



EXHIBIT GG (c)

FORMER PRESIDENT

MR JACOB GEDLEYIHLEKISA

ZUMA



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

2nd floor, Hillside House
17 Empire Road,
Parktown
Johannesburg
2193

Tel: (010) 214 to 0651

Email: inquiries@sastatecapture.org.za

Website: www.sastatecapture.org.za

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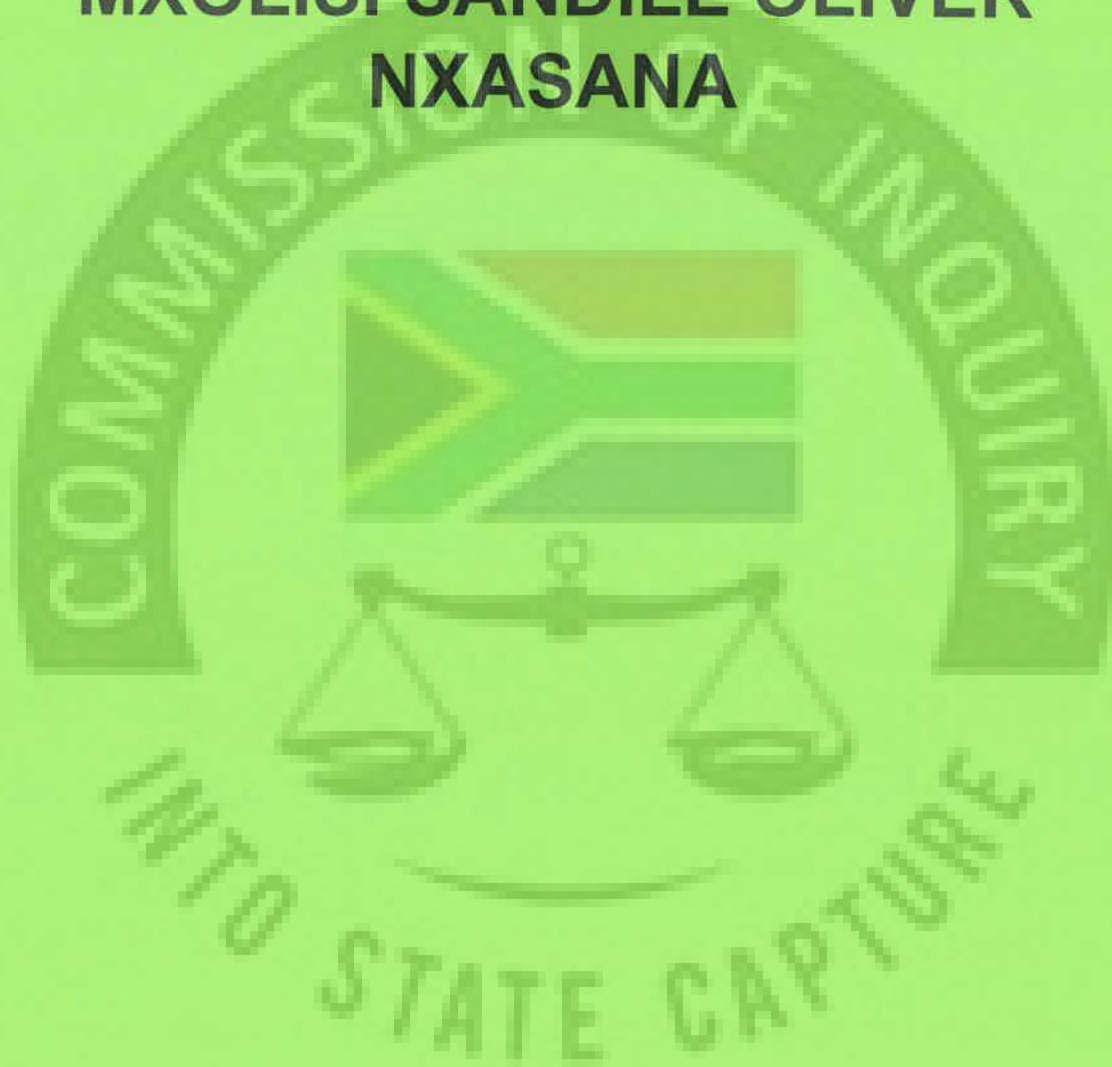
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**MXOLISI SANDILE OLIVER
NXASANA**



EE1



AFFIDAVIT

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 Sifas 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

[Handwritten signatures]

- 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);

[Handwritten signatures]

- 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

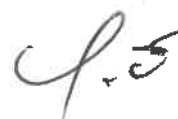
30. During my first year in office, it became clear that my leadership of the NPA was resisted by National Deputy Director Advocate Nomgcobo Jiba (Advocate Jiba) and the Special Director Specialised Commercial Crime Unit Advocate Lawrence Mrwebi (Advocate Mrwebi). They appeared determined to undermine 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 Mrwebl) 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 Mwebl 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 Gumedu 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 at 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"

Two handwritten signatures are present at the bottom right of the page. The first signature is in dark ink and appears to be 'J. S.'. The second signature is in a lighter ink and is more stylized, possibly 'M. J.'.

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 are was 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 I had taken 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 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 Court¹ and the Supreme Court of Appeal² 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 held³:

¹ *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)

² *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)

³ *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 Mdiuli⁴
- 70.5. In the SCA, Brand JA confirmed Murphy J's decision. He criticised Advocate Jiba's conduct.⁵
- 70.6. In the case of Major-General Johan Booysen v Acting National Director of Public Prosecutions,⁶ Gorven J found that Advocate Jiba had misled the court⁷.
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.⁸

⁴ FUL v NDPP, op cit para 88

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

⁶ (2014) 2 All SA 391 (KZD)

⁷ (2011) 32 ILJ 112 (LAC)

⁸ 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 Mdluli⁹.
- 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 unreliable¹⁰.
- 71.4. Murphy J's findings against Advocate Mrwebi were confirmed by the SCA¹¹.
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

⁹ Booyesen v Action National Director of Public Prosecutions, op cit at para [32] and [34]

¹⁰ FUL v NDPP, op cit at paras [58]; [61]; [68]

¹¹ 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 Mrwebi 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 President's 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.

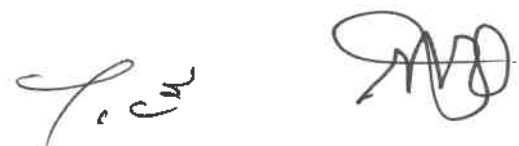
I know and understand the contents of this declaration.

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 11th 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.


COMMISSIONER OF OATHS

FULL NAMES:

Thabi' Eddie Ranyane

DESIGNATION:

CST



ADDRESS:

71 Dundalk Avenue
Parkview SAPS

ANNEXURE MN.1

ANNEXURE

1 Affidavit of Terrence Joubert

2 Affidavit of Mr Wille Pretorius

3 Letter dated 4 July 2014 informing of President's

4 Notice of consideration of suspension dated 1 July

5 Madala's submission to the Cassim Committee

1.5

MS

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, 3RD 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. J.

AA
SIR
R

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 18th 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

[Handwritten signatures and initials]

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.

M. D. 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

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

The block contains handwritten signatures and initials. On the left, there is a large, stylized signature that appears to be 'J. E.'. To its right, there are two sets of initials: 'AM' and 'MH', each followed by a small 'R'.

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.

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;

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- 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:


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"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 Ferreira⁴ 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.

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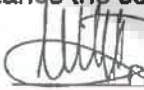
33. This raises the issue whether he wants to afford undue protection to Ms Jiba even if this means that he must make baseless and defamatory attacks on me.
34. A request for Mutual Legal Assistance in the Booyens matter was removed from me shortly after I informed him that it had been handed to me. 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.

The block contains three handwritten signatures or sets of initials. On the left is a signature that appears to be 'J. E.'. In the center is a signature that appears to be 'P. M.'. On the right is a signature that appears to be 'U. A.' with a large 'R' written below 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} ~~Johannesburg~~ on **30 January 2016**, the deponent having acknowledged that the deponent knows and understands the contents of this affidavit.

 716 576 2-2
 Nemaakonde R CST

Commissioner of oaths

Full names: Nemaakonde Rendani
 Business address: 119 Duxberg road
 Designation: CST
 Capacity: Visipol




 J.E. R. NAA

ANNEXURE MN.3



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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(8)(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]



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30 July 2014

Dear Mr Nxasana

**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;

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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 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
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ANNEXURE MN.5



J.S. *[Signature]*

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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 2015.¹
- 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;

¹ 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 2016 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.²
- 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 2008.³
- 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:

³ President's submissions, p22/29
¹ President's submissions p24/33- 34

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5.3.1 During 1985 I was acquitted on a charge of murder;⁴

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

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.⁶

5.5 I made statements to the media that⁷:

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

⁴ President's submissions p 28/37

⁵ President's submissions p 31/42.2

⁶ President's submissions p35/47

⁷

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;⁸

12.2 possess legal qualifications that entitle him or her to practise in all courts in the Republic;⁹ 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.¹⁰

- 13 As the NDPP, I may be removed from office if I am not fit and proper.¹¹ 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:

⁸ Section 9(2)
⁹ Section 9(1)(a)
¹⁰ Section 9(1)(b)
¹¹ 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 practitioners¹² who may not compromise on standards of honesty and integrity.¹³
- 15.2 Experience implies relevant knowledge and skill acquired over time from observing and from practical acquaintance.¹⁴
- 15.3 Conscientiousness means hardworking, diligent, and reliable with a genuine concern for the quality of one's work.¹⁵
- 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.¹⁶ Consequently, the submission by the President¹⁷ 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
- 18 The question whether the NDPP is a fit and proper person is an objective inquiry.¹⁹ Whether the NDPP is fit and proper is not a question left to the discretion or indeed opinion or view of the President.

¹² Botha v Law Society Northern Provinces 2009 (1) SA 216 (SCA) para 18
¹³ Malan v Law Society Northern Provinces 2009 (1) SA 216 (SCA) para 10
¹⁴ Pine v Society of Advocates of SA 1983 (4) SA 488 (A) at 495 A - H
¹⁵ OED
¹⁶ OED
¹⁷ Pikoli v President of the Republic of South Africa 2010 (10 SA 400 (GNP) at 406F
¹⁸ President's submission p 14/19
¹⁹ 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)

19 I submit that the way that the Inquiry should be carried out is as follows:²⁰

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.²¹

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

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

²¹ General Council of the Bar of South Africa v Qoach 2013 (2) SA 52 (SCA) at [60]

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1985, 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.²²

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.²³

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

²² See p 22/29 of the President's submission

²³ Eskom Holdings Limited (Pty) v Fipaza (2013) 34 ILJ 549 (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.²⁴

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 Mtshali. The complaint was made against me by Mr Mtshali's stepson, Mr Jabulani Mtshali.
- 42 It is true that there were delays in winding up Mr Mtshali's estate. The reasons for the delay are set out in my letter of 21 June 2014.²⁵ 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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²⁵ 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. fo
- 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.²⁰ 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;

²⁰ In my letter to the President on 21 June 2014 at President's Bundle Item 2 p5-7

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46.4 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

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.²⁷
- 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)²⁸ 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

²⁷ President's submission at p26/36.4

²⁸ President's bundle of documents, p 88 and 93 - 94

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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.²⁹

- 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. 10
- 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 Blose and Mr Sithole) 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. 20
- 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.

²⁹ 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 525 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 1986. 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.

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.

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 6 July 2014 and to Times Live on 8 June 2014 .

75 In the Sunday Times of 6 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 Nomgcobo 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 Mrwebi³⁰ and of breaching the Code of Conduct.³¹

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.³²

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.

³⁰ President's submissions, p 35/47.2

³¹ 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.

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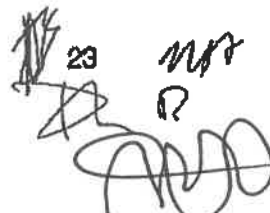
84 Even before I assumed my position as NDPP, I was made aware of attempts from within the NPA to discredit me.

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.

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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.



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 10 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.³³

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.

³³ 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:³⁴

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

³⁴ 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 Court³⁵ and the Supreme Court of Appeal³⁶ 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

³⁵ 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).

³⁶ 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).

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conducted the proceedings. He held:³⁷

" 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 Mditshi.³⁸

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

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

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.⁴²

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

³⁷ FUL v NDPP, op cit at [24]

³⁸ FUL v NDPP, op cit, para 88

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

⁴⁰ [2014] 2 All SA 391 (KZD)

⁴¹ (2011) 32 ILJ 112 (LAC)

⁴² FUL v NDPP, op cit [56]

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Mdluli.⁴³

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.⁴⁴

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

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. 10

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. 20

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

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

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

⁴⁵ *NDPP v FUL* op cit at Fn6, 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:

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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 1986 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.

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- 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.

MXOLISI NXASANA

J. E.

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EXHIBIT EE 2

**CONSTITUTIONAL COURT
OF SOUTH AFRICA**

**CASE NO:
CCT 333/17 & CCT 13/18**

ORDER & JUDGEMENT



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

ORDER

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.

JUDGMENT

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

MADLANGA J

(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 Act¹ (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.²

¹ 32 of 1998.

² *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

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.³ 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.⁴ Some have entered the fray, others not.⁵ 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

³ 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."

⁴ 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.

⁵ 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.

MADLANGA J

since September 2007 the recent history at the NPA “has been one of paralysing instability”.⁶ That judgment gives details of that history.⁷ 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.⁸ 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.⁹ 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

⁶ High Court judgment above n 2 at para 19.

⁷ Id at paras 18–46.

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

⁹ 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.

MADLANGA J

Mr Nxasana to give reasons "in this regard". Apparently this was an invitation for representations on why Mr Nxasana should not be suspended.¹⁰

[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

¹⁰ 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.¹¹ 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

¹¹ 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)¹² of the NPA Act unconstitutional.¹³

[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

¹² The section is quoted at n 44 below.

¹³ 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.

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Prosecutions and prosecutors.¹⁴ 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".¹⁵ 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.¹⁶ Also, malleability, corruption and

¹⁴ 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.”

¹⁵ *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.

¹⁶ 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.”

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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”.¹⁷ 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.¹⁸ 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

¹⁷ *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.

¹⁸ 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".¹⁹ 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".²⁰

[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;²¹ and certain safeguards on the removal of the NDPP from office.²² Section 12(8) provides for the voluntary vacation of office by an NDPP.²³ This section is of some significance. It must be read in the context of the constitutional

¹⁹ *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.

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

²¹ Section 12(1).

²² Section 12(5).

²³ 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."

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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.²⁴ 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,

²⁴ 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".

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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”.²⁵

[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

²⁵ High Court judgment above n 2 at para 3.

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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",²⁶ "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".²⁷ When an NDPP vacates office for "any other reason which the President deems sufficient",²⁸ "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".²⁹ 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.

²⁶ Section 12(8)(a)(i).

²⁷ Section 12(8)(c)(i).

²⁸ Section 12(8)(a)(ii).

²⁹ 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*³⁰ is the effect of the constitutional invalidity of Mr Nxasana's vacation of office on the consequential act of the appointment of Advocate Abrahams.³¹ 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.³² This pronouncement has been relied upon by this Court on a number of occasions.³³ 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

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

³¹ 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.

³² *Oudekraal* above n 30 at para 26.

³³ See *Department of Transport v Tasma (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.³⁴ 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.”³⁵ (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”.³⁶

³⁴ *Oudekraal* above n 30 at para 31.

³⁵ *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.

³⁶ *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."³⁷

[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

³⁷ *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.”³⁸

[38] In *Lawyers for Human Rights* Yacoob J, writing for the majority, quoted this passage with approval³⁹ 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.⁴⁰ 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.”⁴¹

[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

³⁸ *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.

³⁹ *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.

⁴⁰ *Id* at para 17.

⁴¹ *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*⁴² and *Helen Suzman Foundation*⁴³ 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.⁴⁴

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

⁴³ *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*).

⁴⁴ 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."⁴⁵ (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

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."

⁴⁵ *Justice Alliance* above n 19 at para 75.

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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."⁴⁶

[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

⁴⁶ *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."⁴⁷

[47] There is the question of "unilateral suspension"⁴⁸ 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.⁴⁹ 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."⁵⁰ (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

⁴⁷ *Helen Suzman Foundation* above n 43 at para 85.

⁴⁸ 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.

⁴⁹ 68 of 1995.

⁵⁰ *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.⁵¹

⁵¹ 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”.⁵² 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.

⁵² High Court judgment above n 2 at para 8.

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[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”.⁵³ 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;⁵⁴ the appointment of retired Justice Yacoob to enquire into the instability at the NPA; a memorandum

⁵³ High Court judgment above n 2 at para 19.

⁵⁴ 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"⁵⁵ or "true sense".⁵⁶ 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."⁵⁷ (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?

⁵⁵ *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.

⁵⁶ *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.

⁵⁷ *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."⁵⁸

[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?

⁵⁸ *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.⁵⁹ 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.

⁵⁹ 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.”⁶⁰ (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 Act⁶¹ was at “odds with the strictures not just of the law but also of the rule of law”.⁶² 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 date⁶³ 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

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

⁶¹ 73 of 1998.

⁶² *Mhlope* above n 60 at para 122.

⁶³ 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.⁶⁴ 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”,⁶⁵ 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

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

⁶⁵ *Id* at 758.

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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”.⁶⁶ 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.”⁶⁷ 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

⁶⁶ See [103].

⁶⁷ 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.⁶⁸ 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.⁶⁹ 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.

⁶⁸ See [113] to [119].

⁶⁹ 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.⁷⁰ The very quotation by the second judgment from *Mhlope*⁷¹ 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,⁷² Moseneke DCJ said that “at a broader level [the purpose of a public law remedy is] to entrench the rule of law”.⁷³ 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

⁷⁰ See [116].

⁷¹ See [105].

⁷² 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.

⁷³ *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.

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action. The rule of law must never be relinquished, but the circumstances of each case must be examined"⁷⁴

[83] Where necessary, the aim is to ameliorate the effect of vindicating the rule of law.⁷⁵ 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

⁷⁴ *Bengwenyama* above n 33 at para 85.

⁷⁵ Compare *id* at para 85.

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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.⁷⁶ 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.

⁷⁶ 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.

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[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

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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

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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.⁷⁷ 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.⁷⁸ 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.”⁷⁹

[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.⁸⁰ 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:

⁷⁷ *Steenkamp* above n 60.

⁷⁸ See [85].

⁷⁹ *Steenkamp* above n 60 at para 189.

⁸⁰ *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."⁸¹

[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."⁸²

⁸¹ Id at para 192.

⁸² High Court judgment above n 2at 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*⁸³ 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

⁸³ *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.⁸⁴

[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.⁸⁵

[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.⁸⁶

[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.⁸⁷ In *Ferreira* this Court held:

⁸⁴ Id at para 133.

⁸⁵ 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).

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

⁸⁷ *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."⁸⁸

[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".⁸⁹ 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

⁸⁸ *Ferreira* above n 38 at para 28.

⁸⁹ *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."⁹⁰

[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.⁹¹ The section seeks to achieve this by securing the tenure of office, conditions of service and other benefits.⁹² But more importantly, section 12(5)

⁹⁰ *Black Sash* above n 76 at para 51.

⁹¹ See [21] to [23].

⁹² 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.⁹³

[114] Therefore, section 12 of the NPA Act is umbilically linked to the Constitution.⁹⁴ 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”.⁹⁵ 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.

⁹³ Section 179(4) reads:

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

⁹⁴ *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.

⁹⁵ 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.”⁹⁶

[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.⁹⁷ The concept of a just and equitable order is sourced from section 172(1)(b) of the Constitution.⁹⁸ It is an equivalent of section 98 of the interim

⁹⁶ *Steenkamp* above n 60 at para 190.

⁹⁷ See [71] to [72].

⁹⁸ 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.⁹⁹

[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

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- (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.”

⁹⁹ *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.¹⁰⁰

[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."¹⁰¹

[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

¹⁰⁰ *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.

¹⁰¹ *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.

EE3



**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**

First Respondent

MINISTER OF JUSTICE AND

CORRECTIONAL SERVICES

Second Respondent

MXOLISI SANDILE NXASANA

Third Respondent

SHAUN 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

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

Eighth Respondent

FIRST RESPONDENT'S ANSWERING AFFIDAVIT

/s/

J. G. Z.

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;

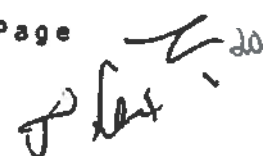
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J. G. Zuma

- 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

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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.

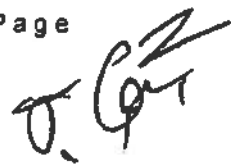
5.8 I, therefore, deemed the reasons provided by Nxasana, together with the possibility of a protracted litigation and the holding of the inquiry not to be in the best interest of the National Prosecuting Authority, Nxasana and the Republic of South Africa, to be sufficient to allow Nxasana to vacate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

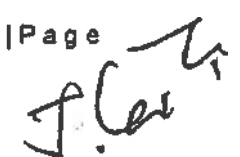
NDPP satisfies the first leg of section 12(8) of the NPA Act. To the extent that the payment to Nxasana is found unlawful, all that needs to happen is that he must be paid in terms of the provisions of section 12(8)(c)(ii) of the NPA Act (meaning that he would be deemed to have retired in terms of section 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.

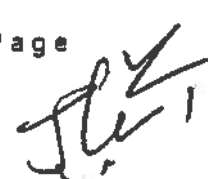
THE LEGISLATIVE FRAMEWORK

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

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 communications¹.

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 response².

12.3 Subsequent to the response received and considering all the events that has transpired together with the media reports³, on 4 July 2014, I caused to be served on Nxasana a notice of the institution of an inquiry⁴.

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

¹ This letter is contained in the Record in terms of prayer 5 ("Record 1") on pages 2 to 3.

² This letter is contained in Record 1 on pages 4 to 13

³ These media reports are contained in Record 1 on pages 84 to 126

⁴ This notice is contained in Record 1 on page 14

from suspending him⁵. 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 inquiry⁶.

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 provided⁷.

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.

⁵ The court papers are contained in Record 1 on pages 15 to 52

⁶ This notice is contained in Record 1 on pages 53 to 60

⁷ 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 agreement⁸ 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.

⁸ 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 Director⁹. I then held an interview with Abrahams together with Mr Hulley. The interview guide notes form the minute of this interview¹⁰.

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 2015¹¹.

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.

⁹ This is contained in the Record in terms of prayer seven ("Record 3") on pages 3 to 10.

¹⁰ This is contained in Record 3 on pages 100 to 102

¹¹ 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.

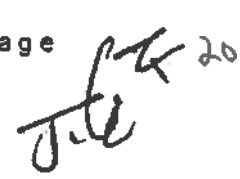
15.4 Therefore section 96(2) of the Constitution does not arise.

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.

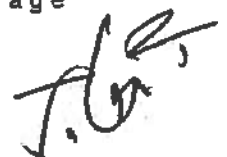
23.2 I aver that Nxasana's vacating of office was in accordance with the empowering provisions contained in section 12(8) of the NPA Act. This provides for a consensual vacating of office of the NDPP, where sufficient reasons exist as was the case in this instance. 16

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, 9th 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.

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.

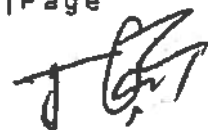
47. AD PARAGRAPH 56

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 to 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 want 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.

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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.

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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.

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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

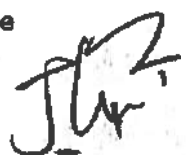
77.1 I deny that the applicants are entitled to the relief as prayed for.

78. AD PARAGRAPH 16

78.1 I note the content of this paragraph.

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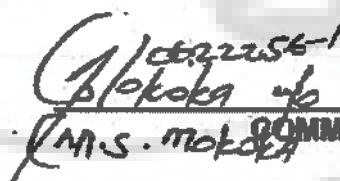


WHEREFORE I pray that this application be dismissed with costs, which costs include the cost of two counsel.

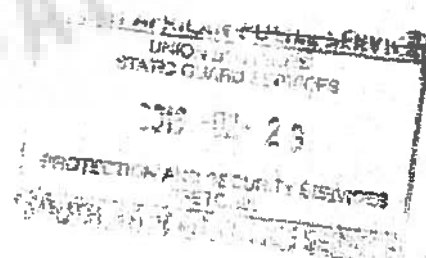


DEPONENT

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



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Relevant Sections



Office of the National Director of Public Prosecutions



CONFIDENTIAL MINISTERIAL MEMORANDUM

TO	TM MASUTHA, MP (ADV) MINISTER OF JUSTICE AND CORRECTIONAL SERVICES
FROM	MR WA HOFMEYR ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
SUBJECT	SUSPENSION OF DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND DIRECTORS OF PUBLIC PROSECUTIONS IN TERMS OF SECTION 12(6) OF NATIONAL PROSECUTING AUTHORITY ACT, 1998
REF NO.	4/2/18/11(NDPP)
DATE	18 JULY 2014

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A. BACKGROUND INFORMATION & PURPOSE OF MEMORANDUM

1. On 22 December 2010, the President appointed Adv Nomgcobo Jiba as Deputy National Director of Public Prosecutions in the Office of the National Director of Public Prosecutions (National Director) with effect from 22 December 2010 (Annexure "A").
2. On 26 October 2011, the President appointed Adv Sthembele Lawrence Mrwebe as a Special Director of Public Prosecutions to head the Specialised Commercial Crime Unit in the Office of the National Director, with effect from 1 November 2011 (Annexures "B" and "C").

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Justice in our society so that people can live in freedom and security

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Victoria & Griffiths
Mxenge Building
123 Westlake Avenue



P/Bag X752

Pretoria
0001

Tel: (012) 845-6000

Fax: (012) 804 9529

www.npa.gov.za



3. Former President Thabo Mbeki appointed Adv Sibongile Mzinyathi as Director of Public Prosecutions, with effect from 1 December 2003 (Annexure "D").
4. Following recent High Court and Supreme Court of Appeal decisions, wherein the conduct of the above officials were severely criticised, the National Prosecuting Authority (NPA), via the Office of the State Attorney, briefed Senior Counsel to furnish a legal opinion as to whether, among others, disciplinary steps ought to be taken against the abovementioned senior members of the NPA. The legal opinion was furnished to the State Attorney on 7 July 2014 (Annexure "E").
5. After careful consideration and taking into account the findings of the High Court and the Supreme Court of Appeal; the values and principles enshrined in the Constitution; the Code of Conduct for Prosecutors; the recommendations of Senior Counsel; and certain outstanding and ongoing inquiries and investigations, the NPA is of the view that it is obliged—
- (a) to inform the Minister regarding the abovementioned findings and recommendations;
 - (b) to recommend that disciplinary steps be taken against all three abovementioned senior members of the NPA in terms of the provisions of section 12 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998) (NPA Act);
 - (c) to refer the Court judgments to the South African Police Service with a view to open criminal investigations for perjury against all three senior members of the NPA;
 - (d) submit the findings made in the judgments against the abovementioned senior members of the NPA to the General Council of the Bar to consider action in terms of section 7 of the Admission of Advocates Act, 1964 (Act No. 74 of 1964).

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6. In view of the above, the purpose of this memorandum is to request the Minister to—

- (a) forward the contents of this memorandum to the President; and
- (b) approach the President and to request him to provisionally suspend **Advocates Nomgcobo Jiba, Sthembele Lawrence Mrwebi, and Sibongile Mzinyathi** from their offices as Deputy National Director of Public Prosecutions and Directors of Public Prosecutions, respectively, pending an enquiry into their fitness to hold such offices and the finalisation of the envisaged criminal investigations and outstanding inquiries and investigations and action of the General Council of the Bar.

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B. STATUTORY REQUIREMENTS

- 7. In terms of the NPA Act, the power to appoint the National Director of Public Prosecutions (NDPP), Deputy National Directors of Public Prosecutions (DNDPP's) and Directors of Public Prosecutions (DPP's), including a Special Director of Public Prosecutions, vests in the President.¹
- 8. The powers to suspend and remove the above functionaries from office, also vests in the President.²
- 9. In terms of section 12(6)(a), read with section 14(3), of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998) (NPA Act), the President may provisionally suspend a Deputy National Director or a Director of Public Prosecutions from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit.

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¹ See sections 10, 11(1), 13(1)(a) and 13(1)(c) of the NPA Act, respectively.

² See section 12(7) and 14(3) of the NPA Act.

C. DISCUSSION

10. In *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SACR 111 (GNP) April 2014), the North Gauteng High Court (per Murphy J) made certain unfavourable credibility findings against Advocates Jiba, Mrwebi and Mzinyathi (Annexure "F"). The judgment of Murphy J was confirmed by the Supreme Court of Appeal (SCA) in *National Director of Public Prosecutions v Freedom Under Law* 2014 (4) SA 298 (SCA) (Annexure "G").
11. There were also other cases or inquiries where unfavourable findings were made against the conduct of some of the abovementioned senior members of the NPA. When dealing with the individuals concerned separately hereunder, these other instances will be referred to.
12. On 26 June 2014, the National Prosecuting Authority (NPA), briefed Adv Patrick Ellis, SC (Adv Ellis), to furnish a legal opinion on the following questions:
 - (a) The disciplinary procedures available in respect of senior personnel at the NPA.
 - (b) Whether disciplinary steps ought to be taken against Advocates Jiba, Mrwebi, Mzinyathi and Molpone, primarily as a result of the findings made in the judgments referred to in paragraph 10 above and the judgment by Gerven J in *Booyesen v Acting National Director of Public Prosecutions & Others* (4665/2010) [2014] ZAKZDHC 1; [2014] 2 All SA 391 (KZD) (26 February 2014).
13. In his legal opinion furnished to State Attorney of 7 July 2014, Adv Ellis deals with the mentioned individuals separately as indicated hereunder (Annexure "E"). This memorandum does not deal with the position of Adv Noko, since no adverse finding has been made against her at this stage. However, her conduct in the matter *Democratic Alliance v*

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Acting Director of Public Prosecutions: KZN (Case No. 4962/2013), is still under consideration by the National Director.

ADV NOMGCOBO JIBA (ADV JIBA)

14. Adv Jiba is a Deputy National Director of Public Prosecutions in the Office of National Director. The President appointed her in this position with effect from 22 December 2010 (Annexure "A").
15. Adv Ellis points out that Adv Jiba is no stranger to controversy and if the reported incidents are found to be true, it would no doubt cast serious doubt as to whether she is a fit and proper person to hold office in the NPA. However, he points out that he will limit his comments to the findings of the abovementioned judgments as well as the judgment by Van Niekerk J in the Labour Court in the matter between *Jiba v National Director of Public Prosecutions* (Unreported: J169/09). The opinion is held that it is not necessary to deal with the latter judgment for purposes of this memorandum.
16. In *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SACR 111 (GNP) April 2014), Murphy J made scathing credibility findings against Adv Jiba. The judgment was the result of an application instituted by Freedom Under Law against *inter alia* the National Director to review and set aside the decisions not to proceed with charges, including murder and corruption charges, against Lieutenant General Richard Mdluli and also to review and set aside the decision of the National Commissioner to terminate a disciplinary inquiry into his conduct.
17. Murphy J severely criticised Adv Jiba for the manner in which the proceedings were conducted by her and the other mentioned senior members of the NPA. In paragraph 24 Murphy J remarked as follows:

SUSPENSION OF DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND DIRECTORS OF PUBLIC PROSECUTIONS IN TERMS OF SECTION 12(6) OF NATIONAL PROSECUTING AUTHORITY ACT, 1996

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"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 responsibilities 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." (Emphasis added)

18. Adv Ellis points out that "this criticism stems from Adv Jiba's failure to file a proper review record as she was obliged to do in terms of the Rules of Court, which left the applicant to rely upon various other sources of information about the impugned decisions. Such sources included evidence led at the disciplinary proceedings of Adv Glynis Breytenbach and the affidavits filed in subsequent Labour Court proceedings. Having analysed those, Murphy J came to the conclusion that Ms Jiba had known of certain representations made by Mdluli's legal team, that they were considered and dealt with by her, that Ms Breytenbach later made written representations to her to revise the decision taken by Mrwehl not to pursue criminal charges of fraud and corruption against Mdluli, the decision to withdraw the murder case against Mdluli, the decision to convene an inquest and the finding of the Magistrate who presided over the inquest that the case against Mdluli was 'overwhelming probable'".

19. After a comprehensive evaluation of the evidence, Murphy J found that Adv Jiba, as an officer of the High Court, had misled the court under oath. In paragraphs 196 and 197, Murphy J remarked as follows:

"[196] The dispute that forms the subject-matter of this application has been ongoing for more than 18 months, since February 2012. Given its high-profile nature and the outcry about it in the media and other quarters, there can be no doubt that the NDPP was aware of it, and its implications, from the time the charges were withdrawn. Mdluli's representations were sent to her and she referred them down the line;

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probably rightly so. But she was nonetheless empowered by s 179 of the Constitution to intervene in the prosecution process and to review the prosecutorial decisions *mero motu*; yet, despite the public outcry, she remained supine and would have us accept that her stance was justified in terms of the Constitution. She has not given any explanation for her failure to review the decisions at the request of Braytenbach, made in April 2012. Her conduct is inconsistent with the duty imposed on all public functionaries by s 195 of the Constitution to be responsive, accountable and transparent.

[197] Besides not availing herself of the opportunity to review the decision, she waited more than a year after the application was launched before raising the point, and then did so in terms that can fairly be described as abstruse. Her 'plea' made no reference to the relevant paragraphs of the prosecution policy directives, the relevant provisions of PAJA or the principles of the common law. A plea resting only on an averment that an application is 'premature' is meagrely particularised and lacks sufficient allegations to found a complete defence that there had been non-compliance with a duty to exhaust internal remedies. Had we to do here with a set of particulars of claim, they would have been excipiable on the grounds of being vague and embarrassing." (Emphasis added)

20. And at paragraph [200]:

"For the reasons I have stated, a referral to the NDPP in this case would be illusory. Had the NDPP truly wanted to hold the remedy available, instead of simply asserting that the application to court was premature, as a senior officer of the court she would (and should) have assisted the court by reviewing the decisions and disclosing her substantive position in relation to them and their alleged illegality and irrationality. She has not pronounced at all on the decisions or for that matter the evidence implicating Mdluli. Her stance is technical, formalistic and aimed

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solely at shielding the illegal and irrational decisions from judicial scrutiny." (Emphasis added)

21. In this regard Adv Ellis referred to the SCA decision of *General Council of the Bar v Geach & Others* 2013 (2) SA 52 (SCA) AT 102A – C, where Wallis AJ remarked as follows:

"One of the cardinal duties owed by an officer of the Court is not to mislead the Court in any way".³ (Emphasis added)

22. The judgment of Murphy J was confirmed on appeal in *National Director of Public Prosecutions v Freedom Under Law* 2014 (4) SA 298 (SCA) and Adv Jiba's conduct was also strongly criticised by Brand JA. In paragraph 37 he remarked as follows:

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

23. According to Adv Ellis, the above finding confirms "the finding by the court a quo that it was misled by Ms Jiba's conduct".

³ See also the cases referred to in paragraph 19 of Annexure "B".

24. Adv Ellis further points out that a similar finding was made against Adv Jiba in *Booyesen v Acting National Director of Public Prosecutions & Others* where Gorven J said the following:

"32. In his replying affidavit, Mr Booyesen submits that the NDPP is 'mendacious when she asserts in paragraph 21 of the answering affidavit that she considered the statements together with the other information in the 'docket' before making the impugned decisions. She could not have considered the statements referred to in her answering affidavit. She is invited to explain how she could have taken into account information on oath that objectively did not exist at the time of taking the decision'.

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(34) Mr Booyesen was clearly within his rights to deal in reply with the inaccurate assertions by the NDPP in her answering affidavit and to issue the challenge and invitation in question. He had not seen the statements until they were annexed to the answering affidavit. As regards the inaccuracies, the NDPP is, after all, an officer of the court. She must be taken to know how important it is to ensure that her affidavit is entirely accurate. If it is shown to be inaccurate and thus misleading to the court, she must also know that it is important to explain and, if appropriate, correct any inaccuracies. Despite this, the invitation of Mr Booyesen was not taken up by the NDPP by way of a request, or application, to deliver a further affidavit. In response to Mr Booyesen's assertion of mendacity on her part, there is a deafening silence. In such circumstances, the court is entitled to draw an inference adverse to the NDPP. The inference in this case need go no further than that, on her version, the NDPP did not have before her annexure NJ4 at 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 Booyesen to the offences in question. This means that the documents on which she says she relied did not provide a rational basis for the decisions to issue the authorisations to

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charge Mr Booysen for contraventions of s 2(1)(e) and (f) respectively."
(Emphasis added)

25. Taking into account the abovementioned findings, Adv Ellis holds the following views:

"24. It is my considered view that these very serious findings against Ms Jiba cannot be allowed to pass by without disciplinary steps being taken against Ms Jiba. The fact that she was prepared to lie under oath in two very important cases before the High Court, where her conduct was placed under scrutiny, not only indicates a strong prima facie case of serious misconduct, but also casts grave doubt on her fitness to hold office.

27. 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 Director of Public Prosecutions to be presided over by a retired judge of the High Court.

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

29. 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." (Emphasis added)

ADV STHEMBISO LAWRENCE MRWEBI (ADV MRWEBI)

26. Adv Mrwebi was appointed by the President as a Special Director of Public Prosecutions to head the Specialised Commercial Crime Unit in the Office of the National Director, with effect from 1 November 2011.
27. In *Freedom Under Law v National Director of Public Prosecutions and Others* Murphy J also made scathing credibility findings against Adv Mrwebi. As Special Director of Public Prosecutions of the SCCU, Adv Mrwebi was the person who took the decision and gave instructions to withdraw the charges of fraud and corruption against Mdluli.
28. In the above High Court case Murphy J found that Adv Mrwebi has failed to disclose relevant documents which formed part of the record of his decision. Those documents included memorandum and a "consultative note".
29. In paragraph [55] of the judgment Murphy J made the following finding:
- "[55] In light of the contemporaneous evidence, Mrwebi's averment in the answering affidavit, that he consulted and reached agreement with Mzinyathi before taking the decision, is equally untenable and incredible to a degree that it too falls to be rejected". (Emphasis added)*
30. In paragraphs [59] to [61], Murphy J made the following findings against Adv Mrwebi:
- "[59] Had Mrwebi genuinely been willing to pursue the charges after 9 December 2011, one would have expected him to have acted more effectively. He justified his supine stance on the basis that Breytenbach had not come back to him with additional evidence to cure the defects in*

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the case. He implied that, had she done her job, the charges would have been reinstated.

[60] FUL was justifiably sceptical in its reply to these allegations. Paragraphs 106 and 107 of the reply read:

'106. Advocate Mrwebi's version as set out in this paragraph is, I submit, palpably implausible and in conflict with his ipsissima verba. In its ordinary meaning closed is unequivocal. As it is used in Advocate Mrwebi's letter to General Dramat, seen in the context, there can in my submission be no doubt that Advocate Mrwebi was implacably opposed to any prosecution against General Mdluli.

107. Indeed, I submit that the very attempt to adhere to the untenable casts serious doubt on the veracity of the deponent and moreover casts a shadow over the propriety of his decision to block the prosecution of General Mdluli.'

[61] The attempt to blame Breytenbach is frankly disingenuous and unconvincing, as is Mrwebi's subsequent claim that investigations into the charges are continuing. Three experienced commercial prosecutors and two senior police investigators were satisfied in early December 2011 that there was sufficient evidence to prosecute Mdluli on these charges immediately. Breytenbach, who is an experienced prosecutor with more than two decades of experience in the criminal courts, accused Mrwebi, in her founding affidavit in the labour court application, of 'blind and irrational adherence to his instruction that the charges be withdrawn', and of frustrating her efforts to prosecute to the extent of having her suspended on spurious charges. The assertion that Breytenbach agreed that the case against Mdluli was defective is irreconcilable with the contemporaneous evidence, particularly a threat made by her in a memo to the NDPP to seek legal relief to compel the NPA to pursue the charges, and is accordingly wholly improbable.

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[62] In a 24-page memo to the Acting NDPP dated 13 April 2012, annexed to her affidavit in the labour court application, Breytenbach made a forceful argument in favour of proceeding against Mdluli on the corruption charges and stated her view that the instruction to withdraw the case against Mdluli and his co-accused, Colonel Barnard, was 'bad in law and in fact illegal'. She asked the NDPP for an internal review of Mrwebi's decision not to institute criminal proceedings, and to review the lawfulness of the decision." (Emphasis added)

31. The judgment of Murphy J was confirmed by the SCA in paragraphs [39] to [42]. In paragraphs [40] to [42] the SCA held as follows:

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[40] An even more serious problem with the version presented in Mrwebi's answering affidavit, is that it was in direct conflict with the evidence that he and Mzinyathi gave under cross-examination at a disciplinary hearing of Breytenbach. The transcript of the hearing was annexed to the supplementary founding affidavit on behalf of FUL. The conflict is set out in extensive detail in the judgment of the court a quo (paras 47-48). I find a repetition of that recordal unnecessary. What appears in sum is that Mrwebi conceded in cross-examination that he took a final decision to withdraw the charges before he wrote the memorandum of 5 December 2011; that at that stage he did not know what Mzinyathi's views were; and that he only realised on 8 December 2011 that Mzinyathi did not share his views, at which stage he had already informed Mdluli's attorneys that the charges would be withdrawn. According to Mzinyathi's evidence at the same hearing, Mrwebi took the position at their meeting of 9 December 2011 that the charges had been finally withdrawn and that he was functus officio, because he had already informed Mdluli's attorneys of his decision.

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[41] In these circumstances I agree with the court a quo's conclusion (para 55) that Mrwebi's averment in his answering affidavit, to the effect that he consulted and reached agreement with Mzinyathi before he took the impugned decision, is

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untenable and incredible to the extent that it falls to be rejected out of hand. The only inference is thus that Mrwebi's decision was not in accordance with the dictates of the empowering statute on which it was based. For that reason alone the decision cannot stand.

[42] The court a quo gave various other reasons why Mrwebi's impugned decision cannot stand. These are comprehensively set out in the judgment of the court a quo under the heading 'the withdrawal of the fraud and corruption charges' (para 141 et seq). However, in the light of my finding that the decision falls to be set aside on the basis that it was in conflict with the empowering statute, I find it unnecessary to revisit these reasons. Suffice it to say that, in the main, I find the court's reasoning convincing and nothing that has been said in arguments before us casts doubt on their correctness. (Emphasis added)

32. Taking into account the abovementioned findings of the High Court and the SCA, Adv Ellis makes the following findings and recommendations:

*35. I am of the considered view that the findings of Murphy J, as confirmed by Brand J in the Supreme Court of appeal constitute compelling justification for disciplinary proceedings against Mr Mrwebi. In view of the fact that he has been appointed a Special Director of Public Prosecutions, the provisions of section 12(6) and (7) read with section 14(2) and (3) are applicable.

36. I consequently recommend that the President should, in terms of section 12(6)(a) of the NPA Act, consider to provisionally suspend Mr Mrwebi, pending an inquiry into her fitness to hold the office of Special Director of Public Prosecutions to be presided over by a retired judge of the High Court.

37. I also recommend that a criminal investigation for perjury be opened against Mr Mrwebi.
38. Finally, I recommend that the findings against Mr Mrwebi 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 him in terms of section 7 of the Admission of Advocates Act. (Emphasis added)

ADV SIBONGILE MZINYATHI (ADV MZINYATHI)

33. Adv Mzinyathi was appointed by former President Mbeki as a Director of Public Prosecutions, with effect from 1 December 2003. At present he is the Director of Public Prosecutions of North Gauteng in Pretoria. 10
34. Adv Mzinyathi is one of the senior members of the NPA whose conduct was also strongly criticised by Murphy J in the *Freedom Under Law* matter.
35. Adv Mzinyathi's conduct came under scrutiny in the disciplinary hearing against Adv Breytenbach where he initially corroborated Adv Mrwebi's evidence that he was consulted by the latter before the decision was made to withdraw the charges of fraud and corruption against Mdluli.
36. In the *Freedom Under Law* case Murphy J dealt comprehensively with Adv Mzinyathi's involvement. In paragraphs [52] to [54], Murphy J remarked as follows: 20
- "[52] Mrwebi in his answering affidavit did not deal with Mzinyathi's testimony at the disciplinary enquiry (or for that matter with any of the averments in the supplementary founding affidavit). His account of the events between 5 December 2011 and 9 December 2011 takes the form of a general narrative which does not admit or deny the specific

allegations in the supplementary founding affidavit. He nonetheless maintained that he had consulted Mzinyathi. The answering affidavit was not accompanied by a confirmatory affidavit from Mzinyathi, who therefore initially did not confirm Mrwebi's general account. In his confirmatory affidavit — filed at the eleventh hour the day before the hearing, without any explanation whatsoever for it being filed six months after the delivery of the supplementary founding affidavit — Mzinyathi, differing from his evidence at the hearing, confirmed the allegations in Mrwebi's affidavit as they relate to him, thus saying in effect for the first time that he had indeed concurred in the decision.

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[53] Mzinyathi elaborated further, in paras 7 to 9 of the affidavit, that Mrwebi approached him at his office on 5 December 2011, told him that he was dealing with representations regarding Mdluli and needed to consult him. Mrwebi mentioned to him that he was busy researching the Intelligence Services Oversight Act and then left his office. The impression created, as mentioned earlier, is that no substantive discussions took place that day and hence clearly there was no concurrence before Mrwebi wrote the consultative note and communicated with Mdluli's attorneys. Later Mzinyathi heard from Smith that Mrwebi had instructed the prosecutor to withdraw the charges. He then wrote the email of 8 December 2011 to Mrwebi and met him on 9 December 2011, together with Breytenbach. At the meeting he was persuaded that the matter was not ripe for trial and agreed to the provisional withdrawal of the charges. This differs materially from his original position that he was unable to influence the decision because it had been finally taken but conceded to the characterisation of the withdrawal as provisional as a compromise partially addressing his concerns.

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[54] Taking account of how it was placed before the court by Mzinyathi — after FUL's heads of argument were filed, without explanation for its lateness, and its inconsistency with his testimony at the disciplinary

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hearing, that he was presented with a fait accompli and was unable to influence the decision because Mrwebi claimed to be functus officio — this evidence of the DPP North Gauteng, to the effect that he ultimately concurred, must regrettably be rejected as uncreditworthy. The affidavit is a belated, transparent and unconvincing attempt to rewrite the script to avoid the charge of unlawfulness. The version in the supplementary founding affidavit, originally uncontested by Mzinyathi, and corroborated by Mzinyathi's testimony in the disciplinary hearing, must be preferred and accepted as the truth." (Emphasis added)

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37. As pointed out by Adv Ellis, the SCA concurs with this finding. In paragraphs [40] to [41] Brand JA said the following:

"[40] An even more serious problem with the version presented in Mrwebi's answering affidavit, is that it was in direct conflict with the evidence that he and Mzinyathi gave under cross-examination at a disciplinary hearing of Breytenbach. The transcript of the hearing was annexed to the supplementary founding affidavit on behalf of FUL. The conflict is set out in extensive detail in the judgment of the court a quo (paras 47-48). I find a repetition of that recordal unnecessary. What appears in sum is that Mrwebi conceded in cross-examination that he took a final decision to withdraw the charges before he wrote the memorandum of 5 December 2011; that at that stage he did not know what Mzinyathi's views were; and that he only realised on 8 December 2011 that Mzinyathi did not share his views, at which stage he had already informed Mdluli's attorneys that the charges would be withdrawn. According to Mzinyathi's evidence at the same hearing, Mrwebi took the position at their meeting of 9 December 2011 that the charges had been finally withdrawn and that he was functus officio, because he had already informed Mdluli's attorneys of his decision.

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- [41] In these circumstances I agree with the court a quo's

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conclusion (para 55) that Mrwebi's averment in his answering affidavit, to the effect that he consulted and reached agreement with Mzinathi before he took the impugned decision, is untenable and incredible to the extent that it falls to be rejected out of hand. The only inference is thus that Mrwebi's decision was not in accordance with the dictates of the empowering statute on which it was based. For that reason alone the decision cannot stand." (Emphasis added)

38. In respect of Adv Mzinathi's involvement, Adv Ellis holds the following view:

"44. As in the case of Mrwebi, I am of the considered view that the findings of Murphy J, as confirmed by Brand JA in the Supreme Court of Appeal constitute compelling justification for disciplinary proceedings against Mr Mzinathi. In view of the fact that he has been appointed a Director of Public Prosecutions, the provisions of section 12(6) and (7) read with section 14(2) and (3) are applicable.

45. I consequently recommend that the President should, in terms of section 12(6)(a) of the NPA Act, consider to provisionally suspend Mr Mzinathi pending an inquiry into his fitness to hold the office of Director of Public Prosecutions in the Gauteng Division, to be presided over by a retired judge of the High Court.

46. I also recommend that a criminal investigation for perjury be opened against Mr Mzinathi.

47. Finally, I recommend that the findings against Mr Mzinathi 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 him in terms of section 7 of the Admission of Advocates Act." (Emphasis added)

EVALUATION BY NATIONAL PROSECUTING AUTHORITY

39. In terms of section 195(1) of the Constitution public administration must be governed by the democratic values and principles enshrined in the Constitution. These include, among others, the following principles:
- A high standard of professional ethics must be promoted and maintained.⁴
 - Services must be provided impartially, fairly, equitably and without bias.⁵
 - Public administration must be accountable.⁶
40. Section 195(2) of the Constitution provides that the above principles apply to the administration in every sphere of government; organs of state; and public enterprises.⁷ Therefore, the principles set out in section 195(1) of the Constitution are also applicable to the NPA and all members of the organisation. 10
41. In December 2010, the former NDPP, Adv Menzi Simelane, under section 22(6)(a) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), framed a new Code of Conduct for the NPA (Code). This Code was published in the Government Gazette of 29 December 2010 (Annexure "H")⁸
42. According to the Preamble of the Code, the provisions of the Code are applicable to all members of the NPA. Furthermore, the Preamble contains the following important provisions relevant to this memorandum: 20

⁴ Paragraph (a) of subsection (1).

⁵ Paragraph (d) of subsection (1).

⁶ Paragraph (f) of subsection (1).

⁷ See paragraphs (a) to (c) of subsection (2).

⁸ Government Notice No. R, 1257, Government Gazette No. 33907 of 29 December 2010.

"In framing this Code, the Minister, Deputy National Directors and Directors of Public Prosecutions were consulted as prescribed by the Act. Due account was taken, inter alia, of the values and principles enshrined in the Constitution of the Republic of South Africa, 1996 ('the Constitution'), the aims to be achieved as set out in the Act, and the United Nations Guidelines on the Role of Prosecutors."

This Code acknowledges the crucial role of prosecutors in the administration of criminal justice. It emphasises the essential need for prosecutions to be fair and effective, and for prosecutors to act without fear, favour or prejudice.

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Furthermore, it serves to inform the public of what is expected of prosecutors and is aimed at ensuring public confidence in the integrity of the criminal justice process.

Above all, this Code requires all prosecutors to respect human dignity and human rights, and to perform their professional duties with full recognition of the supremacy of the Constitution and the rule of law."
(Emphasis added)

43. The following are important extracts for purposes of this memorandum:

43.1 Under the heading "PROFESSIONAL CONDUCT"

"Prosecutors should—

- (a) be individuals of integrity whose conduct should be honest and sincere;
- (b) respect, protect and uphold justice, human dignity and fundamental rights as entrenched in the Constitution;
- (c) loyally serve and protect the public interest;
- (d) strive to be and to be seen to be consistent, independent and impartial;

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- (e) conduct themselves professionally, with courtesy and respect to all, and in accordance with the law and the recognised standards and ethics of their profession;
 - (f) ...; and
 - (g) at all times maintain the honour and dignity of their profession and dress in a manner befitting their status and the decorum of the court." (Emphasis added)

43.2 Under the heading "INDEPENDENCE"

"The prosecutorial discretion to institute and to stop proceedings, should be exercised independently in accordance with the Prosecution Policy and the Policy Directives, and be free from undue political and judicial interference." (Emphasis added)

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43.3 Under the heading "IMPARTIALITY"

"Prosecutors should perform their duties without fear, favour or prejudice. In particular, they should—

- (a) carry out their functions impartially and not become personally, as opposed to professionally, involved in any matter;
- (b) avoid taking decisions in matters where a conflict of interest exists or might possibly exist;
- (c) take into consideration the public interest as distinct from partisan interests or concerns, however vociferously these may be presented;
- (d) avoid participation in political activities which may prejudice or be perceived to prejudice their independence and impartiality;
- (e) ...;
- (f) act with objectivity and pay due attention to the constitutional right to equality;
- (g) take into account all relevant circumstances and ensure that reasonable enquiries are made about evidence, irrespective of whether these enquiries are to the advantage or disadvantage of the alleged offender;

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- (h) be sensitive to the needs of victims and do justice between the victim, the accused and the community, according to the law and the dictates of fairness and equity; and
- (i) assist the court to arrive at a just verdict and, in the event of a conviction, a fair sentence based on the evidence presented. (Emphasis added)

43.4 Under the heading "ROLE IN THE ADMINISTRATION OF JUSTICE"

1. "Prosecutors should perform their duties fairly, consistently and expeditiously and—

- (a) in their role as lawyers for the people in adversarial proceedings, perform their duties fearlessly and vigorously in accordance with the highest standards of the legal profession;
- (b) where legally authorised to participate or assist in the investigation of crime, or when exercising authority over the police or other investigators, they should do so objectively, impartially and professionally, also insisting that the investigating agencies comply with legal precepts and fundamental human rights; and
- (c) ...

2. Prosecutors should, furthermore—

- (a) preserve professional confidentiality;
- (b) refrain from making inappropriate media statements and other public communications or comments about cases which are still pending or cases in which the time for appeal has not expired;
- (c) consider the views, legitimate interests and possible concerns of victims and witnesses when their personal interests are, or might be, affected, and endeavour to ensure that victims and witnesses are informed of their rights, especially with reference to the possibility, if any, of victim compensation and witness protection;

- (d) if requested by interested parties, supply reasons for the exercise of prosecutorial discretion, unless the individual rights of persons such as victims, witnesses or accused might be prejudiced, or where it might not be in the public interest to do so;
- (e) to (j)". (Emphasis added)

43.5 Under the heading "CO-OPERATION"

"In order to ensure the fairness and effectiveness of the prosecution process, prosecutors should—

- (a) co-operate with the police, court officials, the legal profession, defence counsel, and any relevant government agencies, whether nationally or internationally;
- (b) in their professional dealings, at all times conduct themselves in a dignified manner commensurate with their position; and
- (c) render assistance to the prosecution services and colleagues of other jurisdictions in accordance with the law and in a spirit of mutual co-operation". (Emphasis added)

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43.6 Under the heading "ENFORCEMENT"

1. "All prosecutors should respect and comply with the terms of this Code and report all instances of unprofessional conduct by colleagues (and also, as the case may be, other court officials) to the relevant supervising prosecuting authority who should consider the appropriate steps.
2. In the event of transgressions, appropriate disciplinary steps may be taken in terms of the applicable legal prescripts." (Emphasis added)

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44. It is important to note that according to the notes to the Code, it is specifically pointed out that "References in this Code to prosecutors include members of the National Prosecuting Authority as defined in the

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Act and every person acting under a temporary delegation to prosecute, unless the context indicates otherwise. Therefore, the Code is applicable to all members of the NPA as defined in section 4 of the NPA Act, namely, the National Director; Deputy National Directors; Directors (including Special Directors); Deputy Directors; and prosecutors.

45. Furthermore, as required by the Code all prosecutors should respect and comply with the terms of this Code and report all instances of unprofessional conduct by colleagues (and also, as the case may be, other court officials) to the relevant supervising prosecuting authority who should consider the appropriate steps. Therefore, NPA Management is obliged to report these adverse findings and transgressions to the Minister and the President.

46. In *Democratic Alliance v The President of the RSA & others* (2011) ZASCA 241 (1 December 2011), the SCA referred to section 179 of the Constitution, which section deals with the establishment of the prosecuting authority. In paragraph [70] the SCA held as follows:

"As can be seen the same theme that suffuses all the other Chapters of the Constitution permeates Chapter 8 as well, namely, that institutions of state integral to the well-being of a functioning democracy have to be above reproach, have to be independent and have to serve the people without fear, favour or prejudice."

47. In paragraph [72] of the above SCA decision, the Court remarked as follows:

[72] To understand the importance of the office of the NDPP and the power that he or she wields, regard should be had first, to the provisions of s 179(2) of the Constitution, set out in para 68 above. 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. This power is echoed in s 20(1) of the Act. Section 20(1)(c) of the Act gives the prosecuting authority the power to discontinue criminal proceedings. It hardly needs stating that these are awesome powers and that it is central to the preservation of the rule of law that they be exercised with the utmost integrity. That must mean that the people employed by the prosecuting authority must themselves be people of integrity who will act without fear, favour or prejudice."

D. CONCLUSION AND RECOMMENDATIONS

48. Taking into account the values and principles enshrined in the Constitution, the Code of Conduct for Prosecutors, the findings of the High Court and the Supreme Court of Appeal, the integrity requirements expected from members of the NPA as set out in the above SCA decision and the recommendations of Senior Counsel, the NPA Management is of the view that the findings and recommendations of Adv Patrick Ellis, SC, are sound. Therefore, members of the NPA Management are obliged to—

- (a) report the adverse findings to the Minister and the President;
- (b) recommend that the President should, in terms of section 12(6)(a) of the NPA Act, consider to provisionally suspend Advocates Jiba, Mrwebi and Mzinyathi pending an inquiry into their fitness to hold the offices of Deputy National Director of Public Prosecutions and Directors of Public Prosecutions, respectively, to be presided over by a retired judge of the High Court;
- (c) refer the matter and findings of the Courts to the South African Police Service with a view to open criminal investigations for perjury against the above-mentioned members of the NPA;
- (d) 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.

SUSPENSION OF DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND DIRECTORS OF PUBLIC PROSECUTIONS IN TERMS OF SECTION 12(6) OF NATIONAL PROSECUTING AUTHORITY ACT, 1998

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49. Apart from the above-mentioned findings there are also further criminal proceedings to be instituted against Adv Mrwebi. It is alleged that Adv Mrwebi during December 2011 and during 2012 committed the offences of contravention of section 32(1)(b) of the NPA Act, intimidation and defeating the ends of justice. The charges have been investigated under *Silverton CAS 427/02/2013*. The complainant is Adv Nathi Mncube, a senior state advocate in the Office of the National Director. It is alleged that these offences were committed in respect of criminal charges against Mr Terence Joubert (a friend of Adv Mrwebi), which case was handed to Adv Mncube to oversee the prosecution, and that Adv Mrwebi interfere with the work of Adv Mncube. Although the matter falls within the jurisdiction of the DPP: North Gauteng, since Adv Mrwebi was previously stationed at the Office of the DPP: North Gauteng, the NDPP referred the case to the DPP: South Gauteng for a decision. The latter DPP declined to prosecute, where after the complainant make representations to the NDPP to review the decision in terms of section 179(5) of the Constitution and section 22(2) of the NPA Act. The NDPP in turn authorised Mr Willie Hofmeyr to make a final decision. After having complied with the requirements set out in section 179(5)(d) of the Constitution and section 22(2)(c) of the NPA Act, Mr Hofmeyr reviewed the decision not to prosecute and decided that the DPP: North Gauteng must institute criminal proceedings against Adv Mrwebi.

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50. The opinion is held that this case on its own justifies the request that the President should provisionally suspend Adv Mrwebi pending the finalisation of the criminal case.

51. The NPA is also aware of a several other investigations and allegations against Adv Mrwebi and is investigating these further. Furthermore, the NPA is also in the process of instituting a fact finding inquiry to investigate certain alleged unethical conduct by senior members of the NPA. At this stage it seems probable that Advocates Mrwebi and Jiba may be involved in this fact finding inquiry.

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52. It is totally undesirable for Advocates Jiba and Mrwebi to be at office whilst criminal charges have been opened and/or instituted against them. They may also interfere with other outstanding and ongoing investigations. Therefore, the opinion is held that the President should provisionally suspend them pending the outstanding and ongoing investigations and/or criminal prosecutions.

53. It must be borne in mind that it is trite law that employees who face suspension must be afforded the opportunity to submit reasons as to why it is not necessary to be suspended. Therefore, it is proposed that they be afforded an opportunity to make the necessary representations before suspension is considered.

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54. To give effect to the abovementioned recommendations contained in paragraph 48(a) and (b), a draft memorandum addressed to the President is in the cover for the Minister's consideration.



Mr Willie Hofmeyr

Acting National Director of Public Prosecutions

Date: 18/7/14

Recommendations in paragraph 48(a) and (b) ☒ SUPPORTED/ NOT SUPPORTED



Adv Karen van Rensburg

Chief Executive Officer: NPA

21/7/2014

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1. Contents of memorandum NOTED

Comments: _____

Mrs N Sindane

Director-General: Justice and Constitutional Development

Date:

1. Contents of memorandum NOTED

Comments: _____

Mr J Jeffery, MP

Deputy Minister of Justice and Constitutional Development

Date:

1. Contents of memorandum NOTED

2. Draft letter to President SIGNED / NOT SIGNED

TM Masutha, MP (Adv)

Minister of Justice and Correctional Services

Date:

SUSPENSION OF DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND DIRECTORS OF PUBLIC PROSECUTIONS IN TERMS OF SECTION 12(6) OF NATIONAL PROSECUTING AUTHORITY ACT, 1996

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MINISTER
JUSTICE AND CONSTITUTIONAL DEVELOPMENT
REPUBLIC OF SOUTH AFRICA

Mr Mxolisi Nkomo
The National Director of Public Prosecutions
Private Bag x 782
PRETORIA
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Dear Mr Nkomo

RE: MEMORANDUM RECEIVED FROM THE NPA

I am in receipt of a memorandum dated 16 July 2014, signed by the Acting National Director of Public Prosecutions, Mr Willie Hofmeyr (the ANDPP).

In view of the recommendations made in that memorandum, I had enquired from the ANDPP how it came about that he was acting as the National Director of Public Prosecutions (NDPP), as I had not been informed of such appointment. I understand that you were on leave from 17 to 18 July 2014, in which time the ANDPP signed a memorandum of such significance. I had written to the ANDPP on the circumstances giving rise to the acting appointment. In his response, the ANDPP, while not specifically referring to the memorandum in question, informed me that it is "customary for the acting appointment to consult the National Director telephonically or otherwise on important matters that may arise." On this basis, I address this letter to you, on the understanding that you are aware of the contents of the memorandum dated 16 July 2014, which is the subject of this letter to you.

The memorandum of 16 July 2014 recommends that I approach the Honourable President with a request to suspend Adv Jiba, Adv Mrwebi and Adv Mchizisi (the officials) pending an enquiry into their fitness to hold office and the outcome of criminal investigations against them for perjury and an investigation by the General Council of the Bar for their removal from the Roll of Advocates. The request is based upon certain negative statements relating to them which were made in court judgments in the case of the *National Director of Public Prosecutions v Freedom Under Law* (the FUL judgment) and, in respect of Adv Jiba, also the comments made in the case of *Booyse v the Acting National Director of Public Prosecutions* (the Booyse judgment).

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It is also of crucial importance that I be made aware of whether you, as the NDP, raised the matter with any of the officials concerned, with a view to obtaining their explanation. If so, what was the outcome of these engagements? If not, why have the officials not been approached to explain the negative comments that have been levelled against them?

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Yours sincerely,

Date: 05/02/2016

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L. V. K

" MTM3 "

**Office of the
National Director of Public
Prosecutions**



"MTM3"

Mr T M Mesutha, MP (Adv)
The Minister of Justice and Correctional Services

Dear Minister


RE: MEMORANDUM RECEIVED FROM THE NPA

Your letter dated 8 August 2014, which I received on last Friday evening, refers.

I have noted the issues that you have raised therein. You will remember that we have not had an opportunity to sit down and engage properly on matters affecting NPA since your appointment in the current portfolio except, of course, when you visited our office solely to request us to refrain from addressing our issues in the media. It is therefore my humble view that we need to meet and discuss all NPA issues that require discussion including those that you have raised in your letter.

In the circumstances I would appreciate it if you could indicate the date and time when you will be available for such meeting. Your office may liaise with my office to arrange the meeting. I would strongly recommend, with your permission of course, that my Deputies be present when the meeting takes place.

Yours sincerely,


Mr Michael Nkomo
NDPP

Date: 11/08/2014

Victoria & Griffiths
Mango Building
123 Westlake Avenue
Westend Park
Silverton

P/Bag X752
Pretoria
0001

Tel: (012) 845-6000
Fax: (012) 804-9329
www.npa.gov.za



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TM
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JUSTICE AND CORRECTIONAL SERVICES
REPUBLIC OF SOUTH AFRICA

Private Bag 334, PRETORIA, 0001 • SALES Enquiry, 3rd Floor, Belmont Street, PRETORIA • Tel: (012) 468 4000 • Fax: (012) 468 4000 • www.justice.gov.za
Private Bag 1055, CAPE TOWN, 8000 • Tel: (021) 461 1700 • Fax: (021) 461 1700 • www.justice.gov.za

Mr. Mxolisi Nkomo
The National Director of Public Prosecutions
Private Bag x 752
PRETORIA
0001

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Dear Mr. Nkomo

RE: MEMORANDUM FROM THE NPA

Your letter dated 11 August 2014 refers and the contents therein are noted.

Whilst in principle I support the need for a proposed meeting between the NPA leadership and myself, I am however of the view that the issues raised in the letter dated 08 August 2014 to yourself should still be responded to. The said response is therefore awaited.

Yours sincerely

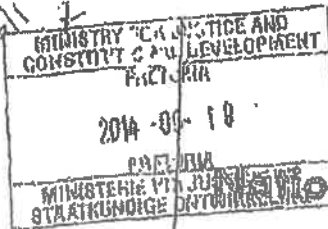
T M Masutha
T M Masutha, MP (Adv)
Minister of Justice and Correctional Services
Date: 12/08/2014

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L. J. K.

"PN36"



Office of the
National Director of Public
Prosecutions



Victoria & Griffiths
Exchange Building
Westlake Avenue
Leopold Park
Silverton

P/Bag X762
Pretoria
0001

Tel: (012) 845-6000
Fax: (012) 804 9529
www.npa.gov.za

CONFIDENTIAL MINISTERIAL MEMORANDUM	
TO	TM Masutha, MP (ADV) Minister of Justice and Correctional Services
FROM	Mr M.S.O. Nxasana National Director of Public Prosecutions
SUBJECT	SUSPENSION OF DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND DIRECTORS OF PUBLIC PROSECUTIONS IN TERMS OF SECTION 12(6) OF NATIONAL PROSECUTING AUTHORITY ACT, 1998
REF NO.	4/2/18/11(NDPP)
DATE	17 September 2014

A. BACKGROUND INFORMATION & PURPOSE OF MEMORANDUM

1. In the Confidential Ministerial Memorandum dated 18 July 2014 attached hereto as Annexure "A", the Acting National Director of Public Prosecutions Mr WA Hofmeyr, informed the Minister that the members of the Management of the National Prosecuting Authority (NPA) are obliged to—
 - (a) report certain recent adverse findings made by the High Court and the Supreme Court of Appeal relating to the conduct of Advocates Nomgcobo Jiba, Sthembiso Lawrence Mtwabi, and Sibongile Mzinyathi ("three senior members of the NPA") to the Minister and the President;



- (b) recommend that the President should, in terms of section 12(6)(a) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998) ("NPA Act"), consider to provisionally suspend Advocates Jiba, Mrwehi and Mzinyathi pending an inquiry into their fitness to hold the offices of Deputy National Director of Public Prosecutions and Directors of Public Prosecutions, respectively, to be presided over by a retired judge of the High Court;
- (c) refer the matter and findings of the High Court and the Supreme Court of Appeal (SCA) to the South African Police Service (SAPS) with a view to open criminal investigations for perjury against the above-mentioned three senior members of the NPA;
- (d) submit the findings of the Courts against the three senior 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, 1984.
2. In a letter dated 30 July 2014 addressed to Mr Hofmeyr, the Minister acknowledged receipt of the abovementioned memorandum and indicated that he will consider the contents thereof and revert to him in due course.
3. In a letter dated 8 August 2014 addressed to the National Director, the Minister requested the National Director's response in respect of various issues by 11 August 2014. On the latter date the National Director wrote to the Minister and indicated that he did not have the opportunity to sit down and engage with the Minister properly on various matters affecting the NPA. He therefore suggested that he should meet with the Minister to discuss all NPA issues including the issues raised in the Minister's letter.
4. In a letter dated 12 August 2014 addressed to the National Director, the Minister indicated that he in principle supported the need for a meeting with the NPA, but the Minister held the view that the National Director should first respond to the issues raised in his letter.



B. PURPOSE OF MEMORANDUM

5. The purpose of this memorandum is to---

- (a) respond to the Minister regarding the issues raised in his letter addressed to the National Director dated 8 August 2014;
- (b) inform the Minister about further instances of misconduct committed by and adverse findings made against Advocates Nomgcobo Jiba and Sthembiso Lawrence Mwebi;
- (c) inform the Minister about steps already taken by the NPA and steps to be taken against the three senior members of the NPA concerned;
- (d) inform the Minister about the NPA's submission directly made to the President; and
- (e) request the Minister to engage with the President regarding the proposed suspension of the three senior members of the NPA as a matter of urgency.

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C. DISCUSSION

Ad paragraph 5(a) supra: National Director's response to Minister regarding issues raised in letter addressed to National Director

6. In the first instance, as I have indicated in my letter to the Minister dated 11 August 2014, with respect, I still hold the view that it is vital for me to meet with the Minister to enable us to discuss matters properly and avoid unnecessary misunderstandings that may arise from engaging only by way of correspondence. Indeed, there are also many operational issues about which the NPA Exco needs to brief the Minister properly. It is disappointing that the briefing which had been scheduled in June 2014 has still not been rescheduled more than 2 months after the Minister's appointment. Despite the mentioned reservations, I shall attempt to address the issues raised by the Minister.

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*Whether National Director was consulted about the memorandum of 18 July 2014
("the memorandum")*

7. In his response to the Minister, Mr Hofmeyr made it clear that he consulted me about the memorandum. I hereby confirm that I was fully apprised of the content of the memorandum and I supported it.

Purpose of "memorandum"

8. I wish to clarify that the purpose of the memorandum (Annexure "A") was twofold, namely, for the Minister to—

- forward the contents of the memorandum to the President, and
- approach the President with the request that the three senior members of the NPA should be suspended pending the finalisation of the proposed inquiry and criminal charges.

9. I believe that it is urgent that the President be informed about the request made by me as the National Director to take action against senior members of the NPA who fall under my authority. Although they report to me and I have the responsibility to manage them, the law vests the power to take appropriate action in the President. I therefore seek the Minister's urgent confirmation that the memorandum has indeed been forwarded to the President. If it has not, I believe that, as fully argued in the memorandum attached as Annexure "A", it is my duty in terms of the law to forward it to the President myself and inform him that the Minister may provide further advice to him.

Steps taken regarding judgments

10. I did indeed take a number of steps regarding the mentioned court judgments as set out below.

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- (a) The most important step I have taken as the head of the NPA, is to approach the President with a request to institute an inquiry into the fitness of the three senior members of the NPA to hold office and to suspend them pending the inquiry.
- (b) Given the seniority of the officials, I had felt that it was appropriate to request an opinion from independent senior counsel on how I should deal with the court findings that affected the three senior NPA officials concerned.
- (c) I have applied my mind to the recommendations in the opinion and was of the view that the actions proposed by senior counsel were appropriate. Thus, I, together with the CEO of the NPA, have acted on those recommendations that fall within our legal powers, namely, the following:
- (i) I have submitted, via the Minister, the memorandum to the President recommending an inquiry into the fitness of the three senior members of the NPA to hold office.
 - (ii) I have submitted the memorandum to the President recommending the suspension of the affected officials in order to limit the reputational and other damage to the NPA.
 - (iii) As recommended by senior counsel, the CEO has instructed that criminal charges of perjury be laid against the three senior members of the NPA. Consequently criminal charges of perjury have already been laid against the three senior members concerned. The outcome of the criminal investigation is awaiting.
 - (iv) As recommended by senior counsel, the CEO has instructed that the General Council of the Bar be approached with a view to have the affected persons been removed from the roll of advocates. This has been done.
- (d) In addition, the NPA continues to investigate the circumstances relating to the judgments that it is able to investigate and will furnish any further evidence it finds to the President, the police and the General Council of the Bar.



Initial corrective measures and Institutional arrangements.



finding on the conduct of the affected officials. I must mention that the *Mdfulu and Booysen* matters were never brought to my attention after I assumed

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office, despite the fact that I had written to Adv Jiba and requested her to report to me all matters that she had been dealing with whilst acting as the National Director.

15. Thus, it was unfortunate that I had to find out about the negative comments made in the two judgments in the media. I requested reports from Adv Jiba and Adv Mtwabeni on the Mdluli corruption matter after the High Court judgment. As indicated above, this request was ignored by Adv Jiba and I have received no report to date.
16. Furthermore, I must add that, since I took up office, there has been no official handover of matters being dealt with by Adv Jiba, despite repeated requests from me and verbal promises to do so. I have given her ample opportunity and time to correct her behavior, but it has unfortunately become clear to me that she simply refuses to recognise my authority as head of the NPA. Such insubordination is intolerable and makes it very difficult to perform my duties and should be sufficient grounds.
17. From what I have heard from others, she has been confident for some time that I will be removed from my position soon and that she will be appointed as National Director or acting National Director. Thus, it appears that she is simply defying my instructions in the belief that I will not be there to hold her to account.
18. In early July 2014 and in frustration, I put my request in writing to Adv Jiba. Again I have not had any response or even acknowledgement of a reply.
19. I had also requested reports on the above and other matters from other affected officials, but such reports were simply not forthcoming. It was only when I put my request in writing in early July 2014 that they provided me with the requested reports.



20. I took these steps despite the fact that I have been told in no uncertain terms during NPA Exco and management meetings that I do not have the powers to discipline officials who are appointed by the President. In this regard I refer you to the memorandum which was prepared by the CEO and sent to you soon before your visit to our offices together with the Director-General of Justice and Constitutional Development, Ms N Sindane.

Mdluli matter

21. You correctly refer to the SCA judgment in the *Mdluli matter* which contained severe criticism of the behavior of Adv Jiba and Adv Mrwebi. In effect, the corruption charges were reinstated by setting aside the decision not to prosecute. As a corrective measure, I decided that Adv Jiba and Adv Mrwebi should not play any role in further decisions on this matter. I accordingly appointed new prosecutors to advise me on the matter.
22. As stated above, I decided that we should obtain an independent legal opinion regarding the findings by the High Courts and the SCA, and same was forwarded to you in the memorandum of 18 July 2014 signed by Mr Hofmeyr (See Annexure "A").
23. The appointment of the Fact Finding Committee by the CEO to investigate unethical and unprofessional conduct of senior officials of NPA and the leaking of information to the media was made on my request after a unanimous decision to do so was taken at a special Exco meeting. At the same meeting a unanimous decision was taken to release a media statement.

Other institutional arrangements

24. At the recent NPA strategy session (18 and 19 August 2014), we have discussed several proposals on how to deal better with matters such as this in future.



including some restructuring of the NPA to ensure a closer working relationship between the Directors of Public Prosecutions and the Specialised Commercial Crimes Unit (SCCU). I have also ensured that there is better quality control in the preparation of court papers and other documents that emanate from the office of the National Director.

Views regarding section 33 of NPA Act

25. With respect, I wish to point out that the Minister's understanding of the provisions of section 33(2) of the NPA Act is not correct. My understanding of this section is that it empowers the Minister to request the National Director to furnish the Minister with information or a report with regard to any case, matter or subject dealt with by the National Director, in his capacity as the National Director, or a Director in the exercise of the powers, the carrying out of our duties and the performance of the functions of the prosecuting authority. 10
26. The Minister also made it clear repeatedly in relation to matters relating to the allegations against me that he regards this as a matter for the President to decide, and have never indicated that he intends to advise the President on how to deal with the matter.
27. I understand the provisions of section 33(2) of the NPA Act to refer to prosecution matters in line with the legal advice I have been given, and the findings of the Ginwala Commission. It is precisely for these reasons that I believe it is very important that we should meet and discuss these issues to ensure that we have a common understanding regarding our respective responsibilities. 20
28. As I have mentioned heretofore, I am of the view that the Memorandum dated 18 July 2014 (Annexure "A"), which was signed by Mr Hofmeyr during the time he was acting as the National Director, is sufficient and I do not have to add anything



to it, save to beseech you to forward it to the President for his consideration as a matter of exigency.

Ad paragraph 5(b) supra: To inform the Minister about further instances of misconduct committed by and adverse findings made against Advocates Jiba and Mrwebi

Matters pertaining to conduct of Adv Nomgcobo Jiba

29. As indicated in the Memorandum attached as Annexure "A", in *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SACR 111 (GNP) April 2014), Murphy J made certain unfavourable credibility findings against Advocates Jiba, Mrwebi and Mzinyathi. The judgment of Murphy J was confirmed by the Supreme Court of Appeal (SCA) in *National Director of Public Prosecutions v Freedom Under Law* 2014 (4) SA 298 (SCA).

30.1 Further information obtained by the NPA relating to the conduct of the three senior members has revealed shocking information. As indicated to the Minister in the Memorandum marked Annexure "A", one of the main criticisms of the above judgments made against Advocates Mrwebi and Mzinyathi is that the "version presented in Mrwebi's answering affidavit, is that it was in direct conflict with the evidence that he and Mzinyathi gave under cross-examination at a disciplinary hearing of Breytenbach". (Emphasis added)

30.2 The NPA has in the meantime investigated the facts relating to the drafting of Adv Mrwebi's answering affidavit in the above High Court matter and it now seems as if the NPA team who prepared the answering affidavits was advised by different counsel not to proceed with the answering affidavit prepared by the NPA. The NPA is at present investigating the circumstances under which different counsel withdrew from the matter or where their services were terminated by the NPA. At this stage, we have the following information.

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30.3 After the services of two different Counsel Teams were terminated by the NPA, the NPA was represented by Adv Terry Motau, SC. In a detailed memorandum provided to the office of the State Attorney on 10 December 2013, the NPA counsel, advocates Terry Motau, SC, Benny Makola and Lerato Malle pointed out that they have prepared a draft answering affidavit for the consideration of the NPA and requested the NPA's comment on their draft. However, the NPA informed them that an affidavit should be prepared in the name of Adv Mrwebi. Counsel advised against this approach.

30.4 On 26 June 2013 they met with Adv Jiba and the DPP: South Gauteng, Adv Chauke. At that meeting they informed Advocates Jiba and Chauke about the draft answering affidavit prepared by Counsel and their concerns regarding the NPA's approach. After consultation the original draft answering affidavit was again sent to the NPA. In spite of their proposals how to deal with the matter, the NPA furnished them with split answering affidavits on the basis that the draft prepared by Counsel were no longer in the NPA's possession. The original affidavit was again sent to the NPA to afford the NPA an opportunity to comment on the draft.

30.5 Whilst waiting for comment on the draft affidavit, Counsel requested more documents, among others, the transcript of the Breytenbach hearing. On consideration of the transcript and the contents of the answering affidavit prepared by the NPA for Adv Mrwebi, they noticed contradictions between the evidence which had been given under oath on behalf of the NPA during the Breytenbach hearing and the contents of Adv Mrwebi's answering affidavit.

30.6 Whilst still waiting for the NPA's comment on their original answering affidavit, they were informed that the NPA decided to sign the split affidavits, thereby disregarding their advice. They also realised that the split affidavit retained an original paragraph from Counsel's affidavit to the effect that legal submissions



are made on the advice of the NPA's legal representatives, whilst the advice was not theirs. As a result the members of Counsel met and took decision to withdraw from the matter.

30.7 During a consultative meeting with the CEO and the Deputy CEO on 11 August Counsel confirmed the above facts.

30.8 Prior to the withdrawal of Adv Terry Motau and his team, the NPA was represented by two different counsel teams, namely, that of Adv Leon Halgryn, SC, and Adv McCaps Motimete, SC. The circumstances leading to the termination of their services are still under investigation and they will be consulted soon. However, during telephone conversations they both expressed the same sentiments as eluded to above.

30.9 From the above it is clear that the NPA Team acted in a corrupt and deceitful manner and thereby confirmed the finding of the High Court and the Supreme Court of Appeals. Therefore, apart from the perjury charges already instituted, it now seems as if the above conduct may also constitute the offence of wrongfully and intentionally defeating or obstructing the course of justice. After further investigation and consultation with the different counsel teams, a decision will be made as to whether official charges will be laid against Advocates Jiba and Mrwebi. It is suggested that this conduct should also be brought to the President's attention and should be taken into account in considering the suspension of the three members pending an Inquiry to be instituted by the President.

31. In *Zuma v DA* (836/2013) [2014] ZASCA 101 the Supreme Court of Appeal delivered judgment on 28 August 2014. At paragraph [41], Navsa ADP remarked as follows:



"[41] One remaining aspect requires to be addressed, albeit briefly. As recently as April this year, this court in *National Director of Public Prosecutions v Freedom Under Law 2014 (4) SA 298 (SCA)* criticised the office of the NDPP for being less than candid and forthcoming. In the present case, the then ANDPP, Ms Jiba, provided an 'opposing' affidavit in generalised, hearsay and almost meaningless terms. Affidavits from people who had first-hand knowledge of the relevant facts were conspicuously absent. Furthermore, it is to be decried that an important constitutional institution such as the office of the NDPP is loath to take an independent view about confidentiality, or otherwise, of documents and other materials within its possession, particularly in the face of an order of this court. Its lack of interest in being of assistance to either the high court or this court is baffling. It is equally lamentable that the office of the NDPP took no steps before the commencement of litigation in the present case to place the legal representatives of Mr Zuma on terms in a manner that would have ensured either a definitive response by the latter or a decision by the NPA on the release of the documents and material sought by the DA. This conduct is not worthy of the office of the NDPP. Such conduct undermines the esteem in which the office of the NDPP ought to be held by the citizenry of this country." (Emphasis added).

32. A copy of the SCA's judgment is attached hereto for the Minister's convenience (See Annexure "B"). It is submitted that the abovementioned SCA's finding relating to the conduct of Adv Jiba should be seen in a very serious light and as mentioned by Navsa ADP, her conduct is not worthy of the Office of the National Director. The opinion is held that the judgment should also be the subject of an enquiry and the President should also take this into account in considering whether he should provisionally suspend Adv Jiba pending the institution of an enquiry in terms of section 12(6) of the NPA Act. I am investigating this matter further and have asked Adv Jiba for a full report in order to aid such enquiry. However, given my past experience where she has simply refused to provide me

with reports, I am not hopeful that I will receive such a report, and an enquiry will be the only way in which to elicit information from her.

33. As mentioned above, Adv Jiba has also refused and is still refusing to obey lawful orders given to her. The following matters are relevant:

- (a) After the High Court judgment I requested reports from her and Adv Mrwebi on the Mdtuli corruption matter. This request was ignored by Adv Jiba and I have received no report to date.
- (b) Since I took up office as National Director, there has been no official handover of matters being dealt with by Adv Jiba. I have repeatedly requested such a report from Adv Jiba without response.
- (c) On 22 August 2014, I requested Adv Jiba to provide by 26 August 2014 certain identified information and documents as requested by the Chairperson of the Fact Finding Committee. I also wanted those documents for my own record. However, to date she has not even acknowledged receipt of my request or provided the necessary information and documents.

34. I have given Adv Jiba ample opportunity and time to correct her behaviour, but it has unfortunately become clear to me that she simply refuses to recognise my authority as head of the NPA. Such insubordination is intolerable and makes it very difficult to perform my duties and should be sufficient grounds for suspension.

Matters pertaining to conduct of Adv Lawrence Mrwebi

35. The information provided in paragraphs 30.1 to 30.9 above, is also applicable to Adv Mrwebi's conduct.

36. In paragraph 49 and further of the memorandum marked Annexure "A", the NPA referred the Minister to other criminal proceedings outstanding against Adv Mrwebi. I can now confirm that a decision has been taken to officially charge Adv Mrwebi on the following three criminal charges:

- (a) Count 1: That the accused did wrongfully and intentionally defeat or obstruct the course of justice, to wit the prosecution of Lt Genl Mdluli and Col Barnard, on charges of fraud and corruption Silverton CAS 155/07/2011.
- (b) Count 2: Contravening section 32(1)(b), read with sections 1, 20, 24, 25, 32(1)(a) and 41(1) of the NPA Act, 32 of 1998, in that the accused did wrongfully and intentionally improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof, to wit the DPP, North Gauteng and/or Adv Chris Smith and/or Adv Glynnis Breitenbach in the exercise, carrying out or performance of its, his, her or their powers, duties and functions to wit the prosecution of Lt Genl Mdluli and Col Barnard on charges of fraud and corruption Silverton CAS 155/07/2011.
- (c) Count 3: Contravening section 32(1)(b), read with sections 1, 20, 24, 25, 32(1)(a) and 41(1) of the NPA Act, 32 of 1998, in that the accused did wrongfully and intentionally and improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof, to wit Nathi Mncube, in the exercise, carrying out or performance of its, his powers, duties and functions to wit the prosecution of Terrence Joubert and Others on charges of fraud and corruption per Pretoria Central CAS 742/05/2009.

37. The above matters have been referred to a prosecutor in the office of the DPP: North Gauteng and I have been informed that Adv Mrwebi is set to appear in Court on 25 September 2014.
38. As indicated above, these are serious charges encroaching upon the NPA's fundamental constitutional mandate, namely, "to exercise its functions without fear, favour or prejudice". (Emphasis added)
39. As mentioned in the memorandum marked Annexure "A", the case docket was referred to the DPP: South Gauteng, Adv Andrew Chauke, for a decision. In his report submitted to the National Director and in relation to Adv Mrwebi's conduct towards one of the complainants, Mr Paul O'Sullivan, Adv Chauke is of the view

that Mr O'Sullivan's criticism against Adv Mrwebi was uncalled for. However, he refers to certain e-mail responses by Adv Mrwebi and is of the view that Adv Mrwebi employed profane language. These include the following responses to Mr Paul O'Sullivan:

- On 29 August 2012: "Go to hell safani".
- On 29 August 2012: "I request that you never again contact me in any way for your own good Bastard!"
- On 31 August 2012: "I have always been informed that you are a stupid pig who overestimates his importance and relevance. I have now indeed proven it and can conclude without doubt that you are such a stupid and shortsighted person."

In respect of the above responses, Adv Chauke remarked as follows in paragraphs 13.3 and 13.4 of his report:

- "13.3 Mrwebi should have heeded the advice by Ramalfe and the erstwhile Acting NDPP, Jiba and not have entertained O'Sullivan's emails in the first place to avoid the unnecessary exchange that ensued between them.
- 13.4 In fact, in some of his responses to O'Sullivan, Mrwebi employs profane language that is unbecoming of a senior member of the NPA, who is expected to display and act with professional decorum at all times and with restraint, even in the face of extreme provocation. His conduct brings the NPA into disrepute or threatens to do so, more so, now that the emails in question are in the public domain." (Emphasis added)

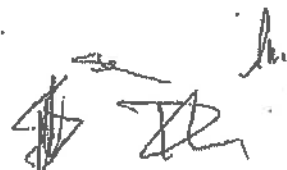
40. A further case illustrating Adv Mrwebi's disregard for the proper administration of justice and the NPA's constitutional mandate, is his conduct in the matter of *State v MG Ledwaba* (Regional Court Case No. 111/88/2010). In this matter a former Deputy Head of the DSO (Scorpions) was charged with theft of monies from the confidential fund of the DSO. Adv Mrwebi gave evidence in the matter and under cross examination by the accused person, MG Ledwaba, Adv Mrwebi made various admissions regarding incorrect statements made by him in his evidence.

41. There are also instances where Adv Mrwebi made himself guilty of insubordination and refused to obey lawful orders given to him. The following are examples:

41.1.1 On 22 August 2014, I requested Adv Mrwebi in writing to provide certain identified information and documentation to me and to the Fact Finding Committee. On 25 August 2014 Adv Mrwebi indicated in a letter to me that he has previously made it clear that he will not cooperate with the Committee. He, among others, held the view that it is an illegal Committee and he questioned the objectivity of the Chairperson.

41.1.2 Further letters were addressed to Adv Mrwebi by the CEO (on 26 August 2014) and the National Director (on 27 August 2014). He was again requested to provide the required information. It was pointed out that the reasons provided by him are unacceptable and that the information requested is the property of the NPA and therefore the NPA is entitled thereto and he is obliged to provide it. Furthermore, it was, among others, pointed out to him that in terms of the Presidential Proclamation he is obliged to advise and render assistance to the National Director as may be required to exercise the powers, carry out the duties and perform the functions which are conferred, imposed or assigned to the National Director. It was further pointed out to him that the functions which are conferred, imposed or assigned to him are to be executed subject to the control of the National Director. On 27 August 2014 Adv Mrwebi wrote to the CEO as follows:

"I reiterate my position that I am not going to cooperate with the said commission or committee which I regard to be an illegal structure to the extent that it is meant to target individuals who are Presidential appointees."



41.1.3 On 28 August 2014, I again wrote to Adv Mrwebi and requested him to provide sound reasons why he deems the Committee to be unlawful and in the absence of such reasons to comply with my request to provide the required information. On 29 August 2014 the CEO, the Deputy CEO, the Head of Security, and officials from the Director: Information Security approached Adv Mrwebi in his office. The CEO informed him about the reasons for the visit, namely, that as the Information Officer of the NPA she comes to collect the NPA documents which have been requested by the National Director and the CEO several times as indicated above. He was requested to identify personal documentation, which will not be collected. The NPA documents in his offices as well as his laptop were collected. The CEO informed Adv Mrwebi that all the information on his laptop will be transferred to a new laptop, which was done immediately and left on his desk.

41.1.4 According to the *Sunday Independent* of 31 August 2014, Adv Mrwebi told the *Sunday Independent* that his office was raided this week (29 August 2014), with documents and his laptop being seized. According to the *Sunday Independent*, he remarked as follows:

"I have no idea why they decided to seize the documents and computers in my office and in a sense close my work station."

He further told the newspaper that the move had surprised him and that "This was embarrassing and humiliating. I was being constructively dismissed". (See Annexure "C")

41.1.5 As indicated in paragraphs 41.1.1 to 41.1.3 above, the statements made by Adv Mrwebi's to the *Sunday Independent* are false and must have been done with the intention to tarnish the NPA. In a statement issued by the NPA's spokesperson on 2 September 2014, the correct facts were provided to the media as per Annexure "D".

41.1.6 According to media reports Adv Mrwebi over the weekend of 31 August 2014, publicly criticized Judge Murphy's judgment in the above *FUL* matter. He allegedly told the Sunday Independent:

"Therefore, how can my decision to drop charges against him have been illegal? I have maintained a consistent position, though misinterpreted by Judge Murphy, that the case against Mdiuli was defective, and that the matter was prematurely enrolled, as there was no evidence linking him to the crimes." (Emphasis added) (See Annexure "E")

41.1.7 In the same statement of the NPA referred to in par 41.1.5 above, the NPA distanced itself from Adv Mrwebi's remarks and stated as follows:

"The institution respects the independence of the judiciary, and fully understands the role which the judiciary plays in strengthening our democracy and its responsibility to assist in this process by giving effect to the judgments of the courts."

Therefore the NPA distances itself from remarks that seek to undermine court judgments."

41.1.8 The above criticism of a Judge of the High Court, and by implication also the Supreme Court of Appeals, which Court confirmed the judgment of Murphy J, is unbecoming of a senior member of the NPA and his conduct brings the NPA into disrepute. During the weekend (7 September 2014), he publicly criticizes the NPA and senior managers in outrageous terms. He has done so in spite of the Minister's and my request that we should refrain from commenting on these matters in the press (See Annexure "F"). Furthermore, it is also NPA policy that only certain identified members of the NPA are authorized to speak to the media.

42. I have given Adv Mrwebi ample opportunity and time to correct her behavior, but it has unfortunately become clear to me that he simply refuses to recognise my

authority as head of the NPA. Such insubordination is intolerable and makes it very difficult to perform my duties and should be sufficient grounds for suspension

Ad paragraph 5(c) above: To inform the Minister about steps already taken by the NPA and steps to be taken against the three senior members of the NPA concerned

43. As indicated in the memorandum marked Annexure "A", the NPA has already taken or intend taking the following steps against the three senior NPA members concerned:
- (a) The Minister was informed regarding their conduct.
 - (b) The Minister was requested to forward the NPA's request to the President and to request him to provisionally suspend Advocates Nomgcobo Jiba, Sthembiso Lawrence Mrwebi, and Sibongile Mzinyathi from their offices as Deputy National Director of Public Prosecutions and Directors of Public Prosecutions, respectively, pending an enquiry into their fitness to hold such offices and the finalisation of the envisaged criminal investigations and outstanding inquiries and investigations and action of the General Council of the Bar.
 - (c) The Court judgments, together with Counsel's opinion to lay criminal charges against the three members, were referred to the South African Police Service with a view to open criminal investigations for perjury against all three senior members of the NPA. Investigation in this matter has already commenced under Pretoria Central CA5 55/08/2014.
 - (d) The findings made in the Court judgments against the three senior members of the NPA were referred to the General Council of the Bar (GCB) to consider action in terms of section 7 of the Admission of Advocates Act, 1964 (Act No. 74 of 1964).
 - (e) As eluded to in paragraphs 30.1 to 30.9 above, the NPA is currently also investigating charges of wrongfully and intentionally defeating or obstructing the course of justice. After further investigation and consultation with the



different counsel teams, a decision will be made as to whether official charges will be laid against Advocates Jiba and Mrwebi.

- (f) On 4 September 2014 a further memorandum was submitted to the GCB requesting them to also take into account the further dishonest conduct as referred to above.
- (g) As indicated in paragraphs 36 and 37 above, criminal proceedings have officially been instituted against Adv Mrwebi. He will appear in court on 25 September 2015.
- (h) The NPA envisages informing the President in a separate letter about these charges and also intent emphasising the importance to suspend Adv Mrwebi as soon as possible pending the outcome of the trial.
- (i) As indicated above, the continued presence of, in particular Adv Mrwebi, clearly has a negative influence on the functioning of the NPA and it is in the interest of the NPA and conducive for proper discipline that Adv Mrwebi should not be present at his office at the NPA. Therefore, I have requested the Chief Executive Officer of the NPA to grant Adv Mrwebi special leave in terms of the NPA's Leave Policy, read with a Presidential determination issued by the late President Nelson Mandela in December 1998, pending a decision by the President to suspend him or not.

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Ad paragraph 5(d) above: To inform the Minister about the NPA's submission directly made to the President

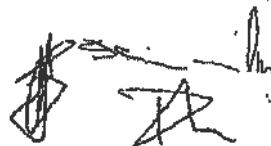
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- 44. It is understood that the Minister indicated about two weeks ago that he has not yet approached the President regarding the NPA's recommendations contained in the memorandum marked Annexure "A".
- 45. I wish to reiterate that the purpose of the memorandum (Annexure "A") was to inform the Minister regarding the adverse findings made against the three senior members of the NPA and to request the Minister to—
 - (a) forward the contents of that memorandum to the President;

(b) approach the President and to request him to provisionally suspend the three senior members concerned from their offices as Deputy National Director of Public Prosecutions and Directors of Public Prosecutions, respectively, pending an enquiry into their fitness to hold such offices and the finalisation of the envisaged criminal investigations and outstanding inquiries and investigations and action of the General Council of the Bar.

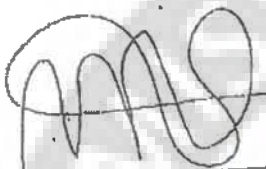
46. I am of the view that failure to bring this serious matter under the attention of the President is causing a credibility crisis for the NPA as a whole. The media is constantly referring to the lack of confidence in the NPA. As recent as June 2014, Justice Edwin Cameron remarked that the NPA appears to be "chaotic and dysfunctional" and it is not performing as it should. Justice Cameron said while he was not fully aware of what was happening within the NPA, from the outside "things look chaotic". He further said that "There is a lack of confidence in it [the NPA]" and such chaos would inhibit the NPA's ability to function at its best.

47. The opinion is held that it is time to bring stability within the NPA and our request to the President in this regard is of the utmost of importance and should be communicated to the President as a matter of urgency. Therefore, a decision has been taken to once again inform you about these serious allegations against the three senior members of the NPA; to inform you about further serious allegations of dishonesty and criminal charges instituted against some of these senior members; and to approach the President directly so as to bring the matter officially under his attention.



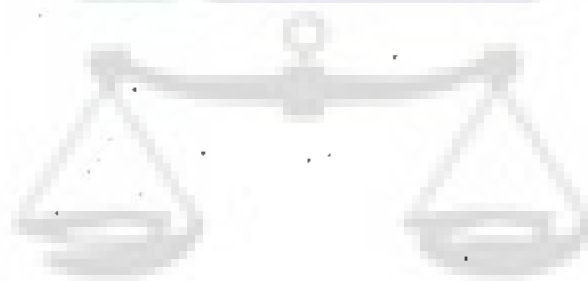
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48. In view of the above, I wish to inform you that I have prepared a further memorandum for the direct submission thereof to the President along the same lines set out above.



Mr M.S.O. Nxasana
National Director of Public Prosecutions

Date: 12-09-2014



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ATTORNEYS AT LAW

3 Pines Road, Corner Ashy Ridge, 2004 Tel (011) 480 7844/1041 Fax (011) 480 1586
PO BOX 84236, Gaborone 216 Email Address info@mtel.com.bw or info@mtel.co.bw

3 November 2014

Dear Mr Hulley

RE: NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS/
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA IN RE: THE
NDPP'S FITNESS TO HOLD OFFICE

We refer to the telephonic conversation between the writer hereof and yourself on the 30th 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 15th and 28th 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.

P R T.

Approved by _____
 Director of National Defense & Security Council
 [Signature] [Name]
 [Title]

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2 Prince Road, Corner Rye, Southdown, 2008 Tel: (0)1245 22841681 Fax: (0)1245 1555
PO BOX 51228 Marshfield, 2167 Email Address: info@medpassion.co.uk DOCX 424 JHS

As you are aware, our client has lodged an appeal with the Minister of State Security Agency, the Honourable Mr David Mhlobo, MP with respect to the security clearance certificate

Furthermore, our client further appeared before the said Minister and the Committee to make oral submission in amplification of the written appeal. Our client is still waiting for the Minister's decision, of which he undertook to communicate with client in due course.

This is a factor which should be taken into account, when addressing issues of the proposed mediation.

Kindly acknowledge receipt of this letter while we are awaiting your further advises.

Yours Faithfully

FB Mabunda

Per email: michaask@hulleyinc.co.za

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ATTORNEYS AT LAW

2 Prince Road, Corner Rujay, Bedfordshire, 2009 Tel: (011) 450 2234/1541 Fax: (011) 450 1506
P.O. BOX 61216, Harare, Zimbabwe Email Address: info@nabwobdelco.co.zw DOC EX 424 JH-1

**THE PRESIDENCY
REPUBLIC OF SOUTH AFRICA
PRETORIA**

10th DECEMBER 2014

ATTENTION: BONISWE MOCHENE
Email: boniswe@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 08th instant at Mahlabandromfu wherein 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 1996 (NPA Act);
 - 1.3. We will furnish you with the above information by no later than the close of business on Thursday the 11th December 2014.
- Following our discussions of the 08th 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:

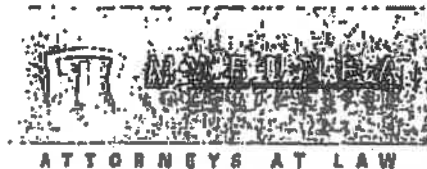
Director : *Patricia Barnett Minkovitz, B.Fac. (NACM) LL.B. (Wisc), LL.M. (about Law) (NYU) Dip. Advanced Banking (NAB), Dip in Criminal Justice and Forensic Auditing (FAU) Certified in Special Law (UCT), Certificate in Admin & Comp. Law (UCT).*

Account by: David Leonard Wilson: B Proc (RAU); LLM (International Law) (LLS); Bobby Fukuhara: Management LLB (UNW);
Tobias Leonard: LLB (LLS); Matthew George Bushrose: LLB (UCL) with Lawton Hunt: LLB (WITB);
Compliance Management (UW); Moring Rogers: LLB (LLS).

Reg. No. 2001/001234/21 - VAT Reg. number NL 4260197209 - Practice Number 2340

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JL M



2 Prince Road, Corner Remy, Bedfordview, 2008 Tel: (011) 430 2204/1041 Fax: (011) 430 1968
PO BOX 81738, Morningside, 2007 Email Address: info@masonandco.co.za DOCEX 424 JHB

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 8, 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.
5. 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.
6. 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.

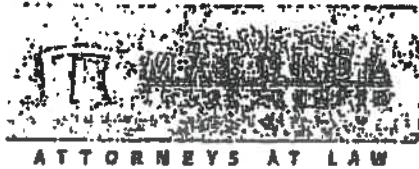
Director: Priscilla Stuart-Balende B. Proc (JUR) LL.B (Hons), LL.M (Labour Law) (Hons) Dip. Advanced English (RAU), Dip. in Criminal Justice and Forensic Auditing (RAU) Certificate in Sports Law (UCT), Certificate in Admin & Comm Law (UCT).

Assisted by: Donald Leonard Pieterse B. Proc (RAU), LL.B (Hons) (Hons), LL.M (Labour Law) (Hons) Dip. Advanced English (RAU), Dip. in Criminal Justice and Forensic Auditing (RAU) Certificate in Sports Law (UCT), Certificate in Admin & Comm Law (UCT).

Reg No. 2001/006230/21 - VAT Registration No. 4280183200 - Practice Number 6048

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ATTORNEYS AT LAW

2 Protea Road, Camer Pley, Medterview, 2008 Tel: (011) 480 2284/1041 Fax: (011) 480 1054
PO BOX 61238, Morningside, 2107 Email Address: info@mabunda.co.za DOCEX 424 JNB

10. In the circumstances, our client will only consider the option of leaving office, as the President would want him to, if he is fully compensated for the remainder of his contract.
11. We confirm that the President advised us that the Minister of the State Security Agency (the Minister) has confirmed that he has upheld the NDPP's appeal against the refusal to grant him the security clearance and he has already issued it but he is waiting to hand it over to the NDPP upon finalisation of settlement between the parties.
12. While we do appreciate and welcome the Minister's decision to uphold the NDPP's appeal, it is our respectful view that the granting of the security clearance certificate to the NDPP is and/or should not be a condition for any proposed settlement.
13. We are accordingly bringing it to your attention that we are dispatching a letter to the Minister to release the Security Clearance Certificate to the NDPP.
14. We await to hear from you.

Yours faithfully
Mabunda Incorporated

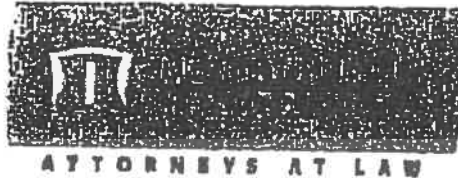
[Signature]
Per: P.B MABUNDA

Director: Priscilla Bessie Mabunda, B. Proc (UWC), LLB (Wits), LLM (Labour Law) (UWC), Dip. Advanced Banking (FABU), Dip in Criminal Justice and Forensic Auditing (FABU), Certificate in Sports Law (UCT), Certificate in Admin & Const Law (UCT).

Assisted by: David Leonard Viljoen, B. Proc (FABU), LLM (International Law) (UWC), State Advocate's Assistant LLB (UWC/BA), Foreign Investment Advisor, LLB (UWC), Graham Charles Mawema LLB (UCT), Judith Lindene Nkomo LLB (Wits), Compliance Management (LLJ), Molema Mphahlele LLB (UWC).

Reg No. 2014/030238/21 - VAT Registration No. 4220193216 - Practice Number 6048

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ATTORNEYS AT LAW

2 Protea Road, Corner Riley, Bedfordview, 2008 Tel: (011) 460 2284/1841 Fax: (011) 460 1886
PO BOX 81238, Marshalltown, 2107 Email Address: info@mabundalaw.co.za DOCEX 424 JHB

THE PRESIDENCY
REPUBLIC OF SOUTH AFRICA
PRETORIA

11TH DECEMBER 2014

ATTENTION: BONISWE MOKHENE
Email: boniswe@presidency.gov.za

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.

Trusting that you will find the above in order.

Yours faithfully
Mabunda Incorporated

Per: P.B. MABUNDA

Director: Priscilla Susan Mabunda: B Proc (UDW) LLB (Wits), LL.M (Labour Law) (UDW) Dip. Advanced Studies (RAU), Dip in Criminal Justice and Forensic Auditing (RAU) Certificate in Sports Law (UCT), Certificate in Admin & Const Law (UCT).

Assisted by: Oswald Leonard Wilson, B Proc (RAU), LL.M (International Law) (UJ), Shorten Phelelani Masekane: LL.B (UNIVEN), Felange Innocentia Mokohe: LL.B (UL), Mokhele Charles Mokohe: LL.B (UL), Andri Lindwe Nkomo: LL.B (WITS), Compliance Management (UJ); Abohen Nkomo: LL.B (UL).

Reg No 2001/018278/21 - VAT Registration No 4300182309 - Priscilla Mokohe 5946

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08:44:40 Thu Dec 11, 2014

PERSONAL SETP 4.08.11 (14) SERV CONDITIONS/BENEFITS: NAT PROCESSING UNIT ENQUIRY LEAVE CREDITS 2014-12-11 08:44:34.3 C80505
 PERSONALNO: 26895102 1 MCO MUSAHAH HAS DIRSC MCO CONTRACT END DATE: 20230930
 QUALIFYING DATE: 20131001
 APPOINTMENT DATE: 20131001
 LEAVE GROUP: 0008 CONTRACT WORKERS (WITH OWN CONTRACTS)
 LEAVE CATEGORY MARK DATE CREDITS DAYS CODE DESCRIPTION
 VACATION CURRENT: - 2014 4.68 22 2020 CONTRACT WORKERS: APPOINTED
 VACATION PREV: - 2013 0.00 22 2020 CONTRACT WORKERS: APPOINTED
 SICK FULL: - 2013 27.80 36 2021 SICK LEAVE: CONTRACT WORKERS

MORE TO DISPLAY LEAVE CREDITS ON VARIOUS CYCLES

CAPPED LEAVE CREDIT: 0.00 CAPPED CREDIT ADJUSTED: N
 LEAVE LAST UPDATED: 20140101 CAPPED CREDIT ADJUST DATE: N
 WORKDAY INDICATOR: Y AUDIT DATE: 20140701
 LEAVE AMENDMENTS BLOCKED: N RESIGNATION INDICATOR: N
 VACATION PENALTY IN FUTURE CYCLE: 0.00
 SICK PENALTY IN FUTURE CYCLE: 0.00

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260.714

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@mabunda.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. Bontsiwe Makhene
Legal Advisor to the President

Handwritten notes and signatures at the bottom right of the page, including "mo", "JK", and "M".



ATTORNEYS AT LAW

2 Prince Road, Corner (Nile, Bedfordview, 2008 Tel: (011) 490 2342/1641 Fax: (011) 490 1566
PO BOX 61234, Marshalltown, 2101 Email Address: info@makhehene.co.za DOCEX 424 JHB

THE PRESIDENCY
REPUBLIC OF SOUTH AFRICA
PRETORIA

15TH 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 08th December 2014 and received by our office on the 09th January 2015.
2. We place on record that we have been liaising and corresponding with Mr Michael Hulley before you were introduced to us as 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 03rd 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 remainder of the letter in particular paragraph 2 thereof remains our client's position.

Director: Prisons and Correctional Services, 8 Prec (JGZ) LLB (1983) LL.M (Labour Law) (1984) B.A. Advanced Learning (JAL) Dip in Criminal Justice and Forensic Auditing (JAL) Certificate in Sports Law (UCT); Certificate in Admin & Comm Law (UCT)

Assisted by: Oswald Lemons, 11 Prec (JAL) LL.M (International Law) (JAL) Sheryl Pridmore, 11 Prec (JAL) LL.B (UNISA);
Tebogo Maseko, 11 Prec (JAL) LL.B (UNISA) Charles Mkhwanza, LL.B (JAL) Justice Mkhwanza, LL.B (UNISA);
Corbinia Maseko, 11 Prec (JAL) Mafene Ngobeni, LL.B (JAL)

Reg No: 2001/26423/03 V47 Reg number No 4/2019/290 - Practising Number: 5049

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JK

M



ATTORNEYS AT LAW

2 Peoria Road, Corner Hwy, Badgeronew, 2006 Tel: (011) 430 2244/1641 Fax: (011) 460 1564
PO BOX 61238 Marshalltown, 2107 Email Address: info@arabundance.co.za DOCEX 024 370

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

Prof. F S NEMUTANDANI

Director - Prizingsdienstleistungen II Proc (MGRV) LLB (PhD), LL.M (Public Law) LL.M (Int'l Law) LL.M (Banking) (RAU); Dip in Criminal Justice and Forensic Auditing (RAU); Certificate in Sports Law (UCT); Certificate in Admin & Const Law (UCT)

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Reg No 703150472221 - VAT Reg number/ID 4207103700 - Profile Number 5044

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THE PRESIDENCY
REPUBLIC OF SOUTH AFRICA
Private Bag 21000, Pretoria, 0001

Ms Nemutandani
Mabunda Incorporated
2 Protea Road, Corner Riley
BERDFOROVUE
2008

Per email: shirley@mabundainc.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. Buntisiwe Makhene

Legal Advisor to the President

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2 Peka Road Corner Rietvlei, Bedfordview 2008 Tel: (011) 490 2941/1541 Fax: (011) 490 1856
PO Box 81734 Melroseburg 2107 E-mail Address: info@masonpartners.co.za DOCEX 424 JHB

THE PRESIDENCY
REPUBLIC OF SOUTH AFRICA
PRETORIA

26th JANUARY 2015

ATTENTION: BONISIWE MAKHENE
Email: bonisiwe@presidency.gov.za

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: F S NEMUTANDANI

Director: Perrenius D. van der Merwe B. Proc. (UCT), LL.B. (Wits); LL.M. (Leeds Law) (UK); Dip. Advanced Banking (BAU); Dip. in Company
Law and Practice (BAU) Certificate in Sports Law (UCT) Certificate in African & Common Law (UCT)
E. van der Merwe B. Proc. (UCT), LL.M. (Leeds Law) (UK); Dip. Advanced Banking (BAU); Dip. in Company
Law and Practice (BAU) Certificate in Sports Law (UCT) Certificate in African & Common Law (UCT)
E. van der Merwe B. Proc. (UCT), LL.M. (Leeds Law) (UK); Dip. Advanced Banking (BAU); Dip. in Company
Law and Practice (BAU) Certificate in Sports Law (UCT) Certificate in African & Common Law (UCT)

Page No. 20010017/2015 1.1.17 Reg. No. 21/2015/1023793 - Practice Number 5516

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Relevant Sections



**Office of the
National Director of Public
Prosecutions**



The Honourable Mr Jacob G Zuma
President of the
Republic of South Africa

Dear President Zuma

Representations for the National Director of Public Prosecutions in response to notice of intention to suspend in terms of section 12(8)(a) of the National Prosecuting Authority Act, 32 of 1995 ("the NPA Act")

Victor & Griffiths
Manga Building
23 Watkiss Avenue
Waverford Park
Shirton

P/Reg K/52
Private
0001

Tel (012) 845-6000
Fax (012) 804-9329
www.npa.gov.za

Discretionary power to suspend

1. Section 12(8)(a) of the NPA Act provides for the President to provisionally suspend the NDPP from his or her office pending an inquiry into his or her fitness to hold such office.
2. By letter dated 5 July 2014, I was informed of your intention to establish an inquiry in terms of section 12(8)(a) into my fitness to hold office. The reasons for the inquiry were not given, nor did the letter set out the allegations giving rise to the inquiry.
3. On 30 July 2014, I received a notice inviting me to make representations as to why I should not be suspended from my position as the National Director of Public Prosecutions ("NDPP"). The allegations that are the reason for the inquiry are the following:

- 3.1. My criminal convictions for violent conduct;

Justice is our society so that people can live in freedom and security 1



- 3.2. Comments reported in media to have been made by me that are unbecoming of an NDPP, are divisive and have the effect of bringing the NPA into disrepute; and
- 3.3. The failure to lack of disclosure of facts and circumstances of prosecutions that I faced.

4. On receipt of this letter, I immediately wrote to you asking for additional time, until Friday 8 August 2014, to make representations as to why I should not be suspended.

5. My reasons for requesting more time to respond are that I suffered a family bereavement and had to help organize and prepare for the funeral on Saturday 2 August 2014, and that I needed details of the allegations made against me in your notice of 30 July 2014 so that I can properly prepare for and make representations.

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6. I remind you that these details are the following:

6.1. Details of the criminal convictions referred to in the first bullet point;

6.2. Details of the comments I am alleged to have made, the dates on which I am alleged to have made them and the media in which they were published;

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6.3. Details relating to the prosecutions I am accused of not disclosing and details of to whom and when I failed to make these alleged disclosures.

7. By 16:55 I had not yet received confirmation that you had granted me more time to file my representations. I take that failure to respond to mean that you do not grant my request.

AD June

8. Consequently, I am forced to make these representations without adequate information that would enable me to respond properly and without being given sufficient time to prepare my response.

Suspension – the general rule

9. Section 12(5)(a) of the NPA Act empowers the President to suspend the NDPP pending an inquiry into his or her fitness to hold office. The NPA Act is silent on the circumstances that must exist for the President to exercise this discretion. My understanding of s12(5) is that the President is given a discretionary power to suspend. That means he must exercise it subject to the law and the requirements of fairness and rationality.
10. The object of the President's discretionary power to suspend is to protect the integrity of the office of the NDPP and to protect any pending investigation from improper influence or interference by an NDPP who is under investigation.
11. So, a suspension without a hearing or an adequate opportunity to be heard would be unfair. And a suspension in the absence of allegations of serious misconduct and reasonable grounds for believing that the NDPP will interfere with or jeopardise an investigation into the allegations, would not be exercising your discretionary power to suspend fairly, lawfully or rationally.¹

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¹ *Mogobole v Premier of the North West Province* (2007) 30 ILJ 403 (LC) at [33] and [39]

Regulated Flexibility: Reviving the LRA and the BCEA (2006) 27 ILJ 663 at 681

Amj

The allegations against me do not constitute serious misconduct

No criminal convictions

12. Section 271A(b) of the Criminal Procedure Act, entitles me to apply to expunge my criminal record. Although I have not done so, I intend to do so. When I do, the Director-General will be obliged to issue me with a certificate of expungement. These two convictions will fall away and in law, I will not have any criminal convictions.

The assaults are not allegations of serious misconduct

13. The two assaults of which I was convicted, concern events that took place almost 30 years ago. They are unrelated to the NPA or to my responsibilities as NDPP nor were they related to an employment situation.
14. The first assault happened in 1985. I do not recall the details or what I was found guilty of. I had forgotten about it. I was reminded of it when I applied for my security clearance during December 2013. I was convicted of the first assault on 23 July 1985. At the time I was 17 years old. I was cautioned and discharged.
15. The second assault happened in 1986, at Nongoma. I was charged and convicted on 19 November 1986 of common assault for assaulting my girlfriend at the time. I remember that my girlfriend and I had a fight, although I do not recall the details. I was sentenced to 30 days imprisonment or a R50 fine. I paid the fine.
16. In my application for admission as an attorney, made in the Pietermaritzburg High Court, I disclosed the assault

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conviction. The High Court found me to be a fit and proper person to be admitted as an attorney of the High Court.

17. The fit and proper test for admission as an attorney is the same or substantially similar to the fit and proper test for appointment as NDPP.² A High Court has already found me to be fit and proper. It has already found that my past criminal record does not make me unfit or improper to be admitted as an attorney. There cannot be any reason why two very old criminal convictions for minor offences, that will be expunged, should render me unfit or improper to be appointed as NDPP.

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Reported comments in the media

18. I have requested details about what comments I allegedly made, when I made them and in what media they were reported. At the time of making these submissions, I was not provided with this information.

19. I assume that they are comments reported in the Sunday Independent and the Weekend Argus on 1 June 2014 and the Sunday Times on 6 July 2014.

20. In the interview, I am reported as saying:

20.1. Former Minister of Justice asked me to resign;

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20.2. Two of my deputies, Jiba and Mxwobi were plotting to have me fired;

20.3. Jiba had sanctioned people to investigate me with the intention of "finding dirt on me";

² *Pikuli v President of the Republic of South Africa 2010 (10 SA 400 (QMP) at 404P*

Handwritten signature

20.4. I learned about the President's intention to establish and inquiry to determine whether I was a fit and proper person from the media.

21. These news reports are accurate. As I confirmed in my response to the Minister dated 22 May 2014, he asked me to resign at a meeting on 21 May 2014. That allegation is true.

22. As I explained in my response to you on 21 June 2014:

22.1. As early as October 2013 I was provided with two affidavits from two NPA employees confirming that they had been approached by Colonel Welcome "WS" Mhlongo, a member of the Hawks for information about me. One of them provided a voice recording in which Col Mhlongo is heard to confirm that he was acting on the authority of Deputy NDPP Nomgcobo Jiba to collect information about me to discredit me.

22.2. As soon as I was made aware of this I brought it to the attention of the Executive Committee of the NPA.

22.3. I have also brought these allegations to your attention and asked that you investigate them.

22.4. It was also brought to my attention that rumours about me were circulating. One of the rumours is that I intended relabelling criminal charges against the President. That rumour is false.

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22.6. The information by Col Mhlongo gives rise, at the very least, to a reasonable suspicion that there is a plot by Jiba to discredit me.

Lack of disclosure regarding prosecutions I faced

23. I have asked for, but have not been provided with details of the prosecutions referred to in the notice. Because of this I am forced to speculate.

24. I suspect that this allegation relates to two matters. The first relates to my arrest and subsequent acquittal for murder. Briefly, the facts are that in December 1985, in an attack by a number of men on the occupants (including me) at my girlfriend's house, I reacted in self defence and one of the perpetrators died. I was acquitted of a charge of murder.

25. I explained the background circumstances in my letter to you on 21 June 2014. I also raised it with the former Minister of Justice and Constitutional Development when I met with him on 21 May 2014.

26. At the time the Minister questioned why I had not disclosed that I had been arrested for murder when I was undergoing my security clearance. I did disclose these facts to the SSA before I refused to grant me a top secret security clearance.

27. The second incident that I suspect is being referred to is an event that took place during October 2012. Briefly, the facts are the following:

27.1. Although I cannot remember the exact date, one evening in October 2012 while driving my wife's BMW

MSJ

520B along Sydney Road, I was arrested for inconsiderate driving and resisting arrest.

27.2. I was released on R1 000 police bail. The following morning I went to the Durban Magistrates Court. The senior public prosecutor, Mr Ntuli declined to place the matter on the roll.

27.3. I have laid criminal charges against the police officers that arrested me. I have subsequently learned that two of the police officers are in fact police reservists. That investigation has not yet been finalised.

No justification to suspend

28. The allegations relating to my previous convictions are not serious. There are no outstanding prosecutions against me.

29. My previous criminal convictions do not arise out of my appointment as NDPP, my carrying out my duties as NDPP or the exercise by any employee of the NPA of his or her duties.

30. The facts and circumstances related to my criminal convictions, my acquittal during 1985 for murder and the withdrawal of the September 2013 charge for inconsiderate driving are a matter of public record.

31. They are accessible court files or files held by the SAPS. These investigations were completed almost 30 years ago. There is no need for any additional investigation. And, in so far as the President might want to investigate these matters, they do not involve information held by the NPA, nor do they

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involve employees of the NPA. It is self evident that, as NDPP, I cannot interfere with or influence that investigation.

32. The source of my comments to the media is Col Mkhango. He is not an employee of the NPA. He works for the Hawks. The information relating to his investigation of me is not held by the NPA but by him. I have no control or influence over him and cannot influence or interfere with him during the course of any investigation into the information held by him.

33. It is self evident that I cannot interfere with or influence the former Minister relating to his request to me to resign. I informed the former Minister of his request. My comments to the media about his request are accurate.

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Prejudice

34. In light of the above, the office of the NDPP and I will be prejudiced if I am suspended.

35. The office of the NDPP will be prejudiced by my suspension because there are no grounds for my suspension and nothing to warrant it. To suspend in these circumstances would amount to interference with the office of the NDPP.

36. I will be prejudiced if I am suspended because it will affect my right to exercise my duties as NDPP, imposed upon me by law. It will also prejudice my professional reputation.

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37. I was informed of your decision to establish an inquiry in terms of section 12(5)(a)(iv) on 4 July 2014. I have not influenced or interfered with or attempted to influence or interfere with any

[Signature]
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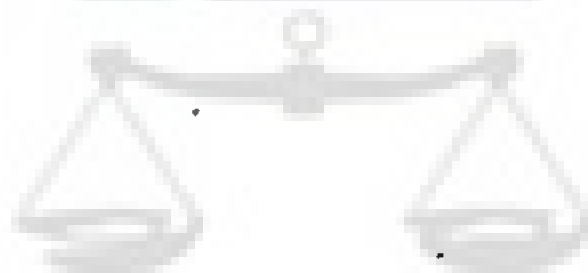
person or any information or documents connected to the allegations giving rise to the inquiry.

38. Accordingly, there is no reason why I should not be allowed to continue in my position pending the outcome of the inquiry.

Yours sincerely



4 Mr Mxolisi Nxasana
National Director of Public Prosecutions
Date: 01/08/2017


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Mxolisi M. Nxasana

From: Mxolisi M. Nxasana
Sent: Thursday, May 22, 2014 4:38 PM
To: 'Ministry@justice.gov.za'
Cc: 'kmaditla@justice.gov.za'
Subject: Meeting on 21 May 2014
Attachments: Letter to Minister.pdf

Dear Honourable Minister

Please find letter attached hereto.

Regards,

Mr Mxolisi Nxasana
National Director of Public Prosecutions (NDPP)
National Prosecuting Authority
Tel: 012 845 6758
Fax No: 012 843 1066
e-mail: mnxasana@nppa.gov.za



Office of the National Director of Public Prosecutions



Mr J Radebe

The Honourable Minister

Department of Justice & Constitutional Development

22 May 2014

Dear Minister Radebe

RE: THE MEETING ON 21 MAY 2014 BETWEEN MYSELF, YOUR GOOD SELF & THE DIRECTOR GENERAL

I refer to the above meeting and confirm the following:

1. That yesterday morning I received a call on my cellphone from your Personal Assistant, Kgomoetso who informed me that you wanted to see me as soon as you have landed at OR Tambo Airport from Cape Town.
2. That later in the day I received a further telephone call from Kgomoetso confirming that the meeting was going to take place at your office at 20:30 yesterday.
3. That I duly turned up for the meeting and met you and the Director General, Miss Sindane, at your office.
4. That you told me that yesterday morning, i.e. 21 May 2014 you were informed by the State Security Agency (SSA) that after they had conducted some investigations about me they decided not to issue me a Top Security Clearance Certificate.
5. That the reasons for the SSA's refusal to issue me a Top Security Clearance Certificate are the following:
 - 5.1 that I did not disclose the fact that during 1985 I was charged with a case of Murder;
 - 5.2 that in about August 2013 I was arrested for Inconsiderate Driving and Resisting Arrest;

Victoria & Griffiths
Mxenge Building
12 Vestlake Avenue
Leavind Park
Silverton

P/Bag X752

Pretoria
0001

Tel: (012) 845-6000

Fax: (012) 804 9529

www.npa.gov.za



- 5.3 that in about 1998 I was fined by the KwaZulu-Natal Law Society for Failure to lodge and/prosecute a client's claim timeously and expeditiously thus allowing it to prescribe; and lastly
- 5.4 that I stopped Mr Prince Mokotedi, the Executive Manager of the Integrity Management Unit (IMU) at my office, from investigating me basically interfering with his investigation and that I went on to disband the IMU.
- 5.5 That Mr Mokotedi has lodged a grievance with the Public Service Commission against me and the latter has written to you and requested that you investigate the matter.
6. I confirm that I responded to the above allegations as follows:
- 6.1 that whilst I did disclose the case of murder to, amongst others, the CEO, Adv Karen Van Rensburg, the Deputy CEO, Ambassador Beryl Sisulu, my members of EXCO and the Director of Domestic Intelligence SSA, Mr Ntombela it is my belief that I do not have a duty in law to disclose the case in which I was tried and acquitted by a Court of Law.
- 6.2 It is the same with the case of inconsiderate driving and resisting arrest, I was wrongly arrested and the Senior Public Prosecutor and the Chief Prosecutor declined to even place it on the Court roll. On the other hand I opened a case against the police who arrested me with the help of a police officer from IPID, Durban when the Charge Commander was reluctant to help me. As far as I know the case that I opened against the police is still active. In fact it turned out that the members that arrested me were not Police Officers but Police Reservists.
- 6.3 I disclosed the complaint where I was fined R2000.00 by the KwaZulu-Natal Law Society and it is there in my vetting documents.
- 6.4 The allegations leveled against me by Mr Mokotedi are devoid of truth as I have never stopped him from investigating me and neither did I disband the IMU. The members of NPA EXCO and the IMU staff can attest to that.
7. I did point out that I know the people who are behind all this smear campaign who go about bragging and boasting that they will do everything in their power to bring me down. I also pointed out that these people make sure that they drop your name and I am told that they have a direct access to you and they communicate with you behind my back. I know they have been peddling lies about me which I mentioned to you last night.
8. I confirm that you then suggested to me that in view of the fact that I do not have a clearance certificate and in the light of all the aforementioned allegations against me I should step down which was supported by Miss

Sindane. The latter, in response to your question as to how does she suggest that this be handled, suggested that I should tender resignation with immediate effect.

9. I confirm that there was some misunderstanding when I said I cannot resist when you suggested to me that I should consider stepping down from my position until I explained that I meant that, as you were telling me, I have nothing to say if "I am fired" since I did not apply for the job but I was approached whilst I was practicing in Durban.
10. I confirm that you then told me that it is going to be a process since the President will have to appoint a Commission of Inquiry and you asked if I wanted to see that happening. My response thereto was if that is the procedure then it means it would have to be followed as I believe that I am a fit and proper person to hold this position. I made it very clear which I reiterate now that I am not going to resign because of these false allegations against me.
11. I wish to state that I could not respond to the alleged complaint against me by Mr Mokotedi as I am not aware of the nature thereof since no one has brought it to my attention. In that regard I would very much appreciate it if I could be furnished with a copy of the complaint.

Yours faithfully

Mxolisi Nxasana

NDPP

BRENT ADRIAN SIMONS



SWORN AFFIDAVIT

I, the undersigned,

BRENT ADRIAN SIMONS

do hereby state under oath:

1. The facts deposed to herein are true and correct and are, save where the context indicates otherwise, within my personal knowledge.
2. This affidavit is submitted for purposes of providing evidence to the Commission of Inquiry into State Capture ("**the Commission**").

History of employment in the public sector

3. I have worked in Public Service for some 18 years. My history of employment with the South African Government is as follows:
 - 3.1. Prior to joining the Public Service in early 2000, I worked as the Western Cape spokesperson for the African National Congress.
 - 3.2. Between the period 2000 and 2005, I was employed as a Director: Media Liaison at the National Department of Provincial and Local Government under Minister Sydney Mufamadi.
 - 3.3. I then took up a post in the Western Cape as a Deputy Director in the Government Communications and Information System Department ("**GCIS**"). This was under the Director General ("**DG**") of GCIS, Mr Themba Maseko ("**Mr Maseko**").
 - 3.4. In 2010, Mr Maseko created a post as Chief Director: Training and Development, which I applied for. Mr Maseko was removed from GCIS in early 2011 (under circumstances dealt with below) and after various delays, towards the end of 2011, I was appointed to the post under the subsequent



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DG, Mr Jimmy Manyi, who replaced Mr Maseko (an aspect also dealt with by me below).

- 3.5. In December 2013, I received a call informing me that Minister Collins Chabane ("**Minister Chabane**") wanted me to join him at the Office of the Presidency. During January 2014, I was seconded to the Office of the Minister in the Presidency and worked directly under Minister Chabane as a Chief Director.
- 3.6. After the elections and in around May or June 2014, Minister Chabane was transferred to the Department of Public Service and Administration ("**DPSA**") and at his request, I accompanied him to the DPSA. I remained working under Minister Chabane at the DPSA until his death in March 2015.
- 3.7. I subsequently worked under Minister Nathi Mthethwa, who was appointed as the Acting Minister of the DPSA, after Minister Chabane's death.
- 3.8. I resigned from the DPSA in January 2018 and took up a position as Parliament's Unit Manager: Information and Content Development.

Prior Submission

4. In 2017, I submitted an affidavit to the Secretary of Parliament and the Speaker of the National Assembly to refute the previous President, Mr Jacob Zuma's ("**Mr Zuma**") denial that he had used his position to secure government contracts for his family members.
5. I am a member of the African National Congress ("**ANC**") and the affidavit submitted by me in 2017 was submitted both in my capacity as a member of the ANC and pursuant to my legislative duty, as a public servant, to report corruption and nepotism.
6. In this respect, it is pointed out that the 2016 Public Service Regulations direct public servants to *"immediately report to the relevant authorities, fraud, corruption, nepotism, maladministration and any other act which constitutes a contravention of any law (including, but not limited to, a criminal offence) or which*

is prejudicial to the interest of the public, which comes to his or her attention during the course of his or her employment in the public service."

7. As was stated by me in my submission to Parliament, I felt that *"I [could] no longer remain silent while the leader of our political party, who is also the serving President of our country, continues with his public lies in parliament!"*

Attempts to have Government contracts awarded to Mr Zuma's family members

8. On 14 March 2014, at the launch of the Solomon Mahlangu Scholarship Fund by the President in Sandton, I personally witnessed Mr Zuma introducing Mr Mqondisi Zuma ("**Mr Mqondisi**"), to Minister Chabane. That the introduction took place on this date is confirmed by the email sent between Government Departments and copied to me, dated 13 March 2014, which states:

"Minister [referring to Minister Chabane] is scheduled to address the GCIS Gauteng Post – SONA Youth Dialogue at Westcol campus in Randfontein tomorrow.

According to our Spokesperson, Minister will invite the audience to engage with him there-after. (Minister will join this event later than scheduled due to his attendance at the Launch of the Solomon Mahlangu Scholarship Fund in Sandton by the President)..."

A copy of this email is attached hereto as **Annexure "BAS 1"**.

9. I was standing next to Minister Chabane when this introduction took place. At the time, Mr Mqondisi was standing together with a group of people, who appeared to be business associates of Mr Mqondisi. Mr Zuma told Minister Chabane that Mqondisi was a member of his family and asked Minister Chabane to *"please assist"* Mr Mqondisi and his associates in furthering their various businesses with government. Both the Minister and I understood this instruction to mean that Minister Chabane should introduce Mr Mqondisi and his associates to the relevant government departments that they wished to do business with and assist them in securing contracts with those departments.



10. Two of the other individuals standing with Mr Mqondisi, who I later came to know were Mqondisi's business associates, were Mr Busa Zuma, who Mr Mqondisi referred to as his "*brother*," and Mr James Zwane.
11. Mqondisi is a young man who referred to Mr Khulubuse Zuma (Mr Jacob Zuma's nephew) as his "*father*", but I am not able to confirm whether this was in fact the case, or whether he simply regarded him as a father. I can, however, state that during the subsequent months following our introduction, I became 'friends' with Mr Mqondisi on the social chat network, 'Facebook,' and on this network I saw various pictures of Mr Mqondisi and Mr Busa Zuma together with Mr Khulubuse Zuma. I, thus, believe that both Mr Mqondisi and Mr Busa Zuma were part of Mr Jacob Zuma's family.
12. Following the introduction, Minister Chabane directed Mr Mqondisi and his business associates to me, informing them that I would be their main point of contact with him (Minister Chabane).
13. My instruction from Minister Chabane was to introduce Mr Mqondisi and his business associates to various government officials in the departments with which they wished to do business. This I was told was a perfunctory exercise, but we had to be seen to be assisting Zuma's family in their attempts to secure government contracts for their various businesses and thus, complying with the wishes of the President. However, Minister Chabane also gave me a clear instruction to "*keep them away from the Ministry*".
14. Pursuant to these instructions, I referred Mr Mqondisi and his business associates to various government officials and also attended various meetings with Mr Mqondisi to determine what it was that they needed. The details hereof are contained within this affidavit further below. At the same time, I kept Mr Mqondisi and his business associates away from the Ministry as instructed by Minister Chabane.
15. From my meetings with Mr Mqondisi and his associates, it became clear to me that their objective was to secure funds and contracts from the National Youth Development Agency ("*NYDA*"), GCIS and the DPSA.



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16. The deals they were interested in related to:

- 16.1. GCIS advertising contracts and the purchasing (by GCIS) of their Public Information Terminals;
- 16.2. Obtaining a single service provider contract to supply airtime and cellular phone deals to the DPSA and all other government departments;
- 16.3. A multi-million rand advertising contract with GEMS (the Government medical aid scheme); and
- 16.4. Various NYDA contracts. The NYDA is a South African youth development agency, which was reporting to the Minister in the Presidency at the time.

17. Mr Mqondisi and his business associates sought to secure these contracts through a company named 'Wintelligent' as well as through other companies that are unknown to me. I was aware that at the time, Wintelligent had a R36 million lawsuit against the NYDA which was reported in a Times Live news article published on their website in 2011 as follows:

"Youth body sued for R36m - 13 March 2011

Two young entrepreneurs have slapped the National Youth Development Agency with a R36-million lawsuit after it allegedly reneged on an agreement to fund their Howzit project. Samuel Tsolo, 27, and James Zwane, 25, the owners of software company Wintelligent Technology, filed papers in the Johannesburg High Court yesterday. By late yesterday afternoon, the sheriff of the court had served summons on the NYDA. Its chairman, Andile Lungisa, who is also the deputy president of the ANC Youth League, declined to comment. - Times Live website"

18. Mr Mqondisi wanted the Office of the Presidency to assist in resolving the dispute between Wintelligent and the NYDA, but Minister Chabane was not interested in becoming involved.


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19. However, following upon the introduction by Mr Zuma, Mr Chabane did address a letter dated 24 March 2014 to Mr James Zwane of Wintelligent Technology wherein he stated that the Ministry of the Presidency supported its 'Howzit' technology. 'Howzit' was the name of a project pursued through Wintelligent Technology, which Mr Mqondisi was proposing should be used by Government Departments. The letter states:

"Our recent engagement and discussion at the Launch of the Mahlangu Scholarship Fund refers...Thank you for your presentation on "HOWZIT"...In this regard we support the efforts of the Wintelligent Technology..."

20. This letter was sent to me via email on 26 March 2014 from Mr Ntshakga Mokgawa, from the Ministry of Performance Monitoring and Evaluation at the Presidency. It was then forwarded by me to Mr Mqondisi and Mr Zwane. A copy of the email and letter is attached hereto as **Annexure "BAS 2"**.
21. Following upon this, Mr Mqondisi addressed an email to me on 02 April 2014, copied to Mr Zwane and Mr Archie Zondo from Wintelligent, requesting a meeting to discuss the Howzit project and their other business projects, stating that:

"We would kindly request to meet with yourselves on 4 April 2014 at Michelangelo Towers, Parc Ferme restaurant from 10am to discuss:

- 1. Howzit and Connect2.gov project*
- 2. and other Digital solutions..."*

A copy of this email is attached hereto as **Annexure "BAS 3"**.

22. After this meeting, Mr Zwane addressed an email dated 07 April 2014 to me and copied to Mr Mqondisi, titled 'Wintelligent Technology: Howzit Project', attaching a business proposal titled '*Business of Wintelligent Technology CC*'. Mr Zwane wished me to facilitate a meeting with Donald Liphoko, who was the Acting CEO of GCIS at the time, in order "*to get Letter of support for howzit*". A copy of the email and business proposal is attached hereto as **Annexure "BAS 4"**.



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23. On 08 April 2014, Mr Mqondisi addressed a further email to me, which was copied to Mr Zwane and Mr Busa Zuma, requesting that I facilitate a meeting between him and his business associates and the decision makers at the Independent Communications Authority of South Africa ("ICASA") (whom Mqondisi introduced as his brother) to discuss their application for a licence required by them for their "advertising on voice call concept", 'adcall' which states:

"Dear Brent,

There is something we forgot to mention on Friday during our meeting. We had a chat with the minister regarding our application for an Icasa license for the advertising on voice call concept, "adcall". The minister was willing to assist us secure a meeting with decision makers at Icasa who could help us fast track the application. we also wanted to negotiate more favorable rates as we will be giving calls for free to the public.

Can you assist us in securing a meeting with them? ...

Regards Mqondisi"


A copy of this email is attached hereto as **Annexure "BAS 5"**.

24. Apart from this, I had several meetings with Mr Mqondisi and his business associates detailed below. Unfortunately, I no longer have the electronic diary in my possession from whence I obtained the dates of these meetings.

- 24.1. On 29 May 2014, I attended a meeting at Sandton with Mr Mqondisi and Mr Busa Zuma. Mr Mqondisi informed me that he wished to:

- 24.1.1. secure a contract with GCIS to place one-stop Public Information Terminal machines at all Thusong Service Centres throughout the country; (Thusong Service Centres are the one-stop service delivery centres for Government Departments); and
- 24.1.2. secure advertising space for advertisements by Government Departments on these terminals.

25. On 30 September 2014 and 06 October 2014, I attended meetings with Mr Mqondisi, Mr Zwane and several other business associates of theirs to discuss *"the concept of offering discounted cell phone packages to government employees"*. The objective of this proposal was to make them the major service provider for cell phone and airtime contracts within National Government.
26. The group wanted to pursue this venture utilising a Zuma family linked youth Empowerment Company in which Mr Mqondisi had an interest. I am not aware of the name of the empowerment company.
27. I also recall that on one occasion in 2014, on a date I cannot now recall, I met a female official from GEMS in Pretoria. I cannot recall this official's name, but I recall that she was from the communications department within GEMS. The purpose of the meeting was to provide her with a proposal given to me by Mr Mqondisi to enter into a communications contract with GEMS to the value of approximately R300 million.
28. I remember that the official became very nervous as she sensed that it would be required of her that she sanction the proposed contract in view of Mr Mqondisi's association with the then President. However, I reassured her that she was not obliged to award a contract to the proposers, as Minister Chabane only wanted it to be seen that we were facilitating contact between the proposers and Government Departments.
29. Ultimately, despite these introductions, to my knowledge, no government contracts were awarded to Mr Mqondisi and his business associates or any of his associated companies. I believe this to be as Mr Chabane was prepared to facilitate the introductions but refused to use his weight to secure contracts with the various government departments that Mr Mqondisi and his associates wished to do business with.
30. Needless to say, this did not please Mr Mqondisi or his business associates and they believed that this was because I had refused them access to Minister Chabane.


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Threats involving Khulubuse Zuma

31. Mr Mqondisi directly threatened to inform the then president, Mr Zuma, and Mr Khulubuse Zuma about what he termed my *"delaying tactics"*.
32. I also received verbal threats that I was going to 'be dealt with'. Mr Mqondisi would say words along the lines of *"Khulubuse is becoming impatient; don't let him come to a meeting and deal with you"*.
33. On one occasion, towards the latter part of Minister Chabane's tenure at the Ministry of the Presidency, Mr Mqondisi phoned me and asked to meet. I informed him that I was on the way to the Johannesburg Oliver Tambo International Airport and asked him to meet me at a coffee shop near the International Departures section, which he subsequently did. At the meeting, Mr Mqondisi informed me that Mr Khulubuse Zuma wanted to meet Minister Chabane to determine what progress had been made on the possible contracts to be awarded to them. When I stated that the Minister was not available and that we were travelling to South Sudan and Nairobi in Kenya, Mr Mqondisi informed me that Mr Khulubuse Zuma would *"sjambok me"* as a result of the lack of progress.
34. On the trip following the meeting held with Mr Mqondisi at the coffee shop at OR Tambo airport, Minister Chabane and I arrived one evening at the Intercontinental Hotel in Nairobi where we were staying, to find Mr Khulubuse Zuma waiting for Minister Chabane at the Hotel.
35. Whilst travelling in Kenya, Minister Chabane always stayed at the same Intercontinental Hotel, whilst in Nairobi, which must have been known to the Zuma family. Minister Chabane refused to meet with Mr Khulubuse Zuma.
36. I cannot recall the exact date of this occurrence. However, it was on one of the last trips I went on with Minister Chabane, before he passed away in March 2015.

The removal of Themba Maseko

37. During my tenure with Minister Chabane, I grew to respect him as he fundamentally believed that government was responsible for the betterment of

all South Africans. He was a very gregarious person by nature. We became very close friends and he would often confide in me.

38. During our trips together, Minister Chabane would often visit me at the Hotels where I stayed or drive in the vehicle with me. On occasion, he instructed his police escorts to either drive ahead or behind us as he drove with me from Beaufort West to Cape Town.
39. One of the things that Minister Chabane confided in me about was the removal of Mr Themba Maseko from GCIS on the instructions of the then President, Mr Zuma.
40. I was in Australia with Minister Chabane at the time when he received a telephone call to say that the Public Protector was going to release a report on the Nkandla investigation (the investigation that had been in the press into the expenses/ upgrades to Mr Zuma's home at Nkandla).
41. Minister Chabane penned a short response on behalf of Mr Zuma advising that the President would not respond to the report in detail and that, if the Public Protector recommended that certain Ministers be reprimanded, the Presidency would comply and reprimand them.
42. Minister Chabane also informed Mr Zuma that if there was any amount recommended to be paid back by him (Mr Zuma), he would raise funds to enable him to do so. This note was typed on the response to Mr Zuma on his statement to be issued, placed in brackets and clearly marked "not for publication".
43. However, we then received the subsequent statement issued by the Presidency and GCIS, where we noted that Mr Zuma had failed to heed Mr Chabane's advice as to how to respond to the report from the Public Protector, and instead responded with an attack on the Public Protector.
44. When this occurred, and whilst still in Australia, Minister Chabane was visibly upset and told me that he was becoming concerned that the country and ANC were moving in the wrong direction. He then told me that when Themba Maseko was the DG in GCIS, the department was being well managed. However, he had

been personally phoned by the former president, Mr Zuma, and instructed to remove Mr Maseko from his position and replace him with Mr Jimmy Manyi ("Mr Manyi").

45. The Minister told me that he did not want Mr Manyi as the DG at GCIS because of the problems caused by him at the Department of Labour after it had been publicised that Mr Manyi had attempted to secure contracts for his private company.
46. Minister Chabane told me that he tried to persuade the President to reconsider, but he refused and he was forced to remove Mr Maseko.
47. Although this was prior to my appointment in the office of Mr Chabane, I understand that as a result of the President's instruction, Mr Maseko was transferred to the DPSA in early 2011.
48. Director Generals of Government Departments are employed on 5-year contracts and when Mr Manyi replaced Mr Maseko, he was still within his 5-year contract. When this term ended, in around October / November 2013, Minister Chabane refused to renew or extend his term. The Minister informed us of this decision at a special GCIS Management Committee meeting.
49. Minister Chabane informed me personally that Mr Zuma was very angry with him over his refusal to extend/ renew the contract of Mr Manyi.
50. Shortly before the April 2014 elections, I drafted a letter for Minister Chabane for the attention of the President informing him that Mr Manyi was to be removed from the Media Development and Diversity Agency Board as he was occupying a position reserved for a GCIS representative, whilst he no longer worked for GCIS.
51. DG's are usually appointed after interviews by a panel comprising of Ministers and other officials, where-after a memorandum is sent through by DPSA recommending the candidate to Cabinet who then either supports/ approves or rejects the proposed appointment.

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52. The DPSA has put in place guidelines regarding the appointments of DG's and Deputy Director General's ("DDG") requiring that candidates need to have a certain amount of years' experience and qualifications before they could be appointed.
53. However, as ultimately, the decision is made by Cabinet, the appointments are political and on occasion the DPSA guidelines and recommendations are overruled. An example of this is what happened with the appointment of Minister Steve Tshwete's son, Mr Mayihlome Tshwete ("**Mr Mayihlome**")
54. Mr Mayihlome followed Minister Gigaba when he went to the Department of Home Affairs and Minister Gigaba wanted to appoint him as the DDG of Communications in that Department. The DPSA, however, did not support his appointment, as he did not have the required experience and qualifications for the post. We at the DPSA submitted a memorandum to Cabinet to this effect indicating that he did not qualify to be appointed;
55. After the Cabinet meeting to discuss Mr Mayihlome's appointment, Minister Chabane informed me that the submitted memorandum had been overruled and Mr Mayihlome was subsequently appointed.

Threatened disciplinary charges against me

56. On a Sunday in or around June 2015, I sent an open Facebook post to a friend which questioned why Mr Zuma, as the President of our country, was at the centre of most cases involving corruption in South Africa.
57. The message was then circulated and on the Monday, I was called in by a visibly upset Minister Nathi Mthetwa, who accused me of undermining the President.
58. I was then posted to an office with no responsibilities where I remained for 8 to 9 months doing nothing; I was informed that no DPSA DDG wanted to work with me, as a result of my treasonous actions.
59. I was told that disciplinary steps were going to be taken against me and was informed that there was a draft charge sheet circulating within DPSA and a person in the Department of Public Enterprises under Minister Lynn Brown was

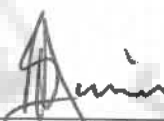
working on the charge sheet. A copy of this charge sheet was leaked to the Media and I managed to obtain a copy, which is attached hereto as **Annexure "BAS 6"**.

60. I engaged the services of a firm of attorneys and was informed that the charge sheet was defective as it stated that my 'employer' was the President of the Republic of South Africa. Reference was also made to the African National Congress when I was being charged as a public servant.
61. The charge sheet also refers to my derogatory comments regarding King Goodwill Zwelithini, after he made comments referring to immigrants as 'cockroaches' and inciting xenophobia.
62. I was, however, never formally charged for these alleged offences and returned to work at the DPSA until I resigned in January 2018.

I know and understand the contents of this declaration.


I have no objection to taking the prescribed oath.

I consider the oath binding on my conscience.

 9/8/19
Brent Adrian Simons

I hereby certify that the deponent has acknowledged that he knows and understand the contents of this affidavit, which was sworn to before me and signed in my presence in the Western Cape on this 09 day of August 2019 at Hermsburg




Full Name: Z. MTHINI
Address: 61 MAIN ROAD
HERMSBURG

Annexure BAS01



----- Forwarded message -----

From: **Mike Louw** <Mike@po.gov.za>

Date: Thu, 13 Mar 2014, 16:20

Subject: FW: Programme for Post SoNA Dialogue.doc

To: Sean Phillips (Sean@po-dpme.gov.za) <Sean@po-dpme.gov.za>

Cc: Caroline Mangwane <Caroline@po-dpme.gov.za>, Brent Simons <Brent@po.gov.za>, brent2708@gmail.com <brent2708@gmail.com>

Dear Dr Phillips,

Minister is scheduled to address the GCIS Gauteng Post – SoNA Youth Dialogue at Westcol campus in Randfontein tomorrow.

According to our Spokesperson, Minister will invite the audience to engage with him thereafter. (Minister will join this event later than scheduled due to his attendance at the Launch of the Solomon Mahlangu Scholarship Fund in Sandton by the President)

Could you kindly arrange for representation from your office.

The contact is Brent Simons (brent@po.gov.za / brent2708@gmail.com) 076 315 7330. Mr Simons will also be able to provide speech in this regard.

Sincere apologies for the late request.

Thanking you in anticipation

Michael Louw

The Presidency

Ministry: Performance Monitoring and Evaluation

Z.m

tel: +27 12 300 5200

cell: +27 82 373 1968

fax: +27 12 300 5779

e-mail: mike@po.gov.za

web: www.thepresidency.gov.za

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From: Brent Simons
Sent: 12 March 2014 10:48 AM
To: Mike Louw
Cc: Noki Modise
Subject: Programme for Post SoNA Dialogue.doc

The programme for Friday

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Thusong Service Centre



Government Services

WESTCOL POST SONA DIALOGUE

11:00 to 14:00

Programme Director: Peter Gumede

1. Opening and Welcome: **College Principal**
2. Introduction of delegates &
Purpose of the session: **Gaynor Marshall (GCIS)**
3. Keynote Address: **Minister Collins Chabane**
4. Q & A session
5. Summary of the session: **Francis Mahlangu**
6. Vote of Thanks: **Tshidi Mokoka**

Lunch!!! Lunch!!! Lunch!!! Lunch!!!Lunch!!!Lunch!!!



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Annexure BAS02



----- Forwarded message -----

From: **Brent Simons** <brent2708@gmail.com>
Date: Wed, 26 Mar 2014, 17:39
Subject: Fwd: Wintelligent Technology:Howzit Project
To: <james@wintelligent.co.za>, <mqondisi@wintelligent.co.za>

Please find attached

----- Forwarded message -----

From: "Ntshakga Mokgawa" <Ntshakga@po.gov.za>
Date: 26 Mar 2014 16:10
Subject: Wintelligent Technology:Howzit Project
To: "Brent Simons" <Brent@po.gov.za>, "Brent Simons (brent2708@gmail.com)" <brent2708@gmail.com>
Cc:

Regards

Ntshakga Edward Mokgawa
Ministry of Performance Monitoring and Evaluation, The Presidency
Tel: [+27 12 300 5334](tel:+27123005334)
Fax: [+27 12 300 5770](tel:+27123005770)
www.thepresidency.co.za
Email: Ntshakga@po.gov.za

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**MINISTER IN THE PRESIDENCY: PERFORMANCE MONITORING AND EVALUATION
REPUBLIC OF SOUTH AFRICA**

Private Bag X1000, Pretoria, 0001; Tel: 012 300 5200 / 021 464 2100

24 March 2014

Mr James Zwane
Wintelligent Technology
CK 2008/154704/23

Email: james@wintelligent.co.za

Dear Mr Zwane,

WINTELLIGENT TECHNOLOGY: HOWZIT PROJECT

Our recent engagement and discussion at the Launch of the Solomon Mahlangu Scholarship Fund refers.

Thank you for your presentation on "HOWZIT", your interactive, web-based customer-targeted Billboard for digital advertising. It is indeed encouraging to find our young people making in-roads in the area of digital advertising.

In this regard we support the efforts of the Wintelligent Technology through their HowzitProject which will not only benefit our youth, but the community at large.

Yours sincerely,

OHM COLLINS CHABANE, MP

Minister in The Presidency for Performance Monitoring and Evaluation

cc: Mr Obed Bapela — Deputy Minister in The Presidency for Performance Monitoring and Evaluation

2.4.14

Annexure BAS03



----- Forwarded message -----

From: Mqondisi Zuma <mqondisi@wintelligent.co.za>

Date: Wed, 2 Apr 2014, 11:02

Subject: Meeting Request

To: Brent Simons <brent2708@gmail.com>

Cc: James Zwane <james@wintelligent.co.za>, Archie Zondo <archie@wintelligent.co.za>

Dear Brent,

I trust that this email will find you well. Pursuant to our last engagement we would kindly request to meet with yourselves on 4 April 2014 at Michelangelo Towers, Parc Ferme restaurant from 10am to discuss:


1. Howzit and Connect2.gov project
2. and other Digital solutions

Thanking you in anticipation.

Regards,

Wintelligent Team



Z.m


Annexure BAS04



----- Forwarded message -----

From: **James Zwane** <james@wintelligent.co.za>

Date: Mon, 7 Apr 2014, 18:22

Subject: Meeting notes

To: Brent Simons <brent2708@gmail.com>, Mqondisi Zuma
<mqondisi@wintelligent.co.za>

Dear Brent,

Please find attached the biz plan and see below notes from our meeting

To do for wintelligent

Send Biz plan

Send Rates

Identify sites and get letters

To do for Brent

Meet Donald from GCIS to get Letter of support for howzit

Talk to Donald about meeting Wintelligent

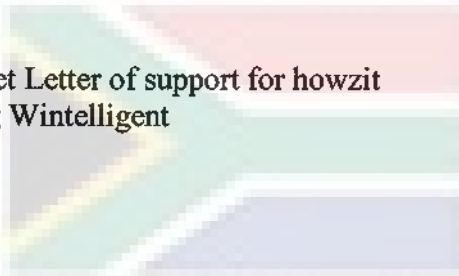
Rates

R2000 per screen per month

There will be 200 Screens to begin with.

Regards

James



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BUSINESS OF WINTELLIGENT TECHNOLOGY CC



2. m

[Handwritten signature]

Customer retention.....	28
Legal/Regulatory.....	29

Private & Confidential

This document serves to guide the directors of Wintelligent Technology to grow the business venture with the assistance of a financial institution. This plan is confidential and will only be used by those individuals and organisations stipulated by Wintelligent Technology cc. Other than those designated individuals the following does apply:

This document is confidential and has been made available to the individual to whom it is addressed strictly on the understanding that its contents will not be disclosed or discussed with any third parties except for the individual's own professional advisers. This plan is strictly for information only and does not constitute a prospectus or an invitation to subscribe for shares. Projections in the plan have been compiled by the promoters for illustrative purposes and do not constitute profit forecasts. The eventual outcome may be more or less favourable than that portrayed.

For further information please direct all queries or comments through to Wintelligent Technology cc.

Tel: 011326 3664 or e-mail to james@wintelligent.co.za

Handwritten signature and initials

Business Details

Business Name	Wintelligent Technology
Type of Business	Close Corporation
Industry Sector	ICT, Digital Advertising Media
Status of Business	Start-up
Members	S.J Zwane, S Tsolo,
Physical Address	280 Oak Avenue, Randburg Johannesburg 2194
Postal Address	280 Oak Avenue, Randburg Johannesburg 2194
TeleFax	011 326 3664
Mobile	0760847080
E-mail	james@wintelligent.co.za
Registration Details:	
Close Corporation Reg. No.	2008/154704/23
VAT Registration No.	4800163471
Accounting Officers details:	
Name	MM Masilela
Address	PO Box 13443 The Tramshed 0126
Contact No	
Practice No	08083151
Date Prepared	March 2014

Executive Summary

Introduction

Detailed within this plan are strategies built solely for the purpose of market dominance and perseverance. This includes study of the conglomerated market and industry research, an analysis of the institutions marketing mix, comprehensive financial projections and options and many more analysis of different aspects of business.

Company Description

Wintelligent Technology, a close corporation, provides Information Communication Technology (ICT) solutions, Digital advertising, and Social media services.

Wintelligent Technology brings to the advertising industry products and services that are related to digital marketing, direct marketing and online advertising. The company operates from Johannesburg and intends to expand to other provinces and also to the rest of the continent. The company offers services based on the latest cutting edge planning strategies and expertise that will pedestal the business to compete effectively in this challenging and yet profitable industry.

Company Background

Wintelligent Technology is an equal opportunity business making its expertise and its products available to the public. The business will be offering range of services ranging from digital advertising space, interactive solutions and software development.

Vision

To be a leader in the online and digital marketing industry in South Africa by providing advertisers with innovative and reliable channels to reach the market effectively and efficiently.

Mission

To develop and provide innovative and effective IT solutions, driven by the

connect like minded businesses and people making it easier to create partnership with private companies.

Connect.gov.za © will become the standard for other governments throughout the world making South Africa its pioneer.

How it works

Connect.gov.za: How it works

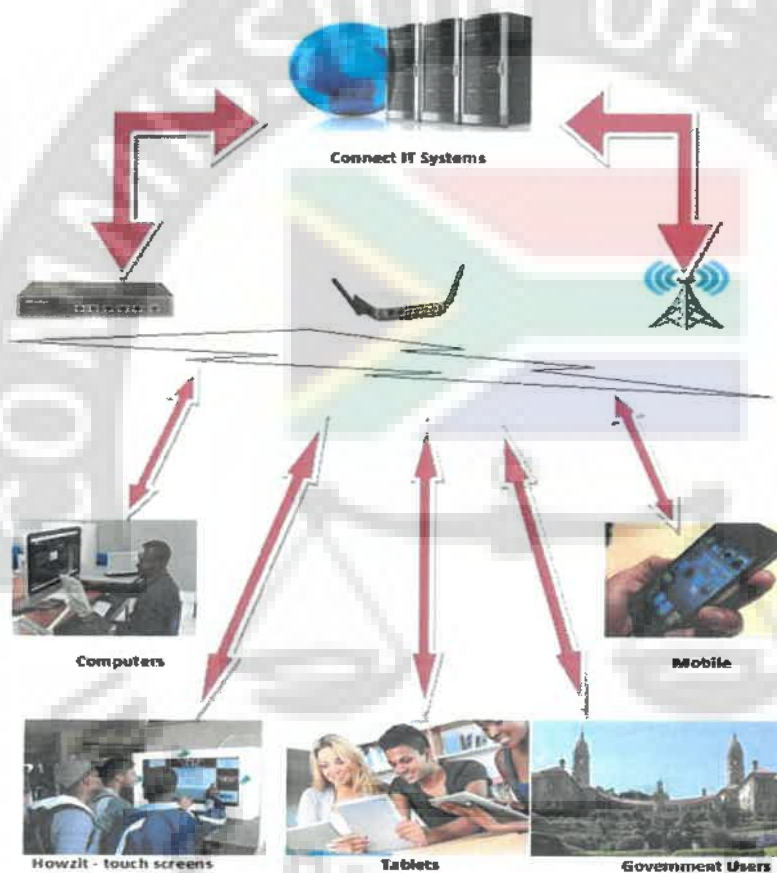


Figure 1.1 Illustration of how Connect.gov.za © works

- The government social media application as the centre of attraction will be accessible on different internet devices.
- In order for people to be able to communicate with government, users in government departments, organizations, business, labour and people in general will create accounts on the Connect.gov.za ©

website just like they would normally do on other social media sites like Facebook and Twitter.

- Different government departments will have their pages added on the site, and people would then be able to connect to the specific departments.
- The site has a live feed that allows any member of the government to view a query posted on the site and also respond to it when required.
- Users can send social messages to each other, post articles, events, announcements, complaints, comments on their pages.
- All user activities taking place on the site will then be recorded and stored on a database system for future reference.

SCREENSHOT - CONNECT.GOV.ZA ©

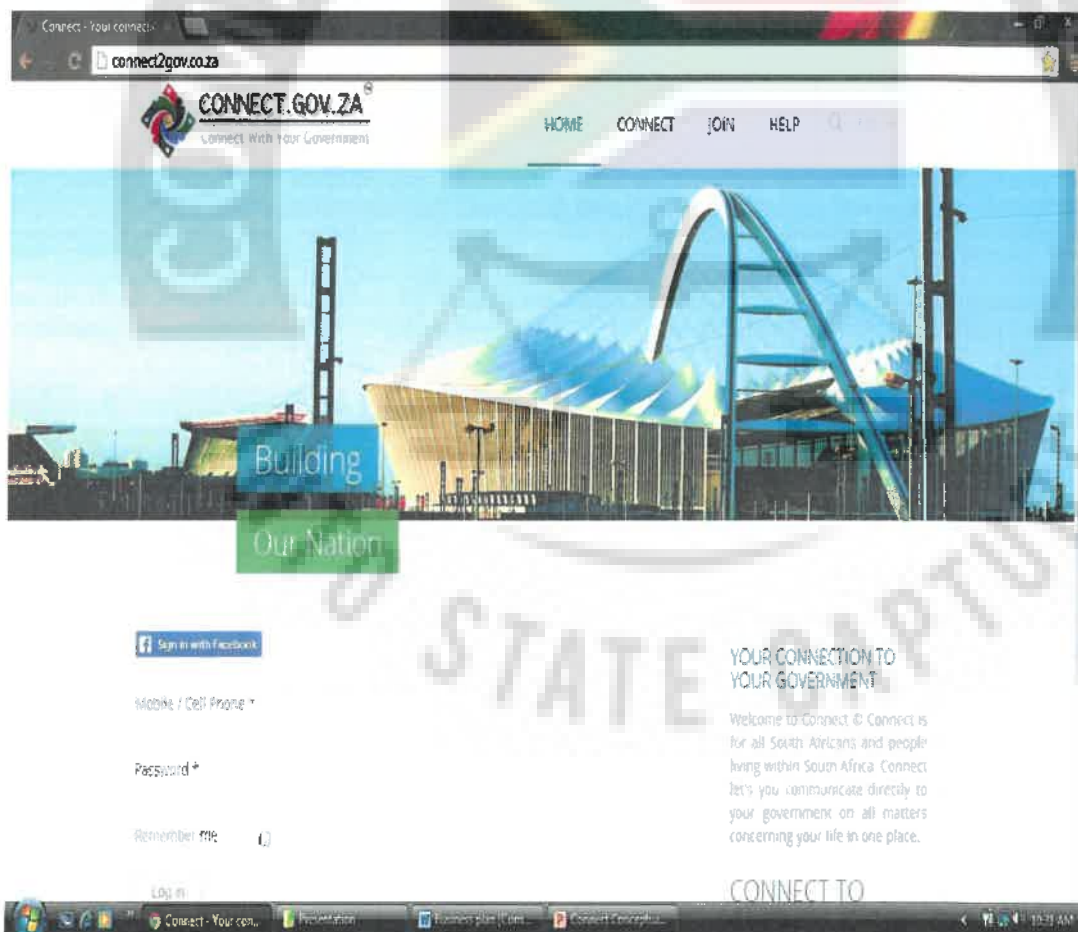


Figure 1.2

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What is HOWZIT©

HOWZIT© is complete solution/product that runs in-house developed interactive social media application with digital advertising space. The software runs on touch screens or any other digital touch advertising screens like the ones usually seen in the malls. The HOWZIT© application has an internet browser in the centre and other apps which runs the web content and uses the bordering space around for advertising purpose.

The websites show pictures, videos, streaming and information, and allow the user to chat. While the user enjoys the internet sites, flash, still pictures, animation and video adverts run on the extreme top, right, left and bottom side of the application.

The Technology**Software**

A developed social media application allows for the capturing of the users details by getting the cookies of every user as they input their information into the social network site. The application is web based which means easier remote updating, deployment and monitoring.

Hardware

Hosted development, testing and production servers will be used to run the software and database.

HOWZIT© requires LCD touch screens and thin clients/interface cards which serves as a computer, enable end users to interact directly.

Wireless networking on the screens will be configured to provide internet connectivity for both the end users and IT.



HOWZIT© at University of Johannesburg (UJ)**Figure 1.3****Strategic and Planning Elements**

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Objectives

The business will aim to meet the following objectives:

- Secure long term advertising contra



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Business Operations

Operational Requirements

Office equipment

- 26 seater call centre
- 10 x laptops for the personnel
- 1 x touch screen for use by IT personnel
- 2 x in-house midrange server
- Networking equipment
- Office furniture

IT Personnel

A group of highly skilled Developers and Graphic designers will be involved with the designing and developing the content.

Skilled IT technicians who understand the architecture and products will be employed on a full-time basis for support.

HOWZIT© equipment

- 200 x Touch Screen LCD Screen
- 200 x media player/thin clients (small computers)
- 200 x Wireless internet modems
- 200 x IP65 Enclosures
- 200 x network cables
- 200 x UPS

Operation Schedule

The office will be operational from 08:00 - 17:00 on week days.

Standby support will be available after hours x 7 days a week.

Connect.gov.za © will be available online for use 24 hours a day.

Howzit will be accessible only during open times of the respective rented building space.

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Insurance

The business will take out sufficient comprehensive insurance cover for all equipment as well as the premises that the business will be operating from.

Suppliers

- Jlss
www.jlss.co.za
- Lumin Vision
www.luminvision.co.za
- Brightspace
www.brightspacemedia.co.za
- Internet Solutions
www.is.co.za/Pages/default.aspx
- Communica
www.communica.co.za

Market Description and Marketing Plan

Industry Analysis and Market Overview

South Africa has over 14 million people using the internet: this is according to research done by the Digital media and marketing association. (DDMA, 2013) Online is the fastest growing medium of advertising in South Africa. According to AdDynamix, South Africa's online display media market grew by 15% between 2011 and 2012, and from R753m to R864m. Its growth out paces that of outdoor and radio, which are growing at 12% and 10% respectively. (BERNARIUSZ, 2013)

PWC reported that they expected the number of mobile internet users to reach 32,3m in 2017 and the internet advertising market is forecast to generate revenues of R3,7bn in 2017. This growth is attributed to the growing number of people using smart phones and LTE penetration (NewsCentral Media, 2013)

2.02

Affiliations and Networking

The marketing team will ensure that they form long and productive relationships with clients and associations that will in the long run benefit the business. Examples of such include advertising agencies and marketing professionals.

SWOT Analysis

In the instance of Wintelligent, the SWOT analysis will clearly match the business resources and capabilities to the competitive environment in which it operates.

Strengths

- We have developed a unique and strong concept
- The directors have strong experience and knowledge of IT, marketing and entrepreneurship.
- We have established good networking and sound relationships with partners, key industry players, and decision makers.
- The business will have quality processes and procedures.
- The services offered are competitively priced.

Weakness

- The directors have limited understanding about the advertising industry.

Measures that will be implemented to mitigate these weaknesses include:

- Using the right personnel team to service the market effectively
benchmarking the satisfaction levels of the deliverables.

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A handwritten signature in black ink, appearing to be "Z. M." with a stylized flourish.

- Applying the right business principles with the help of a qualified business consultant who will assist to establish a competitive edge in the market place.
- Enrolling in industry related short courses in order to receive some form of qualification needed to effectively run the business.
- Working closely with well established advertising agencies.
- Gaining maximum exposure and getting involved in life cycle of the projects



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Advertising: An extensive and aggressive advertising campaign will be embarked upon in the year of operation. The objectives of the advertising campaign will be to inform the target market of the business offerings. Media to be used will include social media website like Twitter and Facebook.



7.2



Human Resource Plan


Management

The leadership of Wintelligent is composed of competent and dedicated like-minded business people with diversified and combined experience in excess 30 years, and are well equipped with skills and expertise that are required to successfully grow the business to be successful and sustainable. The management possesses extensive experience in the ICT industry as IT Services Managers (ITSM), Project managers, IT Infrastructure specialists/architects, System Administrators, Software developers, Technicians and Sales.

The team has been involved in various projects in sectors such as Retail, Telecommunications, Government, Mining and Transport, among others.

That exposure gave them the opportunity to gain invaluable experience of running a successful business, the importance of delivering quality service, decision making especially during mission critical issues, and last but not least, relationship management.

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Structure

Wintelligent Technology is positioned as an advertising company within the advertising industry. The entity will advertise its services directly to potential target markets through media advertising and brand advertising through printed T-shirts, caps and promotional items at various events.

Sales objectives:

- Generate awareness
- Increase sales revenue
- Increase customer base

The business will use the following channels to achieve its further sales objectives:


- Website
- Telemarketing
- Database

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The business will have an impact in the locality in which it operates by:

- Creating jobs
- Increasing market competitiveness
- Transferring skills to local employees



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business will register as an employer for PAYE, VAT, SDL and income tax purposes as prescribed by the South African Revenue Service.

The company is currently exempted for UIF however the employees will be registered with the Department of Labour, and make contributions on behalf of employees for Unemploy



Annexure BAS05



----- Forwarded message -----

From: Mqondisi Zuma <mqondisi@wintelligent.co.za>

Date: Tue, 8 Apr 2014, 11:58

Subject: Icasa application

To: Brent Simons <brent2708@gmail.com>

Cc: James Zwane <james@wintelligent.co.za>, Busa Zuma <busa@wintelligent.co.za>

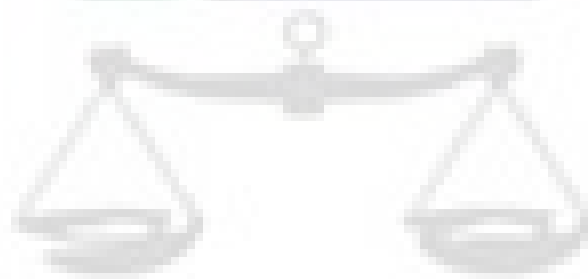
Dear Brent,

There is something we forgot to mention on Friday during our meeting. We had a chat with the minister regarding our application for an Icasa license for the advertising on voice call concept, "adcall". The minister was willing to assist us secure a meeting with decision makers at Icasa who could help us fast track the application. we also wanted to negotiate more favorable rates as we will be giving calls for free to the public.

Can you assist us in securing a meeting with them?

looking forward to your reply.

Regards
Mqondisi



COMMISSION OF ENQUIRY
INTO STATE CAPTURE

2. an A handwritten signature in black ink, appearing to be '2. an' followed by a stylized flourish.



**IN THE DISCIPLINARY HEARING FOR THE DEPARTMENT OF PUBLIC SERVICE
AND ADMINISTRATION HELD IN PRETORIA**

IN THE MATTER BETWEEN

**THE STATE, AS PER
THE DEPARTMENT OF PUBLIC SERVICE
AND ADMINISTRATION**

THE EMPLOYER

AND

MR BRENT ADRIAN SIMONS

THE EMPLOYEE

CHARGE SHEET

**IN THIS CHARGE SHEET, ANY REFERENCE TO THE EMPLOYER, WILL MEAN THE HEAD
OF STATE, THE HONOURABLE PRESIDENT OF SOUTH AFRICA, MR. JACOB ZUMA.**

Count 1.

You are guilty of violating and or contravening an Act, to wit –

**Section 195. (1).(a) of the Constitution Act 108 of 1996, in dealing with Basic Values and
Principles governing Public Administration, states that –**

**Public Administration must be governed by the democratic values and principles enshrined in the
Constitution, including the following principles,**

"A high standard of professional ethics must be promoted and maintained."

**In that during the period April 2015 to April 2016, you embarked on a smear campaign to
tarnish the reputation of your Employer by consistently posting on social media, derogatory
and or defamatory utterances of a criminal nature amounting to hate speech, which is in
conflict with the high standard of professional ethics that a Senior Manager of the State
employed at the Department of Public Service and Administration is expected to promote.**

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Count 2.

You are guilty of violating and or contravening an Act, to wit –

Chapter 2 - dealing with the Prevention, Prohibition, and Elimination of Unfair Discrimination, Hate Speech and Harassment of The Promotion of Equality and Prevention of Unfair Discrimination Act no 4 of 2000 at Section 10, states with regard to the Prohibition of Hate Speech that: 10. (1) Subject to the proviso in section 12.

No person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to

- (a) be hurtful;**
- (b) be harmful or to incite harm;**
- (c) promote or propagate hatred.**

In that during the period April 2015 to April 2016, you deliberately published / communicated words on a social media platform, clearly intended to be hurtful, harmful and or capable of inciting harm, and or promoting / propagating hatred in contravention of the above-mentioned Act, despite having been notified on or about 30 July 2015, that such behaviour is not acceptable and despite having acknowledged and appreciated in writing the possible consequences of same on said date, to the head of department, you still went out and posted the following post:

**"ZUMA HAS NO SHAME !!
HE just screwed the entire nation on national tv.
You are corrupt and should have resigned!
You are a disgrace Mr Zuma.
You are a national embarrassment!
You are a liar!
You are not my leader !
You are not my President !
A Special NGC must be called to forcefully remove you from office."**

Count 3.

In this regard, you intentionally, failed to failed to carry out a lawful order or routine instruction without just or reasonable cause, to desist from what you were doing, when you were informed on 30 July 2015, in the presence of Mr Nkosinathi Dlamini, of the DPSS's Labour relations Unit, that this behaviour is unacceptable and for that reason you were being transferred out of the Ministry pending further investigation.

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The context within which you were addressed on this unacceptable behavior emanated from a whistle-blowing to the Acting Minister of the DPSA in April 2015 wherein it was alleged that you had acted in contravention of sections 5.2 and 5.4 of the DPSA's Policy on acceptable usage of the electronic mail, by:

1. **Violating section 5.2. (a) of the policy by acting in a manner, when posting on social media platforms, which when reasonably construed clearly constitute a common law criminal offence of "crimen injuria" which relates to unlawfully and intentionally impairing the dignity and privacy of another.**
2. **Violating Section 5.4. (a) of the policy by distributing material which you as the user knew, when judged within the context, was likely to advocate hatred that is based either on race or ethnicity, or**

In terms of section 5.4. (b) is likely to be regarded as lewd or obscene by any person who is likely to be exposed to such e-mail.

3. **And in so doing, acting in a manner contrary to the provisions of section 5.2.(b) of the policy, by exposing the government of the republic of South Africa or any functionary thereof, namely, the DPSA, to criminal and or civil liability (in the form of a Defamation of Character law suite), and**

Acting in a manner, which reasonably construed "is intended to bring the government or any function thereof, namely the DPSA, into disrepute.

The nature of these violations arises from a posting that you made on social media that

- (i). the Tradition Leader of the Zulu Nation, namely, his Majesty King Goodwill Zwelethini, was a "stupid".
- (ii). You further insulted him by accusing him publically of desecrating the graves of former struggle icons like "Ashley Kriel, Solomon Mahlangu, Coline Williams, Anton French, OR Tambo, Walter Sisulu, Albert Lithuli, Nelson Mandela and many others who died to ensure democracy and freedom." by *plssing* on them.
- (iii) On 16 July 2015, you called for the downfall of your Employer by propagating the war cry # Zuma must fall #, being interpreted as your Employer must fall.

Count 4.

You are guilty of violating and or contravening an Act, Regulation and or Legal Obligation, alternatively the Public Service Code of Conduct, as outlined in the Public Service Regulations 2016 and the SMS Handbook, alternatively Public Service Policy as articulated in the attached preface to this charge sheet,

In that you refused to refrain from party political activities in the workplace, by insisting on making lewd and obscene utterances about a political party, namely the National Executive Committee of the ANC, on social media in further contravention of the DPSA's email policy, section 5.4.(b), by posting that:

"The current ANC NEC has their heads so far up Zuma's backside we can call them Zumastriche"

First Alternative to Count 4.

You are guilty of violating the section in Annexure A of the Ministerial Determination: Chapter 7 of the SMS Handbook 1 /12 / 2003 - Disciplinary Code and Procedures for Senior Management Service (SMS) Public Servants, relating to a directive to all Senior Managers by the Minister of the DPSA, that no SMS employer may misuse his position in the public service to prejudice the interest of a political party.

You are therefore charged for violating this section of the Disciplinary Code and Procedure when you posted on social media that:

"The current ANC NEC has their heads so far up Zuma's backside we can call them Zumastriche"

Second Alternative to Count 4.

You are guilty of violating section 12 (f) of Part 1 of Chapter 2 of the Public Service Regulations 2016, read in conjunction with Chapter 2 of the Public Service Regulations 1 of 2001, The Public Service Code of Conduct, when you "Abused your position in the public service to promote or prejudice the interest of any political party or interest group; by stating on social media that,

"The current ANC NEC has their heads so far up Zuma's backside we can call them Zumastriche"

Handwritten signature and initials, possibly 'Zuma', with a red number '4' above it.

Count 5

You are guilty of violating a Regulation and or Legal Obligation, alternatively the Public Service Code of Conduct, as outlined in the Public Service Regulations 2016 and the SMS Handbook, alternatively Public Service Policy as articulated in the attached preface to this charge sheet,

In that on or about 11 February 2016, you deliberately and or intentionally,

- failed to failed to carry out a lawful order or routine instruction without just or reasonable cause, alternatively**
- disregarded, in terms of your common law obligations, a lawful and reasonable instruction, from a competent authority, without just cause,**

by once again propagating wrongful behavior by continuing to post on social media, words against your Employer, that based on one or more of the prohibited grounds, could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm, or promote or propagate hatred against him.

In this regard you openly alluded to your Employer, as being a "corrupt leader" who is "threatening the national democratic revolution" and the person responsible for the "increase in community service delivery protests".

You deliberately did this In spite of having been confronted and addressed by senior officials of the Department in or around July 2015, on the unacceptability of such behavior as a Senior Manager within the employee of the State and more particularly, as the face and voice of the Ministry in the media, at that time given your as the spokesperson for the Minister.

The context within which you were addressed on this unacceptable behavior emanated from a whistle-blowing to the Acting Minister of the DPSA in April 2015 that you had acted in contravention of sections 5.2 and 5.4 of the DPSA's Policy on acceptable usage of the electronic mail, by:

- 1 Violating section 5.2. (a) of the policy by acting in a manner, when posting on social media platforms, which when reasonably construed clearly constitute a common law criminal offence of "crimen injuria" which relates to unlawfully and intentionally impairing the dignity and privacy of another.**

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- 2 Violating Section 5.4. (a) of the policy by distributing material which you as the user knew, when judged within the context, was likely to advocate hatred that is based either on race or ethnicity, or

In terms of section 5.4. (b) is likely to be regarded as lewd or obscene by any person who is likely to be exposed to such e-mail.

- 3 And in so doing, acting in a manner contrary to the provisions of section 5.2.(b) of the policy, by exposing the government of the republic of South Africa or any functionary thereof, namely, the DPSA, to criminal and or civil liability (in the form of a Defamation of Character law suits), and

Acting in a manner, which reasonably construed "is intended to bring the government or any function thereof, namely the DPSA, into disrepute.

The nature of these violations arises from a posting that you made on social media that

(i). the Tradition Leader of the Zulu Nation, namely, his Majesty King Goodwill Zwelethini, was a "stupid".

(ii). You further insulted him accusing him publically of desecrating the graves of former struggle icons like "Ashley Kriel, Solomon Mahlangu, Coline Williams, Anton French, OR Tambo, Walter Sisulu, Albert Lithuli, Nelson Mandela and many others who died to ensure democracy and freedom." by "pissing" on them.

(iii) On 16 July 2015, you called for the downfall of your Employer by propagating the war cry # Zuma must fall #, being interpreted as your Employer must fall.

Count 6.

As a result of your deliberate and intentional violation of a clear instruction to desist from continuing with this type of gross misconduct and unacceptable behavior, you have violated the express and or implied fiduciary obligations of your contract of employment as well as section 5.4.(b) of the DPSA e-mail policy, by acting in a manner that if reasonably construed is intent on bringing into Serious Disrepute, the Reputation of the Department of Public Service and Administration on 11 February 2016, by perpetuating the prohibited behavior.

Count 7

You are guilty of violating and or contravening an Act, Regulation and or Legal Obligation, alternatively the Public Service Code of Conduct, as outlined in the Public Service Regulations 2016 and the SMS Handbook, alternatively Public Service Policy as articulated in the attached preface to this charge sheet,

When you, on or about 17 February 2016, deliberately and or intentionally,

- Failed to carry out a lawful order or routine instruction without just or reasonable cause, alternatively**
- disregarded a lawful and reasonable instruction, from a competent authority, without just cause,**

by once again perpetuating postings on a social media platform, words against your Employer, that based on one or more of the prohibited grounds, could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm, or promote or propagate hatred against him.

In this regard you once again openly criticized your Employer, of "causing harm to the good image and reputation of the country".

As indicated before, the only reasonable inference that can be drawn from your actions are that they were done deliberately as you had around July 2015, already been confronted and addressed by senior officials of the department on the unacceptability of such behavior, given that you are a Senior Manager and more particularly, were known in the Media as the face and voice of the Ministry having been the spokesperson for the Minister.

Count 8

You are guilty of violating and or contravening an Act, Regulation and or Legal Obligation, alternatively the Public Service Code of Conduct, as outlined in the Public Service Regulations 2016 and the SMS Handbook, alternatively Public Service Policy as articulated in the attached preface to this charge sheet,

In that on or about 17 February 2016, you refused to refrain from party political activities in the workplace, by insisting on making comments about a political party on social media, which may be perceived by a reasonable person as not:



1. "promoting the unity and well-being of the South African nation in performing of your official duties" ;
2. serving the public in an unbiased and impartial manner in order to create confidence in the public service particularly since you are employed as the face and voice of the Department,
3. being polite or helpful, specifically with respect to those loyal followers of the head of state, whether as fellow employees or members of the public,
4. being respectful to the Employer and seen as protecting the dignity of the Head of State, in his other capacities, as he is entitled to under the Constitution.
5. action that is in conflict with or infringes on the execution of your official duties; and
6. tantamount to you not dealing fairly, professionally and equitably with all other employees or members of the public, irrespective of their political persuasion.

In this regard you opening criticised the political party, by "downgrading" their President of the ANC (your Employer) "to junk status" and further claiming that,

"As president of the ANC he has not only caused harm to the good image and reputation of our party but to our people and country."

It is further the submission of the Employer in this regard that your actions herein may be perceived by a reasonable person as either misusing your position in the public service to promote or to prejudice the interest of that political party, alternatively abusing your position in the public service to promote or prejudice the interest of that political party or interest group given that this was uttered during an election year.

Count 9

As a result of your deliberate and intentional violation of a clear instruction to desist from continuing with this type of gross misconduct and unacceptable behavior, you have violated the express and or implied fiduciary obligations of your contract of employment as well as section 5.4.(b) of the DPSA e-mail policy, by acting in a manner that if reasonably construed is intent on bringing into Serious Disrepute, the Reputation of the Department of Public Service and Administration on 17 February 2016, by perpetuating the prohibited behavior.


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Count 10.

You are guilty of violating and or contravening an Act, Regulation and or Legal Obligation, alternatively the Public Service Code of Conduct, as outlined in the Public Service Regulations 2016 and the SMS Handbook, alternatively Public Service Policy as articulated in the attached preface to this charge sheet,

In that on or about 26 February 2016, you refused to refrain from party political activities in the workplace, by insisting on making comments about a political party on social media, which may be perceived by a reasonable person as not:

- 7. "promoting the unity and well-being of the South African nation in performing of your official duties";**
- 8. serving the public in an unbiased and impartial manner in order to create confidence in the public service particularly since you are employed as the face and voice of the Department,**
- 9. being polite or helpful, specifically with respect to those loyal followers of the head of state, whether as fellow employees or members of the public,**
- 10. being respectful to the Employer and seen as protecting the dignity of the Head of State, in his other capacities, as he is entitled to under the Constitution.**
- 11. action that is in conflict with or infringes on the execution of your official duties; and**
- 12. tantamount to you not dealing fairly, professionally and equitably with all other employees or members of the public, irrespective of their political persuasion.**

In this regard, you had gone onto a social media platform, and called the president of the ANC, who is currently your Employer, as the Head of State, a "Fool " inspite of having been told by seniors in the Department, on or around July 2015, that such behaviour is unacceptable.

It is further the submission of the Employer in this regard that your actions herein may be perceived by a reasonable person as either misusing your position in the public service to promote or to prejudice the interest of that political party, alternatively abusing your position in the public service to promote or prejudice the interest of that political party or interest group given that this was uttered during an election year.

Count 11.

As a result of your deliberate and intentional violation of a clear instruction to desist from continuing with this type of gross misconduct and unacceptable behavior, you have violated the express and or implied fiduciary obligations of your contract of employment as well as section 5.4.(b) of the DPSA e-mail policy, by acting in a manner that if reasonably construed is intent on bringing into Serious Disrepute, the Reputation of the Department of Public Service and Administration on 26 February 2016, by perpetuating the prohibited behavior.

Count 12.

You are guilty of Gross Misconduct as a result of violating the provisions of the Public Service Code of Conduct, as outlined the SMS Handbook,

in that after the court made a ruling on a pending litigation matter, relating a case involving the office of the Public Protector, you once gain violated the Code of Conduct by committing a Common Law offence, which is tantamount to an act or treason and or sedition,

By publically on a social media platform, threatening your Employer, by proclaiming that

"You are no longer worthy of serving our (ANC or Country) President.

GO OR BE FORCED OUT."

And,

In another posting of this nature, as eluded to in Count 2 above that:

ZUMA HAS NO SHAME!! HE just screwed the entire nation on national tv. You are corrupt and should have resigned! You are a disgrace Mr Zuma. You are a national embarrassment! You are a liar! You are not my leader! You are not my President!

"A SPECIAL NGC MUST BE CALLED TO **FORCEFULLY REMOVE YOU FROM OFFICE."**

Count 13.

You are guilty of **Gross Misconduct** as a result of violating the provisions of the **Public Service Code of Conduct**, as outlined the regulations and **SMS Handbook**, as articulated in the attached preface to this charge sheet,

When you **prejudiced the administration, discipline or efficiency of a department, office or institution of the State**, by not serving the public in an unbiased and impartial manner in order to create confidence in the public service;

This you did by once again unacceptably posting the following lewd and or obscene comment on a social media platform in contravention of section 5.4 (b) of the **DPSA's e - mail policy**.

"The Court only made a finding on whether it was correct or wrong to drop the charges against Zuma! It found the decisions made then was wrong.

The NPA – managed by a ZUMA CLOWN – will now have to decide to reinstate charges against out corrupt President or not – Not the Court.

The question remains: for how long will the ANC and some of its members defend this corrupt Zuma ?"

Your comments contained herein do not:

- **"promote the unity and well-being of the South African nation in performing of your official duties";**
- **Are not polite or helpful, specifically with respect to those loyal followers of the head of state, whether as fellow employees or members of the public,**
- **Are not respectful to the Employer or perceived as protecting the dignity of The Employer as the current Head of State, in his other capacities, as he is entitled to under the Constitution;**

Instead , it is submitted, they can clearly be construed as discouraging confidence in the Public Service and in particular the office of the National Prosecuting Authority and Ministry of Justice, and can therefore be described as action that is in conflict with or infringes on the execution of your official duties.

Count 14

As a result of your deliberate and intentional violation of a clear instruction to desist from continuing with this type of gross misconduct and unacceptable behavior, your actions above in count 13 have led to a violation of the express and or implied fiduciary obligations of your contract of employment as well as section 5.4.(b) of the DPSA e-mail policy, as they display the behavior of an employee which if reasonably construed, is intent on bringing into Serious Disrepute, the Reputation of the Department of Public Service and Administration, by perpetuating the prohibited behavior.

The Employer will contend that the charges above if proven individually and or cumulatively, have materially adversely impacted on the employment relationship and has led inherently to a total breakdown of trust in the employer-employee relationship.

ABEGNIGO HLUNGWANI



AFFIDAVIT

I, the undersigned,

Abegnigo Hlungwani

do hereby state under oath:

1. The facts deposed to herein are true and correct and are, save where the context indicates otherwise, within my personal knowledge.
2. This affidavit is submitted for purposes of providing evidence to the Commission of Inquiry into State Capture ("**the Commission**").

Background

3. I am an adult male, 47 years of age, residing in the Gauteng area. Details of my employment in the Government sector are as follows:
 - 3.1. From 14 July 1997 to 11 March 2010, I served in various positions in the Limpopo Provincial Government in the following departments:
 - 3.1.1. Finance and Economic Development;
 - 3.1.2. Economic Development, Environment and Tourism; and
 - 3.1.3. Public Works.
 - 3.2. From 15 March 2010 to April 2013, I was the Private Secretary to Former Minister Collins Chabane ("**Minister Chabane**").
 - 3.3. From April 2013 onwards, I served as the Chief of Staff at the Ministry in the Presidency and the Ministry of Public Service and Administration.

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- 3.4. I am currently employed as the Chief Director in the Office of the Director General in the Department of Mineral Resources and Energy.
4. The Chief of Staff is the head of the Minister's office and is essentially the Administrator in Chief responsible for the overall administration of the Office of the Minister. The duties would include:
- 4.1. Co-ordination of the Minister's programme, which included managing the diary of the Minister, co-ordinating the Minister's travel and making other logistical arrangements;
 - 4.2. Management of staff in the office of the Minister;
 - 4.3. Management of general correspondence in the Ministry;
 - 4.4. Management of the Ministry budget;
 - 4.5. Serving as the link between the Minister's office and the Director General ("DG") and his/ her executive management of the Department.

Telephone call relating to Mr Themba Maseko

5. In late January or early February 2011, whilst in my office at the Union Buildings, I received a telephone call from one of the Private Secretaries of former President Jacob Zuma ("Mr Zuma"). The call was made from the Private Secretary's cellular phone to my cellular phone.
6. The Private Secretary informed me that she was abroad with Mr Zuma at the time and Mr Zuma wished to speak to Minister Chabane.
7. I cannot recall which one of Mr Zuma's three Private Secretaries called me. The former President had three Private Secretaries at the time. As far as I can recall in 2011, Mr Zuma's Private Secretaries were:
- 7.1. Ms Delsey Sithole: Private Secretary in the Private Office of the President;

7.2. Ms Nonhlanhla Majeke: Assistant Private Secretary to the President;

7.3. Ms Milka Bosoga; Assistant Private Secretary to the President.

8. I must emphasise that it was not unusual for one of the former President's Private Secretaries to call me on my cellular phone from their cellular phones; if there was a message to be relayed to Minister Chabane.
9. At the time, Ms Lakela Kaunda was the Head of the Private Office of the President and later became the Chief Operations Officer in the Presidency. As far as I can recall, it was not Ms Lakela Kaunda who called me, but one of the other Private Secretaries to the former president.
10. When the Private Secretary of the former President, Mr Zuma, called me, she asked if Minister Chabane was in the office or if I was near / close to Minister Chabane at the time. I responded that yes I was in the office near Minister Chabane. The Private Secretary indicated that I should inform Minister Chabane to expect a call from the former President shortly.
11. Consequently, I informed Minister Chabane that he would be receiving a call from the former President. After a short while, Mr Zuma's Private Secretary called again from her cellular phone and indicated that the former President wished to speak to Minister Chabane. I then handed my cellular phone to Minister Chabane in his office and when he started speaking, I left his office and went back to my desk.
12. I was thus, not privy to the conversation between Mr Zuma and Minister Chabane. However, after speaking to Mr Zuma, Minister Chabane came out of his office, handed me my phone back, and informed me that he needed to speak to Mr Themba Maseko ("**Mr Maseko**"). Mr Maseko was the Chief Executive Officer ("**CEO**") of Government Communications and Information System Department ("**GCIS**") at the time.

13. Minister Chabane did not elaborate on the details of his discussion with Mr Zuma. I then immediately telephoned the head of Mr Maseko's office to inform her that Minister Chabane would like to speak to Mr Maseko at some stage.
14. A few days after Mr Zuma had spoken to Minister Chabane, I was walking Minister Chabane out of the office to his official vehicle when he informed me that we "*would have to move*" Mr Maseko to another department. I asked the Minister who the replacement would be at GCIS and he stated, "*Jimmy Manyi*" ("**Mr Manyi**").
15. I assumed that this was as a result of the telephonic discussion between Mr Zuma and Minister Chabane that had taken place a few days earlier; this was because immediately after Minister Chabane had spoken to Mr Zuma, Minister Chabane had requested me to arrange for him to speak to Mr Maseko.
16. On Wednesday 2 February 2011, whilst Minister Chabane was in a Cabinet meeting, the department that monitors media reports informed Mr Maseko's Head of Office, Ms Pari Pillay, that the news channel ENCA was running a story that Mr Maseko was being replaced by Mr Manyi. Those of us in the office at the time, immediately went to check the news channel and found that this was indeed correct.
17. At that stage, the removal of Mr Maseko from GCIS, had not been officially announced. I believe that it was only at the Cabinet meeting, which took place on Wednesday 02 February 2011, that Cabinet was informed that Mr Maseko was being moved to the DPSA.
18. I have been provided with a copy of the 'Statement on the Cabinet Meeting' held on 02 February 2011, by the Commission, which is attached hereto as **Annexure "AH1"**. The last page of the Cabinet statement reflects that Mr Maseko was being moved to the DPSA and was being replaced by Mr Manyi.
19. The Commission has also provided me with a copy of the 'President's Minute No 32', which was signed on 3 February 2011 by the former President and the Minister of the Cabinet. A copy of the Minute is attached hereto as **Annexure "AH2"**.

20. This Minute gives effect to the move of Mr Maseko from GCIS to the DPSA. By way of explanation, the process to be followed when a DG or CEO is to be moved to another portfolio, the incumbent Minister who has to move a DG, needs to submit a request to the Minister of the DPSA. The Minister of the DPSA would then be required to process an instrument called the 'President's Minute', which is then submitted to the President to give effect to the decision to move the DG.
21. In order for the Minister of the DPSA to process this President's Minute, the DPSA would have had to generate a submission, which would have included:
 - 21.1. The initial appointment and other documents of Mr Maseko such as his Curriculum Vitae;
 - 21.2. The submission would have had to have been signed by the relevant officials, such as the Director Legal, Chief Director Governance, Deputy Director Governance, and the Acting DG at DPSA; and
 - 21.3. The Acting DG of DPSA at the time, would then have had to submit this to the Minister of the DPSA to consider signing the minute before sending this to the President.
22. The Minute which the Commission has provided to me appears to have been signed on 03 February 2011 (one day after the Cabinet meeting) by the former President and Minister Baloyi, who was also the Minister of DPSA at the time.

Threatening Call

23. On 16 July 2019, which is the same day that Mr Zuma testified at the Commission of Inquiry into State Capture I received an anonymous call at 18:26 and was asked questions relating to Mr Maseko. The call was from a male who warned me not to say anything about former Minister Maseko's removal from his office. I did not recognise the voice of the male caller, nor do I know the phone number he used to contact me as the caller identification was reflected as 'unknown'.

24. On the same evening, soon after I received the anonymous phone call, I received a "Short Message" ("SMS") at 20:01 from number 065 292 1224, which I did not recognise. The SMS stated that "mother fucker am coming for you".

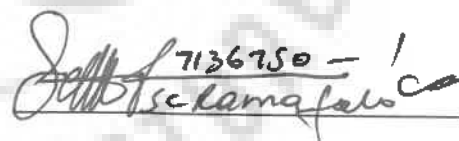
I know and understand the contents of this affidavit.

I have no objection in taking the prescribe oath.

I consider the prescribe oath to be binding on my conscience.



I certify that 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 placed thereon in my presence at Parktown on the 22nd day of August 2019.

Commissioner of Oaths

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government communications

Department:
Government Communication & Information System
REPUBLIC OF SOUTH AFRICA

Private Bag X745, Pretoria, 0001 ● Midtown Building, cnr Prinsloo and Vermeulen Streets, PRETORIA
Tel: (+27 12) 314 2356 ● Fax: (+27 12) 324 4452 ● Website:
www.gcis.gov.za

STATEMENT ON THE CABINET MEETING OF 2ND FEBRUARY 2011

Cabinet held its ordinary meeting in Pretoria yesterday, 2nd February 2011

Cabinet took the opportunity of the meeting, since the hospitalisation of the former State President Nelson Mandela to wish him well and a speedy recovery. Cabinet appeals to all South Africans to continue supporting him and thanked everyone who took the opportunity to pray for his recovery and send the family messages of support during this time.

Cabinet noted the impact that the floods in a number communities and re-affirmed its commitment to providing assistance and support to all affected communities. An Inter-Ministerial Committee is coordinating government's response and is tasked with the responsibility to ensure that all the three spheres of government provide

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assistance and support to our communities in a coordinated manner.

The National Disaster Management Centre, located at the Department of Cooperative Governance and Traditional Affairs (COGTA), is monitoring the situation country-wide and provides regular reports to the IMC and other relevant institutions. The National Joint Operations Center (NATJOINTS) was activated to coordinate the response by the security cluster. The NATJOINTS coordinates with the disaster management centre to ensure prompt deployment of security forces in all the affected areas.

The GCIS has re-activated the 24-hour operations room (Ops room) to facilitate the speedy flow of information regarding flooding to keep the government and the public informed.

Cabinet commends all members of the security forces, emergency services, civil society organisations and members of the public for supporting communities and families that are in distress as a result of the floods. The public must be assured that government is doing everything to mitigate the impact of the floods.

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Cabinet welcomed and supported the initiative by the departments of health and basic education to introduce and implement voluntary HIV testing in schools. This initiative is part of a campaign aimed at ensuring that all South Africans know their HIV status and receive treatment if necessary. A task team consisting of the South African National AIDS Council Secretariat, SANAC Childrens sector, social workers from the Department of Social Development and representatives from the national and provincial education departments has been set up to ensure that the campaign is properly implemented.

The task team will formulate guidelines on how the campaign will be implemented and provide support to schools that require support. A workshop has been held the Foundation for Professional Development to prepare all the professionals and NGO's that will be involved in the testing of learners. Parents must be assured that care will be taken to ensure that the testing is done in a professional and responsible manner. We urge all teachers and learners to participate in the campaign.

Cabinet noted that President Jacob Zuma will be delivering his State of the Nation Address on the evening of the 10 February. The address will be followed by a

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debate in the National Assembly and a series of media engagements by the Ministers. The Minister of Finance will deliver his budget speech in Parliament on the 23rd February 2011.

Cabinet calls on all South Africans to register for the upcoming local government elections. The registration will take place on the 5-6 February 2011.

Cabinet discussed the current challenges in a number of countries on the Continent and re-affirmed its commitment to the active promotion of democratic values and practices in which governments constantly strive to deepen ties with their people and address the real concerns and problems facing them. Cabinet supported the position taken by the African Union to establish a panel to deal with challenges in the Ivory Coast.

Cabinet approved that South Africa hosts the Southern African Customs Union (SACU) Summit and the Second Tripartite Summit of the Southern African Development Community – East African Community-Common Market of East and Southern Africa (SADC-EAC-COMESA) in February and March 2011 respectively.

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Cabinet also noted and endorsed the outcomes of the Clean Energy Ministerial Meeting that held in Washington DC on 19 – 20 July 2010. The meeting endorsed a number of low carbon technologies including the following initiatives: Super-efficient Equipment and Appliances Development (SEAD); International Smart Grid Action Network (ISGAN); Continuous Energy Performance Improvement (CEPI); Renewables such as wind, solar, Biofuels; Carbon Capture Use and Storage (CCUS); Electric/Advanced Vehicles and 'C-3E Women's Initiative and Clean Energy, Education and Empowerment.

Cabinet noted and welcomed the Minister of Energy, Ms Dipuo Peters's nomination as Ambassador of Energy for Africa.

Cabinet noted and supported the appointment of Dr Sandile Malinga as the Chief Executive Officer of the South African National Space Agency (SANSA).

Cabinet noted that Mr Themba Maseko was to be redeployed to the Department of Public Service and Administration (DPSA) with immediate effect. Mr Maseko will be replaced by Mr Jimmy Manyi as the new Government Spokesperson and Chief Executive Officer of

the Government Communication and Information System (GCIS).

Enquiries: Themba Maseko

Contact : 083 645 0810

www.gcis.gov.za; www.info.gov.za



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(Z 19E)**PRESIDENT'S MINUTE NO. 32**

I hereby, in terms of section 12(3)(a), read with section 12(3)(d), of the Public Service Act, 1994 (promulgated under Proclamation No. 103 of 1994), transfer Mr T J Maseko from the post of Director-General of Government Communication and Information System to the post of Director-General of the Department of Public Service and Administration, with effect from the date following the date on which this President's Minute is signed by the President until 30 June 2012.

Given under my Hand and the Seal of the Republic of South Africa at PRETORIA on the 03 day of FEBRUARY 2011.

A handwritten signature in black ink, likely belonging to Jacob Zuma.

PRESIDENTA handwritten signature in black ink, likely belonging to a member of the Cabinet.
MINISTER OF THE CABINET

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