental to the establishment of a single national prosecuting authority and is the Act of Parliament referred to in section 179 of the Constitution and the following sections bear reference:

11.1 Section 10 provides that the President must, in accordance with section 179 of the Constitution, appoint the National Director;

11.2 There is no basis for the Court to remove the constitutional power of the President. What the Court is entitled to do, if a good case is made out, is to set aside any conduct of the President that is inconsistent with the Constitution and which is invalid. The applicants have not made out any case that I have performed any act which is inconsistent with the Constitution.

11.3 I am advised that the question of tenure of an NDPP is regulated by section 12 which in the relevant part reads:

“(1) The National Director shall hold office for a non-renewable term of 10 years, but must vacate his or her office on attaining the age of 65 years.

(5) 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).

(8) (a) The President may allow the National Director or a Deputy National Director at his or her request, to vacate his or her office—

(i) on account of continued ill-health;

(ii) for any other reason which the President deems sufficient.

(b) The request in terms of paragraph (a)(ii) shall be addressed to the President at least six calendar months prior to the date on which he or

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she wishes to vacate his or her office, unless the President grants a shorter period in a specific case.

(c) If the National Director or a Deputy National Director –

(i) ...; or

(ii) vacates his or her office in terms of paragraph (a)(ii), he or she shall be deemed to have been retired in terms of section 16(4) of the Public Service Act, and he or she shall be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her if he or she had been so retired.” (own emphasis)

11.4 As I have earlier indicated I allowed Nxasana to vacate office on the strength of these statutory provisions.

## THE DEVELOPMENTS LEADING TO THE INQUIRY AND SETTLEMENT AGREEMENT OF NXASANA

12. The following developments led to the settlement agreement which took place over a period of 18 months and were, in the main, verbal discussions held primarily between myself and Nxasana, which were not minuted or documented. The developments leading to the inquiry took place over a period of 12 months and are documented and will also be dealt with more fully by the second respondent who, in terms of section 179(6) of the Constitution, exercises final responsibility over the National Prosecuting Authority. These events are:

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12.1 After various media reports, on the 19 June 2014, I addressed a letter to Nxasana, requesting information regarding certain incidents *inter alia*, criminal charges during December 1985; outstanding complaints before the KwaZulu Natal Law Society; the arrest during October 2012; the assault charges proffered against him in the 1980's; the complaint laid with the Public Service Commission by one Prince Mokotedi and the appropriateness of the statements made to the media regarding internal communications<sup>1</sup>.

12.2 I received a response from Nxasana on 21 June 2014 providing me with the information requested. However, Nxasana prefaced the reply by stating that he may not be in a position to have a clear recollection of events due to the lapse of time, in some instances being more than 28 years, and the time period provided for to furnish a response<sup>2</sup>.

12.3 Subsequent to the response received and considering all the events that has transpired together with the media reports<sup>3</sup>, on 4 July 2014, I caused to be served on Nxasana a notice of the institution of an inquiry<sup>4</sup>.

12.4 Nxasana then instituted legal proceedings in the High Court of South Africa, Gauteng Division, Pretoria signed on 8 August 2014 in which I was named as the first respondent. In these court papers, Nxasana sought various relief on an urgent basis, the main being to interdict me

<sup>1</sup> This letter is contained in the Record in terms of prayer 5 ("Record 1") on pages 2 to 3.

<sup>2</sup> This letter is contained in Record 1 on pages 4 to 13

<sup>3</sup> These media reports are contained in Record 1 on pages 84 to 126

<sup>4</sup> This notice is contained in Record 1 on page 14



from suspending him<sup>5</sup>. This matter was settled out of court between the parties.

12.5 On 5 February 2015, I caused a notice to be published in the Government Gazette notice 102 of 2015, which established the inquiry into the fitness of Nxasana. In this notice I appointed Advocate Cassim SC as the chairperson and Advocate Nkosi-Thomas SC and Advocate Mdladla as the additional members. I also provided the terms of reference for the inquiry<sup>6</sup>.

12.6 On 20 February 2015, the chairperson of the inquiry issued rules for the inquiry in Government Gazette notice 155 of 2015. The Code of Conduct for members of the National Prosecuting Authority under section 22(6) of the NPA Act as provided for in Government Gazette notice 1257 of 2010 was also provided<sup>7</sup>.

12.7 It was during the end of 2014 and the beginning of 2015, that I again had discussions with Nxasana and I had discussions with the Minister. It was during these discussions that Nxasana requested to vacate his position as head of the National Prosecuting Authority, citing the continued discord with the senior members of the National Prosecuting Authority and the inquiry as the primary reasons. I deemed the reasons to be sufficient and accepted the request. This request was not reduced to writing.

<sup>5</sup> The court papers are contained in Record 1 on pages 15 to 52

<sup>6</sup> This notice is contained in Record 1 on pages 53 to 60

<sup>7</sup> These notices are contained in Record 1 on pages 61 to 82

- 12.8 I caused the termination of the inquiry as a settlement had been reached with Nxasana.
- 12.9 The settlement agreement<sup>8</sup> was signed on 9 and 14 May 2015 between Nxasana and the Minister. The terms of which are contained in annexure "CW12" to the founding affidavit.
- 12.10 The payment arising from the settlement agreement was handled by the Department of Justice and the National Prosecuting Authority in accordance with the Public Finance Management Act, 1999. I am advised that various formula was provided by the National Treasury in relation to the amount to be paid to Nxasana and the method of such payment. After many sessions of negotiations between my office and Nxasana, Nxasana requested the payment of the entire period.

#### THE APPOINTMENT OF ABRAHAMS

13. The events which led to the appointment of Abrahams are as follows:
- 13.1 After the vacation of office of Nxasana, I appointed Dr Silas Ramaite as acting National Director in terms of section 11(2)(b) of the NPA Act.
- 13.2 The Department of Justice and Constitutional Development, at the request of the Minister, prepared a report regarding possible persons within the NPA who it deemed fit and proper to be appointed to the vacant office of National Director.

<sup>8</sup> This is contained in the Record in terms of prayer six ("Record 2") on pages 2 to 5.

13.3 I was provided with a submission from the Minister, in relation to the appointment of Abrahams to the position of National Director<sup>9</sup>. I then held an interview with Abrahams together with Mr Hulley. The interview guide notes form the minute of this interview<sup>10</sup>.

13.4 I considered all the information before me, and appointed Abrahams as the NDPP. The Presidential Minute no. 162 provides for this appointment as of 1 July 2015<sup>11</sup>.

14. Mercifully the applicants do not contend that the fourth respondent is not fit for office.

#### THE CONFLICT OF INTEREST IN TERMS OF SECTION 96(2) OF THE CONSTITUTION

15. The applicants cannot point to any conduct or action on my part, which is inconsistent with the duties of my office nor am I exposing myself to any situation involving the risk of a conflict between my official responsibilities and my private interests.

15.1 The power I exercised is power I derive directly from the Constitution. Therefore acting in terms of that power can never be an act which is inconsistent with the duties of my office.

<sup>9</sup> This is contained in the Record in terms of prayer seven ("Record 3") on pages 3 to 10.

<sup>10</sup> This is contained in Record 3 on pages 100 to 102

<sup>11</sup> This is contained in Record 3 page 1

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15.2 The power I exercised in accepting the request from Nxasana I derive directly from national legislation. Therefore acting in terms of that power can never be an act which is inconsistent with the duties of my office.

15.3 There is also no basis to state that I have any conflict of interest in exercising those powers. In fact the applicants have not provided this Honourable Court with any objective facts to show that a conflict of interest exists.

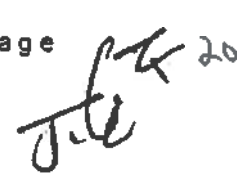
15.4 Therefore section 96(2) of the Constitution does not arise.

15.5 I reiterate that the applicants find no fault with the appointment of Nxasana by me and want to contend that he is still to be regarded as the NDPP. I appointed Nxasana as the NDPP. It was still during the period that I am perceived to be in "*jeopardy of prosecution*". If that appointment remains untainted there is no reason that any other appointment of an NDPP by me would suffer a challenge on that ground.

16. I now turn to deal with such allegations in the affidavits which I am able to respond to.

#### AD FOUNDING AFFIDAVIT OF THE FIRST APPLICANT

#### 17. AD PARAGRAPHS 1 & 2



17.1 I admit the contents of these paragraphs.

17.2 I deny that the facts are both true and correct.

**18. AD PARAGRAPHS 3 – 12**

18.1 I admit the content of these paragraphs.

18.2 I deny that I "purportedly" appointed Abrahams.

18.3 I am also advised that the position of CEO of the National Prosecuting Authority does not exist.

**19. AD PARAGRAPH 13**

19.1 I note the content of this paragraph.

**20. AD PARAGRAPH 14**

20.1 I note the content of this paragraph.

**21. AD PARAGRAPHS 15 – 15.4**

21.1 I admit the content of these paragraphs.

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21.2 With regards to the suspension of Nxasana, I requested reasons as to why he should not be suspended which ultimately resulted in Nxasana instituting proceedings against me in the Gauteng High Court, Pretoria.

**22. AD PARAGRAPH 16**

22.1 I have explained above, the events which led to the conclusion of the settlement agreement.

**23. AD PARAGRAPHS 17 – 17.2**

23.1 I deny the content of these paragraphs.

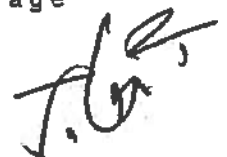
23.2 I aver that Nxasana's vacating of office was in accordance with the empowering provisions contained in section 12(8) of the NPA Act. This provides for a consensual vacating of office of the NDPP, where sufficient reasons exist as was the case in this instance. 16

23.3 The vacating of office of Nxasana in terms of the NPA Act cannot affect the independence of the National Prosecuting Authority.

23.4 I repeat what I have stated above.

**24. AD PARAGRAPHS 17.3 – 17.3.2**

24.1 I deny the content of these paragraphs.





24.2 I aver that:

24.2.1 I am not *'in jeopardy of prosecution'* as alleged by the applicants. The Concise Oxford Dictionary, 9<sup>th</sup> Edition, 1995 defines jeopardy as "*n 1 danger, esp. of severe harm or loss. 2 Law danger resulting from being on trial for a criminal offence.*"

24.2.2 The applicants have not and cannot show that I am in danger as a result from being on trial for any criminal offence. The litigation referred to, which was instituted in 2009, does not place me *"in jeopardy of prosecution."*

24.2.3 The appointment of an NDPP by the President in terms of a constitutionally enshrined power and legislation cannot be inconsistent with the Constitution.

24.2.4 I repeat what I have stated above.

25. AD PARAGRAPHS 18 – 18.2

25.1 I note the content of this paragraph.

25.2 I abide the decision of this Honourable Court in relation to the payment of the R17 357 233.

**26. AD PARAGRAPH 19**

26.1 I deny the content of this paragraph.

26.2 I aver that:

26.2.1 Nxasana requested to vacate his office, which request I accepted in accordance with section 12(8) of the NPA Act.

26.2.2 Therefore a vacancy was created which was filled by Abrahams after the correct procedures were followed.

26.3 I repeat what I have stated above.

**27. AD PARAGRAPHS 20 – 20.2**

27.1 I deny the content of these paragraphs.

27.2 I repeat what I have stated above.

**28. AD PARAGRAPHS 21 – 21.2.2**

28.1 I note the content of these paragraphs.

**29. AD PARAGRAPHS 22 – 22.1**

29.1 I note the content of these paragraphs.

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29.2 I again aver that the vacating of office of Nxasana does not affect the independence of the National Prosecuting Authority.

30. AD PARAGRAPH 23

30.1 I deny the content of this paragraph.

30.2 I aver that:

30.2.1 the removal of Nxasana was in accordance with section 12(8) of the NPA Act.

30.2.2 Mr Selebi was prosecuted and convicted.

30.2.3 Mr Pikoli, through consensual agreement between the parties, vacated his office, after being cleared by the Ginwala Commission.

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31. AD PARAGRAPHS 24 - 26

31.1 I note the content of these paragraphs.

32. AD PARAGRAPH 27

32.1 I admit the content of this paragraph.

32.2 I aver that the instability in 2007 in the office of the NDPP and the National Prosecuting Authority has escalated during the period 2013 to 2015 which were reasons I found compelling to allow Nxasana to vacate office.

**33. AD PARAGRAPHS 28 - 31**

33.1 I deny the content of these paragraphs.

33.2 I am advised further that these allegations are irrelevant to the appointment of Nxasana and Abrahams.

**34. AD PARAGRAPH 32**

34.1 I admit the content of this paragraph.

34.2 I re-emphasise that the applicants seem to see no fault with me having appointed Nxasana as an NDPP.

**35. AD PARAGRAPHS 33 - 41**

35.1 I admit the content of these paragraphs to the extent that it accords with the annexures referred therein and with what I have stated above.

**36. AD PARAGRAPHS 42 – 42.5**

**36.1** I admit the content of these paragraphs to the extent it accords with the settlement agreement.

**36.2** I wish to point out that the settlement agreement also makes reference, in the preface, to some of the reasons which existed and which reasons I deemed sufficient to accept Nxasana's request to vacate his office. I provide them for ease of reference:

**"WHEREAS**

1. On 4 July 2014, the President informed the Applicant (National Director of Public Prosecutions herein after referred to as the NDPP) of his decision to institute an inquiry in terms of section 12 (6) (a)(iv) of the National Prosecuting Authority Act 32 of 1998 (the Act). 10
2. On 30 July 2014, the President gave Notice of Intention to suspend the NDPP in terms of section 12 (6) (a) of the Act.
3. The NDPP brought an urgent application in the North Gauteng High Court to interdict the President from suspending him until the President has provided the NDPP with the requested particularity of the allegations levelled against him, and which allegations were to constitute the subject matter of the inquiry.
4. These proceedings now stand adjourned and the parties subsequently entered into discussions and negotiations in an attempt to resolve the matter. 20
5. The parties recognize that a protracted litigation process will not be in the interests of the office of the National Director of Public Prosecutions, the functioning of the National Prosecuting Authority nor the Republic of South Africa.



6. The parties are also mindful that the public glare brought on by the holding of the inquiry, whilst necessary for transparency in our democracy, has unintended consequences.
7. The parties are fully cognizant of the costs implications for litigating and/or conducting the inquiry which resources may be better applied given the challenges our country faces." (own emphasis)

**37. AD PARAGRAPH 43**

- 37.1 I admit that I appointed Abrahams into the position vacated by Nxasana.

**38. AD PARAGRAPH 44**

- 38.1 I deny that I am disqualified in terms of section 96(2)(b) of the Constitution to exercise my constitutional power of appointment, suspension and removal of the NDPP.

**39. AD PARAGRAPHS 44.1 – 44.8**

- 39.1 I admit the content of these paragraphs to the extent that it accords with the judgments in the *Democratic Alliance v Acting NDPP 2012 (3) SA 486 (SCA)* and *NDPP v Zuma 2009 (2) SA 277 (SCA)*.



**40. AD PARAGRAPHS 44.9 – 44.10**

40.1 I submit that this matter is currently *sub judice*.

**41. AD PARAGRAPHS 45 – 45.2**

41.1 The content of these paragraphs are denied.

41.2 I submit that:

41.2.1 There is a constitutional doctrine that one is innocent until proven guilty. I am neither charged nor am I found to be guilty by any court of law.

41.2.2 To justify these allegations, the applicants state that there is a potential that I may be in jeopardy of prosecution in respect of which there apparently remains a case against me on the merits. This is speculative at best.

41.2.3 The 2009 litigation deals with the review and setting aside of the decision to discontinue the prosecution.

41.2.4 To speculate as to its outcome and then to deprive me of my constitutional rights would be to hold me guilty without a finding of a court of law.

41.2.5 I have provided the detailed approach adopted when sourcing persons for the appointment of the NDPP and I hold that this process provides for transparency and accountability.

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41.2.6 I invite the applicants to furnish evidence that any NDPP having been appointed in accordance with the provisions of the NPA Act and with the constitutional power to perform his or her duty without fear, favour or prejudice, will act contrary to this constitutional duty and will do so purely because I made the appointment to a person who is otherwise fit and proper to hold such office.

42. AD PARAGRAPHS 46 – 47.12.3

42.1 I note the content of these paragraphs.

42.2 I received the letter dated 12 September 2014 from Nxasana and was informed about the recommendations relating to Advocates Jiba, Mrwebi and Mzinyathi.

42.3 I through the Minister referred all these matters relating to these advocates to the NDPP to apprise me whether the facts regarding their continued employment warrants consideration of their suspension. This exercise was conducted by the current NDPP, Abrahams.

42.4 It seemed to me, once I have received all the information that it is prudent to await the outcome of the application by the General Council of the Bar to have these advocates struck from the roll of advocates. The Court would have determined their fitness to hold office. I would clearly be informed by the outcome of those pending applications.

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42.5 I believe my decision not to interfere pending judicial pronouncement on the fitness or otherwise of these advocates, to be rational given the constitutional protection enjoyed by the NPA.

43. AD PARAGRAPH 48

43.1 I note the content of this paragraph.

44. AD PARAGRAPH 49

44.1 I deny that I have failed to act in relation advocate Jiba, Mrwebi and Mzinyathi. I am advised that whether an advocate is fit and proper to be an advocate is a matter eminently within the remit of the courts. No doubt the Deputy National Directors hold that office on the strength that their fitness to be advocates is above reproach. There would be no need to hold an inquiry to probe the same issues of whether the advocates are fit to hold offices as Deputy NDPP's.

44.2 There is also a possibility of conflicting outcomes with the inquiry finding the advocates to be fit to hold office and a court of law holding differently that they are unfit to be advocates. Similarly, the court having found them to be fit to hold office, should not be contradicted by an inquiry finding that they not. This should be avoided.

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**45. AD PARAGRAPH 50**

45.1 I deny that Nxasana's vacating of office is unlawful and unconstitutional.

45.2 I refer to what I have stated above.

**46. AD PARAGRAPHS 51 – 55.3.2**

46.1 I admit the content of these paragraphs to the extent that it accords with the Constitution and the NPA Act.

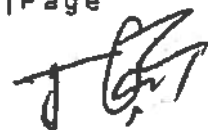
**47. AD PARAGRAPH 56**

47.1 I agree that NDPP cannot vacate office pursuant to a golden handshake.

47.2 I deny that the NPA Act does not provide for a consensual removal from office if all the jurisdictional requirements are met.

47.3 Section 12(8) specifically allows for a consensual vacating of office of the NDPP.

47.4 The applicants clearly understand 'a consensual removal' as indicated in paragraph 55.3 of the founding affidavit. Here the applicants aver that an NDPP can be removed from office 'by agreement'.



**48. AD PARAGRAPHS 57 – 57.2**

48.1 I deny the content of these paragraphs.

48.2 I admit that I established an inquiry into the fitness to hold office of Nxasana which inquiry I terminated prior to any finding being made.

48.3 It was a matter to be determined by the inquiry if the allegations were shown to be correct and the decision was made by the inquiry itself. This did not come it pass when the settlement agreement was concluded.

**49. AD PARAGRAPH 57.3**

49.1 I deny the content of this paragraph.

49.2 I reiterate that the intractable discord that was in the NPA was bleeding the institution and demanded some resolution. Nxasana had indicated unequivocally that he would no longer wanted to continue as an NDPP and the only item for negotiation remained the financial consequence of him vacating office.

**50. AD PARAGRAPHS 57.4 – 57.5**

50.1 I deny the content of these paragraphs.

50.2 I deny that the vacating of office of Nxasana is *ultra vires* and violates the independence of the National Prosecuting Authority. I have already addressed the reasons for allowing Nxasana to vacate office as an NDPP. I already pointed out that I acted in terms of the powers I have as spelt out in section 12(8)(a) of the NPA Act.

50.3 I admit that the financial payment following Nxasana vacating office may be open to judicial review.

51. AD PARAGRAPHS 58 – 58.2

51.1 I deny the content of these paragraphs.

51.2 I repeat what I have stated above.

52. AD PARAGRAPHS 59 – 59.2

52.1 I admit that objective facts relating to a conflict of interest must be placed before this Honourable Court in order to establish whether there is indeed a conflict of interest as provided for in section 96(2)(b) of the Constitution.

52.2 I aver that the applicants have not provided any objective facts to establish a conflict of interest.



52.3 The exercise of a constitutional and legislative power, for the President to remove an NDPP where all the jurisdictional elements are met, is not an 'act' as contemplated by section 96(2)(b) of the Constitution.

52.4 I am advised that there is no need to prove 'actual manipulation'. What the applicants need to show though is an 'actual conflict of interest'. Such an 'actual conflict of interest' has not been shown on the papers. What the applicants appear to do is to anticipate a future event; namely, that the application to review and set aside the decision of the former acting NDPP, will be successful and that I would appoint an NDPP whose decision will be manipulated in my favour. This is particularly remote where the NDPP enjoys statutory independence.

52.5 If the argument by the applicants was good, I would be disentitled to appoint any Judge in this country who may potentially have to preside over my matter if I ever get to be prosecuted. No such relief is being sought and I am advised for correct reasons.

53. AD PARAGRAPHS 60 – 60.3

53.1 I deny the content of these paragraphs.

53.2 The applicants are relying on speculation at best.

53.3 I repeat what I have stated regarding this aspect earlier.

JS

J. G. 20

**54. AD PARAGRAPH 61**

54.1 I note the content of this paragraph.

**55. AD PARAGRAPH 62**

55.1 The settlement agreement has at least two aspects to it. The one relates to Nxasana vacating office as an NDPP and the financial consequences of him vacating the office of an NDPP. The first aspect, I am advised, was lawful having considered the request by Nxasana to vacate office, the reasons behind the request being cogent, compelling and rational; and me allowing him to vacate office.

55.2 Regarding the financial consequences of him vacating office, I repeat the averments contained herein and shall abide the finding of the Court in this regard.

55.3 These two elements to the settlement agreement should not be conflated.

**56. AD PARAGRAPHS 63 - 64**

56.1 I note the content of these paragraphs.

/s/

JG

**57. AD PARAGRAPH 65**

**57.1** I admit that Abrahams is a fit and proper person to hold office as the NDPP.

**58. AD PARAGRAPH 66 – 66.4**

**58.1** I deny the content of these paragraphs.

**58.2** I aver that:

**58.2.1** the vacating of office of Nxasana was in accordance with section 12 of the NPA Act and this necessitated a filling of this vacant post.

**58.2.2** Abrahams was appointed in accordance with section 179(1) of the Constitution.

**58.3** I repeat what I have stated above.

**59. AD PARAGRAPHS 67 - 68**

**59.1** I deny the content of these paragraphs.

**59.2** I aver that the applicants have not laid a basis for any conflict of interest in terms of section 96(2) of the Constitution.

59.3 The applicants admission that there is instability in the National Prosecuting Authority clearly shows an appreciation of the difficulties Nxasana and I faced to try to resolve the instability not only for the National Prosecuting Authority but also to contain its effect on the country at large.

60. AD PARAGRAPHS 69 – 70

60.1 I deny that the applicants are entitled to the relief as set out in the notice of motion.

AD FOUNDING AFFIDAVIT OF THE SECOND APPLICANT

61. AD PARAGRAPHS 1 - 3

61.1 I admit the content of these paragraphs.

61.2 I aver that the deponent has not stated anywhere in the affidavit that the facts contained in her affidavit are to the best of her knowledge both true and correct.

62. AD PARAGRAPH 4

62.1 I note the content of this paragraph.

**63. AD PARAGRAPHS 5 - 9**

63.1 I note the content of these paragraphs.

**64. AD PARAGRAPH 10**

64.1 I deny that I have *'perverted the rules'* or that I *'unlawfully induced'* Nxasana to vacate his office. I invite the applicants to produce evidence of "threat of dismissal" made to Nxasana.

64.2 I am advised that applicants are enjoined by the Rules of Court to furnish this type of evidence in their founding affidavit.

64.3 I refer to what I have stated above.

**65. AD PARAGRAPH 11**

65.1 I note the content of this paragraph.

**66. AD PARAGRAPHS 12 – 13.5**

66.1 I have no knowledge of the content of these paragraphs but have noted the content of the annexures as they stand.

**67. AD PARAGRAPH 14**

67.1 I deny that the second applicant is entitled to the relief in its notice of motion.

**AD SUPPLEMENTARY AFFIDAVIT****68. AD PARAGRAPHS 1 - 4**

68.1 I admit the content of these paragraphs.

68.2 I deny that the facts are both true and correct.

**69. AD PARAGRAPH 5**

69.1 I deny the content of this paragraph.

69.2 I aver that the I have the power to shorten the period referred to in section 12(8)(b), which period was duly shortened. It would not have been in the interest of the workings of the NPA, with the disharmony prevailing between Nxasana and senior management to require the six months' notice. To the contrary, there was every reason to waive that notice period to enable the smooth functioning of the NPA.

10



**70. AD PARAGRAPHS 6 – 6.2**

70.1 I have stated that due to the fact that my engagements with Nxasana were verbal they were not documented or minuted. Therefore no documentary evidence exists for me to produce in terms of the Rule 53 record.

70.2 The NPA Act requires me to deem whether the reasons are sufficient to accept Nxasana's request to vacate his office. These reasons are summarised in the preamble to the settlement agreement.

**71. AD PARAGRAPH 7**

71.1 I note the content of this paragraph.

10

**72. AD PARAGRAPH 8**

72.1 I have provided the record as is required in terms of Rule 53.

72.2 I have stated under oath that the verbal discussions which I had with Mr Nxasana were not documented or minuted and therefore I am unable to produce same.

**73. AD PARAGRAPH 9**

73.1 I deny the content of this paragraph.

**74. AD PARAGRAPHS 10 – 10.6**

74.1 I have no knowledge of the content of these paragraphs.

**75. AD PARAGRAPHS 11 - 12**

75.1 I note the content of these paragraphs.

**76. AD PARAGRAPHS 13 - 14**

76.1 I deny the content of these paragraphs and repeat what I have stated above.

**77. AD PARAGRAPH 15**

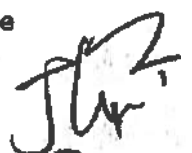
77.1 I deny that the applicants are entitled to the relief as prayed for.

**78. AD PARAGRAPH 16**

78.1 I note the content of this paragraph.

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7/5

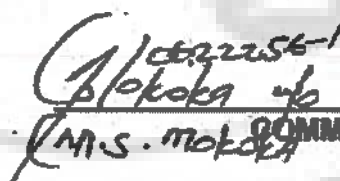


WHEREFORE I pray that this application be dismissed with costs, which costs include the cost of two counsel.

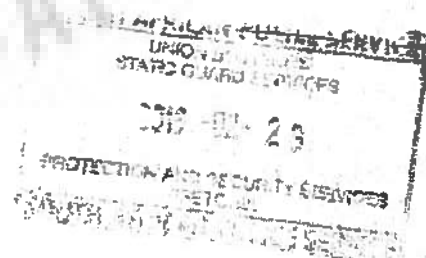


DEPONENT

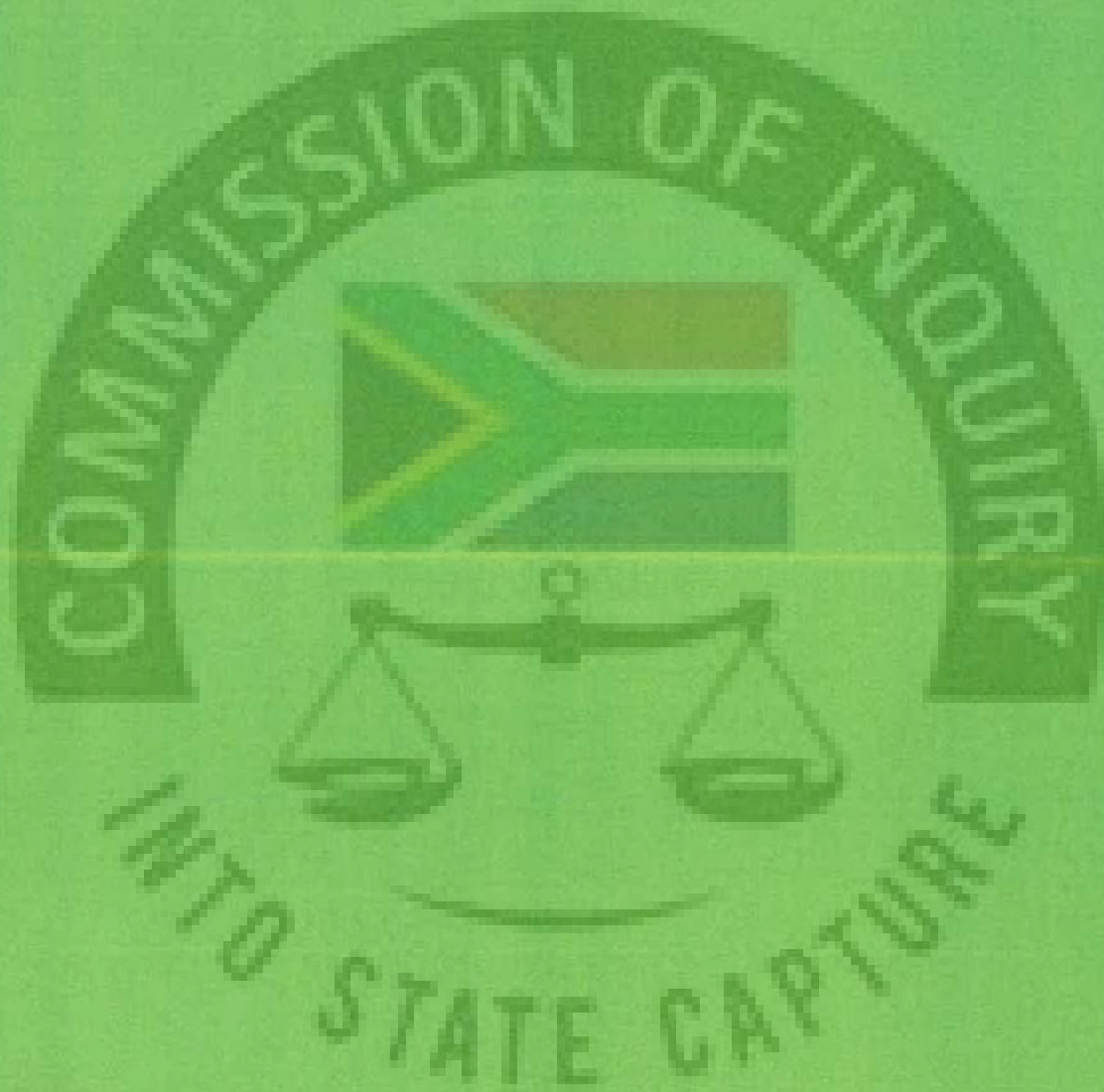
THUS SIGNED AND SWORN to before me at PRETORIA on this the 29 day of February 2016, by the deponent, he having acknowledged that he knows and understands the contents of this affidavit, that he has no objection to taking the prescribed oath and considers same to be binding on his conscience.



COMMISSIONER OF OATHS



EE 4





# **EXHIBIT EE 4**

## **TIMELINE**

**JULY 2014 TO MAY 2015**



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

2<sup>nd</sup> floor, Hillside House  
17 Empire Road,  
Parktown  
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2193

Tel: (010) 214-0651

Email: [inquiries@sastatecapture.org.za](mailto:inquiries@sastatecapture.org.za)

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**INDEX: EXHIBIT EE 4**

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**TIMELINE: JULY 2014 TO MAY 2015**

Item	Date	Event	Pages
1.	4 July 2014	Former President Zuma informed that he had taken a decision to institute an inquiry in terms of s12(6)(a)(iv) of the NPA Act. <i>Affidavit page 11, para 46</i> <i>Annexure "MN 3"</i>	046
2.	30 July 2014	Mr Nxasana received a Notice of Intention to Suspend from the Former President Zuma on full pay pending finalisation of the inquiry and invited to make representations. <i>Affidavit page 11, para 48</i> <i>Annexure "MN 4"</i>	048 to 049
3.	18 July 2014	Mr Nxasana recommended to the Minister of Justice that the Former President pursue disciplinary action against both Advocates Jiba and Mrwebi. <i>Affidavit page 20, para 72</i>	020



Item	Date	Event	Pages
4.	31 July 2014	Constitutional Court Justice Yacoob appointed to chair a fact-finding inquiry to investigate allegations of unethical conduct by senior members of the NPA. <i>Affidavit page 21, para 74 and 75</i>	021
5.	1 August 2014	Mr Nxasana made representations in reply to the notice dated 30 July 2014 <i>Affidavit page 13, para 55</i>	013
6.	8 August 2014	Former President Zuma wrote to Mr Nxasana to justify his refusal to provide particulars of the allegations against him. <i>Affidavit page 13, para 57</i>	013
7.	8 August 2014	Mr Nxasana submitted a founding affidavit in an application to the High Court to compel the Former President to provide him with further particulars pursuant to his intention to hold an Inquiry into his fitness to remain in office. <i>Affidavit page 22, para 80</i>	022
8.	3 November 2014	Mr Nxasana, through his attorneys, informs Mr Hulley of his agreement to a mediation process.	185 to 186
9.	10 December 2014	Mr Nxasana, through his attorneys, informed the Presidency of inter alia his rejection of the settlement proposal, emphasising that it was not his position to resign as NDPP and that the settlement proposal was not initiated by him.	187 to 189
10.	11 December 2014	Mr Nxasana, through his attorneys, informs the Presidency of his estimated pension benefits and leave day accruals to the end of December 2014.	190 to 191
11.	12 December 2014	The Legal Advisor to the Former President responds to the letter of Mr Nxasana dated 10 December 2014 and informs inter alia that the parties are incapable of resolving the matter alone and request to invoke the mediation process.	192
12.	15 January 2015	Mr Nxasana, through his attorneys, writes to the Presidency to inform that he agrees to a proposed independent mediation "and not a confidential one" as proposed.	193 to 194

Item	Date	Event	Pages
13.	23 January 2015	The Legal Advisor to the Former President informs Mr Nxasana, through his attorneys that inter alia Former President Zuma took a decision to proceed with the “Enquiry into Mr Nxasana’s fitness to hold office”.	195
14.	26 January 2015	Mr Nxasana, through his attorneys, requests the Presidency’s Terms of Reference for the inquiry.	196
15.	5 February 2015	Former President Zuma informed Mr Nxasana that Advocate Nazeer Cassim SC (assisted by LG Nkosi-Thomas and SKD Mdladla) to chair the inquiry (“Cassim Inquiry”). <i>Affidavit page 14, para 59</i>	014
16.	9 February 2015	The Terms of Reference for the Cassim Inquiry were published in Government Gazette No. 38453. <i>Affidavit page 14, para 60</i>	014
17.	4 May 2015	Submissions on behalf of Former President Zuma and the Minister were filed in respect of the Cassim Inquiry. <i>Affidavit page 14, para 62</i>	014
18.	May 2015	A settlement agreement is concluded between the Former President, Mr Nxasana and the Minister in terms of which Mr Nxasana agreed to relinquish his position as NDPP. <i>Affidavit page 24, para 83.3</i>  09 May 2015: Signed by Mr Nxasana  14 May 2015: Signed by the Former President and the Minister of Justice and Correctional Services	024  (As per settlement agreement not attached)
19.	10 May 2015	Advocate Nazeer Cassim SC’s mandate to chair the Inquiry is terminated.	

**F. My suspension**

46. By letter dated 4 July 2014, the President informed me that, after careful consideration, he had taken a decision to institute an inquiry in terms of section 12(6)(a)(iv) of the NPA Act. Section 12(6)(a)(iv) provides that the President may provisionally suspend the NDPP from his office, pending an inquiry into his fitness to hold office. A copy of this letter is attached marked Annexure "MN 3."

47. The President advised me that the details regarding the establishment of the inquiry would be communicated to me shortly. The notice did not contain the terms of reference of such an inquiry. Nor did it list the allegations that the inquiry would investigate against me.

48. On 30 July 2014 I received a notice from the President informing me that he was considering suspending me on full pay pending the finalisation of the inquiry into whether I was fit and proper to hold the office of the NDPP. A copy of this notice is attached marked Annexure "MN 4.". The notice reads:

*"The enquiry will examine your fitness to hold the office as National Director of Public Prosecutions having regard to whether:*

- 1. The criminal convictions which you possess for violent conduct;*
- 2. Reported comments in the media are unbecoming of a National Director of Public Prosecutions, divisive and have the effect of bringing the National Prosecuting Authority into disrepute;*
- 3. The lack of disclosure of the facts and circumstances of prosecutions which you faced.*

*Are consonant with the conscientiousness and integrity of an incumbent to the office of the National Director of Public Prosecutions as required by the Act"*



MM 1



4 July 2014

Dear Mr Nxasana

**NOTICE OF INSTITUTION OF ENQUIRY**

I hereby advise you that, after careful consideration of all the matters before me, I have taken a decision to institute an enquiry in terms of Section 12(6)(a)(iv) of the National Prosecuting Authority Act 32 of 1998.

The detail regarding the establishment of the Enquiry will be communicated to you shortly.

Yours faithfully

Mr Jacob G. Zuma  
President, Republic of South Africa

Mr Nxasana  
National Director of Public Prosecutions  
Private Bag X 752  
Pretoria  
0001

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*Handwritten signature*

*Handwritten signature*

*Handwritten signature*

*Handwritten signature*

**F. My suspension**

46. By letter dated 4 July 2014, the President informed me that, after careful consideration, he had taken a decision to institute an inquiry in terms of section 12(6)(a)(iv) of the NPA Act. Section 12(6)(a)(iv) provides that the President may provisionally suspend the NDPP from his office, pending an Inquiry into his fitness to hold office. A copy of this letter is attached marked Annexure "MN 3."

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- 3. The lack of disclosure of the facts and circumstances of prosecutions which you faced.*

*Are consonant with the conscientiousness and integrity of an incumbent to the office of the National Director of Public Prosecutions as required by the Act"*

49. The notice invited me to provide the President with written representations as to why I should not be suspended.

**My rights to a fair hearing**

50. Section 12(6)(a) of the NPA Act empowers the President to suspend me pending an enquiry into my fitness to hold office. Implicit in the statutory power to suspend is the right to a fair hearing before suspension.
51. The requirement of fairness required that I be given a fair hearing or a fair opportunity to be heard on why I should not be suspended. That meant that I should have been given sufficient or adequate time and sufficient or adequate particularity of the allegations against me to make proper representations. It is apparent from the President's letter of 30 July 2014 that I was not given sufficient or adequate essential particulars of the allegations against me.
52. The first bullet point of the President's notice of 30 July referred to the "criminal convictions I possess for violent conduct". The President did not give particulars of the criminal convictions to which this allegation referred.
53. In the second bullet point of the President's notice of 30 July I was told that the inquiry would investigate "reported comments in the media" which the President contended were unbecoming of an NDPP, were divisive, and had the effect of bringing the NPA into disrepute. The President did not give particulars of the comments reported in the media, the dates on which those comments were reported and the media in which they were reported.
54. The third bullet point informed me that the enquiry would consider whether I was fit to hold the office of NDPP in light of my lack of disclosure of facts and circumstances of prosecutions which I had faced. The President did not give particularity of the prosecutions, nor to whom and when I had failed to disclose the relevant prosecutions.



MH 2



30 July 2014

Dear Mr Nassau:

**NOTICE OF INTENTION TO SUSPEND IN TERMS OF SECTION 12(6)(a)  
OF THE NATIONAL PROSECUTING AUTHORITY ACT 32 OF 1998**

I had earlier advised you of my decision to institute an enquiry in terms of Section 12(6)(a)(iv) of the National Prosecuting Authority Act 32 of 1998. The enquiry is in the throes of being established and I am advised that the details of such will be communicated to you in the next few days with a view to it proceeding expeditiously.

You are no doubt aware that the National Prosecuting Authority is an important constitutional institution in the administration of justice and that maintaining public confidence in the institution is of necessity. In consideration of maintaining the integrity of the National Prosecuting Authority and in particular its good administration, I am giving consideration to suspending you on full pay pending the finalization of the enquiry to which I've referred.

The enquiry will examine your fitness to hold the office as National Director of Public Prosecutions having regard to whether:

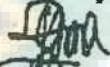
1. the criminal convictions which you possess for violent conduct;
2. reported comments in the media are unbecoming of a National Director of Public Prosecutions, divisive and have the effect of bringing the National Prosecuting Authority into disrepute;

3. the lack of disclosure of the facts and circumstances of prosecutions which you faced

are consonant with the conscientiousness and integrity of an incumbent to the office of National Director of Public Prosecutions as required by the Act.

You are required to furnish me with written representations in this regard by no later than 16h00 on Friday 1 August 2014.

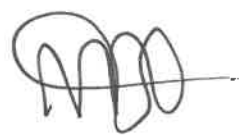
Yours faithfully



Mr Jacob G. Zuma

President of the Republic of South Africa

Mr Nxasana  
National Director of Public Prosecutions  
Private Bag X 752  
Pretoria  
0001

71.2. Advocate Mrwebi had failed to disclose relevant documents that formed part of the record of his decision to withdraw charges against Major-General Mdluli<sup>9</sup>.

71.3. Murphy J also rejected Advocate Mrwebi's contention that the decision to withdraw charges against Major-General Mdluli had been made in consultation with Mr Sibongile Mzinyathi. He also rejected Advocate Mrwebi's contention that investigations into the charges against Major-General Mdluli were defective, and his evidence that Ms Breytenbach had believed that the charges were defective, as improbable. He found his evidence unreliable<sup>10</sup>.

71.4. Murphy J's findings against Advocate Mrwebi were confirmed by the SCA<sup>11</sup>.

72. As early as 18 July 2014 I had recommended to the Minister of Justice that the President pursue disciplinary action against, amongst others, both Advocate Mrwebi and Advocate Jiba.

73. In the memorandum to the Minister of Justice referred to above, it was pointed out that:

73.1. Section 195 (1) of the Constitution requires public administration to be governed by democratic values and principles enshrined in the Constitution. These values require public servants to conduct themselves with a high standard of professional ethics, to provide services impartially, fairly and equitably without bias, and to be accountable,

73.2. The Code of Conduct of the NPA was informed by the values and principles that are enshrined in the Constitution, the NPA Act and the United Nations Guidelines on the Role of Prosecutors. It emphasises the crucial role that

<sup>9</sup> Booyesen v Action National Director of Public Prosecutions, op cit at para [32] and [34]

<sup>10</sup> FUL v NDPP, op cit at paras [58]; [61]; [68]

<sup>11</sup> NDPP v FUL op cit at Fn6, paras [40] - [42]

prosecutors play in the administration of justice. It also stresses the need for prosecutors to be fair, effective and to act without fear, favour or prejudice.

73.3. I requested the President to suspend Advocates Jiba and Mrwebi pending an inquiry into their fitness to hold the offices of Deputy NDPP and Directors of Public Prosecutions. I suggested that the inquiry be chaired by a retired Judge of the High Court.

73.4. I pointed out that there were outstanding criminal proceedings against Advocate Mrwebi for defeating the ends of justice and for intimidation.

74. At the time I wrote that memorandum I was considering appointing a fact-finding inquiry to investigate allegations of unethical conduct by senior members of the NPA, including Advocates Jiba and Mrwebi.

75. On 31 July 2014 Justice Yacoob was appointed to investigate, establish and determine:

75.1. The alleged involvement of the NPA's employees, including senior officials, in the leaking of information to the media and other interested parties;

75.2. The alleged unethical and unprofessional conduct on the part of the NPA's employees.

75.3. Whether any member of the NPA committed an unlawful act.

76. Advocates Jiba and Mrwebi refused to cooperate with Justice Yacoob, despite my express instructions to them to do so.

77. Justice Yacoob completed his report.

78. Justice Yacoob made three recommendations, two of which were relevant to the Cassim inquiry. They were:

78.1 Criminal charges should be instituted or continued against certain members of the NPA;




55. I could speculate, as I did in my representations of 1 August 2014. But to have required me to speculate about the essential particulars of the allegations against me was unfair.

56. Because I did not have the essential particulars of the allegations against me, I could not say whether they were true, or whether they were sufficiently serious to warrant suspension or whether they were such that it is not possible for me to interfere with an investigation into them or with witnesses who made them. These are all considerations relevant to suspension.

57. In his 8 August 2014 letter the President justified his refusal to provide me with particulars of the allegations by saying that:

*"It is my view that the details you require in paragraph 5 of your letter dated 30 July 2014 and repeated under paragraph 2 of your recent letter are matters that will be the subject of the enquiry that I advised I shall be instituting. The information which I have provided is sufficient for the purpose of the representations which you are invited to make. In any event, it appears apparent from your initial response that you were aware of the matters to which I refer.*

*As a result, I do not deem it appropriate to engage on matters that will form the subject matter of the enquiry. My letter invites you to make representations as to why you believe I should not suspend you pending the finalisation of this enquiry and I await your supplementary representations by no later than the extended deadline of 16:00 on Wednesday 13 August 2014".*

58. I submit that it was unfair and unlawful to require me to respond to allegations as lacking in particularity as the allegations in the President's notice of 30 July 2014 were.





55. I could speculate, as I did in my representations of 1 August 2014. But to have required me to speculate about the essential particulars of the allegations against me was unfair.
56. Because I did not have the essential particulars of the allegations against me, I could not say whether they were true, or whether they were sufficiently serious to warrant suspension or whether they were such that it is not possible for me to interfere with an investigation into them or with witnesses who made them. These are all considerations relevant to suspension.
57. In his 8 August 2014 letter the President justified his refusal to provide me with particulars of the allegations by saying that:
- "It is my view that the details you require in paragraph 5 of your letter dated 30 July 2014 and repeated under paragraph 2 of your recent letter are matters that will be the subject of the enquiry that I advised I shall be instituting. The information which I have provided is sufficient for the purpose of the representations which you are invited to make. In any event, it appears apparent from your initial response that you were aware of the matters to which I refer.*
- As a result, I do not deem it appropriate to engage on matters that will form the subject matter of the enquiry. My letter invites you to make representations as to why you believe I should not suspend you pending the finalisation of this enquiry and I await your supplementary representations by no later than the extended deadline of 16:00 on Wednesday 13 August 2014".*
58. I submit that it was unfair and unlawful to require me to respond to allegations as lacking in particularity as the allegations in the President's notice of 30 July 2014 were.

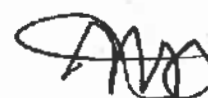




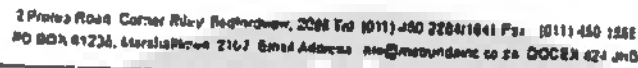
- 78.2. The NPA should appoint a Judicial Commission of Inquiry with powers of compulsion to investigate allegations of impropriety in the NPA.
- 78.3. I handed a copy of Justice Yacoob's recommendations to the Minister of Justice and the President. They did not act on the recommendations.
79. The Mokgoro Commission was later appointed by President Ramaphosa.

**I. The settlement agreement**

80. I had on 8 August 2014 submitted a founding affidavit to the High Court citing the President of the Republic of South Africa as the first Respondent and the Minister of Justice and Correctional Services as the Second Respondent, in an application to compel the President to furnish me with further particulars pursuant to his intention to hold an Inquiry into my fitness to remain in office. I did not proceed with my urgent application since negotiations then commenced between myself and the President with a view to settling the dispute that had arisen regarding my continued service as head of the NPA.
81. There were a number of reasons why I negotiated a settlement agreement with the President.
82. First, I entered into the settlement agreement to settle what I considered to be an intractable, undesirable and ongoing dispute between myself, the President and Minister Radebe.
- 82.1. The source of the dispute was the fact that the President wanted me to vacate the office of the NDPP and I did not want to leave office. A number of spurious and baseless grounds were raised for me to depart office, and I vehemently disagreed with those grounds. To this day I maintain that I am fit and proper to hold the office of NDPP and would serve again. My fitness and propriety was agreed to and recorded by the President and Minister in the settlement agreement, and they did not contend otherwise before Court.



1



Dear Mr Hulley

We refer to the telephonic conversation between the writer hereof and yourself on the 30<sup>th</sup> October 2014.

We confirm that you have raised concerns about the inordinate time the matter is taking and that in your view the delay is attributable to our client.

You are in no doubt aware that the writer has been out of the country attending the International Bar Association (IBA) Conference between the 19<sup>th</sup> and 28<sup>th</sup> October 2014, as a result of which it had been difficult to get an opportunity to consult.

We have however urgently and subsequent to our telephonic conversation consulted with client who has instructed us to respond as follows:-

1. Client is willing to participate in the mediation process as your client has proposed,
2. Although client would have preferred to have the matter resolved by way of enquiry, he is of the view that it is in the best interest of the NPA to have the matter finalised expeditiously by exploring the mediation route.
3. It should be put on record that our client does not in any way waive any rights he has in law by agreeing to explore the mediation process and as such the proposals of the mediator shall not be binding on him unless expressly agreed to in writing.

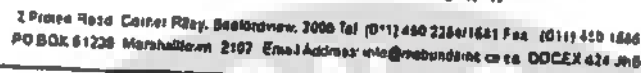
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**REPORT BY THE DIRECTOR**

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As you are aware, our client has lodged an appeal with the Minister of State Security Agency, the Honourable Mr David Mahlobo, MP with respect to the security clearance certificate

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Kindly acknowledge receipt of this letter while we are awaiting your further advises.

FB Mabunda  
Per email: michael@hulleyinc.co.za

[illegible]

10

47

MOL

JKM



ATTORNEYS AT LAW

2 Protea Road, Corner Riley, Bedfordview, 2008 Tel: (011) 450 2284/1841 Fax: (011) 450 1858  
PO BOX 61235, Marshalltown, 2107 Email Address: info@mson187.co.za DCCEN 424 JH-B

THE PRESIDENCY  
REPUBLIC OF SOUTH AFRICA  
PRETORIA

10<sup>th</sup> DECEMBER 2014

ATTENTION: BONISIWE MOKEHE  
Email: bonisiwe@presidency.gov.za

RE: NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS //  
PRESIDENT OF REPUBLIC OF SOUTH AFRICA

1. We refer to the above matter and particularly to the meeting we held on the 08<sup>th</sup> instant at Mahlabandleni whereon it was discussed, advised and agreed as follows:

1.1 Following the settlement proposal that you presented to us, we requested you to furnish us with the NDPP's total unexpired term package in line with the annexure to the presentation.

1.2 You requested the NDPP to furnish you with information regarding:

1.2.1 Leave balances; and

1.2.2 Pension benefits (5.1.2 (8) cc (11) of the NPA Act 32 of 1998 (NPA Act);

1.3. We will furnish you with the above information by no later than the close of business on Thursday the 11<sup>th</sup> December 2014.

2. Following our discussions of the 08<sup>th</sup> instant and the subsequent instructions from client regarding the proposed settlement, we would like to place the following on record:

2.1 We are of the firm view that the prescripts which you sought to rely on pertaining to settlement are not applicable in the present case for the following reasons:

Director: *Phyllis Bantani Mkhondo: B Proc (UDW) LLB (Wits), LLJ (Labour Law) UNW, Dip. Advocat. Secing (RAU), Dip. in Criminal Justice and Forensic Auditing (RAU), Certificate in Sports Law (UCT), Certificate in Admin & Corp. Law (UCT).*

Assisted by: *David Leonard Volpin: B Proc (RAU), LLJ (International Law) (UJ), BSc. Pol. Sci. & Management LLB (UNW), Tshabo Mphahlele: LLB (UJ), Mphahlele Charles Mkhondo: LLB (UC), Judith Luthuli: LLB (WITS), Compliance Management (RAU), Mphahlele Mphahle: LLB (UJ).*

Reg No. 2001400238/21 - VAT Registration No. 4280195289 - Practice Number 8246

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2 Protea Road, Corner Riley, Bedfordview, 2008 Tel: (011) 450 2284/1041 Fax: (011) 450 1988  
PO BOX 61738, Marshalltown, 2107 Email Address: info@mabundela.co.za DOCEX 424 JHS

2.1.1 The provisions of the NPA Act which you seek to rely upon deal with a scenario where the NDPP is removed from office in terms of Section 12 (6) (a).

3. The procedure thereof is succinctly spelt out in Section 12 subsections 6,7,8 and 9 of and the NPA Act.

We would consequently like to draw the following to your attention:

3.1 That it has never been the NDPP's intention to resign from his position since he considers himself to be a fit and proper person to hold this position.

4. The proposed settlement was triggered by the discussions which the NDPP had with the President following the latter's announcement of his decision to hold an enquiry into the NDPP's fitness to hold office and the possible suspension pending the enquiry.

6. Our instructions further are that the meeting between the NDPP and the President only took place after numerous attempts by the NDPP to seek audience with the President without success.

8. It must be remembered that the only time the President agreed to meet the NDPP was after the latter had lodged a court application. *Inter alia*, interdicting the President from suspending the NDPP before the President provided further and sufficient particularity to enable the NDPP to respond or show cause why he should not be suspended.

7. We are advised that during the discussions the NDPP had with the President, the NDPP made it very clear that he will only consider stepping down from office if he is fully compensated for the remainder of his entire contract as head of the National Prosecuting Authority.

8. We reiterate that there is no factual or legal basis for our client to step down from his position.

9. It is our considered view, in light of the above that the Provisions of the NPA Act read with the Provisions of the Public Service Act, which you have alluded to, do not apply to this proposed settlement.

Director: Priscilla Shumway (Bachelors B Proc (NDP) LLB (Wits), LL.M (Labour Law) UNISA) Dip. Advanced Banking (RAU), Dip in Criminal Justice and Forensic Auditing (RAU), Certificate in Sports Law (UCT), Certificate in Admin & Const Law (UCT).

Assisted by: Donald Leonard (Bachelors B Proc (RAU), LL.M (International Law) (UJ), Shirley Feldman (Bachelors LLB (RAU/EN), Bachelors (South Africa) LLB (UJ), Bachelors (South Africa) LLB (UJ), Judith Lindine (LLB (WITS), (Constitution Management (UJ); Masters (Wits) LLB (UJ).

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JK



2 Protea Road, Corner Riley, Bedfordview, 2008 Tel: (011) 460 2354/1641 Fax: (011) 460 1694  
PO BOX 81238, Marshalltown, 2107 Email Address: info@nabundantinc.co.za DOC# 424 JHB

- 10

Per: P.B MABUNDA

Reg. No. 2001/030238/21 - VAT Registration No. 420078324 - France Number 6048

$\begin{array}{c} \uparrow \\ S \\ \text{mor} \end{array} \quad \begin{array}{c} | \\ M \\ \text{Sh} \end{array}$





2 Protea Road, Corner Riley, Badlionview, 2000 Tel: (011) 450 2284/1541 Fax: (011) 450 1888  
PO BOX 81238, Marshalltown, 2107 Email Address: info@matunda.co.za DOCBX 474 JH

11<sup>TH</sup> DECEMBER 2014

RE: NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS //  
PRESIDENT OF REPUBLIC OF SOUTH AFRICA

The above matter refers.

Attached hereto find copies of the following documents for your attention:

1. copy of the NDPP's **estimated pension benefits, before tax, as at the end of December 2014,**
2. **estimated amount of leave days in terms of the NDPP's Conditions of employment, i.e four (4) leave days remaining before the end of 2014.**

Trussing that you will find the above in order.

Yours faithfully  
Mabunda Incorporated

Per: P. B. MAGUNDA

**Director :** Prisoner Survey; Abandon: 8 Proc (OWJ), LLT (Wife), LLT (Labour Law) (LWY) Dip. Advanced Banking (RAU), Dip in Criminal Justice and Forensic Accounting (RAU) Certificate in Sp. Cr. Law (UCT), Certificate in Admin & Const Law (UCT)

Analized by: Donald Leonard Wilson, D Proc (RAUL LLM) (International Law) (UJ), Shirley Fehrleite Harnsmead, LL B (LAWYER),  
Tobias Innocentio Molitor, LL B (UJ), Marlene Marie Gilling, LL B (UJ), Judith Lindeke Harns, LL B (WITB),  
(Company Management) (UJ), Alexus Napier, LL B (UJ).

Reg No 2001009238/21 - VAT Registration No 4260193269 - Practice Number B448

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08:44:40 Thu Dec 11, 2014

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PERSONAL STEP 4.08.11(14) SERV CONDITIONS/ADVERTISE: NAT FACED CORRESP AUTH ENQUIRY LEAVE CREDITS 2014-12-11 08:44:34.3 C80506

PERSONAL NO: 26896102 1 MRO NIELSEN HAS DIRECT WORK CONTRACT END DATE: 20230830

QUALIFYING DATE: 20131001

APPOINTMENT DATE: 20131001

LEAVE GROUP: 0005 CONTRACT WORKERS (WITH OWN CONTRACTS)

LEAVE CATEGORY	MARK	CYCLE DATE	CREDITS	DAYS	CODE	DESCRIPTION
VACATION CURRENT:	-	2014	4.68	28	2020	CONTRACT WORKERS: APPOINTED
VACATION PREV:	-	2013	0.00	27	2020	CONTRACT WORKERS: APPOINTED
SICK FULL:	-	2013	27.00	36	2021	SICK LEAVE: CONTRACT WORKERS

PLEASE TO DISPLAY LEAVE CREDITS ON VARIOUS CYCLES

CAPPED LEAVE CREDIT: 0.00 CAPPED CREDIT ADDED: N

LEAVE LAST UPDATED: 20140101 CAPPED CREDIT ADD DATE: N

WORKDAY INDICATOR: Y AUDIT DATE: 20140701

LEAVE AMENDMENTS BLOCKED: N DESIGNATION INDICATOR: N

VACATION PENALTY IN FUTURE CYCLE: 0.00

SICK PENALTY IN FUTURE CYCLE: 0.00

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R34146.47

Before tax.

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THE PRESIDENCY  
REPUBLIC OF SOUTH AFRICA  
Private Bag X1000, Pretoria, 0001

Shirley Nemutandani  
Mabunda Incorporated  
2 Protea Road, Corner Riley  
Bedfordview  
2008

Per email: shirley@mabundainc.co.za

12 December 2014

Dear Sirs,

**NDPP / PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**

I refer to your correspondence dated 10 December 2014 addressed to The Presidency and respond thereto as follows:

1. It is not my intention to traverse each and every allegation or averment contained in your correspondence notwithstanding certain glaring inaccuracies and misstatements of fact. I reserve the right to do so in the event that it becomes either necessary or appropriate.

2. Whilst any negotiated settlement pertaining to your clients' employment as NDPP ought properly to be had with the Minister of Justice and Correctional Services, the President assumed this role mindful as he was of certain reservations which had been expressed regarding the Minister. Whilst not acknowledging these to be correct, the President as Head of Government interacted with your client. Notwithstanding such intervention, the President is not at liberty to depart from accepted prescripts which regulate government conduct.

3. What now appears apparent is that the parties are incapable of resolving the matter alone and I must therefore revert to the initial suggestion of making use of the services of an independent mediator in order to find a settlement to the matter.

Accordingly, I request that you indicate by no later than Thursday 18 December 2014 your intention to embark on an independent and confidential mediation process regarding your client's tenure as NDPP.

Yours Sincerely,

Adv. Bonisiwe Makhene  
Legal Advisor to the President

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2 Pindar Road, Corner Riley, Bedfordview, 2008 Tel: (011) 450 2254/1641 Fax: (011) 450 1658  
PO BOX 61234, Marikissa, 2107 Email Address: info@makhehene.co.za DOCEX 424 JMS

**THE PRESIDENCY  
REPUBLIC OF SOUTH AFRICA  
PRETORIA**

15<sup>TH</sup> JANUARY 2015

**ATTENTION: BONISIWE MAKHENE**  
Email: bonisiwe@presidency.gov.za

**RE: NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS//  
PRESIDENT OF REPUBLIC OF SOUTH AFRICA**

1. We acknowledge receipt of your letter dated the 09<sup>th</sup> December 2014 and received by our office on the 09<sup>th</sup> January 2015.
2. We place on record that we have been liaising and corresponding with Mr Michael Hulley before you were introduced to us at the legal advisor to the President.
3. At all material times Mr Hulley has always represented to us, which we accept that he was the legal representative of the President. It was at his instance and request that the formal engagement which bears reference was initiated.
4. We are noting the tone of your letter, which is somewhat unsavoury and unreconciliatory. We would like to bring to your attention that our communication to Mr Hulley dated the 03<sup>rd</sup> November 2014 is still of relevance in this case and equally remains on record. We enclose herewith a copy of the said letter received and read by Mr Hulley for the ease of your reference.
5. You will note from the said letter that our client had always been and still remains amenable to the proposed mediation. It is however apposite that you attend to the proposed terms of reference for the mediation, for consideration and acceptance by our client. In this regard you are specifically referred to paragraphs 1 and 3 respectively. The reminder of the letter in particular paragraph 2 thereof remains our client's position.

Director: Priddy@Makhehene.co.za B Proc (UCW) LLB (Wits) LLM (Labour Law) (Wits) D. Sc. Advanced Banking (RAU) Dip in Criminal Justice and Forensic Accounting (RAU) Certificate in Sports Law (UCT) Certificate in Admin & Criminal Law (UCT)

Assisted by: Oswald Leonard Viljoen B Proc (RAU) LLM International Law (Wits) Sherry Pulubala Hemuduodani LLB (Wits) B Proc (RAU) LLB (Wits) Makhehene Charles Muthwazi LLB (UK) Judicial Officer (Wits) LLB (Wits) (Criminal Law) (Wits) Makhehene Charles Muthwazi LLB (UK)


Reg No 25012/2003/34 VAT Reg number No. 426315 1299 - Postal Address: 2008

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6. We must record that our client is amenable to a proposed independent mediation and not a confidential one you seem to be proposing.
7. We further wish to record that our client has at no stage initiated the discussions regarding settlement proposal.
8. In terms of paragraph 2 of your letter, you seem to be creating an impression that the Minister and not the President should have been the one liaising with our client regarding the issue in question. We venture not to express an opinion in this regard. We are equally unaware of any formal meeting between the Minister and our client.
9. Trusting that you will find the above in order

Yours faithfully  
Mabunga Incorporated  
  
Per: F. S. NEMDANDANI

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Reg. No. 2014/0423421 • VAT Reg. number (E): 1201163760 - Product Number 5044

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THE PRESIDENCY  
REPUBLIC OF SOUTH AFRICA  
Private Bag X1000, Pretoria, 0001

Ms Nemutandeni  
Mabunda Incorporated  
2 Protea Road, Corner Riley  
BERDFORDVIEW  
2008

Per email: shirley@mabunda.co.za

23 January 2015

Dear Madam

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS/PRESIDENT OF THE  
REPUBLIC OF SOUTH AFRICA**

I refer to your recent correspondence in respect of this matter and reserve our rights to deal with certain aspects contained therein.

It appears apparent that insufficient progress has been made in respect of resolving your client's current status as National Director of Public Prosecutions.

I must accordingly advise that after consideration of the matter, President Zuma has taken a decision to proceed with the Enquiry into Mr Nxasana's fitness to hold office.

The matter will now proceed accordingly.

Yours Sincerely,

Adv. Bonisiwe Makhene

Legal Advisor to the President

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THE PRESIDENCY  
REPUBLIC OF SOUTH AFRICA  
PRETORIA

**26<sup>th</sup> JANUARY 2015**

RE: NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS//  
PRESIDENT OF REPUBLIC OF SOUTH AFRICA

1. We refer to your letter dated 23 January 2015.
2. We note the President's intention to proceed with the inquiry into our client's fitness to hold office.
3. Kindly advise us when we can expect to receive the Terms of Reference for the inquiry.
4. We urgently await to hear from you.

Yours faithfully,  
Mabunda Incorporated

Per: IF S NEMUTANDANI

Course: Principles of Law : PCC (UCW) ILS (WIS) LLM (Legal Law) (WIS) Do: Advanced Banking (RAU) Do: Corporate Justice and Forensic Auditing (RAU) Certificate in Sports Law (UCI) Certificate in Admin & Cont. Law (UCI)

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**G. The Cassim Enquiry regarding the fitness of the NDPP to hold office:**

**Terms of Reference**

59. By letter dated 5 February 2015 the President informed me that he had appointed Nazeer Cassim SC (Cassim) (assisted by LG Nkosi-Thomas and SKD Mdladla) to chair an inquiry.

60. The inquiry's Terms of Reference were published in Government Gazette No. 38453 on 9 February 2015.

61. The TOR directed the Chairperson to inquire into whether it was fit or proper for me to hold the office of the NDPP in light of the following:

61.1.1. My two previous separate convictions on charges of assault;

61.1.2. The complaints of professional misconduct laid against me with the KwaZulu - Natal Law Society;

61.1.3. My having faced criminal charges for acts of violence;

61.1.4. My arrest and detention on criminal charges;

61.1.5. Media statements either issued by me or on my instruction that undermined or brought the office of the NDPP or the NPA into disrepute;

61.1.6. Any other matter as might be relevant to the abovementioned issues and my fitness and propriety to hold the office of the NDPP as contemplated in section 9 (1)(b) of the NPA Act.

**The President's complaints**

62. Submissions on behalf of the President and the Minister were filed on Monday 4 May 2015 at 18h30.

63. His complaints in the submissions were different to the complaints in the Terms of Reference.

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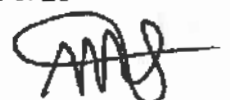
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**The President's complaints**

62. Submissions on behalf of the President and the Minister were filed on Monday 4 May 2015 at 18h30.
63. His complaints in the submissions were different to the complaints in the Terms of Reference.

83.2. There was also considerable media attention paid to the dispute and speculation on the issues at stake regarding the integrity and functionality of the NPA.

83.3. During May 2015, the President, the Minister and I concluded a settlement agreement in terms of which I agreed to relinquish my position as NDPP. I received a settlement amount equivalent to what I would have received as a salary had I served my full term as NDPP. In that agreement, the President acknowledged that I was a fit and proper person to hold office as the NDPP.

84. I then vacated my office as the National Director of Public Prosecutions, but not in terms of Section 12(6) of the NPA Act.

**J. My refusal to vacate my Office in terms of section 12(6)**

85. At all material times, the President, the Minister and the President's legal representative Mr Hulley, were aware that I did not intend to, and in fact did not, request the President to allow me to vacate office in terms of section 12(6), me having informed them accordingly.

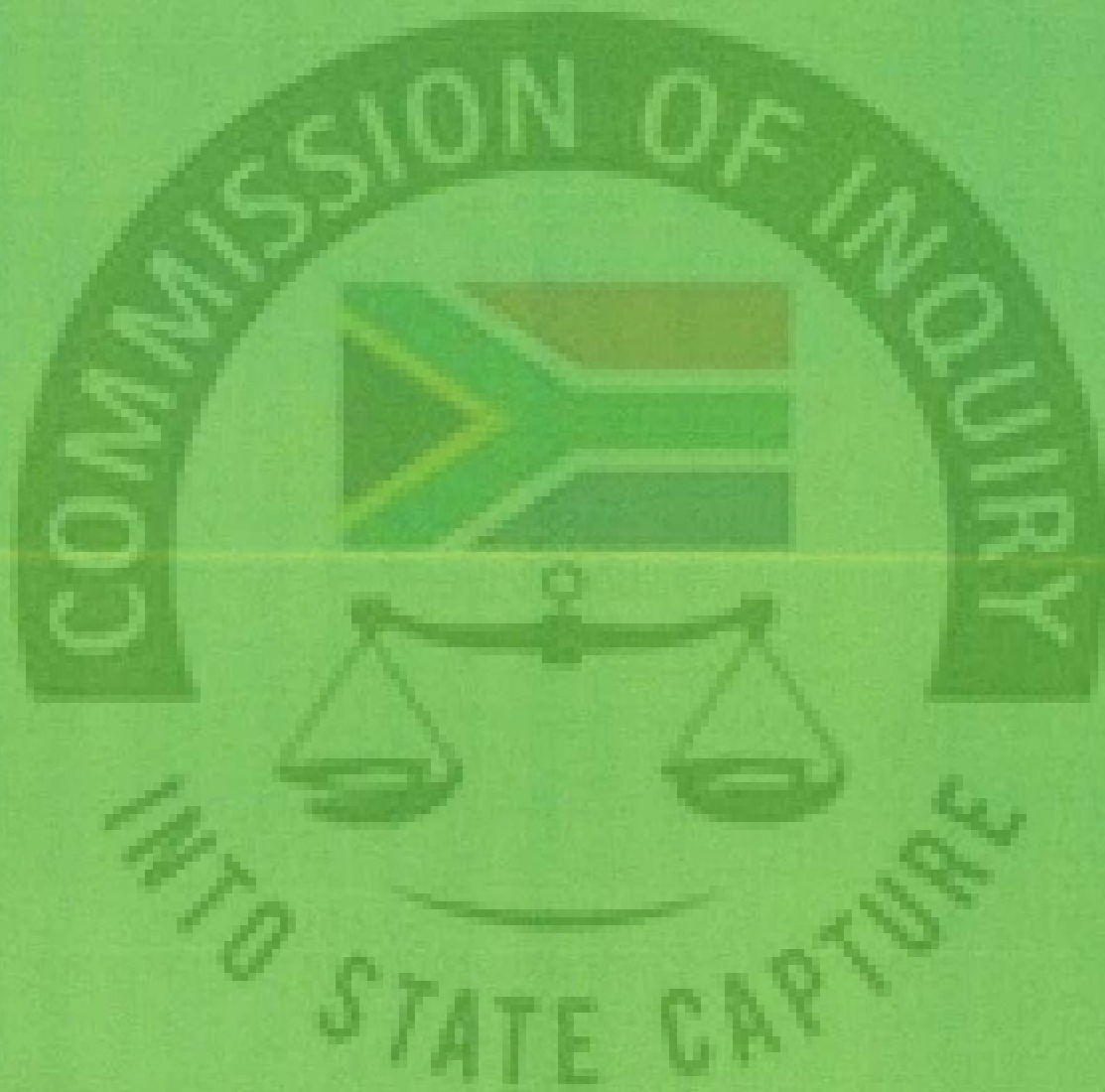
86. In this regard, I met with Mr Hulley after the conclusion of the settlement agreement and shortly after I was served with the papers in the application issued out of the Court under case number 62470/15 (the Corruption Watch/ Freedom Under Law application).

86.1. On 22 October 2015, I met with the Minister of State Security, David Mahlobo at the Beverley Hills Hotel in Durban, at his request. I drove him to Ebandla Hotel in Ballito where he was scheduled to speak at the opening of the "Integrity Leadership Summit", hosted by the Office of the then Premier of KwaZulu Natal, Mr Senzo Mchunu.

86.2. I was acquainted with Minister Mahlobo from when we had both attended university at the same time.



EE 5







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# **EXHIBIT EE 5**

## **TRANSCRIPTIONS**

**DAY 111**

**12 JUNE 2019**



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

2<sup>nd</sup> floor, Hillside House  
17 Empire Road,  
Parktown  
Johannesburg  
2193  
Tel: (010) 214-0651  
Email: [inquiries@sastatecapture.org.za](mailto:inquiries@sastatecapture.org.za)  
Website: [www.sastatecapture.org.za](http://www.sastatecapture.org.za)

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**INDEX: EXHIBIT EE 5**

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Description	Pages
Transcriptions of Day 111, 12 June 2019	197 to 332

COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

PARKTOWN, JOHANNESBURG

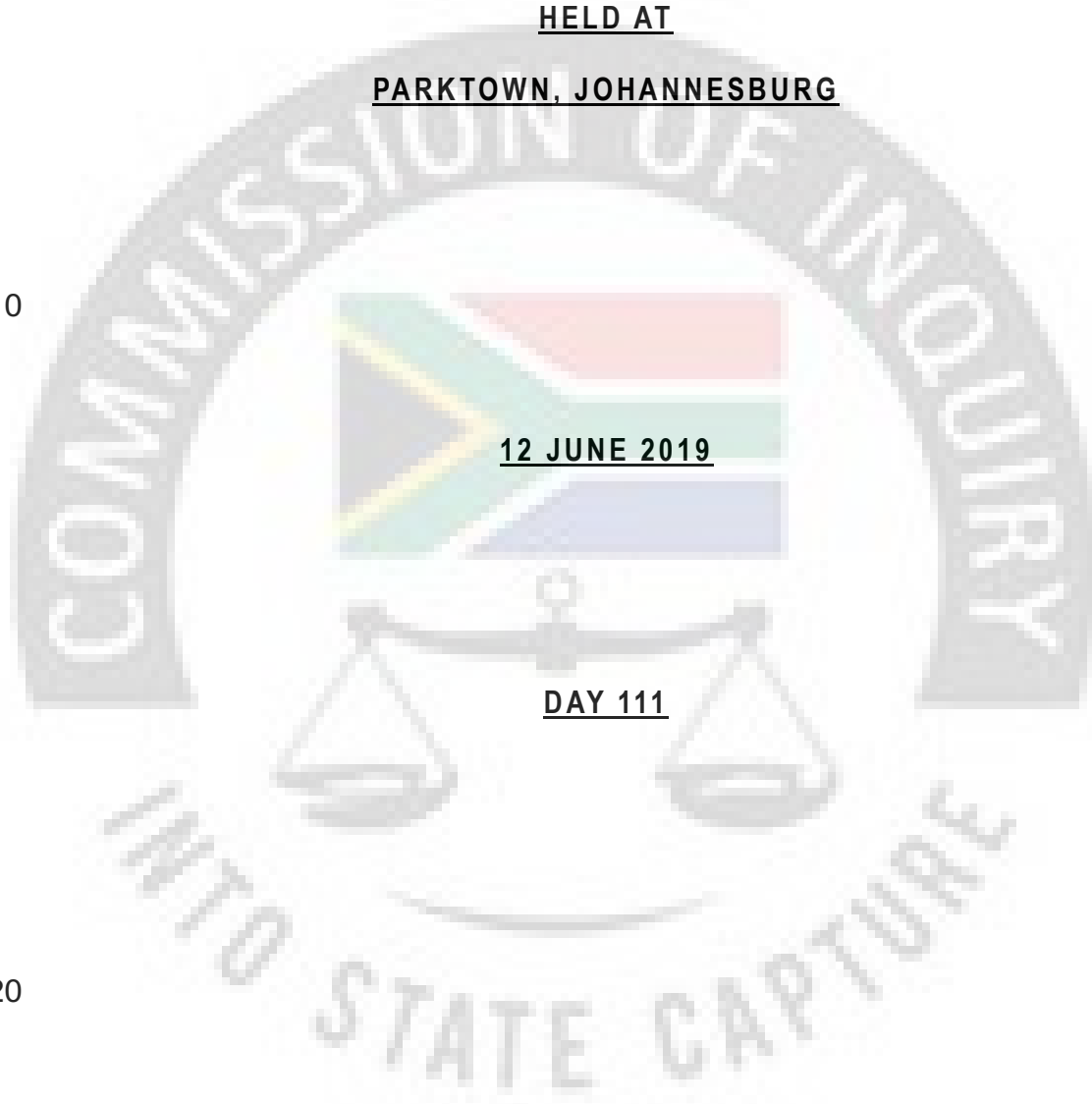
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12 JUNE 2019

DAY 111

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**PROCEEDINGS ON 12 JUNE 2019**

**ADV PAUL JOSEPH PRETORIUS SC:** Part of the work streams that have been presenting evidence before you. Tomorrow the aviation work stream will begin its work for the next few weeks. We obtained the statement finally in its signed form, attested form last night and at – as at yesterday it was not clear who would be implicated but Rule 3.3 Notices will be issued at the conclusion of the evidence. Can I hand up Exhibit EE1?

**CHAIRPERSON:** Well yes you may. Normally Rule 3.3 Notices are  
10 issued before if you propose to have them issued after we should explain to the public why?

**ADV PAUL JOSEPH PRETORIUS SC:** Yes. Chair the direction from the Chair was that a series of witnesses be called. Those witnesses fall outside the normal planning of the legal team and the investigation team. It was only late last week that it was planned therefore for Mr Nxasana in the absence of other witnesses who were unavailable to come today. The time was set aside for consultation on Monday the investigators having done quite some preparation over the weekend. Mr Nxasana was not available on Monday and therefore had to come  
20 from Durban to Johannesburg today – yesterday when his statement and evidence was prepared in consultation with the legal team myself. It was not clear until yesterday evening when the statement was finally attested to who would be implicated and to what extent. It was not possible to obtain from the various judgments and court records read over the weekend with any certainty who should be implicated and for

that reason and because this witness falls into a different category from those that are planned from the outset we would ask your leave to issue 3.3's after the conclusion of the evidence today?

**CHAIRPERSON:** Well does his evidence not really relate to matters that have already been dealt with in courts and judgment - judgments of the high court and the constitutional court and...

**ADV PAUL JOSEPH PRETORIUS SC:** Not in...

**CHAIRPERSON:** And where those who may be implicated have been aware of those – of what he says about his tenure at the NPA and they  
10 have had a chance to respond to those. Does it cover anything new?

**ADV PAUL JOSEPH PRETORIUS SC:** Yes it does.

**CHAIRPERSON:** In his statement?

**ADV PAUL JOSEPH PRETORIUS SC:** The statement does Chair. It – the focus is not entirely on the litigation that has gone through the courts concerning the circumstances under which the contract of Mr Nxasana came to an end and what the courts have said about it and there are various other applications that have come before court including the constitutional court in relation to the termination of their services. The evidence of Mr Nxasana deals with a much broader set  
20 of issues and it was only on full examination of those issues that the extent and the basis upon which implicated persons are indeed implicated can properly be dealt with. So there are different issues. The various court cases are a matter of record and I will in due course ask leave to place on record publicly excerpts from the judgment of the constitutional court in relation to the matter that finally came before

court where the constitutional court's attitude to the independence of the NPA and matters related to the independence are set out. But apart from that those particular issues that led to that litigation in the courts are not central to this statement. He deals with other matters in addition.

**CHAIRPERSON:** Well as you say he was among a number of witnesses that I said should be called. Other witnesses were witnesses who have been implicated by certain witnesses and other witnesses were not necessarily implicated but would need to come before the commission  
10 to give their version which could corroborate or not corroborate previous witnesses and – and he – he falls under Law Enforcement but he – I had considered that he – his evidence – he needs to give evidence. But I conceded that what was important relates to in regard to his evidence – relate to his tenure at the NPA. Certain matters which have been in the public domain as far as I am concerned those are the matters I had in mind and particularly how he left the NPA. Now that has been dealt with extensively in affidavits that were filed by him and by the former president and other persons in the high court and in the matter that culminated in the constitutional court. I think it  
20 was brought by Corruption Watch and maybe other parties. But there may be other matters that the legal team you know had you know also thought of once he was to be called. So I would like the full set of affidavits in the Corruption Watch matter to be placed before me as soon as possible to give me a full picture of the situation. So obviously you can – you can cover whatever the legal team or you think should be



– should be covered in relation to his evidence but in particular I was interested in his tenure at the NPA. Some of the matters that may be important for the commission in the light of his terms of reference there have been all kinds of allegations and evidence about the NPA and then of course the circumstances under which he vacated office.

**ADV PAUL JOSEPH PRETORIUS SC:** Yes.

**CHAIRPERSON:** So I thought I would just make clear what I had in mind but from the legal team's point of view you – you are at large to cover much more than that if you believe he has got more in – more  
10 evidence that relates to matters falling under our terms of reference.

**ADV PAUL JOSEPH PRETORIUS SC:** The investigators have done an enormous amount of work.

**CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** In the time.

**CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** From the day in which it was decided that Mr Nxasana should be requested to give evidence.

**CHAIRPERSON:** Yes, yes.

**ADV PAUL JOSEPH PRETORIUS SC:** The documents to which you  
20 have referred particularly the court documents.

**CHAIRPERSON:** Hm.

**ADV PAUL JOSEPH PRETORIUS SC:** Have been collated.

**CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** We do have them here.

**CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** And are able to put them before you.

**CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** It was however necessary to leave the public domain to one side and concentrate on the allegations relevant both in the court applications and other matters relevant as the evidence of the commission has been put before you.

**CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** In order to get the detail.

10 **CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** Of exactly what allegations he makes.

**CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** And who should be

**CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** Served with notices in regard to the detail that you will hear.

**CHAIRPERSON:** Yes. No that is fine. Thank you.

20 **ADV PAUL JOSEPH PRETORIUS SC:** Of particular concern to the legal team are the questions as to the independence and effectiveness of the National Prosecuting Authority and the question will be raised as to what extent if any there has been political interference in senior appointments in the National Prosecuting Authority and the effect this has had on the efficacy of the organisation and this is a matter addressed pertinently by Justice Madlanga in the constitutional court

judgment and I will ask leave to put excerpts on record in due course at the conclusion of the evidence.

**CHAIRPERSON**: Yes well I think you should put in the whole judgment and draw particular attention to particular

**ADV PAUL JOSEPH PRETORIUS SC**: Yes.

**CHAIRPERSON**: Parts of the judgment that you think are particularly important.

**ADV PAUL JOSEPH PRETORIUS SC**: That judgment is in your bundle.

**CHAIRPERSON**: Ye.

10 **ADV PAUL JOSEPH PRETORIUS SC**: After the divider at page 85 and following.

**CHAIRPERSON**: Okay. No that is fine.

**ADV PAUL JOSEPH PRETORIUS SC**: It is a very instructive judgment.

**CHAIRPERSON**: Ja.

**ADV PAUL JOSEPH PRETORIUS SC**: In regard to the issues that the commission is dealing with.

20 **CHAIRPERSON**: Yes. No that is fine. Indeed of course the main point of Mr Nxasana's evidence has to be about the independence of the NPA and whether there has been interference with it and by whom and in what circumstances would that interference be justified? Is it permissible, is it not permissible? So more than anything that is – that is the most important thing everything else is about that. You know all the evidence has to revolve around that whether...

**ADV PAUL JOSEPH PRETORIUS SC**: Indeed.

**CHAIRPERSON**: There was interference and if so what form it took and

under what circumstances.

**ADV PAUL JOSEPH PRETORIUS SC:** Yes. And not only Mr Nxasana but other witnesses will deal with...

**CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** Those questions.

**CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** And their answers.

**CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** In due course.

10 **CHAIRPERSON:** Ja. No thank you.

**ADV PAUL JOSEPH PRETORIUS SC:** Chair bundle EE1 is out of sequence because he bundles for the aviation tranche of evidence have already been prepared.

**CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** As bundle DD.

**CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** So this is a little out of sequence but I think the circumstances left us with no choice.

**CHAIRPERSON:** Ja. Yes okay.

20 **ADV PAUL JOSEPH PRETORIUS SC:** May the witness be sworn?

**CHAIRPERSON:** Thank you.

**ADV PAUL JOSEPH PRETORIUS SC:** Or may he...

**CHAIRPERSON:** Please swear him in.

**ADV PAUL JOSEPH PRETORIUS SC:** Give the affirmation?

**CHAIRPERSON:** Or administer the affirmation.

**REGISTRAR:** Please state your full names for the record?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Mxolisi Sandile Oliver Nxasana.

**REGISTRAR:** Do you have any objection with making the prescribed affirmation?

**ADV MXOLISI SANDILE OLIVER NXASANA:** No I have none.

**REGISTRAR:** Do you solemnly affirm that the evidence you will give will be the truth, the whole truth and nothing but the truth, if so please raise your right hand and say, I truly affirm?

10 **ADV MXOLISI SANDILE OLIVER NXASANA:** I truly affirm.

**REGISTRAR:** Thank you.

**CHAIRPERSON:** Thank you.

**ADV PAUL JOSEPH PRETORIUS SC:** Mr Nxasana would you bring the microphone closer to you please? You have in front of you a bundle marked EE1, do you see that? It is Exhibit EE1?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes I have.

**ADV PAUL JOSEPH PRETORIUS SC:** Would you go to page 27 please?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes I am on page 27.

20 **ADV PAUL JOSEPH PRETORIUS SC:** Whose signature is that at the bottom of page 27?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes I confirm that.

**ADV PAUL JOSEPH PRETORIUS SC:** Is that your signature?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes it is my signature.

**ADV PAUL JOSEPH PRETORIUS SC:** Did you attest to this affidavit

last night?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes I did.

**ADV PAUL JOSEPH PRETORIUS SC:** And the statement from page 1 to 28 are you satisfied that that correctly reflects the contents of the evidence that you are going to give and wish to give?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes Chair I do confirm that this is my statement.

**ADV PAUL JOSEPH PRETORIUS SC:** And subject to any typographical errors or other errors we may come across of which we do not yet know  
10 the contents are true and correct?

**ADV MXOLISI SANDILE OLIVER NXASANA:** The contents are true and correct I confirm that.

**CHAIRPERSON:** Mr Pretorius before you proceed I notice that the witness did an affirmation now but the statement is – I noticed.

**ADV PAUL JOSEPH PRETORIUS SC:** Sorry Chair.

**CHAIRPERSON:** I noticed that the witness – the witness affirmed a few minutes ago but the affidavit is – is an affidavit and it is under oath. Is everything in order with that?

**ADV PAUL JOSEPH PRETORIUS SC:** I notice that now Chair. This  
20 morning I asked the witness Mr Nxasana which he would prefer – which course of action he would like to take today I was – my attention was not drawn to the fact that this was an oath nor did I have – pay any attention to it quite honestly Chair. But perhaps the witness might explain?

**CHAIRPERSON:** Well we can – we can ask – Mr Nxasana?



**ADV MXOLISI SANDILE OLIVER NXASANA:** Chair thank you.

**CHAIRPERSON:** Yes.

**ADV MXOLISI SANDILE OLIVER NXASANA:** Chair it is an option that was open to me I was asked a question then I opted for an affirmation but I do not have a problem giving evidence under oath.

**CHAIRPERSON:** So...

**ADV MXOLISI SANDILE OLIVER NXASANA:** In line...

**CHAIRPERSON:** Either it is fine. This you did as an oath and it is fine and now you did an affirmation both are fine I just want to check that?

10 **ADV MXOLISI SANDILE OLIVER NXASANA:** Yes it is fine.

**CHAIRPERSON:** They are both fine?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes.

**CHAIRPERSON:** Okay alright. Thank you.

**ADV PAUL JOSEPH PRETORIUS SC:** Mr Nxasana it is common knowledge that you are a former National National Director of Public Prosecutions.

**ADV MXOLISI SANDILE OLIVER NXASANA:** That is correct.

**ADV PAUL JOSEPH PRETORIUS SC:** And in that capacity you carried out the duties of your office in Pretoria?

20 **ADV MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** Right. Before we deal with the period of your own office and before we deal with the brief history of the NPA at least to your knowledge before you came to the NPA please tell the Chair what your qualifications are and what profession you performing at the moment?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Chair I hold a B.Proc Degree and an LLB Degree both degrees which I obtained from the University of Zululand. I served articles of clerkship and I was admitted as an attorney in 1997 and from that date of my [indistinct] I practiced from my own account until 2013 when I was appointed as the National Director of Public Prosecutions.

**ADV PAUL JOSEPH PRETORIUS SC:** You left the National Director of Public Prosecutions post in May 2015, is that correct?

**ADV MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

10 **ADV PAUL JOSEPH PRETORIUS SC:** And since then what work have you been performing if any?

**ADV MXOLISI SANDILE OLIVER NXASANA:** I have gone back to set up my practice again and I am practicing in Durban for my own account as the attorney.

**ADV PAUL JOSEPH PRETORIUS SC:** So you are an attorney in private practice [indistinct].

**ADV MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** Alright. In Section A of your statement at page 1 you have given a brief timeline in order to  
20 illustrate a point that is pertinent to the work of the commission. You set out in paragraph 3 a timeline and in that timeline you note who has been the National Director of Public Prosecutions for what period since April 2001. Would you place that on record please?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Thank you Chair. To the best of my recollection Chair the – Mr Bulelani Ngcuka was the first

National Director of Public Prosecutions. I think from April 2001 until 31 August 2004. And Doctor Silas Ramaite in an acting position was the Director of Public Prosecutions – National Director of Public Prosecutions from August 2004 to January 2005. Then in – on 1 February 2005 to 7 February 2009 Advocate Vusi Pikoli was the National Director of Public Prosecutions. After him Advocate Mokotedi Mpshe in an acting capacity was also appointed as the National Director of Public Prosecutions from 1 May 2009 until 31 October 2009. After him on 1 December 2009 until 8 May 2012 Advocate Menzi Simelane was the National Director of Public Prosecutions. Then on 20 December 2011 until 30 September 2013 Advocate Nomgcobo Jiba was also – was appointed to act as the National Director of Public Prosecutions. Then on 1 October 2013 I took up the position until the 31 May 2015. I was the National Director of Public Prosecutions. I was succeeded by Advocate Shaun Abrahams on the 18 June 2015 until 13 August 2018. On the 1 August 2018 to 31 January 2019 Doctor Silas Ramaite again was appointed to act in that capacity. Then from the 1 February 2019 to date we have a permanent National Director of Public Prosecutions in Advocate Shamila Batohi.

20 **ADV PAUL JOSEPH PRETORIUS SC:** The statutory term of office of the National Director of Public Prosecutions in terms the National Prosecuting Authority Act what is that?

**ADV MXOLISI SANDILE OLIVER NXASANA:** It is ten years.

**ADV PAUL JOSEPH PRETORIUS SC:** Alright. Has any of the NDPP, National Directors of Public Prosecutions since its inception ever

completed a ten year term of office?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Unfortunately not Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** Right. Chair the constitutional court in the judgment we referred to earlier has made some pertinent remarks in regard to security of tenure in relation to the independence of the NPA and that issue will be dealt with in due course. For the moment Mr Nxasana you recall certain events in relation to some of the appointments and dismissals of National Directors of Public Prosecution that is not necessarily to give a complete record of the  
10 evidence it is merely to highlight and raise questions at this point in time Chair. Would you tell the Chair of the events of which you have at least indirect knowledge from paragraphs 4 onwards?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Thank you Chair. Chair the issues are of public knowledge. Advocate Bulelani Ngcuka as the first National Director of Public Prosecutions was subjected to a commission of inquiry after allegations were made against him that he was an apartheid spy and after he was cleared by the commission that was headed if my memory serves me well by Judge Heffer he then left the NPA. Then Advocate Vusi Pikoli was also subjected to the same  
20 process of a commission of inquiry. I know at the time he had reinstated charges against the former President Jacob Zuma and also had instituted criminal proceedings against the then Commissioner Of Police and the President of Interpol at the time Mr Jackie Selebi – Commissioner Jackie Selebi I mean. Despite also his – despite him being cleared at the Ginwala Commission of Inquiry he was

nevertheless removed from office.

**CHAIRPERSON:** Hm. I know that the inquiry that was chaired by Doctor Ginwala was an inquiry under the Prosecuting Authority Act as opposed to a Commission of Inquiry under the Commissions Act. I am not sure about the Inquiry that was chaired by Justice Heffer in relation to Mr Ngvuks whether it was a Commissioner of Inquiry under the Commissions Act or whether it was an inquiry under the – just an inquiry under the National Prosecuting Authority Act. But I think the point you make is not about those technicalities it is simply that certain  
10 inquiries precede that.

**ADV MXOLISI SANDILE OLIVER NXASANA:** Precede that.

**CHAIRPERSON:** Their departure. But it is just important to

**ADV MXOLISI SANDILE OLIVER NXASANA:** To make a distinction.

**CHAIRPERSON:** To – when we are not sure ja.

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes thanks Chair for bringing that to my attention.

**ADV PAUL JOSEPH PRETORIUS SC:** What is common to both proceedings however is that the inquiries whether judicial or internal to the NPA Act according to the best of your recollection anyway in  
20 principle at least clear both Mr Ngcuka and Mr Pikoli?

**ADV MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** And then how was Mr Pikoli finally removed, can you recall? Without going into too much detail.

**ADV MXOLISI SANDILE OLIVER NXASANA:** Chair I remember that despite him having been cleared but at the time I think it was President

Kgalema Motlanthe was the President of the Republic of South Africa. I think the matter had to be referred to Parliament after the Commission of Inquiry but I think they took a decision that she should not be retained at NPA.

**ADV PAUL JOSEPH PRETORIUS SC:** You have told the Chair in your timeline summary that Advocate Mpshe was not in the position on any permanent basis.

**ADV MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**CHAIRPERSON:** I am sorry Mr Pretorius did he complete the story in relation to Mr Ngcuka, his resignation after the inquiry, did he complete that part? What happened to Mr Ngcuka after?

**ADV PAUL JOSEPH PRETORIUS SC:** In relation to Chair?

**CHAIRPERSON:** In relation to Mr Ngcuka?

**ADV PAUL JOSEPH PRETORIUS SC:** Ngcuka yes.

**CHAIRPERSON:** Did he complete the story about what happened after the inquiry chaired by Judge Heffer?

**ADV PAUL JOSEPH PRETORIUS SC:** Yes. How did his term of office come to an end to the best of your recollection?

**ADV MXOLISI SANDILE OLIVER NXASANA:** My, my...

20 **ADV PAUL JOSEPH PRETORIUS SC:** And that is after the Judge Heffer inquiry?

**ADV MXOLISI SANDILE OLIVER NXASANA:** My understanding Chair is that Mr Ngcuka resigned.

**ADV PAUL JOSEPH PRETORIUS SC:** And then in relation to Mr Pikoli you said to the Chair that the matter came before Parliament and



subsequent to that his – or as a consequence of that his term of office came to and end?

**ADV MXOLISI SANDILE OLIVER NXASANA:** It came to an end – I understand that at times he did make attempts to take the matter to court but I think he was drained out and he could not pursue the matter and ultimately a settlement agreement was reached and he left the NPA.

**ADV PAUL JOSEPH PRETORIUS SC:** Alright. Alright. The details Chair are understandably not placed before you in their thoroughness  
10 but will be in time. Then in relation to Menzi Simelane what is your recollection?

**ADV MXOLISI SANDILE OLIVER NXASANA:** My recollection Chair is that when Menzi Simelane was – Advocate Menzi Simelane was appointed as the National Director of Public Prosecutions he was the Director General of Justice before that and at the inquiry – at the Ginwala Inquiry he was called to testify and the Ginwala Inquiry made some critical remarks about his testimony amongst other things that his evidence was contradictory and when he was appointed by the President at the time as the National Director of Public Prosecutions  
20 the I think it was DA if I am not mistaken who then challenged his appointment and ultimately the matter came before the constitutional court. The constitutional court declared he – the appointment irrational and reviewed it and set aside.

**ADV PAUL JOSEPH PRETORIUS SC:** He was then I understand replaced in an acting capacity by Advocate Jiba?

**ADV MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** Alright and we will talk of that in a little more detail in due course. I understand you were then appointed when?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Chair I was appointed on the 31 August 2013 with effect from the 1 October 2013.

**ADV PAUL JOSEPH PRETORIUS SC:** Alright. Do you recall any litigation before our courts in relation to a directive to the President to make a permanent appointment?

10 **ADV MXOLISI SANDILE OLIVER NXASANA:** Yes I do.

**ADV PAUL JOSEPH PRETORIUS SC:** To the post of NDPP? Would you just tell the court – tell the Chair briefly about that please?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Chair I think the organisation called CASAC had taken the matter to court compelling the President to make a permanent appointment. I think at the time the reasons they advanced was that the office of the NDPP was such a critical office that we cannot afford to have an acting and NDPP at the time and that the position had to be filled on a permanent basis. And the court if my memory serves me well delivered the judgment and gave  
20 the President who was President Zuma at the time and ultimate time to fill the post by a certain date – a particular date.

**ADV PAUL JOSEPH PRETORIUS SC:** Yes. When that evidence is placed before the Chair in the fullness of time and all its details certain questions arise and they arise as a matter of observation now and that is firstly your comment that appears to be entirely correct that no

National Director of Public Prosecutions in the whole history of the National Prosecuting Authority has ever fulfilled a full term of office?

**ADV MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** Secondly the history of encumbrance in that office appears to be filled with inquiries and allegations relating to their fitness to hold office and very often having been cleared of any wrongdoing or any adverse finding nevertheless their terms of office have come to an end?

**ADV MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair  
10 especially with regards to the – with regards to Mr Bulelani Ngcuka and Advocate Vusi Pikoli.

**ADV PAUL JOSEPH PRETORIUS SC:** Ja. Given your own experience in relation to the National Prosecuting Authority and the post of the National Director of Public Prosecutions what is your view as to the effect of this history on the stability and effectiveness of the NPA?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Chair my view is that from this history and also what I experienced at NPA my view is that there has been political interference as well as external interference that impacted on the decision making in the NPA.

20 **ADV PAUL JOSEPH PRETORIUS SC:** And would that have any effect on public confidence in the NPA?

**ADV MXOLISI SANDILE OLIVER NXASANA:** No doubt it did have – it does have effect on public confidence in the NPA.

**ADV PAUL JOSEPH PRETORIUS SC:** Yes. And what role does Parliament play to your knowledge in relation to the National

Prosecuting Authority?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Chair there is a Portfolio Committee on Justice because NPA is also a – a – a unit falling under justice although it is independent. It plays political oversight over the justice as well as NPA.

**ADV PAUL JOSEPH PRETORIUS SC:** You will make some comments later in your evidence in relation to the role of Parliament and in relation to matters within your own knowledge.

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes.

10 **ADV PAUL JOSEPH PRETORIUS SC:** But we will do that later in the statement.

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** You have also mentioned that Parliament played a role in relation to Mr Pikoli?

**ADV MXOLISI SANDILE OLIVER NXASANA:** That is correct.

**ADV PAUL JOSEPH PRETORIUS SC:** But perhaps we should place that evidence before the Chair in the fullness of time.

20 **CHAIRPERSON:** Well the – the story might not be perceived to be complete when you talk about inquiries in relation to the NPA. If you do not mention that recently there was also an inquiry relating to somebody who had acted as the National Director of Public Prosecutions. So if one states simply facts of course you what – what you were talking about were those who had been permanently appointed as National Director of Public Prosecutions namely Mr Ngcuka, Mr Pikoli and of course yourself but there is also somebody

who had acted quite a number of times and I know you will talk more about some of the events. Then there was an inquiry in relation to her and it is public knowledge that that inquiry reached certain conclusions and I think the matter may be going to Parliament for what it is worth. It may be that it is important to just state those – back those facts. Ja. Okay.

**ADV PAUL JOSEPH PRETORIUS SC:** Chair there will be reference.

**CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** Further in the evidence to at  
10 least two other inquiries.

**CHAIRPERSON:** Yes. No thank you.

**ADV PAUL JOSEPH PRETORIUS SC:** Chair but your comments are noted.

**CHAIRPERSON:** Hm.

**ADV PAUL JOSEPH PRETORIUS SC:** The appointment of a National Director of Public Prosecutions is you state governed by the constitution. You deal with that in paragraph 11 of your statement. Would you just tell the Chair very briefly about the provisions regarding the appointment of a National Director of Public Prosecutions?

20 **ADV MXOLISI SANDILE OLIVER NXASANA:** Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** I am sorry if you just hold for a moment. May I say perhaps unsurprisingly Chair the live stream is down and I have been asked to request a ten minute adjournment?

**CHAIRPERSON:** Okay alright. We will take a ten minutes adjournment to enable the technicians to attend to the problem. We adjourn.

**REGISTRAR:** All rise.

**INQUIRY ADJOURNS**

**INQUIRY RESUMES**

**CHAIRPERSON:** You may proceed.

**ADV PAUL JOSEPH PRETORIUS SC:** Thank you Chair. Mr Nxasana before the break you were at paragraph 11 of your statement and you had – I think - made the point that the appointment of the National Director of Public Prosecutions is governed by the Constitution.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct.

10 **ADV PAUL JOSEPH PRETORIUS SC:** If I may take the liberty Chair just to place on record the relevant sections of the Constitution.

**CHAIRPERSON:** Ja.

**ADV PAUL JOSEPH PRETORIUS SC:** You refer Mr Nxasana to Section 179 of the Constitution which provides in Subsection 1:

20 “There is a single National Prosecuting Authority in the Republic structured in terms of an act of Parliament and consisting of a, an National Director of Public Prosecutions who is the Head of the Prosecuting Authority and is appointed by the President as Head of the National Executive and b, Directors of Public Prosecutions and Prosecutors as determined by an act of Parliament.”

Who appoints the Directors of Public Prosecutions other than the National Director?

**MR MXOLISI SANDILE OLIVER NXASANA:** They are also appointed by

the President.

**ADV PAUL JOSEPH PRETORIUS SC:** Are they? Then powers of the Prosecuting Authority are set out in broad terms in Section 179(2) which states:

“The Prosecuting Authority has the power to institute criminal proceedings on behalf of the state and to carry out any necessary functions incidental to instituting criminal proceedings.”

Subsection 4 of Section 179 reads:

10 “National legislation must ensure that the Prosecuting Authority exercises its functions without fear, favour or prejudice.”

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** Then Subsection 5 deals with policy and the functions of the National Director of Public Prosecutions. How is policy in relation to prosecutions formulated and by whom?

**MR MXOLISI SANDILE OLIVER NXASANA:** It is ...

**CHAIRPERSON:** I am sorry. Before that Mr Pretorius with regard to who appoints who the National Director of Public Prosecutions is  
20 appointed by the President.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct.

**CHAIRPERSON:** And you have just said also the Directors of Public Prosecutions are appointed by the President. Is that right?

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**CHAIRPERSON:** The Directors of Public Prosecutions are those the



NPA Officials who are in various provinces or some are heading the NPA in provinces but others are not necessarily heading NPA in provinces but fall within some or other office of the NPA or in the courts. What is the position? What is the structure?

**MR MXOLISI SANDILE OLIVER NXASANA:** Okay Chair. The National Director of Public Prosecutions is the Head of the Prosecution in South Africa and then we have – during my time four and I think that is still – that is what is still in existence. Then have four Deputy National Directors of Public Prosecutions. We then have Special Directors of  
10 Public Prosecutions. Then we have all of these that I have mentioned are based at the Head Office in Pretoria – of the National Prosecuting Authority. Then in the divisions – in the regions – we have the Heads of the Prosecutions who are the Director of Public Prosecutions. All of them are appointed also by the President on the recommendation of the Minister of Justice – I think – in consultation with the National Director of Public Prosecutions.

**CHAIRPERSON:** So you have talked about Directors of Prosecutions and a Head of Directors of Prosecutions. Is that right?

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes. The Directors of  
20 Public Prosecutions are Head of Prosecutions in the regions.

**CHAIRPERSON:** So each Director of Public Prosecutions ...

**MR MXOLISI SANDILE OLIVER NXASANA:** Public Prosecutions.

**CHAIRPERSON:** Is – is Head of certain region insofar as the NPA is concerned?

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes. If ...

**CHAIRPERSON:** Okay and the regions are not necessarily demarcated in accordance with provinces or are they necessarily demarcated according to provinces?

**MR MXOLISI SANDILE OLIVER NXASANA:** A decision had been taken to align them to provinces ...

**CHAIRPERSON:** Yes.

**MR MXOLISI SANDILE OLIVER NXASANA:** Because initially that was the whole idea that the Directors of Public Prosecutions should be aligned to the – to the provinces.

10 **CHAIRPERSON:** Hm.

**MR MXOLISI SANDILE OLIVER NXASANA:** That they – they are Heads of Public Prosecutions in the provinces ...

**CHAIRPERSON:** Hm.

**MR MXOLISI SANDILE OLIVER NXASANA:** But we have exceptions like in Gauteng.

**CHAIRPERSON:** Hm.

**MR MXOLISI SANDILE OLIVER NXASANA:** In Gauteng we have – we have two Directors of Public Prosecution. That is one for the South Gauteng ...

20 **CHAIRPERSON:** Hm.

**MR MXOLISI SANDILE OLIVER NXASANA:** And one for the North Gauteng ...

**CHAIRPERSON:** Hm.

**MR MXOLISI SANDILE OLIVER NXASANA:** But I – when I left – at the time when I left they were in the process of aligning them so that it will

have one ...

**CHAIRPERSON:** Hm.

**MR MXOLISI SANDILE OLIVER NXASANA:** One Director of Public Prosecutions. We will have one Premier for the province. We will have one President ...

**CHAIRPERSON:** Hm.

**MR MXOLISI SANDILE OLIVER NXASANA:** Judge President. We will have Director of Public Prosecutions and in the Eastern Cape as well ...

**CHAIRPERSON:** Yes.

10 **MR MXOLISI SANDILE OLIVER NXASANA:** Because of the ...

**CHAIRPERSON:** Number of High Courts?

**MR MXOLISI SANDILE OLIVER NXASANA:** The number of High Courts and the – and the fact that the area is so wide to cover ...

**CHAIRPERSON:** Hm.

**MR MXOLISI SANDILE OLIVER NXASANA:** We had two Directors of Public Prosecution. Hence we also had two Deputy – Deputy Judge Presidents ...

**CHAIRPERSON:** Hm.

**MR MXOLISI SANDILE OLIVER NXASANA:** Like in Gauteng.

20 **CHAIRPERSON:** Hm.

**MR MXOLISI SANDILE OLIVER NXASANA:** Those are the only – those are the only exceptions.

**CHAIRPERSON:** But as a general rule when one hears the term Director of Public Prosecutions when it is used in the context of the NPA one should be thinking of somebody in charge of prosecutions in

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the area falling under a certain High Court or in a – in a province but accepting that there are provinces where there are two Directors instead of one?

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**CHAIRPERSON:** Where there are two in the same province that is Directors of Public Prosecutions one of them would be the Head?

**MR MXOLISI SANDILE OLIVER NXASANA:** No.

**CHAIRPERSON:** Or they – they ...

**MR MXOLISI SANDILE OLIVER NXASANA:** They – they are equal.

10 **CHAIRPERSON:** There is no Head or they are both co Heads?

**MR MXOLISI SANDILE OLIVER NXASANA:** They are both co Heads, yes.

**CHAIRPERSON:** Okay, okay. So is the National Director of Public Prosecutions at the top ...

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

**CHAIRPERSON:** And then four Deputy ...

**MR MXOLISI SANDILE OLIVER NXASANA:** National Directors.

**CHAIRPERSON:** National Directors of Prosecutions?

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

20 **CHAIRPERSON:** And all those are at the Head Office in Pretoria of the NPA?

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct.

**CHAIRPERSON:** And then you have Special ...

**MR MXOLISI SANDILE OLIVER NXASANA:** Special Directors.

**CHAIRPERSON:** Directors of Prosecutions. Is that right?

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**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

**CHAIRPERSON:** And – and those two are or how many would there be of Special Directors of Prosecutions – Public Prosecutions?

**MR MXOLISI SANDILE OLIVER NXASANA:** When I left – because this is not provide by the ...

**CHAIRPERSON:** In the Act?

**MR MXOLISI SANDILE OLIVER NXASANA:** In the Act.

**CHAIRPERSON:** Yes.

**MR MXOLISI SANDILE OLIVER NXASANA:** I think they were appointed  
10 in terms of a proclamation ...

**CHAIRPERSON:** Oh.

**MR MXOLISI SANDILE OLIVER NXASANA:** By the President.

**CHAIRPERSON:** Oh, okay. So the number might change from time to time?

**MR MXOLISI SANDILE OLIVER NXASANA:** The number might change from time to time ...

**CHAIRPERSON:** Okay, okay.

**MR MXOLISI SANDILE OLIVER NXASANA:** Because at the time it was Advocate Lawrence Mgwebi for the Specialised Commercial Crime Unit  
20 ...

**CHAIRPERSON:** Yes.

**MR MXOLISI SANDILE OLIVER NXASANA:** And at the time it was Mr Dawood ...

**CHAIRPERSON:** Hm.

**MR MXOLISI SANDILE OLIVER NXASANA:** Who was the Special

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Director for – what is this unit that deals with witnesses?

**CHAIRPERSON:** Sexual – oh – protection of witnesses?

**MR MXOLISI SANDILE OLIVER NXASANA:** Witness protection, yes.

Witness protection ...

**CHAIRPERSON:** *Ja.*

**MR MXOLISI SANDILE OLIVER NXASANA:** Office for Witness Protection and we also had a – another post of the Special Director which I recommended that it be frozen. At the time Abrahams – Advocate Shaun Abrahams was acting when I arrived at NPA ...

10 **CHAIRPERSON:** Hm.

**MR MXOLISI SANDILE OLIVER NXASANA:** And that was the Special Director for Priority Crime Litigation Unit.

**CHAIRPERSON:** Oh okay. Now in terms of the hierarchy it is the National Director of Public Prosecutions. It is the Deputy National Directors of Public Prosecutions and then is it then the Special Directors below that?

**MR MXOLISI SANDILE OLIVER NXASANA:** Well they (intervenes).

**CHAIRPERSON:** Or they are on the same level as the Directors?

**MR MXOLISI SANDILE OLIVER NXASANA:** As the Directors.

20 **CHAIRPERSON:** Oh.

**MR MXOLISI SANDILE OLIVER NXASANA:** They are on the same level but there is that power play ...

**CHAIRPERSON:** Oh.

**MR MXOLISI SANDILE OLIVER NXASANA:** Between the Special Directors and the Directors.

**CHAIRPERSON:** About who is at Head Office ...

**MR MXOLISI SANDILE OLIVER NXASANA:** And who ...

**CHAIRPERSON:** Who is not at Head Office?

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

**CHAIRPERSON:** Okay.

**MR MXOLISI SANDILE OLIVER NXASANA:** I think that power play – you know – it played itself out

**CHAIRPERSON:** Ja.

**MR MXOLISI SANDILE OLIVER NXASANA:** In the matter we will talk  
10 about earlier ...

**CHAIRPERSON:** Yes.

**MR MXOLISI SANDILE OLIVER NXASANA:** A bit later on.

**CHAIRPERSON:** Oh, okay.

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

**CHAIRPERSON:** But legally they are on the same ...?

**MR MXOLISI SANDILE OLIVER NXASANA:** They are on the same level  
yes.

**CHAIRPERSON:** Yes, okay.

**MR MXOLISI SANDILE OLIVER NXASANA:** It is just that they are  
20 Directors.

**CHAIRPERSON:** Yes.

**MR MXOLISI SANDILE OLIVER NXASANA:** They are Special  
Directors.

**CHAIRPERSON:** Yes. Below the Directors do you have Deputy  
Directors ...



**MR MXOLISI SANDILE OLIVER NXASANA:** We ...

**CHAIRPERSON:** Of Public Prosecutions?

**MR MXOLISI SANDILE OLIVER NXASANA:** We have Deputy Directors of Public Prosecutions.

**CHAIRPERSON:** Yes and then those ...

**MR MXOLISI SANDILE OLIVER NXASANA:** And ...

**CHAIRPERSON:** Could be a number – there could be a number of them?

10 **MR MXOLISI SANDILE OLIVER NXASANA:** There could be a number of them ...

**CHAIRPERSON:** Yes.

**MR MXOLISI SANDILE OLIVER NXASANA:** And some of them at the Head Office. They are all over.

**CHAIRPERSON:** Yes.

**MR MXOLISI SANDILE OLIVER NXASANA:** Well they also rank themselves – the Deputies – as senior and Deputies.

**CHAIRPERSON:** Oh, there are different levels?

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes. Yes they have different levels.

20 **CHAIRPERSON:** Now Prosecutors that one finds in the High Courts and in the Magistrate's Court would they simply be Prosecutors or some of them would be Deputy Directors and maybe even Director - Directors?

**MR MXOLISI SANDILE OLIVER NXASANA:** The Prosecutors who normally prosecute in the High Courts they are the Advocates who are

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based in the DPPs Office – the Director of Public Prosecutions Offices

...

**CHAIRPERSON:** Yes.

**MR MXOLISI SANDILE OLIVER NXASANA:** And anyone – you might find – you might find anyone prosecuting.

**CHAIRPERSON:** Ja.

**MR MXOLISI SANDILE OLIVER NXASANA:** (Intervenes) from an - an Advocate to ...

**CHAIRPERSON:** Ja.

10 **MR MXOLISI SANDILE OLIVER NXASANA:** To a Senior Advocate

**CHAIRPERSON:** Ja.

**MR MXOLISI SANDILE OLIVER NXASANA:** Deputy Director, Senior Deputy Director.

**CHAIRPERSON:** They – they fall under the Office of ...

**MR MXOLISI SANDILE OLIVER NXASANA:** The DPP.

**CHAIRPERSON:** Of a particular DPP ...

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

**CHAIRPERSON:** In the province?

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

20 **CHAIRPERSON:** Okay, okay and ...

**MR MXOLISI SANDILE OLIVER NXASANA:** Then the Prosecutors that you find in the lower courts ...

**CHAIRPERSON:** Hm.

**MR MXOLISI SANDILE OLIVER NXASANA:** By lower courts I mean Regional Courts going ...

**CHAIRPERSON:** Yes.

**MR MXOLISI SANDILE OLIVER NXASANA:** Down to the ...

**CHAIRPERSON:** District Courts.

**MR MXOLISI SANDILE OLIVER NXASANA:** To the District Courts.

Those are Prosecutors that fall under the Chief Prosecutors in the ...

**CHAIRPERSON:** In the particular court?

**MR MXOLISI SANDILE OLIVER NXASANA:** In the particular court.

The Chief – the Chief Prosecutors they – they – under them I think they cover a certain area ...

10 **CHAIRPERSON:** Of jurisdiction?

**MR MXOLISI SANDILE OLIVER NXASANA:** Of jurisdiction.

**CHAIRPERSON:** Yes, yes.

**MR MXOLISI SANDILE OLIVER NXASANA:** Under whom they have Prosecutors.

**CHAIRPERSON:** Yes.

**MR MXOLISI SANDILE OLIVER NXASANA:** Below the Chief Prosecutor will be the Senior Public Prosecutors, (intervenes) Prosecutors.

**CHAIRPERSON:** Prosecutors, *ja*.

20 **MR MXOLISI SANDILE OLIVER NXASANA:** Then Prosecutors and – in their ...

**CHAIRPERSON:** Yes but ...

**MR MXOLISI SANDILE OLIVER NXASANA:** In their ranks.

**CHAIRPERSON:** Basically in – in the province where they operate the Prosecutors – Chief Prosecutors and whoever they fall under the DPP

of the Province?

**MR MXOLISI SANDILE OLIVER NXASANA:** All of them, yes.

**CHAIRPERSON:** All of them?

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct.

**CHAIRPERSON:** Yes okay, thank you.

**ADV PAUL JOSEPH PRETORIUS SC:** Thank you Chair.

**CHAIRPERSON:** And – and the President appoints the DPPs ...

**MR MXOLISI SANDILE OLIVER NXASANA:** The DPPs, yes.

**CHAIRPERSON:** But below that does he go that far?

10 **MR MXOLISI SANDILE OLIVER NXASANA:** No he does not go that far.

**CHAIRPERSON:** He stops there?

**MR MXOLISI SANDILE OLIVER NXASANA:** He stops there.

**CHAIRPERSON:** And then who appoints the DPPs – the NDPP?

**MR MXOLISI SANDILE OLIVER NXASANA:** The ...

**CHAIRPERSON:** Or who appoints them?

**MR MXOLISI SANDILE OLIVER NXASANA:** The Deputies.

**CHAIRPERSON:** The Deputy Directors?

**MR MXOLISI SANDILE OLIVER NXASANA:** The Deputy Directors.

**CHAIRPERSON:** Ja.

20 **MR MXOLISI SANDILE OLIVER NXASANA:** It is the NDPP and the –  
and the Minister - the Minister.

**CHAIRPERSON:** The Minister in consultation with the NDPP?

**MR MXOLISI SANDILE OLIVER NXASANA:** With the NDPP.

**CHAIRPERSON:** Okay, alright thank you.

**ADV PAUL JOSEPH PRETORIUS SC:** Thank you Chair. You refer to

Section 179(5) of the Constitution. That is the subsection which deals with the powers and duties of the National Director of Public Prosecutions. Perhaps we should place that on record and then I - you may make any comment that you wish. Subsection 179(5) reads:

“The National Director of Public Prosecutions a,  
must determine with the concurrence of the Cabinet  
Member responsible for the administration of  
Justice after consulting the Directors of Public  
Prosecutions Prosecution Policy which must be  
10 observed in the prosecution process.”

It appears then from the Constitution that is the National Director's primary responsibility or at least responsibility in the first instance to determine policy in regard to prosecutions. Is that correct?

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** What does that mean in practical terms? What policies are determined?

**MR MXOLISI SANDILE OLIVER NXASANA:** Chair it means that the – the NDPP must consult with the Directors of Public Prosecutions. The policy to be followed in prosecuting matters that is how to go about  
20 prosecuting matters and what is expected of the Prosecutors in handling matters when they are prosecuting them.

**CHAIRPERSON:** That would include – would that include when to prosecute and when to not to prosecute and when to withdraw charges or prosecution?

**MR MXOLISI SANDILE OLIVER NXASANA:** That is – that is correct

Chair.

**CHAIRPERSON:** Thank you.

**ADV PAUL JOSEPH PRETORIUS SC:** Do you recall the content of the policy in broad terms whilst you were the National Director of Public Prosecutions?

**MR MXOLISISANDILE OLIVER NXASANA:** I cannot remember anyone specific offhand.

**ADV PAUL JOSEPH PRETORIUS SC:** Perhaps – perhaps that is a task for the investigators ...

10 **MR MXOLISI SANDILE OLIVER NXASANA:** *Ja.*

**ADV PAUL JOSEPH PRETORIUS SC:** In due course. Section 179(5) goes on to state that:

“The National Director of Public Prosecutions must issue policy directives which must be observed in the prosecution process.”

And Subsection C of Subsection 5 reads:

“The National Director may intervene in the prosecution process when policy directives are not complied with.”

20 Is that correct?

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair. That means Chair as the National Director of Public Prosecution you can *mero motu* on your own intervene when you believe that prosecution policy and directives have not been followed in a particular matter or when any of the parties involved in the matter approaches you as the

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National Director of Public Prosecutions and make representations that you review the decision to prosecute him or her or a decision not to prosecute a particular individual.

**ADV PAUL JOSEPH PRETORIUS SC:** You refer to Section 179(6) of the Constitution in your statement at paragraph 13. What does that deal with?

**MR MXOLISI SANDILE OLIVER NXASANA:** (No audible reply).

**ADV PAUL JOSEPH PRETORIUS SC:** In other words who exercises final responsibility over the National Prosecuting Authority?

10 **MR MXOLISI SANDILE OLIVER NXASANA:** That is the Minister of Justice and currently it is the Minister of Justice and Correctional Services.

**ADV PAUL JOSEPH PRETORIUS SC:** Services, right.

**MR MXOLISI SANDILE OLIVER NXASANA:** But I must also explain Chair that whilst he – the Minister – exercises final responsibility over the NPA the Director General of Justice is the accounting officer of the National Prosecuting Authority.

**CHAIRPERSON:** I – I take it that he – he is being accounting officer is limited to how money is spent or is - does it go behind that as far as  
20 you understand the position?

**MR MXOLISI SANDILE OLIVER NXASANA:** Well as far as I ...

**ADV PAUL JOSEPH PRETORIUS SC:** Perhaps there is a public interest in your question and its answer. Once again we are down ...

**CHAIRPERSON:** Oh.

**ADV PAUL JOSEPH PRETORIUS SC:** And offline. I have been



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requested to ask for 10 minutes. This is also important I think for the record ...

**CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** So ...

**CHAIRPERSON:** No, no that is important that we should have it on record.

**ADV PAUL JOSEPH PRETORIUS SC:** Perhaps we should take the short adjournment now.

**CHAIRPERSON:** Yes. It is – it is about the time for tea. I was not  
10 going to take it because we just had 10 minutes but we are forced to take it now. So we will take an adjournment until half past 11. Hopefully it will be sorted out ...

**ADV PAUL JOSEPH PRETORIUS SC:** Thank you Chair.

**CHAIRPERSON:** In the meantime. We adjourn.

#### **HEARING ADJOURNS**

#### **HEARING RESUMES**

**CHAIRPERSON:** I am told that the technical problems have been sorted out at least for now.

**ADV PAUL JOSEPH PRETORIUS SC:** At least for now Chair.

20 **CHAIRPERSON:** Yes. Let us proceed.

**ADV PAUL JOSEPH PRETORIUS SC:** Thank you Chair. Mr Nxasana if you go to paragraph 14 of your statement you deal with Section 9 of the National Prosecuting Authority Act which is the legislation which directly governs the National Prosecuting Authority and you refer ...

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct.

**ADV PAUL JOSEPH PRETORIUS SC:** To the Section which sets out the requirements of the person who may be appointed as National Director of Public Prosecutions. What are those requirements?

**MR MXOLISI SANDILE OLIVER NXASANA:** Chair is that the person must possess legal qualifications that entitle him to – him or her – to appear in all courts in the Republic of South Africa and also that that person must be a fit and proper person with due regard to his or her experience conscientiousness and integrity to be entrusted with the responsibilities of Office of the NDPP.

10 **ADV PAUL JOSEPH PRETORIUS SC:** Yes and particularly relevant to your particular case are the provisions or were the provisions of Section 12 of the Act which we will deal with when we come to the Constitutional Court matter involving yourself and others.

**MR MXOLISI SANDILE OLIVER NXASANA:** Okay.

**ADV PAUL JOSEPH PRETORIUS SC:** Where certain subsections were declared unconstitutional.

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** Let us then deal with Section C which details the circumstances preceding and surrounding your  
20 appointment as National Director of Public Prosecutions in 2013. Would you tell the Chair about those circumstances please?

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes Chair. Chair as I have pointed out that I was conducting my own private practice in Durban. Then during 2013 - I cannot remember the exact date and the month – I received a call from Mr Michael Hulley who was the President's Legal

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Advisor – former President Jacob Zuma's Legal Advisor at the time – who wanted to see me and I obliged. He came over to see me at my office in Durban. We had a discussion with him. He told me that he was looking for a candidate to fill the position of the National Director of Public Prosecutions as he was mandated by President Zuma. He had with him three names that he told me that he had been given – were given to him by colleagues in Durban but when he bounced off those names to those colleagues they were of the view that I was the person who could do the job and my name was not amongst the list.

10 Hence he then came to see me. He expressed then the – he asked me if I was willing to take over the – I would be willing to take over the appointment ...

**ADV PAUL JOSEPH PRETORIUS SC:** Before you go there Mr Nxasana in relation to the process by which you had been selected did he mention anything other more formal than bouncing your name off other colleagues?

**MR MXOLISI SANDILE OLIVER NXASANA:** No sir.

**ADV PAUL JOSEPH PRETORIUS SC:** Right. Sorry proceed if you will.

**MR MXOLISI SANDILE OLIVER NXASANA:** Then Chair it – I was  
20 surprised. I was shocked and surprised because not in bad way that I never thought that one day I would become a Prosecutor because I had chosen to become an Attorney but it also at the same time humbled me that my colleagues especially from my division saw something in me that I could head an institute – institution of that magnitude. Then I felt that - I remember that I even remarked to him that if my colleagues

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have confidence in me so why not – why should I not have confidence in myself. Then I was willing as everyone would be willing to serve the country. I thought that the – my colleagues saw some qualities in me that entered me to be appointed to that position. I then agreed.

**ADV PAUL JOSEPH PRETORIUS SC:** Did you subsequently meet with the President at the time?

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes. A meeting was then scheduled to meet the President at his official residence in Pretoria and I remember – I think it was around August if I am not mistaken if not  
10 before that. I went up to meet the President at his official residence in Pretoria. Present at the meeting was the President, Mr Hulley and I think there was also the lady who – who I was later told that she was – she was also the Legal Advisor to the President – Ms Bonisiwe Makhene.

**ADV PAUL JOSEPH PRETORIUS SC:** Spell that surname please.

**MR MXOLISI SANDILE OLIVER NXASANA:** Spelt M-A-K-H-E-N-E, Makhene.

**ADV PAUL JOSEPH PRETORIUS SC:** Okay, thank you.

**CHAIRPERSON:** Well based on what Mr Hulley said to you it seems  
20 that what you are saying is he said to you your peers suggested that you might be the right person.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**CHAIRPERSON:** Hm – and you – you had not applied for any position?

**MR MXOLISI SANDILE OLIVER NXASANA:** No, no Chair.

**CHAIRPERSON:** Yes.

**MR MXOLISI SANDILE OLIVER NXASANA:** Not.

**CHAIRPERSON:** Okay.

**ADV PAUL JOSEPH PRETORIUS SC:** Yes. What happened at that meeting?

**MR MXOLISI SANDILE OLIVER NXASANA:** At that meeting - before I went to the meeting Mr Hulley assured me that I was not going to an interview of any sort. The President wanted just to see me, interact with me and I should relax and that is exactly what happened. It was not an interview. It was an interaction and what I remember quite  
10 vividly what the President asked me of was that did I have courage to take up that position. To which I responded by saying yes I do and I even said to him that knowing that he has been through hardships I thought that he meant that I would be able to take decisions independently and firmly. Then I said yes I have that courage and also I remember he even said something in isiZulu that it is like that position might be like the people stabbing you with arrows something like that.

**CHAIRPERSON:** Well you can say it ...

**MR MXOLISI SANDILE OLIVER NXASANA:** In isiZulu.

**CHAIRPERSON:** In isiZulu and then seek to translate – interpret it for

20 **MR MXOLISI SANDILE OLIVER NXASANA:** Okay.

**CHAIRPERSON:** People who might not understand isiZulu.

**MR MXOLISI SANDILE OLIVER NXASANA:** Okay.

**CHAIRPERSON:** Ja.

**MR MXOLISI SANDILE OLIVER NXASANA:** I think if I remember well he said that position is like (isiZulu) which I understood him to be

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saying that it was a – a very difficult task to handle and he described it as like a – arrows ...

**CHAIRPERSON:** A position where ...

**MR MXOLISI SANDILE OLIVER NXASANA:** A position where ...

**CHAIRPERSON:** Spears would be directed at you.

**MR MXOLISI SANDILE OLIVER NXASANA:** Spears would be directed at you yes.

**CHAIRPERSON:** That is – that is the (intervenes).

**MR MXOLISI SANDILE OLIVER NXASANA:** Literally yes, yes.

10 **CHAIRPERSON:** It is a position where spears could be directed at you.

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

**CHAIRPERSON:** Okay.

**MR MXOLISI SANDILE OLIVER NXASANA:** Ja.

**ADV PAUL JOSEPH PRETORIUS SC:** Is there anything else about the meeting that you wish to tell the Chair?

**MR MXOLISI SANDILE OLIVER NXASANA:** Then Chair as about I was leaving – about I was leaving the meeting - I think the meeting lasted for not more than 30 minutes because I remember it coincided because I had to wait there. It was a date when I think the former Deputy  
20 President of the country – Ms Mlambo-Ngcuka - was there I think to meet the President before she was going to take up the position in the – in – I think was it in The Hague if I am not mistaken - had a long meeting then I had to wait. There were also other Ministers there that were waiting to see the President. As I was leaving I think it was Mr Hulley who asked if the – I had anything to – to say and my

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response was that my father who is now late was a trade unionist and I know that he would mention that the President - Jacob Zuma – was his comrade at the time. I felt that was necessary to bring that to the – to their attention. I think that was because – I think that was prompted by a question that – I think the question was – was I related to Sizwe Nxasana if I remember well. Then I said to them Sizwe is my – is my brother in isiZulu. Well in English he is my cousin.

**CHAIRPERSON:** Is he – I know what you are talking about when you say in isiZulu and in English because in the Zulu culture – you know –  
10 if you are of the same surname – you know – there – there is some kind of connection that you – that is recognised even though you might not be related in any way in the English sense. I think that is what you are talking about.

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

**CHAIRPERSON:** With him are you related in any way in the English sense?

**MR MXOLISI SANDILE OLIVER NXASANA:** No we are Black relatives.  
Our – our ...

**CHAIRPERSON:** You are Black relatives?

20 **MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

**CHAIRPERSON:** Oh, okay.

**MR MXOLISI SANDILE OLIVER NXASANA:** Our grandfathers are brothers.

**CHAIRPERSON:** Okay, alright.

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.



**CHAIRPERSON:** Thank you.

**ADV PAUL JOSEPH PRETORIUS SC:** What happened then on 30 August 2013 pursuant to this meeting? Did you ...

**MR MXOLISI SANDILE OLIVER NXASANA:** Oh the 30<sup>th</sup> ...

**ADV PAUL JOSEPH PRETORIUS SC:** Have further contact with Mr Hulley?

**MR MXOLISI SANDILE OLIVER NXASANA:** Ja. 30 August 2013 I remember I was running a trial at Umlazi Court in a civil trial then I received a call from Mr Hulley who then asked me to send – to send  
10 him my CV which I then did.

**ADV PAUL JOSEPH PRETORIUS SC:** Did he tell you anything of the President's intentions?

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes. He told me that the President was under pressure to appoint and he intended appoint – to announce my appointment.

**ADV PAUL JOSEPH PRETORIUS SC:** Was your appointment subsequently announced by the President?

**MR MXOLISI SANDILE OLIVER NXASANA:** Although Mr Hulley had told me that the – the President was going to announce the  
20 appointment probably over the weekend or on a Monday I think circumstances – he told me that circumstances forced him because the information leaked from the President's office which then precipitated the President to make the announcement the next day which was 31 August 2013.

**ADV PAUL JOSEPH PRETORIUS SC:** Right. Do you know whether the

position prior to your appointment of National Director of Public Prosecutions was advertised in anyway?

**MR MXOLISI SANDILE OLIVER NXASANA:** No I do not know. I had not seen any advertisements myself.

**ADV PAUL JOSEPH PRETORIUS SC:** And apart from what you have told the Chair are you aware of any more formal or any other - for that matter – selection process?

**MR MXOLISI SANDILE OLIVER NXASANA:** No Chair. I have no idea if there were other selection processes or whether there were other  
10 candidates interviewed but Chair I think I must pause to mention that later on I discovered that Advocate Jiba as she was acting she was promised by the then Minister of Justice and Constitutional Development – Minister Jeff Radebe – that she was going to be appointed on a permanent basis.

**ADV PAUL JOSEPH PRETORIUS SC:** Yes. We deal with that later. For the moment though were you ever subjected to an interview in the formal sense where you were asked questions about your own history, your own qualifications your professional history?

**MR MXOLISI SANDILE OLIVER NXASANA:** Except for the meeting?

20 **ADV PAUL JOSEPH PRETORIUS SC:** Your attitude?

**MR MXOLISI SANDILE OLIVER NXASANA:** Except of the meeting that we had on the – when I met President Zuma, Mr Hulley and Ms Bonisiwe Makhene – nothing.

**ADV PAUL JOSEPH PRETORIUS SC:** Right. So there was no interview that one could describe as a formal job application interview

in relation to your appointment?

**MR MXOLISI SANDILE OLIVER NXASANA:** Unless they were to ascribe that meeting as the formal interview - none.

**ADV PAUL JOSEPH PRETORIUS SC:** Well did have the characteristics to your knowledge of what one would expect in the ordinary sense a job interview to entail?

**MR MXOLISI SANDILE OLIVER NXASANA:** What I can – what I can say Chair is that recently there has been an – an interview to appoint the direct – the National Director of Public Prosecutions. If that is what  
10 you mean that was not done.

**ADV PAUL JOSEPH PRETORIUS SC:** Right.

**MR MXOLISI SANDILE OLIVER NXASANA:** That process was not done.

**ADV PAUL JOSEPH PRETORIUS SC:** Were you required to fill in any application form setting out your personal history, your details and similar matters?

**MR MXOLISI SANDILE OLIVER NXASANA:** No Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** You did however complete a security clearance application?

20 **MR MXOLISI SANDILE OLIVER NXASANA:** Yes I did. I completed it only after I was appointed and I was in the office. I think it was around December 2013.

**ADV PAUL JOSEPH PRETORIUS SC:** Did you sign any other document apart from your security clearance application prior to been employed?

**MR MXOLISI SANDILE OLIVER NXASANA:** I would have signed the –

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my employment contract as well as the oath of office before Judge – Judge President Mlambo.

**ADV PAUL JOSEPH PRETORIUS SC:** Alright.

**CHAIRPERSON:** You – you did of course as you said you were asked to furnish your CV which you did?

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

**CHAIRPERSON:** Ja, okay.

**ADV PAUL JOSEPH PRETORIUS SC:** You then would have arrived at the NPA during October. Is that correct?

10 **MR MXOLISI SANDILE OLIVER NXASANA:** That ...

**ADV PAUL JOSEPH PRETORIUS SC:** Of 2013?

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct – excuse me – that is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** What did you find on your arrival?

**MR MXOLISI SANDILE OLIVER NXASANA:** Chair I received a warm welcome from the personnel at NPA. At one stage the Minister of Justice – Mr Radebe – also came to the Head Office to introduce me and I can say I was warmly received.

20 **ADV PAUL JOSEPH PRETORIUS SC:** Right.

**CHAIRPERSON:** Prior to your assumption of duty but after the announcement of your appointment had you been in touch with the Acting National Director of Public Prosecutions who was acting before you came to arrange for what would happen when you arrived or there was no communication?

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**MR MXOLISI SANDILE OLIVER NXASANA:** Chair there was no communication. I did not know anyone at – at the – at the Head Office except that when I arrived there I – I identified the person who I know in the leadership as Advocate Pinky Mokgatla because she – she attended – I think – the university in KZN – in Durban – and she qualified there and she practiced there as an advocate and she was also my colleague in the Black Lawyers Association. That is where I knew her from.

**CHAIRPERSON:** Okay.

- 10 **MR MXOLISI SANDILE OLIVER NXASANA:** But to answer the question there was a time when the – the CEO at the time – Advocate Karen Van Rensburg – and the Deputy CEO that was Ms Beryl Sisulu they phoned me and they wanted to come and meet with me just to give me a briefing of what I would – I should expect when I get to the NPA. They came down to Durban and we met I remember in one of the hotels in Umhlanga. Then was we were in the meeting I then subsequently get – received a call from a person who introduced herself as Advocate Jiba who was acting who wanted to see me as well and she then appeared to be around Durban. I had to
- 20 hastily go and meet her. I did not know how – whether it was a coincidence that she knew that they had come down the CEO and the Deputy CEO but I later learnt that they – they got a hiding because they came down to see me from – from Advocate Jiba. We met and when I met Advocate Jiba she was in the presence of the Director of Public Prosecutions in KZN – Advocate Moipone Noko – and the

gentleman who I knew very well from KZN in Durban who at the time was Colonel BW Mahlangu – Colonel Mahlangu – at the time. We exchanged pleasantries with him because he is a Mahlangu and my late mom's surname is Mahlangu and we used to call each other cousins until his involvement in all of this thing and which I did not know then we stopped having that relationship.

**ADV PAUL JOSEPH PRETORIUS SC:** You deal with some of those issues in due course.

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

10 **ADV PAUL JOSEPH PRETORIUS SC:** Perhaps we should take it step by step. The Acting National Director of Public Prosecutions at the time of your appointment was Advocate Jiba?

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct.

**ADV PAUL JOSEPH PRETORIUS SC:** Was there any formal or even informal handing over process where the two of you sat down and exchanged details of the state of the NPA, the prosecutions current policies and the like?

**MR MXOLISI SANDILE OLIVER NXASANA:** No Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** Did you instruct Advocate Jiba to  
20 conduct a formal hand over process with your appointment?

**MR MXOLISI SANDILE OLIVER NXASANA:** I did Chair and she did not comply.

**CHAIRPERSON:** In relation to the date of your assumption of duty when would that have been? In a week's time or when you asked for her to do a hand over – a week's time, two weeks' time or much later?

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**MR MXOLISI SANDILE OLIVER NXASANA:** Chair I – there were a lot of things happening Chair because when I – I think it was around December – if I am not mistaken – December 2013.

**CHAIRPERSON:** Okay, thank you.

**ADV PAUL JOSEPH PRETORIUS SC:** At the time we know from other evidence and the Chair will be informed perhaps in relation to these matters and more detail in due course but we have heard that at this time there were investigations being conducted in regard to the conduct of General Booysen in KwaZulu-Natal. What has been called the Cato  
10 Manor death squad investigations?

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** Were you given any information about those investigations on your assumption of office?

**MR MXOLISI SANDILE OLIVER NXASANA:** No Chair. I was not given any information.

**ADV PAUL JOSEPH PRETORIUS SC:** How did you learn of the investigations – if at all?

**MR MXOLISI SANDILE OLIVER NXASANA:** Apart from the fact that coming from Durban I knew that there was an investigation whilst I was  
20 still in private practice because the matter was at the court that I appear frequently. That is the Durban Court but when I assumed office I did not know what the status of that matter was and I was not informed about it. I only learnt about it when I read the newspaper. I cannot remember where I was coming from but I was travelling. I was on plane – on the plane reading if I remember a – the Business Times.



Then I saw that there was a decision by Judge Gorven in KZN.

**ADV PAUL JOSEPH PRETORIUS SC:** G-O-R-V-E-N.

**MR MXOLISI SANDILE OLIVER NXASANA:** G-O-R-V-E-N, yes – criticising the manner in which Advocate Jiba handled herself in the matter but of particular concern was also that the NPA was appealing the decision of Judge Gorven. Then I became worried because as the Head of the institution and taking into consideration the – the seriousness of that matter I thought that it was appropriate that I be familiarised with what was happening. I immediately summoned the – I  
10 think it was Advocate Jiba – and asked her to tell me what was happening in the matter and summon the prosecuting team. They came over to my office in Pretoria and we went through the evidence there and then I got the impression - Chair I think the matter – I think they have spoken about the matter previously but ...

**CHAIRPERSON:** Yes.

**MR MXOLISI SANDILE OLIVER NXASANA:** Of particular importance is that what I also found in the matter is that when Advocate Jiba authorised the racketeering certificate but perhaps I must explain that the racketeering certificate can only be authorised by one person in the  
20 whole country that is the National Director of Public Prosecutions himself or herself and the National Director of Public Prosecutions cannot delegate that authority to anyone.

**CHAIRPERSON:** That is in terms of the National Prosecuting Authority Act?

**MR MXOLISI SANDILE OLIVER NXASANA:** Hm.

**CHAIRPERSON:** Or in terms of the legislation (intervenes) ...

**MR MXOLISI SANDILE OLIVER NXASANA:** In terms of the legislation.

**CHAIRPERSON:** To – to ...

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

**CHAIRPERSON:** Racketeering?

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

**CHAIRPERSON:** Yes, okay.

**MR MXOLISI SANDILE OLIVER NXASANA:** In terms of the legislation to racketeering. Then in this matter what I found is that Advocate Jiba  
10 authorised the racketeering – she signed the racketeering certificate and authorised the – that – that General Booyesen be charged with racketeering which was then the subject matter in court. Judge – General Booyesen challenged the – challenged that and Judge Gorven found in his favour that there was no evidence justifying the authorisation of the racketeering charges against General Booyesen but when I questioned Advocate Jiba why she had to sign that obviously bearing in mind that she was exercising her authority at the time before I – I came there. Her – her response was that she relied – if I quote her she said – I relied on the so called experts – racketeering experts  
20 and then I pointed out to her that it is ...

**CHAIRPERSON:** Was she pointing to certain specific people as experts?

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes. She pointed at people – the prosecution team who were present.

**CHAIRPERSON:** Yes, okay.

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**MR MXOLISI SANDILE OLIVER NXASANA:** Then I said to her perhaps it would have been better. I did not expect – I would not have expected her to go through the – the bundles and bundles – in fact it was the boxes of evidence but if I were her I said I would have asked them to point me to the relevant evidence that points to racketeering – to the relevant evidence that implicates General Booysen and to my surprise what they then produced ...

**CHAIRPERSON:** I am sorry. When you say she said she relied on ...

**MR MXOLISI SANDILE OLIVER NXASANA:** Someone.

10 **CHAIRPERSON:** The persons that she referred to as experts in racketeering.

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

**CHAIRPERSON:** Was she saying that in relation to concluding whether or not a racketeering charge should be one of the charges against General Booysen?

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct.

**CHAIRPERSON:** So she was saying as to whether there was enough evidence or not to justify ...

**MR MXOLISI SANDILE OLIVER NXASANA:** Her ...

20 **CHAIRPERSON:** A charge of racketeering she had relied on them?

**ADV PAUL JOSEPH PRETORIUS SC:**

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct.

**CHAIRPERSON:** That was your understanding (intervenes)?

**MR MXOLISI SANDILE OLIVER NXASANA:** That was my understanding Chair.

**CHAIRPERSON:** Yes, okay.

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes. then Chair I think it is – it is on record that what was there in the – in the file – in the docket was a – a mere unsigned statement not commissioned from one witness who left the country as in Greece – he is in Greece - and also the other statements were statements of – were hearsay statements which were not only hearsay but twice removed hearsay statements and Your Worship my feeling was that there is no way I then took them through and I explained to them, I convinced them that there is no way  
10 that you would succeed in appealing the decision of Judge Gorvan and I then instructed them to withdraw the notice of appeal which, they then did.

**CHAIRPERSON:** You made a comment earlier on about who has power to authorise or sign racketeering certificate or authorise that a person be charged with racketeering and as I understand your evidence you were saying that it's only the National Director of Public Prosecutions, in the whole country who can authorise that a person be charged with racketeering, is that correct?

**MR MXOLISI SANDILE OLIVER NXASANA:** That's correct Chair.

20 **CHAIRPERSON:** And to show that authorisation he or she signs a certain certificate, is that correct?

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**CHAIRPERSON:** Now I thought there was a point you wanted to make about that, I assume that Ms Jiba had signed that certificate if she did sign it at a time when she was acting National Director of Public

Prosecutions?

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct and because of – because she was acting National Director, she had the power.

**CHAIRPERSON:** She had the power.

**MR MXOLISI SANDILE OLIVER NXASANA:** She had the power to say...(intervention).

**CHAIRPERSON:** So there is no issue about that?

**MR MXOLISI SANDILE OLIVER NXASANA:** The issue is that, Chair,  
10 the point I'm making is, before she signed the racketeering certificate she had to satisfy herself that there was evidence to justify her to sign the racketeering certificate and I found her response to my question, really puzzling that she could only rely to the – she could only rely upon what she has been – she was told by the so-called experts, the prosecutors that were leading the matter because – I think that was the reason why the legislature made that provision that it must only be the National Director of Public Prosecutions, that is the – the National Director of Public Prosecutions is given the responsibility to satisfy himself or herself that because of the – of the consequences flowing  
20 from being charged with racketeering.

**CHAIRPERSON:** So part of the point you are making is, there must be a reason why the legislation said only one person in the whole country can make the decision whether a person should be charged with racketeering and that must be because of the seriousness of the charge of racketeering and its consequences on a person and that although

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any prosecutor and any Director of Public Prosecutions should satisfy themselves or himself or herself before deciding on any charge against anybody. This one is particularly serious...(intervention).

**MR MXOLISI SANDILE OLIVER NXASANA:** It's very serious yes.

**CHAIRPERSON:** And the NDPP must take care to satisfy himself that there is – or herself that there is proper and sufficient evidence before authorising it, that's part of the point you are making.

**MR MXOLISI SANDILE OLIVER NXASANA:** That's the point I'm making Chair.

10 **CHAIRPERSON:** Okay thank you.

**ADV PAUL JOSEPH PRETORIUS SC:** You mentioned to the Chair, Mr Nxasana that during the course of the conversation with Advocate Jiba you suggested that she might have considered actually examining the evidence and asking the prosecutors to point out the evidence to her on which she based her decision.

**MR MXOLISI SANDILE OLIVER NXASANA:** That's is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** What – do you recall her response to that intervention by yourself?

20 **MR MXOLISI SANDILE OLIVER NXASANA:** Chair her response was that she relied on the – if I quote her verbatim, she said, "I relied on these so-called experts - racketeering experts".

**CHAIRPERSON:** I understand you to say the persons to whom she referred as experts were in the same room, in the meeting.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct.

**CHAIRPERSON:** What was their response when she said that, did

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they say anything about whether there was evidence or were they conceding that there wasn't evidence?

**MR MXOLISI SANDILE OLIVER NXASANA:** Chair the team as far as I can recall, the team appeared to be divided on the issue but they were of the opinion, I don't know, because they were quiet, they did not respond to when she said she relied on what they had told her.

**CHAIRPERSON:** Yes.

**MR MXOLISI SANDILE OLIVER NXASANA:** But then we went through the matter and I made it clear – it became very clear that there  
10 was no evidence in the docket to justify the racketeering, in fact, Chair, I went as far as to - if I may be allowed this latitude, I went as far as to advise them that, you see I come from Durban and most of the – and some of the victims of the so-called Cato Manor death squad were people that I knew personally, I even told them at that meeting and I told the that perhaps I was trying to display any feeling that I might be taking sides, I wanted to display to them that if there was any person that is really very close to what is happening in KZN, it's myself other than them because even the people who died under the so-called – the alleged death squad, are the people that I knew and I counted to them,  
20 the names of those people that I knew very well. I was trying to convince them and I said to them, you see I understand that you mustn't be carried away by this racketeering charges, you may also consider the predicate charges, predicate offences, murder, accessory to murder, conspiracy to murder if there is any but really in the docket there is none – there is no evidence of racketeering against General



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Booyesen and if the docket still remains the same as I left it, my view is still the same.

**CHAIRPERSON:** Thank you.

**ADV PAUL JOSEPH PRETORIUS SC:** So in summary you learnt from sources other than sources in the NPA that Judge Govern had issued a judgment in which he was critical of the NPA stance in relation to charges against General Booyesen.

**MR MXOLISI SANDILE OLIVER NXASANA:** I read from the newspapers.

10 **ADV PAUL JOSEPH PRETORIUS SC:** You read from the newspaper?

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** You then instituted your own inquiries within the office as Director of National Public Prosecutions.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** You called Advocate Jiba who had signed the racketeering certificate to account basically.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

20 **ADV PAUL JOSEPH PRETORIUS SC:** You suggested to her that it would have been appropriate for her to satisfy herself directly by reference to witness statements and other evidence that there was indeed a basis for issuing the certificate.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** You then understood from her responses that she hadn't had direct access or required direct access to evidence but had rather relied on the opinions of others.

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**MR MXOLISI SANDILE OLIVER NXASANA:** That is absolutely correct.

**ADV PAUL JOSEPH PRETORIUS SC:** You then conducted the exercise yourself.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** And you came to a different conclusion.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is so sir.

**CHAIRPERSON:** You see some of the witnesses who have come  
10 before me have suggested that what has happened in some of the  
cases is that people who were fighting corruption were being charged  
by the NPA with various crimes in circumstances where there was no  
evidence to support those crimes. The suggestion being that they are  
being the decisions to charge certain people may have been influenced  
by reasons other than legitimate legal reasons. Now I have to ask you  
this question, were you - did the persons that Ms Jiba referred to as  
experts in racketeering, did they at any stage say to you, here are  
some documents which supported our opinion that General Booysen  
should be charged, either on that day at the meeting or at any stage  
20 afterwards, did they ever say to you, no, no, no our decision or  
recommendation to the acting NDPP was justified because of this and  
that and that?

**MR MXOLISI SANDILE OLIVER NXASANA:** Chair I did ask them to  
produce at least evidence – at least *prima facie* evidence against  
General Booysen but they then referred to the statement of – I don't

know if I may mention the witness?

**CHAIRPERSON:** I think you may, I think we may have been told – I think we have been told yes.

**MR MXOLISI SANDILE OLIVER NXASANA:** They then produced the statement of a Mr Danikus he was a Greek national, it was an unsigned statement.

**ADV PAUL JOSEPH PRETORIUS SC:** Won't you spell that name please?

**MR MXOLISI SANDILE OLIVER NXASANA:** It's D-a-n-i-k-u-s,  
10 Danikus, Chair that was an unsigned statement, then when I asked for any statement implicating General Booysen they then produced a statement, I cannot remember the name but I will try to recollect it was a person who apparently was a security guard for a Stanger Taxi Association who, in his statement, was alleging that a Mr Mhlongo who was a member of the executive committee of Stanger Taxi Association was – had collected monies from the Association and told the Association in this security guard's presence that , that money was required by the General and that he was present when Mhlongo and the Chairperson at the time was Mr Zondi of the Stanger Taxi Association  
20 went to meet with the General at the gateway. Chair that is the General it doesn't even describe that it was General Booysen, that is the problem but he doesn't say that he overheard the conversation between even that General and Mhlongo, that was the only evidence that they said that it implicated General Booysen.

**CHAIRPERSON:** So this person who had signed this statement, you

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say he was a security guard simply said, he was present when somebody collected money and said it was for a certain General or the General...(intervention).

**MR MXOLISI SANDILE OLIVER NXASANA:** Wanted the money.

**CHAIRPERSON:** Wanted the money yes- wanted by the General.

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

**CHAIRPERSON:** He did not mention who the General was is that...(intervention).

**MR MXOLISI SANDILE OLIVER NXASANA:** No.

10 **CHAIRPERSON:** Yes and that he was present also – or that the Chairperson of the Taxi Association took it to meet with the General and that he was present when he met with the General or that didn't come out clearly?

**MR MXOLISI SANDILE OLIVER NXASANA:** It didn't come out clear but I think he was in the vehicle as the VIP protection.

**CHAIRPERSON:** Yes but also he didn't say who the General was?

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

**CHAIRPERSON:** Are those the only two documents they produced?

**MR MXOLISI SANDILE OLIVER NXASANA:** At the time yes.

20 **CHAIRPERSON:** And they did that in that meeting?

**MR MXOLISI SANDILE OLIVER NXASANA:** In that meeting.

**CHAIRPERSON:** In Ms Jiba's presence?

**MR MXOLISI SANDILE OLIVER NXASANA:** In Ms Jiba's presence.

**CHAIRPERSON:** And Ms Jiba didn't point to anything else she might have been told or shown in regard to what evidence there was.

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**MR MXOLISI SANDILE OLIVER NXASANA:** No.

**CHAIRPERSON:** Okay thank you.

**MR MXOLISI SANDILE OLIVER NXASANA:** Perhaps Chair, that is why if I follow the matter, I think when it came before you, if I'm not mistaken, I think that is why then subsequent I heard that Advocate Shaun Abrahams re-instated the charges, but I understand that people were sent to Greece to obtain a statement, again I'm told that, that statement is written in Greece and it was translated by someone here.

**CHAIRPERSON:** No I think it's important that, while you are here, we  
10 get as much evidence as you have to inquire into these things – these matters because it's quite a serious suggestion or allegation when it is said that the NPA or certain people within the NPA abused their powers to charge people who should – against whom there was no evidence and that they were motivated by certain illegitimate considerations because if there is no evidence to support those allegations against those people or against the NPA then let us know but if there is evidence then let us know, the nation deserves to know exactly what the position is because the NPA is a very important institution in the country and in the fight against crime and the nation needs to know  
20 exactly what the position is and if there are people who did that, we must know if there is evidence that shows that that's what they did and they will come before the Commission, put their side of the story and the Commission will make decisions and findings in due course and it was important that somebody like you comes before the Commission because you were – for a certain period of time occupying this very

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important position of NDPP and you left under certain circumstances and in the public domain there are all kinds of things that are said but also there are judgement, Court judgements that have dealt with that. It's important that somebody like you comes and tells the Commission exactly what you know and what happened while you were NDPP so that the Commission can have as full a picture as possible before, in due course, it makes findings.

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes I appreciate that.

Sir – Chair can I make also this observation because – so that my  
10 evidence here is not taken out of context.

**CHAIRPERSON:** Yes.

**MR MXOLISI SANDILE OLIVER NXASANA:** I haven't suggested that there was no evidence at all against General Booyesen's co-accused.

**CHAIRPERSON:** Yes, yes.

**MR MXOLISI SANDILE OLIVER NXASANA:** That – just to make that one very clear.

**CHAIRPERSON:** Yes, yes.

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes  
because...(intervention).

20 **CHAIRPERSON:** But you are saying with regard to the...(intervention).

**MR MXOLISI SANDILE OLIVER NXASANA:** To the racketeering charge against Booyesen, Chair there was not a shred of evidence.

**CHAIRPERSON:** Are you saying anything in regard to any other charges I can't remember whether that was the only charge he was facing, are you saying anything about any other charges he may have

been facing other than the racketeering charge, I just can't remember if it was just racketeering charges.

**MR MXOLISI SANDILE OLIVER NXASANA:** Because in the main

Chair, perhaps just to unpack this matter Chair, you know I even suggested Chair that if I was prosecuting that matter or directing that matter I was going to – I said to them, you could have approached one of the co-accused and turn him a 204 witness because most of the evidence I said to them, you know, I'm based in Durban and come from Durban and all that you are telling me here is what is in the public  
10 domain in Durban. We hear a lot of things about Cato Manor at the time and I told them that we would hear that when the members of the Cato Manor Unit had killed a person, they would plant a firearm and then General Booysen would come and take over the scene, so to say. Those were the allegations but then I said to them, these are just allegations and without the evidence in the docket you cannot prosecute because we don't prosecute with emotions and I tell you this is what I would also hear about the Cato Manor Unit and Chair, there was also evidence also, in the – there were allegations, not evidence in the docket that one member of the Cato Manor Unit shot and killed a  
20 teenager at, I think, Empangeni (indistinct) when they were looking for a suspect, I don't know whether the suspect was related to this young man but I think they recklessly opened fire and killed an innocent young man. That's a simple investigation, I've never been an investigator in my life but, I mean you can take – collect evidence, match cartridges, spent cartridges, take the firearms for ballistic



examination purposes and link the person or even use the adoption of common purpose to charge whoever, that is why I pointed out to them that they mustn't get carried away with this racketeering charge but of particular importance which I brought to their attention that, if you want to charge a person with racketeering you have to prove that there has been a pattern and this pattern has been continuously happening for a particular period and I said, if they want to allege that Cato Manor as the unit which was based at Cato Manor, Chair knows where Cato Manor is, in Durban, and my difficulty was that at the time General

10 Booyesen was not even a member of that unit because he was the head of the Hawks in Durban based, the now called (indistinct) building in Durban and then to allege that he was managing the enterprise when he was based there, they were not going to succeed.

**CHAIRPERSON:** Okay thank you.

**ADV PAUL JOSEPH PRETORIUS SC:** Just to explain the reference you made to Section 204, Section 204 is a Section of the Criminal Procedure Act, I understand, that is used to enable a co-accused to assist the prosecution and perhaps receive indemnity in the Court's discretion as a result.

20 **MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** And that's what you were referring to.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is what I was referring to.

**ADV PAUL JOSEPH PRETORIUS SC:** Earlier as having been as step

that could and perhaps should have been taken.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair, that is what I was suggesting.

**ADV PAUL JOSEPH PRETORIUS SC:** The time at which you took office, October 2013 was a time when the former President Zuma was still being investigated, is that correct?

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair

**ADV PAUL JOSEPH PRETORIUS SC:** Were you briefed on the status of that investigation?

10 **MR MXOLISI SANDILE OLIVER NXASANA:** Not at all Chair, in fact Chair I've never even touched the docket relating to the former President Jacob Zuma. I understand that the docket was still in the possession of Advocate Jiba and Mr Hofmeyr, if I'm not mistaken.

**ADV PAUL JOSEPH PRETORIUS SC:** Alright.

**CHAIRPERSON:** Was – is it correct that the investigation was still going on at that time because remember in 2009 charges were withdrawn, did the investigation continue after they had been withdrawn?

20 **MR MXOLISI SANDILE OLIVER NXASANA:** Chair my response for the question of the investigation, I understand quite clearly that the investigations had ceased to – by then but I understand that the matter was pretty much very alive because there were challenges at the time. Then my response is in regard to that, that there were people still challenging the decision to withdraw charges against the former President Jacob Zuma.

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**CHAIRPERSON:** So in other words you are not necessarily saying there were investigators who were still continuing to investigate...(intervention).

**MR MXOLISI SANDILE OLIVER NXASANA:** No, no.

**CHAIRPERSON:** That you do not know?

**MR MXOLISI SANDILE OLIVER NXASANA:** No I'm not – I don't know Chair.

**CHAIRPERSON:** Ja you simply know that the matter...(intervention).

**MR MXOLISI SANDILE OLIVER NXASANA:** There were Court  
10 challenges.

**CHAIRPERSON:** There were Court challenges relating to the dropping of the charges.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**CHAIRPERSON:** Okay.

**ADV PAUL JOSEPH PRETORIUS SC:** Yes perhaps my question should have been re-phrased to more accurately reflect what you say in paragraph 29 Mr Nxasana when you say you were not briefed on the status of the investigation rather on whether the investigation itself was continuing.

20 **MR MXOLISI SANDILE OLIVER NXASANA:** That is correct.

**ADV PAUL JOSEPH PRETORIUS SC:** Right if we can move on then please to the events leading up to your own suspension. During your first year in office, it was not much more than a first year in office, but during that year, did you learn anything about the attitude towards you and the conduct towards you on the part of Advocates Jima and

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Mgwebi, that's Laurence Mgwebi and Nomgcobo Jiba?

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes Chair, Chair as I

pointed out that I was appointed on the 31<sup>st</sup> of August 2013 with effect from the 1<sup>st</sup> of October 2013. In a sense it means that I had this whole month of September still in Durban to wrap up before I took office.

Chair I started to learn that during that period of September, because the announcement was made by the President that, there were people that were running around, driving around in the township where I grew up from that is Umlazi in my area and that these people, many people

10 were stopping people, asking them about me, about my history especially about my involvement in a matter that was publicised of murder around 1985. It didn't puzzle me at first because I thought that it was part of the vetting process but this thing gained its momentum until I got to the office. I then learnt there were members within NPA who were very much responsible also for that. I then subsequently

received unsolicited statement in the form of an affidavit from one member of the NPA by the name of Terrence Joubert who was, at the time, I don't know if he still is, a risk specialist at NPA he was based in Durban. He sent me an email and in the email there was an affidavit

20 that affidavit forms part of the bundle here where he then – where he was basically telling me that there was a campaign by Advocate Jiba that – to dig the dirt about me so that the intention, the whole purpose was to embarrass me so that the President will then remove me as the National Director of Public Prosecutions and she would then stand a chance of being considered to either continue to act or to be appointed

permanently, it is there but it also – this affidavit – in this affidavit he also states that there were police – two police members that were assigned to the DPP, that's Deputy – Director of Prosecutions in KZN, Advocate Noko who was stationed there at his office who had received vehicles from the provincial office at the time the Commissioner was – Commissioner Mmamonye Ngobeni and that those people that were there, those two gentlemen they were then tasked with going around finding any dirt about me but he also went as far as recording this Colonel Mahlongo. Yesterday I tried to get this recording, I only  
10 managed to get it very late because it happened in – I think 2013 or 2014 where basically I could hear the voice of Colonel Mahlongo and Terrence Joubert, Joubert was playing along. He did not – Colonel Mhlongo did not know that he was recording him. He was basically saying that Jiba had mandated him to go about digging dirt about me. They went so far as to that recording saying that I think Terence Joubert had undertaken to hook him up with people from the Road Accident Fund because the allegation was that because I was practising as an attorney they were alleging that I had embezzled clients monies when I handled the Road Accident Fund claims and also  
20 I do not know how they got it from and it is true that my wife at some stage was also – was employed at the – at the Road Accident Fund office in Durban. All of that it is there that my wife was also employed there and that Terence Joubert was going to hook him up with the gentleman at Road Accident Fund so that they could give them evidence implicating me in all of that. They also refer in the murder

charge that Terence Joubert could hear him saying that that murder charge that you have in your position referring to Colonel Mhlongo that was – it is there – it is there I have it in the record here.

**ADV PAUL JOSEPH PRETORIUS SC:** Because these are serious allegations perhaps we should do you the favour of allowing to go through your evidence in the sequence you settled it in your statement. You talked about people in Umlazi informing you.

**ADV MXOLISI SANDILE OLIVER NXASANA:** That is...

**ADV PAUL JOSEPH PRETORIUS SC:** This was before your  
10 appointment actually became confirmed or...

**ADV MXOLISI SANDILE OLIVER NXASANA:** It was confirmed.

**ADV PAUL JOSEPH PRETORIUS SC:** Before you took office.

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes, yes.

**ADV PAUL JOSEPH PRETORIUS SC:** After its confirmation but before you took office trying to as you put it dig up information about your past.

**ADV MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** That is the one set of facts that you place before the Chair.

20 **ADV MXOLISI SANDILE OLIVER NXASANA:** That is correct.

**ADV PAUL JOSEPH PRETORIUS SC:** You also mentioned earlier in your evidence the approach to you of two NPA officials.

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** Now what did they tell you? That is in paragraph 33 of your statement.

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**ADV MXOLISI SANDILE OLIVER NXASANA:** That is the one that I am referring to. That approach I meant the – the affidavit that I received from Mr Terence Joubert.

**ADV PAUL JOSEPH PRETORIUS SC:** And the other person?

**ADV MXOLISI SANDILE OLIVER NXASANA:** The other person was Ms Queen Mlongo who was stationed at the – the NPA offices attached to the Asset Forfeiture Unit in Durban.

**ADV PAUL JOSEPH PRETORIUS SC:** What did she tell you?

**ADV MXOLISI SANDILE OLIVER NXASANA:** She told me that Colonel  
10 Mglongo was bragging saying that – in fact she also had recorded him unfortunately we have lost the phones now and the recordings but I listened to the recording myself. And in that recording he was bragging that he claimed to know me very well and he made a lot of false allegations about me in that recording but of importance is that he was saying that he had been promised the appointment of the Brigadier – he was accusing me of wanting to charge General Mdluli and that General Mdluli if he is not charged General Mdluli was going to make sure that he is appointed as the – he was going to be promoted as the Brigadier.

**ADV PAUL JOSEPH PRETORIUS SC:** Let us just take that slowly  
20 because that is a lot of information.

**CHAIRPERSON:** Maybe before you proceed Mr Pretorius just one line. At the time going back to Mr Joubert's affidavit – at the time you got that affidavit was Mr Joubert known to you?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Chair no he was not known to me.



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**CHAIRPERSON:** So you received an affidavit from somebody that you had never met, that you did not know?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes but he is an employee of the NPA.

**CHAIRPERSON:** Yes.

**ADV MXOLISI SANDILE OLIVER NXASANA:** And my details are there for them.

**CHAIRPERSON:** Yes. Okay.

10 **ADV MXOLISI SANDILE OLIVER NXASANA:** Because I received on the ...

**CHAIRPERSON:** On the email.

**ADV MXOLISI SANDILE OLIVER NXASANA:** Official NPA email.

**CHAIRPERSON:** Okay, Thank you.

**ADV PAUL JOSEPH PRETORIUS SC:** Right. So you have said in your statement that almost immediately after you were appointed two NPA officials approached you. We will deal with Mr Joubert in a moment. The other person how do you spell her name?

**ADV MXOLISI SANDILE OLIVER NXASANA:** It is Queen. Queen Mhlongo. Mhlongo it is Mhlongo.

20 **ADV PAUL JOSEPH PRETORIUS SC:** Ngo. Right. Did she tell you anything about Advocates Jiba and Mwebe?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Chair except that – I just see if I can refresh my memory.

**ADV PAUL JOSEPH PRETORIUS SC:** Yes please do. Look at paragraph 33 of your statement.

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**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes, Yes Chair this is – that is the – the evidence that I have just given that paragraph 33 talks to that about the plot to oust me. That Colonel Mhlongo was the main person that was used by Advocate Jiba to run the campaign.

**ADV PAUL JOSEPH PRETORIUS SC:** And Advocate Mwebi?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Both of them Chair.

**CHAIRPERSON:** Hm you talk about two officials of the NPA one of them I understand to have been Mr Joubert.

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes.

10 **CHAIRPERSON:** That you are talking about. Was the other one the person that you refer to as Queen Mhlogo?

**ADV MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**CHAIRPERSON:** Okay.

**ADV MXOLISI SANDILE OLIVER NXASANA:** She was – she was attached to the Asset Forfeiture Unit based in Durban at the time. But she is no longer with the NPA. She is the private...

**CHAIRPERSON:** Okay. Thank you.

**ADV MXOLISI SANDILE OLIVER NXASANA:** Sector now.

20 **ADV PAUL JOSEPH PRETORIUS SC:** Did they approach you together as a team or did they approach you separately?

**ADV MXOLISI SANDILE OLIVER NXASANA:** No independent of each other Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** These were two separate independent...

**ADV MXOLISI SANDILE OLIVER NXASANA:** Separate incidents.

**ADV PAUL JOSEPH PRETORIUS SC:** Approaches to you?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** Right.

**CHAIRPERSON:** Around about the same time?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Around about the same time Chair.

**CHAIRPERSON:** Hm.

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes.

**CHAIRPERSON:** During the month of September before you – no, no  
10 after you had commenced your duties as NDPP?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes after I had  
commenced my duties yes.

**CHAIRPERSON:** Okay ja.

**ADV MXOLISI SANDILE OLIVER NXASANA:** And Chair I think I must  
also mention that both – I think they were – Terence Joubert and –  
although he was a Risk Officer Specialist. I think his office was also in  
the same building as the office where – of the Asset Forfeiture Unit of  
the NPA in Durban. That is the ...

**CHAIRPERSON:** Where Ms Queen Mhlongo...

20 **ADV MXOLISI SANDILE OLIVER NXASANA:** Yes.

**CHAIRPERSON:** Was working [indistinct]

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes it is – yes – it – at –  
is it 185 Building, Southern Life Building.

**CHAIRPERSON:** Hm.

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** Alright. These approaches to you at whose instance were they made? Did you call on them to speak to you? Did they come of their own accord? What was the case?

**ADV MXOLISI SANDILE OLIVER NXASANA:** No Chair they came of their own accord.

**ADV PAUL JOSEPH PRETORIUS SC:** And separately?

**ADV MXOLISI SANDILE OLIVER NXASANA:** And separately.

**ADV PAUL JOSEPH PRETORIUS SC:** Alright.

**ADV MXOLISI SANDILE OLIVER NXASANA:** In fact Chair what I have  
10 not mentioned here in the affidavit is I have referred earlier to an incident when I said I was warmly welcomed at the NPA and during that – I referred to a – to the day when Minister Radabe came to introduce me. I gave a speech also there. We were at the auditorium. Chair I then said – I remember saying that Minister I am no – NDPP has ever finished his term of office and I can assure you that I will finish my term of office. In fact the NPA Act even permits me to take an extra period of not more than two years and I am sure that I will be here for the period of 12 years. I was saying that in jest.

**CHAIRPERSON:** Yes.

20 **ADV MXOLISI SANDILE OLIVER NXASANA:** But what then happened is that later on I – a lady was then seconded to my office as my secretary and at a very late stage she then said to me that she related her story to me that she said she was present at the – when I gave that – at that welcoming event. Then she said there was a gentleman she was standing by the door and a second gentleman immediately passed

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a comment after I made those remarks and said you will be surprised that you will not even last for a period of three months. As we continued working together then in the office and she then happened to meet and know that apparently that person who made those comments was Mr Lawrence Mwebe.

**CHAIRPERSON:** So – so this lady who was employed by the NPA said a person who was standing behind her.

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes.

**CHAIRPERSON:** At...

10 **ADV MXOLISI SANDILE OLIVER NXASANA:** Or next to her.

**CHAIRPERSON:** Oh next to her?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes.

**CHAIRPERSON:** At the time when you made the speech.

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes.

**CHAIRPERSON:** After being introduced by Minister Jeff Radabe at the NPA to the NPA staff.

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes.

**CHAIRPERSON:** Said you will be surprised that you will not even finish three months?

20 **ADV MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**CHAIRPERSON:** And then that same lady later came back to you and said that person was Mr Lawrence Mwebe?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes when she got to see him when we had interactions with them in my boardroom.

**CHAIRPERSON:** Yes. Okay.

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**ADV MXOLISI SANDILE OLIVER NXASANA:** And she identified him as Lawrence Mwebe.

**CHAIRPERSON:** Okay thank you.

**ADV PAUL JOSEPH PRETORIUS SC:** Alright. You have spoken then about the two NPA officials who approached your unsolicited and separately?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** With information.

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes.

10 **ADV PAUL JOSEPH PRETORIUS SC:** About what other people in the NPA were doing to unseat you?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** Is that more or less an accurate summary I do not want to put words in your mouth unnecessarily. We are going to go to the detail in a moment.

**ADV MXOLISI SANDILE OLIVER NXASANA:** Ja but again also Chair perhaps this might also become relevant I – also during the – just to go back. During the – that September period of 2013 when the announcement had been made before I took office I received – I  
20 remember I received a call from Advocate Mdladla commonly known as Advocate Sthembiso Mdladla commonly known as Sticks Mdladla. I know that he was then subsequently one of the members of the Cassim Commission of Inquiry he was also a member. He phoned me in the morning and said to me apparently he made mention of a Mr Mwebe. He said he understand Mr Mwebe wanted to speak to me because he

fears or hears told him that – he has been told that when I came to NPA I will deal with him. Chair it took me by surprise as I pointed out earlier on that I did not even know him. I did not even met him I did not know anyone except the person that I later identified as Advocate Pinkie Mokgatlé.

**CHAIRPERSON:** The information that the lady gave you about the gentleman that was standing next to her was that information solicited?

**ADV MXOLISI SANDILE OLIVER NXASANA:** No Chair.

**CHAIRPERSON:** Hm. Okay.

10 **ADV PAUL JOSEPH PRETORIUS SC:** Right. You said that Mr Terence Joubert gave you an affidavit that is part of the bundle?

**ADV MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** In summary what did Mr Joubert tell you in that affidavit? Or what did that affidavit say? You deal with that in paragraph 36.

**ADV MXOLISI SANDILE OLIVER NXASANA:** In summary Chair apparently Advocate Jiba was going to Durban. I think it was on the day that I met her. And the protocol is that Terence Joubert as the Risk Officer Specialist in Durban is – was responsible for security and risk. I  
20 think he was the head in Durban. He was the one who was going to fetch Advocate Jiba from the King Shaka International Airport and drive to her destination. But then Mr Joubert says that he then subsequently when he had made arrangements to go and fetch Advocate Jiba he received a phone call from the Advocate Jiba's secretary advising him that he was not – he was no longer going to be – it was not going to be



him who was going to fetch Advocate Jiba and it was now going to be Colonel Mhlongo. And then he said he found that very strange because he talks about the security, the protocol and the security risk attached to all of that. And then he made mention of a situation where – he then made mention of these two police officers that were deployed to the DPP's office in Durban Advocate Noko and that is when he challenged that because of the security risk and that they were not vetted apparently his boss from the head office a Mr Ramahana flew down and came down and castigated him for that. Then he in this affidavit he

10 then talks about the – the plot now that apparently Jiba was running a campaign to get me removed as the – he said to Mhlongo – or he said Mhlongo told him that ...

**ADV PAUL JOSEPH PRETORIUS SC:** Mhlongo told who?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Oh sorry Mhlongo told Joubert.

**ADV PAUL JOSEPH PRETORIUS SC:** Yes.

**ADV MXOLISI SANDILE OLIVER NXASANA:** That Jiba said to him – Jiba does not trust this guy the – who is the new NDPP Mr Nxasana and that Mhlongo must go out and get some – and dig some dirt about him.

20 So that...

**ADV PAUL JOSEPH PRETORIUS SC:** That is you?

**ADV MXOLISI SANDILE OLIVER NXASANA:** About me?

**ADV PAUL JOSEPH PRETORIUS SC:** Yes.

**ADV MXOLISI SANDILE OLIVER NXASANA:** The whole intention was to embarrass me and that she did not know me but the whole intention

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was to embarrass me so that the President will remove me or will fire me as the National Director and she will then be considered to either continue to act or to be considered on a – to be appointed on a permanent basis.

**ADV PAUL JOSEPH PRETORIUS SC:** So the affidavit of Mr Joubert talks of a conversation between Colonel Mhlongo and Mr Joubert?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes that is correct.

**ADV PAUL JOSEPH PRETORIUS SC:** And relates what was told to Mr Joubert in that conversation by Colonel Mhlongo?

10 **ADV MXOLISI SANDILE OLIVER NXASANA:** That is correct.

**ADV PAUL JOSEPH PRETORIUS SC:** And you have related some of that?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** Was anything mentioned in that conversation according to Mr Joubert about the Road Accident Fund?

**ADV MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** And you have – is that what you have just told the Chair about?

20 **ADV MXOLISI SANDILE OLIVER NXASANA:** That is what I have just told the Chair and also the – the issue about the cases that I had faced in about 2015.

**ADV PAUL JOSEPH PRETORIUS SC:** Alright.

**ADV MXOLISI SANDILE OLIVER NXASANA:** Sorry 1985.

**ADV PAUL JOSEPH PRETORIUS SC:** And what – was anything said about the example prior example of Mr Stanley Gumede would you

explain that briefly to the Chair.

**ADV MXOLISI SANDILE OLIVER NXASANA:** Oh yes. Chair yes. In that affidavit also Mr Joubert refers to – he says that Colonel Mhlongo also told him that Mr Stanley Gumede who is the Regional Magistrate in Durban was the person who was considered for the position before myself. But that Advocate Jiba ran the campaign to discredit him and one of the things in that affidavit that which Joubert alleges is that Jiba or – Jiba then – they convinced a one advocate here – they call him Makosi in Durban to – to complain about the manner in which Mr  
10 Gumede had treated her in court as a result Mr Gumede had to face a lot of complaints and he was investigated by the Magistrates Commission. The matter was all over the media and the President that [indistinct] the President not considering him as the candidate. Then he says that they were using the very same tactic that they used against – and he was responsible Mr – Colonel Mhlongo in that campaign authorised by Jiba.

**ADV PAUL JOSEPH PRETORIUS SC:** Now you have told the Chair that this conversation between Mr Joubert and Colonel Mhlongo was recorded?

20 **ADV MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** You informed the investigators that it had been recorded but as of yesterday we had not been or the investigators had not been able to obtain the recording?

**ADV MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** You managed to obtain the

recording?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Yesterday after I had left you.

**ADV PAUL JOSEPH PRETORIUS SC:** Okay. And you now have that recording?

**ADV MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** Chair we have not had an opportunity firstly to hear the recording, secondly and importantly to transcribe the recording. I am not averse to playing the recording  
10 should you require Chair in fact to do so but on the assumption that we have not been able to precognize the witness in relation to the recording.

**CHAIRPERSON:** How long is the conversation in the recording?

**ADV MXOLISI SANDILE OLIVER NXASANA:** Chair I think it is less than eight minutes if I am not mistaken or five minutes ja.

**CHAIRPERSON:** Yes. Maybe during lunch break I do not know if there could be a chance for you to hear it I would not be insisting that it be heard today if you would rather let it be heard some other time but...

**ADV PAUL JOSEPH PRETORIUS SC:** Well it is just perhaps  
20 inconvenient for you Chair to hear the recording which may be unclear in part without it being properly transcribed. But without a transcription the...

**CHAIRPERSON:** If you ...

**ADV PAUL JOSEPH PRETORIUS SC:** It is not up to us to preconize the witness in the sense that we...

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**CHAIRPERSON:** Ja. No I would prefer that you hear it first so that you have an idea about its value.

**ADV PAUL JOSEPH PRETORIUS SC:** Indeed Chair we will do that over the...

**CHAIRPERSON:** Before I allow it..

**ADV PAUL JOSEPH PRETORIUS SC:** Long adjournment.

**CHAIRPERSON:** If – once you have heard it and if you say you take the – your submissions that it can be heard then we can look at hearing it but if there are circumstances that justify that it be heard on another  
10 day then that should be arranged. I am sure Mr Nxasana would make himself available. But obviously to the extent that it is possible we would like to try and finish his evidence.

**ADV PAUL JOSEPH PRETORIUS SC:** Today.

**CHAIRPERSON:** And so it is just a balance to be struck.

**ADV PAUL JOSEPH PRETORIUS SC:** Yes. Indeed Chair.

**CHAIRPERSON:** Thank you.

**ADV PAUL JOSEPH PRETORIUS SC:** Is this a convenient time then?

**CHAIRPERSON:** Yes. We will take the lunch adjournment now it is one o'clock we will resume at two. We adjourn.

20 **REGISTRAR:** All rise.

**INQUIRY ADJOURNS**

**INQUIRY RESUMES**

**CHAIRPERSON:** Yes Mr Pretorius.

**ADV PAUL JOSEPH PRETORIUS SC:** Chair we have had a polite request from counsel representing Advocate Jiba to place opposition or

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an argument before you. I am trying to get hold of counsel concerned – Advocate Ngalwana. May we stand down for five minutes so I can establish where his whereabouts are?

**CHAIRPERSON**: Okay. We will stand down for about five minutes.

**ADV PAUL JOSEPH PRETORIUS SC**: Thank you.

**CHAIRPERSON**: We adjourn.

**REGISTRAR**: All rise.

**HEARING ADJOURNS**

**HEARING RESUMES**

10 **CHAIRPERSON**: Mr Pretorius you - do you want to deal with the fact that we only resume now?

**ADV PAUL JOSEPH PRETORIUS SC**: Yes thank you Chair. You – you will recall this morning prior to the witness being called and sworn and giving testimony it was drawn to your attention that in all the circumstances which were placed before you Rule 3.3 Notices to implicated parties had not been given but would be given immediately after the conclusion of the witness' testimony. On that basis you requested to allow the witness' evidence and you did so. Since then Advocate Ngalwana on behalf of Ms Jiba has approached the

20 Commission and made certain requests of the Commission. In essence that any evidence concerning Ms Jiba be excluded pending the issue of a notice to allow Ms Jiba to consider her position and take legal advice. Now Chair the purpose of the Rule certainly as we understand it or at least the principle purpose of the Rule is to give an implicated person an opportunity to place a version before the Commission and to make

application to cross-examine. In other words to contest the evidence given by a witness and in any approach that you will be requested to make that principle should remain sacrosanct. There is another potential purpose of the rule and that is if there is any prospect of unlawful and I stress unlawful as opposed to inadmissible evidence being given perhaps of a confidential nature or of a top secret nature then that implicated person would have an opportunity to deal with it. I do not believe we are dealing with that category of issue in this matter. Certainly not in the evidence that the witness intends to give. So that

10 is the principle purpose of the Rule to allow a version to be put and to allow cross-examination to take place and it should be respected at all times. There can be no doubt about that. The Rule maybe departed from in appropriate circumstances and our submission is such circumstances existed this morning and you Chair accepted that. There are two principles embedded in the rules of fairness with which this Commission is obviously bound and in the rules which give expression to those principles of fairness. The one is that no party may because that implicated or otherwise disagrees with the evidence that a person is going to give and who has received notice of that evidence hold a

20 trial or a contest outside the Commission's proceedings and say you cannot lead that evidence because it is wrong or I disagree with it or because it is false. The proper place for that contest to take place is in this forum in public and indeed that is what the law requires that this Commission to take place in public. So a witness gives evidence that. That evidence is contested after that witness has been – had given



evidence. There cannot be a trial outside which would influence that witness' evidence. That is the first principle. The second principle is that – and it is also sacrosanct – is that any implicated person must be given a full and fair opportunity to contest the evidence of a witness and to cross-examine subject to the rules and the discretion that you have embedded in those rules Chair. So those are the two sacrosanct principles. The question is can they be met in this case. If there are circumstances which indicate that the evidence that this witness is about to give is somehow unlawful or cannot be lawfully put before a

10 Commission that is one set of issues. I do not believe those exist here. If however it is merely a matter of managing a fair opportunity to respond either by way of putting up a version or by way of allowing cross-examination then that can be managed in any order that you might make Chair and the rules provide expressly for such a circumstance. I think that is Rule 3.6. There are two options then having considered the position that I would suggest require consideration. The one is to allow the evidence - but to exclude any reference to any implicated party because of course all implicated parties must be treated in the same manner not only Ms Jiba – to allow

20 that evidence to be given without reference to any implicated party and then to recall the witness at a later stage once notice has been given. That is the one option. It may not be entirely practical. It is the cautious option. The second option is to allow the witness to testify subject to appropriate arrangements being made on representations by Mr Ngalwana either now or at a later stage to ensure that there is a full

opportunity to place a version before you and to cross-examine in due course. The tape that we mentioned earlier may possibly fall into the category of that evidence that may not be led at all and perhaps representation should be allowed on that before the tape is played but that concession we are happy to make but otherwise Chair the stark choice and the approach to adopt is left with you.

**CHAIRPERSON:** Well I said in the morning when you mentioned that Mr Nxasana was called in – or pursuant to my directions one of the things I said was that I wanted to hear his evidence in regard to his  
10 departure from the NPA and I said of course then his tenure at the NPA because he having been National Director of Public Prosecutions at a certain stage and there been suggestions and allegations and some evidence that there may have been interference with the NPA and that some people in the NPA may have used their powers to charge and not to charge certain people in an unlawful way or they may not have been motivated by proper reasons. It would be important to hear his evidence. So one, I confirm that Mr Nxasana was called pursuant to my direction. That is the first point. The second point, you did raise in the morning the issue that Rule 3.3. Notices were not given in advance –  
20 were not sent out in advance because the legal team only got a signed statement of the witness yesterday or last evening. I was concerned about that but I indicated that in terms of my focus it was – I expected the witness to deal with largely matters that have been the subject of judgments and some litigation that would be – that would have been in the courts but of course when a witness gives evidence he gets asked

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questions and he gives evidence and he may elaborate and so on. So – and – and I was prepared to let him continue and in doing so the provisions of Rule 3 – of the Rules of the Commission make – they provide that where a party who – an implicated person believes that he has not been given enough – enough notice that party may approach the Commission for such order as may in effect give redress to the situation. Of course this is a situation where the notices were not given in advance at all. That is important to look at. I think what should happen is I should allow Mr Ngalwana to say something if he  
10 wishes to say something. He represents Ms Jiba and then we take it from there but it may well be that where notice has not been given at all. It may be that that must be looked at carefully as opposed to where notice was given but there is a complaint that it is inadequate – the notice given is inadequate or – so maybe subject to whatever you might wish to say I would like to hear what Mr Ngalwana has to say but maybe that we should see what can be done. The idea is always to try and be as fair as possible to everybody but taking into account practicalities that we have to deal with. Mr Ngalwana.

**ADV VUYANI NGALWANA:** Thank you Deputy Chief Justice. Thank  
20 you for the indulgence.

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** Of the two options or perhaps should I confirm that I ...

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** I stand here on the instructions of Majavu

Incorporated ...

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** For Ms Jiba.

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** None of the legal – members or the legal team ...

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** Are in Johannesburg.

**CHAIRPERSON:** Yes.

10 **ADV VUYANI NGALWANA:** So I am the only one who is here. So I have been asked to make these representations.

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** Of the two proposals made by the evidence leader ...

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** I have not taken instructions but I would imagine the one that would endure itself to Ms Jiba and the legal team might be the first one which is to allow the witness to testify further because he is quite right. We cannot stop the witness from giving  
20 evidence in a public domain but then not to give evidence that would implicate Ms Jiba and all the – and the other persons whom – who are not represented by me.

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** Now Mr Pretorius referred to what he terms the principle of Rule 3.3.

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** Just briefly I wish to deal with this.

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** Can I take us to Rule 3.3 itself and with your indulgence DCJ I just want to briefly read it because it is important to understand the text of the Rule so that one can appreciate the textual context and the principles ...

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** That lies behind it.

10 **CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** It reads as follows:

“If the Commission’s legal team intends to present to the Commission a witness whose evidence implicates or may implicate another person it must through the Secretary of the Commission notify an implicated person in writing within a reasonable time before the witness gives evidence.”

I stress on the word “before”.

**CHAIRPERSON:** Yes.

20 **ADV VUYANI NGALWANA:** 3.3.1:

“So must be given reasonable time before the witness gives evidence that he or she ...”

These are the things about which notice had to be given to the implicated person.

“...that he or she is or maybe implicated by the

witness' evidence."

I understand that the evidence leading team only learnt last night about the content of Mr Nxasana's evidence and so there would not have been an opportunity to give prior notice. Two:

"In what way he or she is or maybe implicated and furnished with him or her with the witness' statement or relevant portions of the statement."

Three:

10 "Of the date and when - and the venue when the witness will give evidence."

Four:

"That he or she may attend the hearing at which the witness gives evidence."

Five:

"That he or she may be assisted by legal representative when the witness gives evidence."

Six:

20 "That if he or she wishes to give evidence himself or herself to call any witness to give evidence on his or her behalf or to cross-examine the witness then he or she must within two weeks from the date of notice apply in writing to the Commission for leave to do so and that the Chairperson will decide the application."

3.4 then says:

“An application in terms of in terms of Rule 3.3.6 must be submitted in writing to the Secretary of the Commission within 14 calendar days from the date of the notice referred to in Rule 3.3. The application must be accompanied by a statement from the implicated person responding to the witness’ statement insofar as it implicates him or her. The statement must make it clear what parts of the witness’ statement are disputed or denied and the grounds upon which those parts are disputed or denied.”

And lastly this is the last part I am going to read.

“If an implicated person believes ...”

And this is the part that I understand the DCJ was dealing with.

“If an implicated person believes that the Commission’s legal team did not give him or her notice referred to in Rule 3.3 within a reasonable time before the witness could or was to give evidence and that this may be prejudicial to him or her he or she may apply ...”

That is the implicated person.

“...may apply to the Commission for such order as will ensure that he or she is not seriously prejudiced.”

That is why I am here.



**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** There is nothing in Rule 3.5 that says that application must be in writing ...

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** And of course since the legal team ...

**CHAIRPERSON:** Well you might wish to look towards the end of the Rules ...

**ADV VUYANI NGALWANA:** Yes.

**CHAIRPERSON:** For something that might say any application  
10 provided here needs to be (indistinct) application.

**ADV VUYANI NGALWANA:** Yes.

**CHAIRPERSON:** I seem to think there is something along those lines  
but ...

**ADV VUYANI NGALWANA:** Yes.

**CHAIRPERSON:** Anyway you – you ...

**ADV VUYANI NGALWANA:** I – I appreciate that DCJ ...

**CHAIRPERSON:** Ja.

**ADV VUYANI NGALWANA:** But given ...

**CHAIRPERSON:** Yes.

20 **ADV VUYANI NGALWANA:** Circumstances ...

**CHAIRPERSON:** Ja.

**ADV VUYANI NGALWANA:** When one learns of ...

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** Evidence that might implicate a person ...

**CHAIRPERSON:** Ja.

**ADV VUYANI NGALWANA:** On the morning effectively five minutes ...

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** Before the beginning ...

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** It is impossible ...

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** That one would be able to put that in writing.

**CHAIRPERSON:** Ja.

10 **ADV VUYANI NGALWANA:** Now this – the Rule as I have read talks about the statement ...

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** Of the witness likely to implicate the implicated person.

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** Notice of the statement being given.

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** It does not say notice of evidence ...

**CHAIRPERSON:** Hm.

20 **ADV VUYANI NGALWANA:** Being given.

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** So it is to the statement ...

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** That the implicated person is to respond.

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** The reason I make this submission is this Mr Pretorius in his second option that Mr Nxasana may testify on all and sundry including evidence - as I understand it – evidence that may implicate Ms Jiba subject to Ms Jiba been given an opportunity in due course to come and place her own version before the Commission. Now the Rules 3.3 to 3.5 as I have read it does not seem to me to countenance such a proposition because it deals with statement. It does not with evidence and if a witness is permitted to make or to give evidence that implicates a witness who has not been given notice and  
10 then is given an opportunity to come and place evidence later the damage is long done because as we all know we are all members of society. We watch television. We read newspapers. Whatever is said by a witness especially in this Commission - at least it has been my observation – is any allegation - not even proven evidence - any allegation that is made against a person is taken by society to the truth before it is even tested and so by the time in due course Ms Jiba comes to test that evidence it is too late. Now Chairperson there is a fear that the legal team and Ms Jiba has and I appreciate your explanation of how Mr Nxasana came to testify today. It is the timing of the evidence  
20 the concern is that the President has relieved Ms Jiba of her duties as the Deputy National Director of Public Prosecutions but that that decision still needs to be considered by the National Assembly. Now there is a debate about whether the National Assembly needs to approve the President's decision or it is simply a rubber stamp. I have not studied that but it certainly has to be considered by the National

Assembly and so the fear is that any evidence that implicates Ms Jiba without her having been given prior notice may colour those considerations by members of the National Assembly. We do not know yet when the National Assembly will consider this. We have the State of the Nation Address coming up in a couple of days' time. I do not imagine that is a platform for this sort of thing to happen. So in short Deputy Chief Justice we without having taken instructions but I imagine this might be a practical way to go about it. The first option that Mr Pretorius suggested which is to lead Mr Nxasana in evidence except  
10 the evidence of the implicated people who have not been given notice. There was one last thing which I forget now. Well if I forget it could not have been that important.

**CHAIRPERSON:** Ja.

**ADV VUYANI NGALWANA:** DCJ unless there are ...

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** Other questions that you want to put to me those are my submissions for now.

**CHAIRPERSON:** Yes. No, I just want to confirm again that as far as I know the only reason Mr Nxasana is here is because I gave directions  
20 that a number of witnesses be called and he was among those and – and it was not the first time that I said he should be called. Already last year I had said he should be called and I think some attempts were made but it did not happen.

**ADV VUYANI NGALWANA:** Yes.

**CHAIRPERSON:** Early this year I had said he should be called and

some attempts may have been made and did not succeed.

**ADV VUYANI NGALWANA:** Yes.

**CHAIRPERSON:** So he might have had nothing to do with ...

**ADV VUYANI NGALWANA:** Yes.

**CHAIRPERSON:** Him being here and Ms Jiba maybe or his evidence been at – at a particular time nor would the legal team really or the Commission have anything to do with that and from my side as I indicated earlier on and you were not here with all the allegations about what has been happening at the NPA this Commission cannot  
10 finish its work in regard to the law enforcement agencies what has been happening without hearing evidence of somebody like Mr Nxasana.

**ADV VUYANI NGALWANA:** Yes.

**CHAIRPERSON:** So I just – I just want to clarify that.

**ADV VUYANI NGALWANA:** Yes. No thank you DCJ. Deputy Chief Justice that thought has come back to me while you were just (intervenes).

**CHAIRPERSON:** Yes, yes.

**ADV VUYANI NGALWANA:** It is the extent of the evidence that Mr Nxasana now maybe led on by Mr Pretorius. There has been a  
20 suggestion that if the evidence covers matters that are already in the public domain or matters that have already been dealt with in ...

**CHAIRPERSON:** In judgment.

**ADV VUYANI NGALWANA:** Affidavits and in judgments.

**CHAIRPERSON:** Ja.

**ADV VUYANI NGALWANA:** That Ms Jiba would have had an

opportunity to deal with those in any event. So they should be no impediment to Mr Nxasana testifying to those issues. The difficulty with that ordinarily I have – I would have no difficulty with it but the difficulty in these circumstances ...

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** Is I do not know what evidence he is going to testify to ...

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** That is already in the public domain.

10 **CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** That is the one thing and so ...

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** One needs to do to perform this exercise of looking ...

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** At what is already in the public domain to which Mr Nxasana will testify to ...

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** And so one would not raise any objection.

20 **CHAIRPERSON:** Ja.

**ADV VUYANI NGALWANA:** So the exercise that needs to be performed is look at what is in the public domain and what is new.

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** Standing now here before you I do not know what is new what is in the public domain ...

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** And so ...

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** It seems to be ...

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** Reasonable and practical to allow the legal team to perform that exercise.

**CHAIRPERSON:** Ja.

**ADV VUYANI NGALWANA:** Had we known that Mr Nxasana is going to  
10 be testifying today.

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** We probably would have performed that  
exercise already.

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** We cannot now be ...

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** Penalised ...

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** And be expected to sit in the Commission.  
20 I could sit ...

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** On a watching brief ...

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** To listen to what is been led to ...

**CHAIRPERSON:** Hm.



**ADV VUYANI NGALWANA:** But since I do not know what is already in the public domain I cannot stand up and object or tug my learned friend by the sleeve of his jacket and say well hang on a second.

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** That is not in the public domain because I do not know ...

**CHAIRPERSON:** Yes, yes.

**ADV VUYANI NGALWANA:** And so Deputy Chief Justice I would request ...

10 **CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** That the first option that Mr Pretorius suggested ...

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** Which is and I would add this ...

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** That that evidence should subtract any evidence that implicates Mr Nxasana with it is in the public domain or not.

**CHAIRPERSON:** Ms Jiba.

20 **ADV VUYANI NGALWANA:** Ms – did I say?

**CHAIRPERSON:** You say Mr Nxasana.

**ADV VUYANI NGALWANA:** Oh I am sorry. Mr Nxasana does not seem to here implicate. Any evidence that implicates Ms Jiba should be held back. I am not saying it should excised or not dealt with. It should be held back. The opportunity for dealing with such evidence at this forum

will come. It may be next week. I do not know what the – what the schedule of the Commission is. It may be next week. It may be in two weeks' time.

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** By that time ...

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** The legal team for Ms Jiba would have performed all these exercises ...

**CHAIRPERSON:** Hm.

10 **ADV VUYANI NGALWANA:** And therefore ...

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** The matter can continue without any discomfort from ...

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** Ms Jiba's team.

20 **CHAIRPERSON:** As we speak what I am inclined to allow is Mr Pretorius first option which you – you have no problem with but when I say that I am inclined to say there should be no problem if the evidence includes evidence or it includes matters that have been dealt with in court judgments or affidavits filed in – in court on matters that are in the public domain already in respect of which whether it is Ms Jiba or the former President or Mr Mrwebi where they would have had a chance to deal with. In regard to the point you make namely that as you stand there you do not know what those may be because you have not had a chance to have a look I am wondering whether there will

be no problem if we proceed on the basis that Mr Pretorius would be cautious to look at – to deal – to lead the witness in regard to matters that fall with that - within that and you might not be aware of it as long as it can be shown that there – there are matters that are dealt within judgments or in affidavits that have been in court and so on and then to the – and therefore that for now there should not be any new matters dealt with that implicate the persons who have not been covered in that way but that when Mr Nxasana comes back everybody who is implicated has had a chance then they can - he can cover all new matters. That is

10 the inclination I have. What do you say about that?

**ADV VUYANI NGALWANA:** Yes Deputy Chief Justice far be it for me to doubt my learned friend Mr Pretorius' intentions ...

**CHAIRPERSON:** Ja.

**ADV VUYANI NGALWANA:** Or integrity – I even hesitate to bring in the word integrity.

**CHAIRPERSON:** Ja.

**ADV VUYANI NGALWANA:** I am quite confident that ...

**CHAIRPERSON:** Ja.

**ADV VUYANI NGALWANA:** He will do precisely that and steer off ...

20 **CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** Away from new matters.

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** Might it not be a sort of belt and racist job ...

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** To request Mr Pretorius to when he puts such questions to Mr Nxasana that have previously been or dealing with matters that are previously of reason ...

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** On affidavit or in judgments ...

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** Perhaps prefix the question. I know it may be a tough ask ...

**CHAIRPERSON:** Hm.

10 **ADV VUYANI NGALWANA:** Because he maybe he did not prepare it that way.

**CHAIRPERSON:** Yes.

**ADV VUYANI NGALWANA:** To prefix the question with Mr Nxasana in the matter of so and so in the judgment without citing a particular paragraph ...

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** This matter was dealt with can I ask you this question then ask him or ...

**CHAIRPERSON:** Hm.

20 **ADV VUYANI NGALWANA:** In a particular affidavit in a matter this was dealt with ...

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** So that when I keep my note ...

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** I know exactly which judgment to go to ...

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** To satisfy myself and the legal team ...

**CHAIRPERSON:** Hm.

**ADV VUYANI NGALWANA:** That that matter was indeed – had indeed been dealt with previously and that it is not new.

**CHAIRPERSON:** Hm. I – I think what we would be important is that the witness' evidence is limited to those parameters.

**ADV VUYANI NGALWANA:** Yes.

**CHAIRPERSON:** Whether Mr Pretorius refers to which affidavit and  
10 which matter and so on and so on if he – if he can. I am sure there is  
no problem but if he is not able to as long as in due course you can be  
informed ...

**ADV VUYANI NGALWANA:** Yes.

**CHAIRPERSON:** To say that related to that. That related to that. So  
as long as that can be done it should be fine.

**ADV VUYANI NGALWANA:** No I am happy with that.

**CHAIRPERSON:** You are? You would be happy with that?

**ADV VUYANI NGALWANA:** Yes.

**CHAIRPERSON:** Okay, alright. I think we proceed. Mr Pretorius...

20 **ADV VUYANI NGALWANA:** Thank you Deputy Chair.

**CHAIRPERSON:** Thank you Mr Ngalwana. Mr Pretorius what do you ...

**ADV PAUL JOSEPH PRETORIUS SC:** Chair just ...

**CHAIRPERSON:** Say that is the inclination I have but you have  
(intervenes).

**ADV PAUL JOSEPH PRETORIUS SC:** Just a little more briefly than

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what has occurred so far. The first thing is you will make an order. I will abide by that order. I cannot abide by suggestions ...

**CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** In regard to what would be appropriate.

**CHAIRPERSON:** Ja, no, no but I want to hear what you have to say about suggestions.

**ADV PAUL JOSEPH PRETORIUS SC:** Yes. So let me do that then. Firstly it is important to place on record this issue of timing.

10 **CHAIRPERSON:** Hm.

**ADV PAUL JOSEPH PRETORIUS SC:** There is a suggestion that the witness' evidence has been timed intentionally or unintentionally ...

**CHAIRPERSON:** Hm.

**ADV PAUL JOSEPH PRETORIUS SC:** I do not know how you time evidence.

**CHAIRPERSON:** Hm.

**ADV PAUL JOSEPH PRETORIUS SC:** Evidence unintentionally ...

**CHAIRPERSON:** Hm.

**ADV PAUL JOSEPH PRETORIUS SC:** In order to prejudice Ms Jiba.

20 **CHAIRPERSON:** Hm.

**ADV PAUL JOSEPH PRETORIUS SC:** Let me state quite clearly that is not the case.

**CHAIRPERSON:** Hm.

**ADV PAUL JOSEPH PRETORIUS SC:** I can give the Chair an assurance and ...

**CHAIRPERSON:** *Ja.*

**ADV PAUL JOSEPH PRETORIUS SC:** And as you know Chair it was at your direction that this ...

**CHAIRPERSON:** Well I – I have made that quite clear.

**ADV PAUL JOSEPH PRETORIUS SC:** That this happened.

**CHAIRPERSON:** Hm.

**ADV PAUL JOSEPH PRETORIUS SC:** In any event the timing was not a choice of the witness.

**CHAIRPERSON:** Yes.

10 **ADV PAUL JOSEPH PRETORIUS SC:** The timing was imposed ...

**CHAIRPERSON:** *Ja.*

**ADV PAUL JOSEPH PRETORIUS SC:** On the witness by the Commission ...

**CHAIRPERSON:** Hm.

**ADV PAUL JOSEPH PRETORIUS SC:** At your request.

**CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** He had nothing to do with it at all.

**CHAIRPERSON:** Hm.

20 **ADV PAUL JOSEPH PRETORIUS SC:** The third is that in any even the consequences of evidence being led under oath or under affirmation at a public inquiry of this nature would inevitably affect other issues in other jurisdictions and that must be so. Those consequences can never be an excuse or a ground for not leading evidence that we are obliged to lead here by virtue of statute but that is not an issue that we need do



any more than note for the present.

**CHAIRPERSON:** Yes, yes.

**ADV PAUL JOSEPH PRETORIUS SC:** The second point that we would like to emphasis as a legal team Chair is the very nature of a public inquiry. It involves encouraging witnesses to come forward, to give evidence within its terms of reference. It is inevitable the statute contemplates that the terms of reference contemplated the regulations contemplated the rules contemplated that persons will be implicated by evidence adverse to that – to that persons interests. It is the very stuff  
10 of this inquiry that evidence would be led implicating other persons in many cases negatively or adversely. That principle cannot be undermined by any order that you would make Chair or anything that the legal team could agree to. Provided witnesses are treated fairly and those rules are there for that purpose.

**CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** So Chair all we submit ...

**CHAIRPERSON:** *Ja.*

**ADV PAUL JOSEPH PRETORIUS SC:** Is that the principle must remain sacrosanct.

20 **CHAIRPERSON:** Hm.

**ADV PAUL JOSEPH PRETORIUS SC:** That witnesses must not be prevented from giving such evidence as they are entitled to give (intervenes).

**CHAIRPERSON:** Yes but remember Mr Ngalwana also made it clear that they are not seeking to prevent the leading of evidence ...

**ADV PAUL JOSEPH PRETORIUS SC:** Well ...

**CHAIRPERSON:** It is just the timing.

**ADV PAUL JOSEPH PRETORIUS SC:** No that is – that is clear.

**CHAIRPERSON:** Ja.

**ADV PAUL JOSEPH PRETORIUS SC:** And then a solution that we will reach ...

**CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** That principle will be met but the public out there is listening to this argument.

10 **CHAIRPERSON:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** It can never be the case that the public should be discouraged ...

**CHAIRPERSON:** Hm.

**ADV PAUL JOSEPH PRETORIUS SC:** From coming forward to give their evidence ...

**CHAIRPERSON:** Hm.

**ADV PAUL JOSEPH PRETORIUS SC:** In fear that prior to their giving evidence ...

**CHAIRPERSON:** Hm.

20 **ADV PAUL JOSEPH PRETORIUS SC:** They will somehow come under some sort of judicial or other attack and ...

**CHAIRPERSON:** Hm.

**ADV PAUL JOSEPH PRETORIUS SC:** Somehow their influence will – their evidence will be influenced in that way. So the principle that must remain sacrosanct – we submit – is that witnesses must believe that

they are free to come here and give evidence whatever its consequences and however damaging it may be to other people and I believe in the solution we have reached that is sacrosanct. It is subject only to one duty and that is the duty of the Commission to act fairly and that we are trying to do in that case. The last point that I would like to make Chair is that I will obviously abide by your ruling but the intention is not to deal with anything beyond the interactions that gave rise to the many court applications and decisions of the court and in fact insofar as a judgment deals with a particular issue one may  
10 assume that that is in the public domain. It is a matter (indistinct) thank you Chair.

**CHAIRPERSON:** I just want to emphasise again that the Commission seeks to strike a balance between various or among various interests and one of these is that it seeks to ensure fairness to all parties including implicated persons. I have made it clear over the past year or so both in media briefings and in this venue that implicated persons will be dealt with fairly as well. They must be dealt with fairly and that nobody will have findings made against them just because of what the media maybe saying about them or against them. Any findings that will  
20 be made will be made on the basis of evidence led in the Commission and throughout we continue to try and be fair to everybody. I thought I must just emphasise that and again to the extent that there may have been any thinking that Mr Nxasana – Mr Nxasana's being here is timed by anybody to coincide with anything. Again I indicate that he was called because I gave directions that he and certain other witnesses

whom we are not mentioning now be called and I have been told that some of them are not available. So they will – may have to be called later. So we will continue to have situations where a person who is implicated or not implicated but a person who in the view of the Commission has knowledge or information that may be helpful in the inquiry of the Commission maybe called to come and give evidence. So it is not the last time that a person is called to give evidence because the Chairperson so directs but fairness to all implicated persons is very important but as I say there is fairness that must be taken into account

10 together with all practicalities and constraints that the Commission has – within which the Commission must operate. So what I am – these are just remarks that I consider important to make. With regard to how we proceed I confirm that we are going to follow the option – option one that Mr Pretorius mentioned with which Mr Ngalwana does not have a problem subject to the remarks he made and on the understanding that I believe we – all three of us have achieved here in this open hearing in terms of also matters that may be in the public domain by way of court judgments and affidavits filed in court and Mr Pretorius in leading the evidence of the witness will be – will bear that in mind as he leads the

20 evidence of the witness. Of particular importance in this case is that the legal team was not able to give notice even to say Mr Nxasana would be giving evidence. Sometimes there may be a situation where notice was given of – in terms of Rule 3.3 of the Rules of the Commission but the 14 days did not lapse. That might fall under a different considerations. So Mr Nxasana will have to come back at – on

a later date to finalise his evidence that would cover any matters that will fall outside of the parameters that I have indicated as discussed here at the opening hearing with Mr Pretorius and Mr Ngalwana. That is how we are going to proceed.

**ADV PAUL JOSEPH PRETORIUS SC:** Thank you Chair.

**CHAIRPERSON:** I would like to take a five minute adjournment and then we will – we will continue. We will just take a five minute adjournment. We adjourn.

**INQUIRY ADJOURNS**

10 **INQUIRY RESUMES**

**CHAIRPERSON:** You may proceed Mr Pretorius.

**ADV PAUL JOSEPH PRETORIUS SC:** Chair a housekeeping matter, I've decided to deal with something that I had intended to deal with at the conclusion of the witnesses' evidence and that's the Constitutional Court judgment, one can safely assume that matters commented on by the Constitutional Court and contained in the judgement, particularly are matters in the public domain. They do not, in any event, implicate Ms Jiba or any other individual apart from the former President in any sense at all and those are merely comments.

20 **CHAIRPERSON:** Well you are, of course, not suggesting that what you mean is whatever it is you are going to refer to is something that has been said by the Court and is in the public domain...(intervention).

**ADV PAUL JOSEPH PRETORIUS SC:** And all parties concerned have and an opportunity to present their versions, argue fully and the result of all that process in the highest Court is what I'm going to refer to.

**CHAIRPERSON:** Yes okay.

**ADV PAUL JOSEPH PRETORIUS SC:** Chair in addition to that Mr Nxasana himself raises a concern that he's here at some personal cost and at the request of the Commission, volunteered to come forward and given that his evidence may now stretch over to another day it's a matter of some concern and I would just wish to place that on record it was communicated to me during the recent short adjournment.

**CHAIRPERSON:** Yes maybe before you proceed let me talk to him. Mr Nxasana, it appears that it's inevitable that you may have to come  
10 back, now Mr Pretorius tells me that you are concerned about that. It doesn't mean you'll come back tomorrow so you may have intended to spend only today at the Commission but in terms of when you come back your availability would be looked at as well. Does your concern remain, notwithstanding?

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes Chair it remains Chair, notwithstanding. Chair as I have explained that I run a practice and unfortunately I'm a sole proprietor of my practice, my practice is suffering as I am here. In fact, I've been here, not only today, two days already.

20 **CHAIRPERSON:** Including yesterday.

**MR MXOLISI SANDILE OLIVER NXASANA:** Including yesterday.

**CHAIRPERSON:** Yes.

**MR MXOLISI SANDILE OLIVER NXASANA:** And they say that it is inevitable and it's anticipated that I'll have to come back.

**CHAIRPERSON:** Yes – no I think it's unfortunate that this is the

situation and I appreciate what you are talking about when you are a sole practitioner in a legal firm when you are not there you are not earning income and there are people that you have to pay at the end of the month, there are bills to be paid but the legal team may have to have a look, I mean, if somebody goes to give evidence in Court, there's provision for witness fees and I would imagine that the Commission should have similar provisions that are applicable to it. I don't know what limits there are but I would have imagined that they should be – their rate should be such that it should, as far as personal, place the person – the witness in the position he or she would have been in if she had not been called to come and give evidence but I think that probably at this stage there's nothing more one can say other than that, that avenue should be explored that might not fully cover your situation but it might go to a certain point, is that right?

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**CHAIRPERSON:** Yes I think that must be explored, I can see no reason why there wouldn't be a similar provision applicable to the Commission but the legal team can look into that and you can be in touch with them.

20 **MR MXOLISI SANDILE OLIVER NXASANA:** Thank you Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** Well look at the applicable law.

**CHAIRPERSON:** Yes look at the applicable law ja, thank you.

**ADV PAUL JOSEPH PRETORIUS SC:** Thank you. Chair the final matter is that, Mr Nxasana is booked on a flight at 7 o'clock so if we may because we're going to come back another day anyway, adjourn at



the normal time.

**CHAIRPERSON:** Ja that's fine.

**ADV PAUL JOSEPH PRETORIUS SC:** Thank you.

**CHAIRPERSON:** One second Mr Pretorius, thank you.

**ADV PAUL JOSEPH PRETORIUS SC:** Thank you Chair. Mr Nxasana at page 11 of your statement you deal with the circumstances giving rise to your ultimate suspension by the President. For the moment we're not going to deal with the evidence that you intended leading concerning the circumstances which say – which you say would have  
10 explained or would explain the President's actions because those are matters which implicate other parties.

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes but just for correction I wasn't ultimately suspended, just for the record.

**ADV PAUL JOSEPH PRETORIUS SC:** Yes.

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** Yes there was an intention to suspend and that was the subject matter of litigation.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct yes.

**ADV PAUL JOSEPH PRETORIUS SC:** I'm sorry if I put it that way. You  
20 also deal with the step that you took to ensure that in any process that occurred in relation to your employment you attempted to ensure that you would receive a fair hearing.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** You deal with the inquiry that was intended to be held under Advocate Nazeer Cassim.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct.

**ADV PAUL JOSEPH PRETORIUS SC:** We won't go into that for the moment simply because I'd like to keep the evidence in its proper sequence. You then deal with the situation at the NPA during your term of office which has been a subject of comment by the Courts and concerns the conduct of persons who are implicated by your statement.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** I'm not going to test the fine distinctions between what are facts within your knowledge that haven't  
10 been canvassed in Court and what evidence has been canvassed in Court, that's perhaps too fine a distinction to draw at this stage. So what I'd like to do is, just to place on record as is common knowledge that you ultimately entered into what has been termed, a settlement agreement.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** That settlement agreement involved payment to you of a sum of money.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** That issue came before the  
20 Courts and what came before the Courts were not only the terms of the settlement agreement but the fact of the settlement agreement, the circumstances in which it took place and its lawfulness.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** That litigation of which you were a part but not the principle applicant finally found its way to the

Constitutional Court.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is so.

**ADV PAUL JOSEPH PRETORIUS SC:** And in a judgment of the Constitutional Court which is contained in the bundle at page 85 the Constitutional Court dealt with the evidence placed before it...(intervention).

**CHAIRPERSON:** One second Mr Pretorius, thank you, you may proceed.

**ADV PAUL JOSEPH PRETORIUS SC:** The Constitutional Court dealt  
10 with the evidence that had been placed before it, dealt with the judgements of the Court below and came to its own findings in relation to the issues before it, principally matters relevant to the National Prosecuting Authority and in particular relevant to the eventual ending of your term of office.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is so Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** And I'd like to go there directly if I may, to deal with, firstly some general comments made by the majority of the Court under the hand of Madlanga J, Justice Madlanga and if one can go to paragraph six. The Constitutional Court and its  
20 majority there says, and that's at page –sorry Chair, that's at page 92 of the bundle where the background is dealt with.

**CHAIRPERSON:** Thank you.

**ADV PAUL JOSEPH PRETORIUS SC:** Paragraph six reads,

“The event that are at the centre of these proceedings are in the public domain, the judgment of the High Court notes that it

was common cause before that Court that since September 2007 the recent history at the NPA, and it quotes the judgment of the High Court, has been one of paralysing instability”,

That is the quote, that judgment gives detail of that history. If we may go then to paragraph seven it reads,

“In July 2014 within about only nine months of his appointment, a process calculated to remove Mr Nxasana commenced”,

That process would have been the substance of your evidence  
10 today.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct

**ADV PAUL JOSEPH PRETORIUS SC:** In the main at least,

“The then President, the judgment continues, Mr Jacob Zuma informed Mr Nxasana of his intention to institute an inquiry into his fitness to hold office, this was followed by a notice that the former President was considering suspending Mr Nxasana pending finalisation of he inquiry. The former President said that suspension was necessary in order to maintain the integrity and good administration of the NPA”,

20 Your evidence would have dealt with that contention in some detail because you, in your evidence, would have today, and will in the future give evidence regarding what you regard as the true reasons for what occurred.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct.

**ADV PAUL JOSEPH PRETORIUS SC:** The notice also specified that

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the inquiry sought to establish whether certain issues were consonant with the conscientiousness and integrity of an incumbent in the office of the National Director of Public Prosecutions as required by the NPA Act, we've referred to that section of the constitution already Mr Nxasana.

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** The issues were,

10 “Mr Nxasana previous criminal conviction for violent conduct allegedly unbecoming and divisive comments which had the effect of bringing the NPA into disrepute made by Mr Nxasana and reported in the media and alleged non-disclosure of facts and circumstances of prosecutions which Mr Nxasana had faced previously”.

Now in your evidence you will go into some detail in regard to these issues, in particular the lack of particularity that you alleged in Court proceedings you had been subjected to.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is so.

**ADV PAUL JOSEPH PRETORIUS SC:** And in fact reference is made to that in the latter part of paragraph eight on page 94 of the bundle  
20 where the Constitutional Court says,

“Mr Nxasana approached the High Court seeking an order compelling former President Zuma to provide the required particularity and interdicting the former President from suspending him until he had furnished him with this particularity”,

That particularity, Mr Nxasana is that to which we have just referred.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** The application was not – that application was not pursued to finality, the former President changed tact in late 2014, he proposed that the dispute between him and Mr Nxasana be mediated, Mr Nxasana acceded to this proposal, is that correct?

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

10 **ADV PAUL JOSEPH PRETORIUS SC:** And then paragraph nine which is on page 94 of the exhibit EE reads,

“It appears from a letter written on 10 December 2014 by attorneys acting for Mr Nxasana that former President had engaged Mr Nxasana to get him to agree to vacate office. In the letter Mr Nxasana made it plain that he did not want to vacate office as there was no basis for him to. He stated that he would, however, consider stepping down only if he was fully compensated for the remainder of the contract period”,

20 Is that a correct record of the facts as far as you are concerned, I will give you an opportunity to expand on it in a moment.

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes that is a correct record.

**ADV PAUL JOSEPH PRETORIUS SC:** At issue in the litigation - in part at least was whether you had requested the former President to be

allowed to vacate office or whether you were compelled to vacate office against your will but subject to certain conditions. If I put it correctly, it's now your opportunity to place the issues in dispute before the Chair.

**MR MXOLISI SANDILE OLIVER NXASANA:** Okay thank you, Chair, I at no stage did I make a request o vacate the office to the former President Mr Jacob Zuma and that letter of the 10<sup>th</sup> that is referred to here, I was also involved in drafting that letter confirming the discussion that we'd had with the President and the company –  
10 President and Mr Harley together with my legal representative, therefore the Court found, correctly, that I did not make any request, I never made that request.

**ADV PAUL JOSEPH PRETORIUS SC:** The position is summarised in paragraph 12 of the Constitutional Court judgment and that appears at page 95 of Bundle EE – Exhibit EE it reads,

“It must be noted that right from the onset and throughout the entire negotiation process that culminated in the settlement agreement, Mr Nxasana unequivocally stated that he did not wish to resign and that he considered himself to be fit for  
20 office, instead his preference was for former President Zuma's allegation that he was no longer fit for office, to be tested in a formal inquiry as proposed by the former President”,

Is that the proposed Cassim inquiry?

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** The summary of the judgment



continues, or the judgment continues rather,

“Throughout he protested the existence of a factual or legal basis for him to vacate office, also he disavowed any invocation by him in Section 12 (8) of the NPA Act to voluntarily vacate office. It is so, of course that he did indicate that he would resign only if he was paid the full salary for the remainder of his term of office”.

Does that fairly summarise the position as far as you are aware?

10 **MR MXOLISI SANDILE OLIVER NXASANA:** That is correct, it fairly summarises the position.

**ADV PAUL JOSEPH PRETORIUS SC:** Then there are some general comments Chair, which I think it is appropriate to place before you because the evidence that will be led by the legal team deals pertinently with these issues and these comments of the Constitutional Court are instructive and very important for the work of the Commission and if I may place them on record.

**CHAIRPERSON:** Yes you may do so.

**ADV PAUL JOSEPH PRETORIUS SC:** At paragraph 18 the  
20 Constitutional Court says,

“The importance of the office of NDPP in the administration of justice is underscored and amplified by no less an instrument than the Constitution itself. Section 1794 of the Constitution requires that there be National legislation which guarantees the independence of the Prosecuting Authority. Lower down the

paragraph it reads, Section 1794 provides that National legislation must ensure that the NPA exercises its functions without fear, favour or prejudice, that legislation is the NPA Act. Predictably Section 32(1) A of the NPA Act requires members of the Prosecuting Authority to carry out their duties without fear, favour or prejudice and subject only to the Constitution and the law”.

Paragraph 19 reads,

10 “This Court has said of the NPA’s independence “there is a Constitutional guarantee of independence” and any legislation or executive action inconsistent there with would be subject to Constitutional control by the Courts. The reason why this guarantee of dependence exists is not far to seek. The NPA plays a pivotal role in the administration of criminal justice with a malleable corrupt or dysfunctional Prosecuting Authority many criminals, specially those holding position of influence will rarely, if ever answer for their criminal deeds. Equally

20 functionaries within that Prosecuting Authority may, as Casak submitted be “pressured” into pursuing prosecutions to advance a political agenda. All this is antithetical to the rule of law a founding value of the Republic. Also Malleability, corruption and dysfunctionality are at odds with the Constitution and junction of prosecuting without fear, favour or prejudice. They are thus at variance with the Constitutional requirement of the independence of the NPA.

It continues, at the centre of any functioning Constitutional democracy as a well functioning criminal justice system, in democratic alliance, Jacobus ADC J observed that the office of the NDPP “is located at the core of delivering criminal justice”, if you subvert the criminal justice system, you subvert the rule of law and Constitutional democracy itself. Unsurprisingly the NPA Act proscribes improper interference with the performance of prosecutorial duties. Section 31 (1) B provides, subject to the Constitution and this Act, no organ of State and no member  
10 or employee of an organ of State nor any other person shall improperly interfere with, hinder or obstruct the Prosecuting Authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions”. And then the Court makes some further comments relevant to your evidence Mr Nxasana and generally relevant to the evidence that will be led and the concerns raised by this Commission. At paragraph 21, which is on page 98 of Exhibit EE it reads,

“Improper interference may take any number of forms without  
20 purporting to be exhaustive it may come as downright intimidation, it may consist in improper promises or inducements, it may take the form of corruptly influencing the decision making or functioning of the NPA. All these forms and others are proscribed by an Act that gets its authority to guarantee prosecutorial independence directly from the Constitution. Paragraph 22 reads, another guarantee of the

NDPP's independence is provision for security of tenure. In Section 12 (1) the NPA Act provides that the NDPP shall hold office for a ten year non renewable term of office. It is now well established in terms of this Court's jurisprudence that security of tenure is an integral feature of the Constitutional requirement of independence. In justice alliance, and the reference is given to that case, this Court held that "international standards acknowledge that guaranteed tenure and conditions of service adequately secured by law are amongst the conditions necessary to secure and promote the independence of judges", these necessary conditions must of course be true of the independence of the NPA as well. In a unanimous judgment in McBride Bossialo AJ said, amongst fact said that amongst the factors that are relevant to the independence of offices or institutions which in terms of constitutional prescripts must be independent are "the method of appointment, the method of reporting, disciplinary proceedings and the method of removal from office and security of tenure",

20 And we're here dealing with Mr Nxasana in your case with the removal of yourself from office and the circumstance's in which that took place and the lawfulness of that set of events. There is further comment relevant to the previous comment in paragraph 23 which reads,

"The NPA Act has two other salient features that help shield

the NPA from improper interference namely the non-renewability of the ten-year term of office of the NDPP and certain safeguards on the removal of the NDPP from office”,

And then the various methods that provide for – are provided for termination of the office of the NDPP are dealt with. It goes on to say in paragraph 24 that, the manner in which your office was vacated Mr Nxasana was not Constitutionally compliant and you recorded in the judgment as having accepted that, is that correct?

**MR MXOLISI SANDILE OLIVER NXASANA:** That's is correct ja.

10 **ADV PAUL JOSEPH PRETORIUS SC:** And then paragraph 25 certain salient comments are made concerning the conduct leading up to your vacation of office and paragraph 25 reads, that is on page 100 of the judgment,

20 “The facts set out above point to one thing and one thing only, former President Zuma was bent on getting rid of Mr Nxasana by whatever means he could muster, his was an approach that kept on mutating, it was first a stick then a carrot a stick once more and eventually a carrot. There was firstly notification that Mr Nxasana would be subjected to an inquiry with a view to establishing whether he was still a fit and proper person to hold office. Concomitantly there was a threat of suspension pending finalisation of the inquiry albeit with full pay. This was followed by former President Zuma’s proposal that there be mediation. When there was no progress on this the inquiry was instituted, whilst the inquiry was in its preliminary stages

the former President pursued a parallel process in which Mr Nxasana was first offered in a draft settlement agreement ten million rand. As indicated earlier he did not accept it. What plainly evinces how desperate former President Zuma was to get rid of Mr Nxasana, is that this was followed by a draft settlement in which the amount was left blank. Mr Nxasana was being told to pick whatever figure, indeed Mr Halie said that he would “await the final amount from Mr Nxasana” and then the question is asked in paragraph 27, instead of settling  
10 for so huge an amount, why did the former President not simply pursue the inquiry, did he not believe that the evidence that had motivated him to come up with the idea of an inquiry was sufficiently cogent, if so why did he not just abandon the inquiry and leave Mr Nxasana in office, after all he was exercising his powers as President and not involved in a personal dispute which he could settle as he pleased. It is difficult to comprehend why he would have settled on so huge an amount from public coffers to boot.”

It continues in paragraph 28, the inference is inescapable that he was  
20 effectively buying Mr Nxasana out of office, in my book conduct of that nature compromises the independence of the office of NDPP, it conduces to the removal of troublesome or otherwise unwanted NDPP’s through buying them out of office by offering them obscenely huge amounts of money”.

Then in addition to those comments, certain comments are

made in regard to your own conduct in accepting the amount of the settlement and I'll come to that in a moment Mr Nxasana but as far as you know, is that a fair summary of the facts that were at least placed before – and I'm excluding any opinion now that may have emerged from the judgment, I'm just relating the facts.

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes, it's a fair remark that is contained here.

**ADV PAUL JOSEPH PRETORIUS SC:** I know that you are more empathic with the minority judgment.

10 **MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** Which we will come to in a moment and explain the differences, but your evidence then not only deals with the termination of your office as NDPP but the real reasons that you allege existed which caused your office to be ended.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** And that evidence would implicate certain individuals.

**MR MXOLISI SANDILE OLIVER NXASANA:** Certain individuals yes.

**ADV PAUL JOSEPH PRETORIUS SC:** And it is to those individuals  
20 that notice will be given and in relation to whom you will give evidence in due course.

**MR MXOLISI SANDILE OLIVER NXASANA:** That is so Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** But as I understand that evidence it is such that there is an explanation for the conduct which led to your, the termination of your services?



**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**ADV PAUL JOSEPH PRETORIUS SC:** I must put before you the comments of Justice Madlanga in paragraph 85 of the judgment, those are clear on page 123 of the bundle Chair. In the latter part of paragraph 85 Justice Madlanga says the following:

10 “Effectively although Mr Nxasana strongly protested his fitness for office he was saying he was willing to be bought out of offices if the price was right. As much as I sympathise with him I do not think that is the reaction expected of the holder of so high and important an office. An office the holder of which if he or she is truly independent is required to display utmost fortitude and resilience. Even allowing for human frailties, because Mr Nxasana is human after all, I do not think the holder of the office of NDPP could not reasonably have been expected to do better. His conduct leads me to the conclusion that a just and equitable remedy is not to allow him to return to office.”

20 Having decided as the Constitutional Court did that the termination of your services was unlawful the further question arose in relation to which the majority and the minority disagreed.

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** And that was whether you should be allowed to return to office. In fairness you should be entitled to comment now that that evidence is on record, or that judgment is on record.

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**MR MXOLISI SANDILE OLIVER NXASANA:** Yes Chair. Are you asking me to comment?

**ADV PAUL JOSEPH PRETORIUS SC:** Yes, if you wish to.

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes, thanks.

**ADV PAUL JOSEPH PRETORIUS SC:** It's an adverse comment and therefore in fairness you should be allowed to put your own opinion before the court, before the judge, before the Chair.

**MR MXOLISI SANDILE OLIVER NXASANA:** Firstly Chair as things were going on and that have been going on after I left office I felt that  
10 had this matter come before the Constitutional Court after this Commission was constituted and after the other Commission of Inquiry had been constituted I strongly believe that the majority in the Constitutional Court would have come to a different conclusion. That is my view.

**CHAIRPERSON:** That is in relation to whether you should be reinstated or not?

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

**CHAIRPERSON:** Okay.

**MR MXOLISI SANDILE OLIVER NXASANA:** Perhaps ...(intervention)

20 **CHAIRPERSON:** Not in regard to the main issue in regard to remedy, in other words.

**MR MXOLISI SANDILE OLIVER NXASANA:** To remedy, Chair I felt that the ...(intervention)

**CHAIRPERSON:** Okay, I'm sorry, I may be confusing you.

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

**CHAIRPERSON:** I just want to make sure that I understand where you locate your comments, you have just said that you felt or feel that had the Constitutional Court considered that matter after this Commission and after the Mokgoro Inquiry ...(intervention)

**MR MXOLISI SANDILE OLIVER NXASANA:** Mokgoro Commission, inquiry yes.

**CHAIRPERSON:** They may have come to a different conclusion.

**MR MXOLISI SANDILE OLIVER NXASANA:** That's my view.

**CHAIRPERSON:** I'm just asking whether the conclusion you are talking  
10 about is with regard to whether you should be reinstated or not or are you talking about the main conclusion on the matter.

**MR MXOLISI SANDILE OLIVER NXASANA:** I believe that the conclusion would have been the same as the conclusion reached by the minority judgment that I should be reinstated.

**CHAIRPERSON:** Okay.

**ADV PAUL JOSEPH PRETORIUS SC:** If we have time we will get there in a moment. Just to place the judgment of the majority in proper context its reasoning at least in part is in paragraph 87 which appears on page 124, bundle EE, EXHIBIT EE, it reads:

20 "The narrative at the beginning of this judgment shows that for a few years there has been instability in the office of NDPP, and therefore in the leadership of the NPA. With the Court challenge to Mr Nxasana's vacation of office and to the appointment of Advocate Abrahams that instability persist to this day."

The second judgment, that's the minority judgment, accepts correctly that it would be open to the President to initiate an inquiry into the manner in which Mr Nxasana vacated office renders him unfit to hold office. The order proposed by the second judgment thus has the effect of prolonging the instability. The second judgment proposed that you should be allowed to return or as a matter of law that your contract should continue, in fact that is effect of the judgment.

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** Relying on the former President  
10 of the Labour Court reasoning that where a dismissal is invalid and unlawful nothing needs to be done, the employment contract just continues, Zondo, JA, I think.

**CHAIRPERSON:** (laughing) Well there has never been a Zondo , JA. Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** President of the Labour Court.

**CHAIRPERSON:** Zondo, JP.

**ADV PAUL JOSEPH PRETORIUS SC:** JP yes.

**CHAIRPERSON:** Okay yes.

**ADV PAUL JOSEPH PRETORIUS SC:** The order proposed by the  
20 second judgment that has the effect of prolonging the instability, so it seems that part of the reasoning of the majority was that the instability by allowing you to return and the majority felt it had a discretion in that regard, which should be exercised in favour of the conclusion that you should not be allowed to return, the concern was one of stability at the NPA.

And then one of the further results of the judgment of the Constitutional Court is that the appointment of Advocate Abrahams was declared invalid and the President was directed to appoint a replacement for Advocate Sean Abrahams.

**MR MXOLISI SANDILE OLIVER NXASANA:** Yes.

**ADV PAUL JOSEPH PRETORIUS SC:** If I may then just briefly go to the order, you were ordered then to repay the amount received by yourself less tax, is that correct?

**MR MXOLISI SANDILE OLIVER NXASANA:** That is correct Chair.

10 **ADV PAUL JOSEPH PRETORIUS SC:** And then in the minority judgment after a long debate over the consequences of a declaration of invalidity in regard to termination of an employment contract the conclusion is reached at paragraph 112 by the minority, which is at page 134 of the bundle Chair, where Justice Jaftha stated:

20 “In the present matter there is nothing exceptional or extraordinary that warrants the exercise of remedial power to prevent Mr Nxasana from returning to office. His return will certainly not cause a constitutional crises or a national crises. On the contrary his return would enable the President to follow the law if he wishes to remove him from office and Parliament would play a vital part in that process, and more importantly preventing Mr Nxasana from returning to office without pronouncing on the validity of his employment contract would not only be unfair to him, but would also create considerable uncertainty on the parties rights and interests. This would be

antithetical to the Rule of Law which promotes certainty.”

And in relation to a just and equitable order the Court found at paragraph 128, in the minority page 140:

“As mentioned allowing Mr Nxasana to go back to his job would also meet the objectives of the Constitution and the Rule of the Law if he his involvement in the impugned settlement agreement brought his fitness to hold office into question he may be removed in Section 12 of the NPA Act.”

For all these reasons says the minority:

10 “I do not support the conclusion that Mr Nxasana ought not to resume office following the setting aside of the invalid and unlawful termination of his appointment.”

That is in summary what the Constitutional Court found after all the evidence had been placed before it, had been considered by the lower courts and was finally considered by it and we all know the result.

What remains is for your evidence to clarify the circumstances which led to steps being taken to remove you from office, and those will be the subject of the further evidence of Mr Nxasana.

Is this a convenient time Chair?

20 **CHAIRPERSON:** Yes it is, subject to just mentioning that the last part that you talked about in regard to the judgment comes from the minority judgment.

**ADV PAUL JOSEPH PRETORIUS SC:** Yes.

**CHAIRPERSON:** And what you said at the end might be misunderstood as if you are saying that’s what the Court said but what you intended is

to say some of the things you have said come from the majority judgment and the last bit comes from minority judgment.

**ADV PAUL JOSEPH PRETORIUS SC:** Yes the last quotes were all from the minority judgment.

**CHAIRPERSON:** Yes, yes. Okay yes we can adjourn now, so Mr Nxasana we will adjourn, and it's on the basis that you would be asked to come back and the legal team and yourself liaise with them with regard what witness fees or what fees is maybe payable when a witness has come to the Commission and because of that he is not able to work  
10 and earn income. For somebody who is self-employed it is quite important, I am hopeful that there is a provision that would – should take care of that, but – you will be asked to come back.

**MR MXOLISI SANDILE OLIVER NXASANA:** Thank you Chair, I will

**CHAIRPERSON:** Yes, but other than that thank you for availing yourself and then arrangements will be made as to when you will come back and the legal team of the Commission will make sure that implicated persons are given Rule 33 notices.

**ADV PAUL JOSEPH PRETORIUS SC:** Yes, I might just add Chair that the Commission's Act under which we operate was passed at the time  
20 the currency was still in pounds, so that may favour the witness.

**CHAIRPERSON:** (laughing). Ja so he might prefer that the remuneration be in the currency as stipulated in the Commissions Act of 1947.

**ADV PAUL JOSEPH PRETORIUS SC:** I think the Interpretation Act may have something to say about that, but we did examine it.



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**CHAIRPERSON:** Yes, yes, no thank you very much once again, you are excused.

We adjourn, and tomorrow we will start at – what time should we ...

**INQUIRY ADJOURNS TO 13 MAY 2019**

